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The Future of the World Health Organization: What Role for International Law?

David P. Fidler

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The Future of the World Health Organization: What Role for International Law?

*David P. Fidler**

TABLE OF CONTENTS

I.	INTRODUCTION	1080
II.	A BRIEF HISTORY OF INTERNATIONAL HEALTH LAW	1082
	A. <i>A Century of International Legal Activity</i>	1082
	B. <i>WHO's International Legal Authority</i>	1086
	C. <i>A Half-Century of Neglect</i>	1089
III.	INTERNATIONAL LEGAL DEVELOPMENTS SINCE 1945....	1094
	A. <i>General Developments in International Law Since 1945</i>	1094
	B. <i>International Organizations and International Law</i>	1096
	C. <i>International Law and Global Problems</i>	1097
IV.	EXPLAINING WHO'S INTERNATIONAL LEGAL BEHAVIOR	1099
V.	WOULD INTERNATIONAL LAW REALLY HAVE MADE ANY DIFFERENCE?	1103

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VI.	INTERNATIONAL LAW AND WHO'S FUTURE.....	1107
	A. <i>The Present Situation: An International Legal Tsunami</i>	1107
	B. <i>The Future: A Sea Change Required</i>	1112
VII.	INTERNATIONAL LAW AND GLOBAL HEALTH JURISPRUDENCE.....	1116
	A. <i>The Concept of Global Health Jurisprudence</i>	1116
	B. <i>Dynamics of Global Health Jurisprudence</i>	1118
	C. <i>Some Principles of Global Health Jurisprudence</i>	1122
	D. <i>Global Health Jurisprudence: Theory and Reality</i>	1125
VIII.	CONCLUSION.....	1126

I. INTRODUCTION

Since the election of Dr. Gro Harlem Brundtland as the new Director-General of the World Health Organization (WHO, or the Organization),¹ the future of WHO has been a much discussed topic. For many years, WHO has come under attack from public health and political leaders who believe that it has become inefficient and ineffective. Many reform proposals have been suggested in public health literature; however, under Director-General Hiroshi Nakajima, WHO reform never progressed far.² Brundtland's selection has rejuvenated the hopes of many inside and outside the Organization who wish to see WHO return to the greatness of its halcyon days.³

An emerging issue in discussions of WHO's future is what role international law should have in WHO's global public health mission. Historically, WHO has ignored international law.⁴ In a seminal 1992 article, Allyn Taylor, an American legal scholar and WHO consultant, made the first significant case for WHO to take

1. See World Health Organization, *Dr. Gro Harlem Brundtland Elected Director-General of the World Health Organization*, Press Release WHA/3, May 13, 1998.

2. See, e.g., Fiona Godlee, *WHO in Crisis*, 309 BRIT. MED. J. 1424 (1994).

3. The Brundtland Era Begins, 351 LANCET 381, 381 (1998) ("After a decade of decline, weak leadership, allegations of corruption at all levels, and paranoid defensiveness when any kind of external scrutiny was conducted, WHO now has an opportunity to reclaim its confidence and influence.").

4. See *infra* notes 52-65 and accompanying text.

international law more seriously than it historically has.⁵ This Author has made similar arguments, specifically in connection with WHO's approach to emerging infectious diseases.⁶ The literature also contains a growing recognition of the importance of other international legal regimes, especially international trade law, to WHO's future.⁷ The contrast between WHO's historical attitude and the emerging interest in the importance of international law to WHO's work creates an opportunity to explore what role international law should play in WHO's future.⁸

This Article argues that WHO should take international law more seriously than it has in the past by developing an understanding of how international law already affects global health concerns and by using international law as a strategy to support WHO's mandate of furthering humanity's health. In addition, this Article develops the concept of *global health*

5. See Allyn L. Taylor, *Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health*, 18 AM. J.L. & MED. 301 (1992) [hereinafter Taylor, *Making the World Health Organization Work*]. See also Allyn L. Taylor, *Globalization and Public Health: Regulation, Norms and Standards at the Global Level*, Background Paper for the Multilateral Conference on World Health Cooperation, Mexico City, Mexico (Mar. 29 - Apr. 1, 1998) (unpublished manuscript on file with author) [hereinafter Taylor, *Globalization and Public Health*].

6. See generally David P. Fidler, *Globalization, International Law, and Emerging Infectious Diseases*, 2 EMERGING INFECTIOUS DISEASES 77 (1996) [hereinafter Fidler, *Globalization, International Law*]; David P. Fidler, *Legal Issues Associated with Antimicrobial Drug Resistance*, 4 EMERGING INFECTIOUS DISEASES 169 (1998); see also David P. Fidler, *The Role of International Law in the Control of Emerging Infectious Diseases*, 95 BULL. DE L'INSTITUT PASTEUR 57 (1997) [hereinafter Fidler, *The Role of International Law*]; David P. Fidler, *Return of the Fourth Horseman: Emerging Infectious Diseases and International Law*, 81 MINN. L. REV. 771 (1997) [hereinafter Fidler, *Return of the Fourth Horsemen*].

7. See Bruce J. Plotkin & Anne-Marie Kimball, *Designing the International Policy and Legal Framework for the Control of Emerging Infectious Diseases: First Steps*, 3 EMERGING INFECTIOUS DISEASES 1 (1997) (discussing the importance of international trade law and the World Trade Organization to the strategy for emerging infectious diseases); see also David P. Fidler, *Trade and Health: The Global Spread of Diseases and International Trade*, 40 GERM. Y.B. INT'L L. 300 (1997) (analyzing the link between trade and health and the importance of international trade law) [hereinafter Fidler, *Trade and Health*]; see, e.g., Derek Yach & Douglas W. Bettcher, *The Globalization of Public Health, Part 1: Threats and Opportunities*, 88 AM. J. PUB. HEALTH 735 (1998) (noting the importance of international trade, human rights, and environmental protection to global public health concerns and arguing for an enhanced role for international legal instruments, standard setting, and global norms); Taylor, *Globalization and Public Health*, *supra* note 5, at 13 (arguing for better WHO coordination with other international organizations).

8. See, e.g., Taylor, *Globalization and Public Health*, *supra* note 5, at 10 (noting that "the emergence of new leadership at WHO has been accompanied by unprecedented burgeoning interest, meetings and activities related to national and international public health law").

jurisprudence to provide a comprehensive framework into which the Organization can integrate its international legal endeavors. The concept of global health jurisprudence helps clarify that WHO faces legal challenges not only internationally, but also nationally, and both must be addressed in an integrated and comprehensive manner. Creating global health jurisprudence will prove a difficult and frustrating task for WHO and will require the Organization to develop and utilize public health law capabilities that it has never thought necessary. Despite this formidable challenge, pursuit of global health jurisprudence constitutes a strategy that WHO needs to include as an essential element of its future global health policy.

Part II provides a brief history of international health law by analyzing (1) international legal activity from the mid-nineteenth century until WHO's creation, (2) the constitutional authority WHO possesses to develop international health law, and (3) how WHO has neglected international law during most of its fifty-year existence. Part III contrasts WHO's historical attitude towards international law with general developments in international law since 1945 and with how other international organizations have used international law to address global problems. Part IV attempts to explain why WHO neglected international law during its first fifty years by focusing on the adverse legal consequences of the Organization's "medical-technical ethos." Part V addresses the skeptical perspective that, even if WHO had been more involved with international law, such involvement would have made little difference to global public health because international law is a weak institution in international relations. Part VI examines the role of international law in WHO's future and argues that WHO is facing an international legal tsunami that will require a sea change in its attitude towards international law. Part VII presents the concept of global health jurisprudence as a possible framework for WHO to use in integrating national and international law into its future public health mission.

II. A BRIEF HISTORY OF INTERNATIONAL HEALTH LAW

A. *A Century of International Legal Activity*

In thinking about WHO's stance on international law, it is important to note that the structure and dynamics of international relations force states to use international law in

international health cooperation.⁹ WHO's lack of interest in international law is anomalous in the history of international health cooperation. The nature of many public health concerns, such as infectious diseases, tobacco control, and narcotic drugs, is such that these issues escape the control of individual sovereign states and instead become matters of importance in interstate relations.¹⁰ Historically, once public health problems entered the realm of the international system, states turned to international law as a tool to develop common rules, institutions, and values. As a result, WHO's lack of interest in international law does not reflect the historical experience of states and international health organizations prior to World War II. While WHO has been accused of focusing too little on international law, international relations immediately prior to World War II were plagued by too much international health law. This crude comparison invites a brief look at how international health law developed prior to, and after the creation of, WHO. This historical perspective creates a better context for arguments in favor of more international legal activity at the Organization.

International health law was born during the first International Sanitary Conference held in 1851.¹¹ Cholera epidemics in Europe forced European states to realize that protecting their territories from disease importation and easing trade burdens imposed by quarantine measures required international cooperation.¹² Infectious disease control had been a national interest of states since the formation of the modern states system, as evidenced by the widespread adoption of national quarantine regulations by European states prior to the nineteenth century.¹³ But, "[p]rior to the first International Sanitary Conference in 1851, national disease control measures

9. See Fidler, *Globalization, International Law*, *supra* note 6, at 79; Fidler, *The Role of International Law*, *supra* note 6, at 58.

10. See David P. Fidler, *The Globalization of Public Health: Emerging Infectious Diseases and International Relations*, 5 *IND. J. GLOBAL LEGAL STUD.* 11, 23-25 (1997) (analyzing how infectious diseases became international issues) [hereinafter Fidler, *The Globalization of Public Health*]; Allyn L. Taylor, *An International Regulatory Strategy for Global Tobacco Control*, 22 *YALE J. INT'L L.* 257 (1996) (analyzing tobacco control as an international problem) [hereinafter Taylor, *Global Tobacco Control*].

11. The 1851 Conference produced "a convention and regulations designed to bring some uniformity into quarantine practice." NEVILLE M. GOODMAN, *INTERNATIONAL HEALTH ORGANIZATIONS AND THEIR WORK* 46 (2d ed. 1971).

12. See *id.* at 36-42 (analyzing factors that led to the convening of the 1851 Conference).

13. See David P. Fidler, *Microbialpolitik: Infectious Diseases and International Relations*, 14 *AM. U. INT'L. L. REV.* 1, 7-9 (1998) (forthcoming) (analyzing infectious disease control as a national interest of states prior to the nineteenth century) [hereinafter Fidler, *Microbialpolitik*].

were not topics for international diplomacy."¹⁴ Increasing volumes and speed of international trade gradually transformed national quarantine measures into an international systemic concern because of the increasing burdens such measures placed on maritime commerce.¹⁵ Once part of the dynamics of the international system, public health problems implicated international law as an instrument of interstate cooperation.¹⁶ Given the structure of the international system, the only way states could achieve their goals of better protection from disease importation and reduced quarantine burdens on trade was through international cooperation and international law.

The goal of the first International Sanitary Conference was a treaty; a treaty was negotiated, but it never entered into force.¹⁷ Every International Sanitary Conference from 1851 to 1938 sought to produce an international agreement of some kind.¹⁸ Many of these conferences succeeded in this objective, producing a plethora of international agreements on infectious disease control by the eve of World War II.¹⁹

While the major activity of the 1851-1940 era took place in human infectious disease control, states also engaged in activity connected with animal diseases. In 1924, states created the International Office of Epizootics to coordinate international action on animal diseases.²⁰ Other treaties on animal diseases followed.²¹ Nor were plant diseases ignored. Perhaps the earliest treaty that actually came into force on controlling the international spread of a disease was an 1878 agreement addressing a plant louse, *Phylloxera vastatrix*.²² States later

14. *Id.* at 18.

15. *Id.*

16. See Fidler, *The Role of International Law*, *supra* note 6, at 58 (arguing that "the critical role of international law in infectious disease control has been recognized since at least the mid-19th century").

17. See GOODMAN, *supra* note 11, at 46-50.

18. See generally NORMAN HOWARD-JONES, *THE SCIENTIFIC BACKGROUND OF THE INTERNATIONAL SANITARY CONFERENCES, 1851-1938* (1975).

19. See *International Health Security in the Modern World: The Sanitary Conventions and the World Health Organization*, 17 DEP'T ST. BULL. No. 437, at 953 (1947).

20. International Agreement for the Creation at Paris of an International Office for Dealing with Contagious Diseases of Animals, Jan. 25, 1924, 57 L.N.T.S. 135.

21. See, e.g., International Convention for the Campaign Against Contagious Diseases in Animals and Declarations, Feb. 20, 1935, 186 L.N.T.S. 173; Convention with regard to Safeguarding Livestock Interests through the Prevention of Infectious and Contagious Diseases, Mar. 16, 1928, Mexico-U.S., 106 L.N.T.S. 481.

22. Convention between Austria-Hungary, France, Germany, Portugal and Switzerland Respecting Measures to be Taken Against *Phylloxera Vastatrix*, Sept.

concluded another treaty on plant protection.²³ Public health concerns also led states to negotiate international treaties on the alcohol trade to Africa²⁴ and on psychotropic drugs.²⁵

A detailed examination of the significant number of treaties produced between 1851 and 1940 is beyond the scope of this Article. Instead, this Article focuses on the substantive objectives of the major treaties on infectious disease control. The approaches that used international law during this period generally pursued one or more of the following objectives: (1) protecting Europeans and North Americans from diseases from less affluent regions; (2) harmonizing national public health measures, such as quarantine, to reduce burdens on trade; (3) establishing international surveillance for diseases; and (4) creating international health organizations.²⁶ Separating these objectives for analytical purposes is useful, but the dynamics of international legal activity changed from 1851, when the emphasis was largely on quarantine harmonization, to the International Sanitary Conventions of 1912 and 1926, where the emphasis was on surveillance administered through an international health organization.²⁷ The force that caused this shift in international health law was science. Once scientists proved "germ theory" correct and began to understand how pathogenic microbes caused illness, scientific principles began to guide the substance of international health law in two major respects.²⁸ First, surveillance became central to international health law on infectious diseases.²⁹ In addition, proper

17, 1878, 153 Consol. T. S. 247 (protecting plant life and health through reducing the threat to wine vineyards from a plant louse).

23. International Convention for the Protection of Plants, Apr. 16, 1929, 126 L.N.T.S. 305.

24. Convention Relating to Liquor Traffic in Africa and Protocol, Sept. 10, 1919, 8 L.N.T.S. 11.

25. See Convention of 1936 for the Suppression of Illicit Traffic in Dangerous Drugs, June 26, 1936, 198 L.N.T.S. 299; see also Agreement concerning the Suppression of Opium-Smoking, Nov. 27, 1931, 177 L.N.T.S. 373; Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, July 13, 1931, 139 L.N.T.S. 301; International Convention, Adopted by the Second Opium Conference, Feb. 19, 1925, 81 L.N.T.S. 317; Agreement concerning the Suppression of the Manufacture of, Internal Trade in and Use of Prepared Opium, Feb. 11, 1925, 51 L.N.T.S. 337; International Opium Convention of Jan. 23, 1912, 8 L.N.T.S. 187.

26. See DAVID P. FIDLER, *INTERNATIONAL LAW AND INFECTIOUS DISEASES*, ch. 2 (1999) (forthcoming Mar. 1999) (analyzing these four objectives in the 1851-1951 period).

27. *Id.*

28. *Id.*

29. *Id.*; see Fidler, *Trade and Health*, *supra* note 7, at 311 ("Science pointed to the need for surveillance and public health policies driven by the epidemiological nature of the pathogen in question.").

surveillance required permanent international health organizations that could establish and operate surveillance systems.³⁰ By the mid-1920s, four international health organizations had been established: the Pan-American Sanitary Bureau (1902),³¹ the International Office of Public Health (1907),³² the Health Office of the League of Nations (1923),³³ and the International Office of Epizootics (1924).³⁴ Second, scientific and public health principles began forming the basis for the harmonization of national quarantine measures through international agreements. International legal harmonization of quarantine measures through scientific principles directly affected the linkage between trade and health because "the scientifically-based measures needed to protect public health better resulted in fewer and less onerous restrictions on international trade."³⁵

Not only did international law play a role in the international system when international trade brought public health problems into the realm of diplomacy, but it also contributed to public health becoming a feature of the developing international society. Using Hedley Bull's definition of international society,³⁶ the development of international health law and international health organizations evidenced that "states bound themselves to a common set of rules and to sharing in the working of common institutions."³⁷

B. WHO's International Legal Authority

At WHO's creation, the founders believed that international law would continue to play a central role in international health activities. Not only did the WHO Constitution provide WHO with the power to promote and adopt treaties, but it also created an

30. See FIDLER, *INTERNATIONAL LAW AND INFECTIOUS DISEASES*, *supra* note 26, at ch. 2.

31. See PAN AMERICAN HEALTH ORGANIZATION, *PRO SALUTE NOVI MUNDI: A HISTORY OF THE PAN AMERICAN HEALTH ORGANIZATION* 20 (1992).

32. See Rome Agreement of 1907 Establishing the International Office of Public Health, *reprinted in* GOODMAN, *supra* note 11, at 101-04.

33. See GOODMAN, *supra* note 11, at 110-11 (discussing the establishment of the Health Organization of the League of Nations).

34. See International Agreement for the Creation at Paris of an International Office for Dealing with Contagious Diseases of Animals, *supra* note 18.

35. Fidler, *Trade and Health*, *supra* note 7, at 312.

36. See HEDLEY BULL, *THE ANARCHICAL SOCIETY* 13 (1977) (An international society "exists when a group of states, conscious of certain common interests and values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.").

37. Fidler, *Microbialpolitik*, *supra* note 13, at 23.

innovative international legal mechanism in the form of binding regulations.³⁸ Article 19 of the WHO Constitution states that the World Health Assembly (WHA) "shall have the authority to adopt conventions and agreements with respect to any matter within the competence of the Organization."³⁹ The combination of WHO's ambitious objective, "the attainment by all peoples of the highest possible level of health,"⁴⁰ and its expansive definition of health, "a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity,"⁴¹ provided WHO's Article 19 with treaty-making power of virtually limitless potential, and which far exceeded any treaty powers possessed by the Pan American Sanitary Bureau, International Office of Public Health, or the Health Office of the League of Nations.

In Article 21 of the WHO Constitution, WHO founders created an innovative international legal process by providing for regulations that are binding on Member States.⁴² Under Article 21, the WHA has the authority to adopt regulations in five specific areas: (1) sanitary and quarantine regulations; (2) nomenclatures on diseases, causes of death, and public health practices; (3) standards for diagnostic procedures for international use; (4) standards for the safety, purity, and potency of biological, pharmaceutical, and similar products moving in international commerce; and (5) advertising and labeling of biological, pharmaceutical, and similar products moving in international commerce.⁴³

The unifying theme of these areas is the international nature of public health and the need to harmonize national behavior through international standards based on scientific and public health principles. As with the Article 19 treaty power, Article 21 underscores how important WHO's founders believed international law would be in WHO's future work. The historical experiences of states grappling with international problems of infectious diseases from 1851 to 1940 provided empirical evidence supporting a vigorous WHO approach to international law.

The Article 21 procedure was made more innovative through the "contracting out" procedure of Article 22.⁴⁴ Under Article 22, regulations adopted under Article 21 come into force for each WHO Member State unless a Member State notifies WHO of reservations to, or rejection of, the adopted regulations within a

38. See WHO CONST. art. 21.

39. *Id.* art. 19.

40. *Id.* at preamble.

41. *Id.*

42. See WHO CONST. art. 21.

43. See *id.*

44. See *id.* art. 22.

fixed period of time.⁴⁵ In other words, a WHO Member State becomes bound in international law by Article 21 regulations unless that Member State affirmatively opts out. In traditional international law, a state does not become bound by a treaty until that state affirmatively opts in to the regime.⁴⁶ Article 22 makes it harder for WHO Member States to reject regulations if they have to contract out of them.⁴⁷

Article 21 and Article 22 create a quasi-legislative process that was, at the time of WHO's origins in the late 1940s, a radical approach in international law.⁴⁸ In 1989, WHO's Legal Counsel stated that "[a]t the time of their introduction, the International Health Regulations were a novel, and indeed revolutionary, instrument."⁴⁹ However, it is important to remember the context in which this quasi-legislative power was created. States were already aware that public health, especially in connection with infectious diseases, had to be viewed from a global perspective. Not only was there a need for international standards in key areas, but the global nature of public health also created a need to have those standards applied as widely as possible throughout the international system.

WHO's founders believed that the ad hoc treaty approach, which had dominated international health cooperation since 1851, was necessary but not sufficient to address world health problems in the second half of the twentieth century. They responded with international legal creativity in Article 21 and Article 22. Walter Sharp wrote in 1947 that "[i]n the future there will be a permanent mechanism through which steps can be taken periodically with a view to broadening the scope and strengthening the provisions of world health law. This represents a distinct advance in international legislative technique for the health field."⁵⁰

WHO's international legal powers were not intended to be admired, but to be used. One function of WHO is to propose

45. *Id.*

46. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 622 (4th ed. 1990) ("The maxim *pacta tertiis nec nocent nec prosunt* expresses the fundamental principle that a treaty applies only between the parties to it.").

47. See Fidler, *Return of the Fourth Horseman*, *supra* note 6, at 836.

48. See *International Health Security in the Modern World*, *supra* note 19, at 958 (stating that Article 21 and Article 22 of the WHO Constitution constitute a significant advance in the field of international health); see also Walter R. Sharp, *The New World Health Organization*, 41 AM. J. INT'L L. 509, 525 (1947) (noting innovation in the "contracting out" procedure).

49. Claude-Henri Vignes, *The Future of International Health Law: WHO Perspectives*, 40 INT'L DIG. HEALTH LEG. 16, 18 (1989).

50. Sharp, *supra* note 48, at 524-25.

conventions, agreements, and regulations.⁵¹ The scope and vision of WHO's purpose meant these international legal powers should be used, where helpful, in all public health endeavors, not just in infectious disease control. In addition, the WHO Constitution foreshadowed the importance of other areas of international law to WHO's mission by embedding references to human rights, international trade, and environmental conditions.⁵²

WHO began its work preceded by a long heritage of international legal activity on infectious disease control and in international health organizations. This heritage encouraged WHO's founders to construct a comprehensive and innovative framework that would help develop international law to support global health. Created at the beginning of the most revolutionary period in the history of international law, WHO was endowed with a set of international legal powers unprecedented in the history of international health organizations and international organizations generally.

C. A Half-Century of Neglect

Since 1948, the potential for international legal activity created by the WHO Constitution has remained untapped. Between 1948 and 1998, WHO never utilized its international legal authority under Article 19, and only twice adopted regulations under Article 21. The first time WHO ever started a process under Article 19 came in 1996 when the WHA instructed the Director-General to develop an international framework convention for tobacco control for future adoption under Article 19.⁵³ The regulations adopted under Article 21 concerned nomenclature⁵⁴ and infectious disease control, the latter regulations known currently as the International Health Regulations (IHR).⁵⁵ Not only is WHO's inactivity reflected in the very short list of regulations, but it is also seen in the way WHO allowed the IHR to disintegrate as a framework for international infectious disease control.⁵⁶ The IHR have the fundamental

51. See WHO CONST. art. 2(k).

52. See *id.* at preamble (human rights), art. 21(d)-(e) (international trade), art. 2(i) (environmental conditions).

53. See *International Framework Convention for Tobacco Control*, World Health Assembly, Res. WHA49.17, May 26, 1996.

54. For discussion of the Nomenclature Regulations, see S. S. Fluss, *World Health Organization*, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS: MEDICAL LAW 15-16 (H. Nys ed., 1993).

55. WORLD HEALTH ORGANIZATION, INTERNATIONAL HEALTH REGULATIONS (3d ed. 1983) [hereinafter INT'L HEALTH REG.].

56. See Fidler, *Return of the Fourth Horseman*, *supra* note 6, at 843-51; see also Allyn L. Taylor, *Controlling the Global Spread of Infectious Diseases: Towards a*

purpose of ensuring “the maximum security against the international spread of diseases with a minimum interference with world traffic.”⁵⁷ The IHR establish rules to support a global surveillance system for diseases subject to the IHR to achieve the goal of maximum security against the international spread of diseases.⁵⁸ WHO Member States have to report outbreaks of cholera, plague, and yellow fever to the WHO, which then disseminates the information to other Member States.⁵⁹ To achieve the objective of disease control with minimum interference with world traffic, the IHR provide for “the most restrictive health measures that a [M]ember [S]tate may take to protect its territory against the diseases subject to the IHR.”⁶⁰ The IHR rules on maximum protection and minimum interference are interdependent. WHO Member States are unlikely to report disease outbreaks unless they can be assured that other Member States will not enact irrational trade-restricting measures that harm the economy of the reporting Member State. Similarly, WHO Member States are more likely to follow the IHR rules on minimum interference with world traffic when they receive full information about disease outbreaks in other Member States.

Unfortunately, WHO has achieved neither maximum protection against the international spread of diseases nor minimum interference with world traffic. The global surveillance system broke down because (1) WHO Member States routinely failed to report required information to the WHO, and (2) the focus on only three diseases proved inadequate to support a proper global surveillance system for infectious diseases.⁶¹ WHO Member States also regularly violated the rules designed to ensure that disease control measures resulted in minimum interference with world traffic by applying excessive measures to the travelers and trade of Member States suffering disease outbreaks.⁶² Neither the WHO Constitution nor the IHR give WHO any enforcement powers to use in connection with violations of binding rules of international law.⁶³ The IHR only provide a dispute settlement procedure that Member States can use against each other;⁶⁴ but this procedure has been used infrequently.⁶⁵

Reinforced Role for the International Health Regulations, 33 Hous. L. Rev. 1327, 1341-46 (1997) [hereinafter Taylor, *Controlling the Global Spread of Infectious Diseases*].

57. INT'L HEALTH REG., *supra* note 55, at 5.

58. See Fidler, *Return of the Fourth Horseman*, *supra* note 6, at 839.

59. See INT'L HEALTH REG., *supra* note 55, arts. 1, 3, at 8, 10.

60. Fidler, *Return of the Fourth Horseman*, *supra* note 6, at 841.

61. See *id.* at 844-45 (discussing breakdown of IHR surveillance system).

62. See *id.* at 846-47 (discussing excessive measures).

63. See *id.* at 847-49 (discussing lack of WHO enforcement power).

64. See INT'L HEALTH REG., *supra* note 55, art. 93, at 41.

The end result of this situation of widespread violation without enforcement has been that "many legally binding Regulations tend to be treated in practice almost as recommendations."⁶⁶

The only other international legal initiative this Author has been able to identify is WHO's attempt to get the International Court of Justice (ICJ) to rule that any use of nuclear weapons would violate international law because of the adverse health consequences that would result from such use.⁶⁷ The ICJ held that WHO had no competence to ask the ICJ to make such a ruling on nuclear weapons.⁶⁸ This uncharacteristic international legal effort by WHO may, however, have had less to do with global public health than with the politics of nuclear weapons between nuclear states and non-nuclear states. In this nuclear controversy, WHO's health mandate may have been seen as a convenient Trojan Horse for non-nuclear states to promote their position vis-à-vis nuclear states.

The bad news about WHO's international legal performance unfortunately does not end with the near total abandonment of its function of developing international health law through treaties and regulations. WHO has also shown little interest in giving substantive meaning to the human right to health boldly proclaimed in the WHO Constitution.⁶⁹ WHO paid little attention to international human rights law until the HIV/AIDS pandemic shocked WHO into showing concern about the public health consequences of human rights violations. In a development bordering on the surreal, WHO went from having no discernible interest in international human rights law to proclaiming that such law provided *the* basis for addressing the HIV/AIDS pandemic.⁷⁰

More recently, similar shocks have jolted WHO into rethinking its decades-old myopia about international law. In connection with WHO's general international legal powers, in January 1998, WHO's Executive Board approved recommendations from a Special Group

65. See Fidler, *Return of the Fourth Horseman*, *supra* note 6, at 848.

66. DAVID LEIVE, 1 INTERNATIONAL REGULATORY REGIMES 46 (1976).

67. See *Legality of the Threat or Use of Nuclear Weapons* (World Health Organization), 1996 I.C.J. 226 (July 8).

68. See *id.* at para. 31. For an analysis of the ICJ's ruling in this case, see generally C.F. Amerasinghe, *The Advisory Opinion of the International Court of Justice in the WHO Nuclear Weapons Case: A Critique*, 10 LEIDEN J. INT'L L. 525 (1997).

69. See Taylor, *Making the World Health Organization Work*, *supra* note 5, at 328; see also *Fortress WHO: Breaching the Ramparts for Health's Sake*, 345 LANCET 203, 204 (1995) ("The interface of health and human rights has been studiously ignored.").

70. See Jonathan M. Mann, *Afterword* to LAWRENCE O. GOSTIN & ZITA LAZZARINI, HUMAN RIGHTS AND PUBLIC HEALTH IN THE AIDS PANDEMIC 167-69 (1997) (describing development of WHO's human rights approach to HIV/AIDS).

that reviewed the WHO Constitution to expand WHO's power to adopt regulations under Article 21 to include any matter falling within the functions of WHO.⁷¹ Such an expansion of Article 21 powers would, if eventually adopted by the WHA, give WHO the same scope of authority to formulate binding regulations as is granted in the Article 19 power to adopt treaties.⁷²

The global crisis in emerging infectious diseases prompted WHO to begin a revision of the moribund and largely mothballed IHR.⁷³ WHO held an Informal Consultation on the *International Response to Epidemics and the Applications of the International Health Regulations*, which developed principles and recommendations to guide the IHR revision process.⁷⁴ In February, 1998, WHO circulated a provisional draft of the revised IHR (IHR Provisional Draft) to its Member States.⁷⁵ The WHO hopes to have the new IHR adopted by the WHA in May 2000.⁷⁶

The growing specter of global pandemics involving noncommunicable diseases caused by tobacco consumption produced enough political will for WHO to propose an international framework convention for tobacco control.⁷⁷ As noted previously, this proposal marked the first time that WHO ever sought to exercise its Article 19 powers granted by the WHO Constitution. The increasingly global nature of the strategies of major tobacco companies has produced a global tobacco consumption pandemic, which WHO predicts could ultimately make smoking the leading cause of premature death worldwide.⁷⁸

71. See World Health Organization, *Review of the Constitution and Regional Arrangements of the World Health Organization: Report of the Special Group*, WHO Doc. EB101/7 (Nov. 14, 1997). The Executive Board's resolution can be found in *Review of the Constitution of the World Health Organization: Report of the Executive Board Special Group*, WHO Doc. EB101.R2 (Jan. 22, 1998).

72. Compare WHO CONST. art. 21, with WHO CONST. art. 19.

73. See World Health Assembly, *Revision and Updating of the International Health Regulations*, Res. WHA48.7 (May 12, 1995).

74. See World Health Organization, *The International Response to Epidemics and Applications of the International Health Regulations: Report of a WHO Informal Consultation*, WHO Doc. WHO/EMC/IHR/96.1 (Dec. 11-14, 1995). For analyses of the Informal Consultation's work, see Fidler, *Return of the Fourth Horseman*, *supra* note 6, at 851-63; Taylor, *Controlling the Global Spread of Infectious Diseases*, *supra* note 56, at 1350-52.

75. World Health Organization, *International Health Regulations (Provisional Draft)* (Jan. 1998) [hereinafter *IHR Provisional Draft*] (on file with author); World Health Organization, *Revision of the International Health Regulations: Progress Report* (Report by the Director-General), WHO Doc. A51/8, at para. 7 (Mar. 10, 1998) [hereinafter *IHR Progress Report*].

76. See *Revision of the International Health Regulations: Progress Report*, July 1998, 73 WEEKLY EPIDEMIOLOGICAL RECORD 233, 234 (1998).

77. See generally *International Framework Convention for Tobacco Control*, *supra* note 53.

78. See Taylor, *Global Tobacco Control*, *supra* note 10, at 268.

Derek Yach of WHO recently argued that the world remains in a phase of "selective national control but unopposed tobacco transnational expansion."⁷⁹ WHO intends the proposed international framework convention for tobacco control to be a key element of a global tobacco control strategy.⁸⁰ WHO hopes to present a Draft International Framework Convention for Tobacco Control at the WHA in the year 2000.⁸¹

WHO's new global health policy, *Health for All in the 21st Century*, also contains a number of brief references to WHO's need to use international law more than the Organization has used it in the past.⁸² For example, the policy states that "WHO will develop international instruments that promote and protect health, will monitor their implementation, and will also encourage its Member States to apply international laws related to health."⁸³ The policy also shows an awareness of the importance of international law to WHO's work on human rights, trade, and environmental protection.⁸⁴

However, each of these initiatives to some degree builds off the argument that globalization *now* forces WHO to take up the instrument of international law. The globalization of public health, however, is not new. The globalization of public health caused European states to convene the long series of International Sanitary Conferences in the latter half of the nineteenth century. It also convinced states to negotiate International Sanitary Conventions in the 1890s and first half of the twentieth century. Globalization provided the basis for the formation of international health organizations. It was the overarching theme in the creation of innovative international legal authority in the WHO Constitution. And the globalization of public health exposed WHO in the late twentieth century as historically uninterested in international law and currently unprepared to undertake effective international legal initiatives.⁸⁵

79. Derek Yach, Progress Toward Global Tobacco Control, presented at Joint PAHO-WHO-NHLBI-FIC 50th Anniversary Conference on Global Shifts in Disease Burden: The Cardiovascular Disease Pandemic, PAHO Headquarters, Washington, D.C., May 26-28, 1998 (unpublished paper on file with author).

80. See *id.*

81. See World Health Organization, *Project Proposal for the Preparation of International Framework Convention for Tobacco Control*, at 3 (Jan. 1998) [hereinafter *Tobacco Convention Project Proposal*] (unpublished document on file with author).

82. World Health Organization, *Health for All in the 21st Century*, WHO Doc. A51/5 (1998).

83. *Id.* at para. 52.

84. See *id.* at paras. 2, 23, 25.

85. On WHO's lack of internal international legal capabilities, see *infra* Part VI.B.

III. INTERNATIONAL LEGAL DEVELOPMENTS SINCE 1945

WHO's historical attitude towards international law is suspect when it is examined in terms of international health law. This attitude looks more than suspect when compared to (1) general developments in international law post-1945, (2) how other international organizations have used international law since 1945, and (3) how states and international organizations have reacted to other global problems through international law. In Part III, this Article engages in all three comparisons to demonstrate that WHO stands virtually alone among international organizations in the attitude it has long held towards international law.

A. *General Developments in International Law Since 1945*

International legal historians will probably look back on the second half of the twentieth century as the most significant era in the history of international law. Since 1945, states, international organizations, and non-governmental organizations (NGOs) have transformed the scope, substance, and processes of international law. During this time international health law stagnated, but virtually every other area of international law underwent significant changes.

The scope of international law has expanded significantly since 1945. Previously connected to traditional forms of state interaction, such as diplomacy, trade, and war, international legal rules now exist in many new, non-traditional areas, such as human rights and environmental protection.⁸⁶ The scope of international law has also been widened by the process of decolonization, which created new states subject to international law where previously there had been none. International law also was applied to new geographical and extraterrestrial realms, as in Antarctica, the deep seabed, and outer space.

The substance of international law has changed as well. The development of international human rights law shattered the traditional conception that only states were subjects of international law. Making individuals subjects of international law fundamentally shifted the international legal paradigm away from a state-centric view to a more dynamic perspective that looks not only at the state but also through the state to grant individual

86. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816, 838-42 (1997) (discussing the difference between traditional customary international law and new, non-traditional customary international law on human rights).

citizens rights under international law. The emergence of developing countries also affected the substance of international law by bringing non-European, non-affluent perspectives to international legal rules. Developing states championed new international legal rules in international economics, supported the right of self-determination, developed the concept of the common heritage of mankind, and launched the effort that produced a comprehensive reformulation of the law of the sea.⁸⁷

The processes of making, implementing, and enforcing international law have also undergone significant change since 1945. While much of international law was customary international law prior to 1945, the period since then has seen the treaty dominate the process of international law-making. In addition, much international law-making now takes place in multilateral fora rather than in traditional bilateral diplomacy. Thus, the role of international organizations in making international law has grown.⁸⁸ A similar growth has taken place in connection with NGOs, which are increasingly involved in making, implementing, and enforcing compliance with rules of international law.⁸⁹

Further, certain challenges have produced new types of international legal processes, most famously the framework-protocol approach used in international environmental law. In fact, it is the framework-protocol approach that WHO adopted in proposing an international framework convention for tobacco control.⁹⁰ Arguments have been made for using the same approach in connection with infectious diseases.⁹¹

Finally, there has been a growth in the number of entities created to interpret rules of international law in cases of disputes. Along with the ICJ, which had a pre-World War II predecessor in the Permanent Court of International Justice, international law witnessed the development of the European Court of Justice, the

87. See Ian Brownlie *The Expansion of International Society: The Consequences for the Law of Nations*, in *THE EXPANSION OF INTERNATIONAL SOCIETY* 357, 367 (Hedley Bull & Adam Watson eds., 1984) (noting many Third World initiatives in international law) [hereinafter Brownlie, *The Expansion of International Society*].

88. See Jonathan Charney, *Universal International Law*, 87 *AM. J. INT'L L.* 529, 529 (1993).

89. See generally Stephan Hobe, *Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations*, 5 *IND. J. GLOBAL LEGAL STUD.* 191 (1997) (arguing that NGOs have established themselves as important actors in international relations).

90. See Taylor, *Global Tobacco Control*, *supra* note 10, at 292-98 (discussing framework-protocol approach in tobacco context).

91. See FIDLER, *INTERNATIONAL LAW AND INFECTIOUS DISEASES*, *supra* note 26, at ch. 9; Fidler, *Return of the Fourth Horseman*, *supra* note 6, at 864-67.

European Court of Human Rights, the Inter-American Court of Human Rights, dispute resolution panels under the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), the international criminal tribunals for the former Yugoslavia and Rwanda, the Law of the Sea Tribunal, and the proposed International Criminal Court.

Ironically, while significant changes to international law occurred in the post-1945 period, international health law developed new scope, substance, and processes *before* 1945. Driven by the nature of the microbial world, international health law gradually increased its scope, moving away from the European core to the periphery. In addition, states drafted international legal rules for human, animal, and plant disease situations.⁹² The substantive nature of the rules also changed, from primarily rules aimed at quarantine harmonization to rules setting up a surveillance and control system. The WHO Constitution, finally, established new processes for the creation of international health law. The promise of these changes, however, did not materialize. During history's greatest transformation of general international law, the harsh truth is that international law dropped off the agenda of global public health. International health law played no role, had no influence on, and was not influenced by the greatest changes ever seen in international law.

B. *International Organizations and International Law*

The framers of WHO clearly intended the Organization to play a catalytic role in the development of international health law—a role WHO subsequently refused to play.⁹³ During the same period, however, other international organizations with similar or even less international legal authority than WHO developed international law in their respective areas. These international organizations have been engines of international legal development both inside and outside the United Nations system. For example, Taylor has identified the International Maritime Organization and the United Nations Environmental Programme as examples of multilateral organizations that have been successful in promoting international law in their respective areas.⁹⁴ Taylor's insight can be applied to a number of different international areas, including international human rights, international labor law, international civil aviation law, international

92. See *supra* Part II.A.

93. See *supra* Part II.C.

94. See Taylor, *Making the World Health Organization Work*, *supra* note 5, at 333-35.

intellectual property law, the law of the sea, international telecommunications law, and international economic law.

The growth in importance of international organizations in the development of international law is apparent with regards to both treaty law and customary international law. International organizations have been the source for many treaty initiatives since World War II and have really become the major source of multilateral treaty development in the modern international system. Although the United Nations and most of its specialized agencies have played a dominant role in this regard, the phenomenon is also apparent with regional international organizations such as the Council of Europe and the Organization of American States. In connection with customary international law, international lawyers and tribunals frequently rely on the practices of international organizations in finding and analyzing state practice and *opinio juris*. In addition, the treaty role that international organizations have played affects analysis of customary international law as international lawyers and tribunals locate state practice in state parties' behavior under multilateral treaties.

WHO again stands in contrast to these general trends in the development of international law by international organizations. WHO itself has not utilized its treaty-making authority and has shown no interest in customary international law as a source of international law on public health. Further, WHO has not been keen to involve itself in the development of other international legal regimes created by other U.N. specialized agencies or other international organizations that directly affect its mandate (i.e., environmental protection and human rights).

C. *International Law and Global Problems*

Another way to analyze WHO's use of international law is to consider how states and international organizations address global problems. As the history of international health cooperation suggests, preserving and maintaining public health requires international cooperation. As early as the mid-nineteenth century, states realized that the protection of public health required multilateral cooperation because the threat to public health was beyond the unilateral power of any state. Similarly, dealing with environmental degradation is also a global problem that demands international cooperation. Experts often argue that environmental problems like trade in endangered species, trade in hazardous wastes, acid rain, ozone depletion, marine pollution, destruction of biodiversity, desertification, and global warming cannot be handled by any single state or bilateral

agreement but only through multilateral cooperation across the entire international system.⁹⁵

In addition, both global health and global environmental problems involve setting international standards or objectives that states must implement domestically. As in the development of international health law, states established standards for surveillance and quarantine measures through international law; international legal rules then had to be implemented in each country through domestic law. The same dynamic operates throughout international environmental diplomacy: standards or objectives are set internationally and carried out domestically. International health law and international environmental law also both involve serious complications caused by economic gaps between developed and developing countries. The public health gap between developed and developing countries has tremendously affected WHO's activities throughout its existence.⁹⁶ Likewise, the tension between the North and South over tradeoffs between environmental protection and economic development haunt international environmental diplomacy and international environmental law.⁹⁷

Finally, both international health law and international environmental law rely on science for guidance. Science proved the catalyst for the development of international health law and the formation of international health organizations. International legal rules designed to control infectious diseases, for example, begin with the measures scientific principles recommend for dealing with pathogenic microbes.⁹⁸ In international environmental law, science has also been a catalyst as research showed the environmental and health harms caused by pollution and exploitation of natural resources.

While public health concerns and environmental degradation are analogous global problems, each issue has been addressed through international law in a completely different manner. As previously noted, WHO has done virtually nothing to develop

95. See Owen Greene, *Environmental Issues*, in *THE GLOBALIZATION OF WORLD POLITICS: AN INTRODUCTION TO INTERNATIONAL RELATIONS* 313, 314 (John Baylis & Steve Smith eds., 1997) (noting that "many environmental problems are intrinsically transnational, in that by their nature they cross state boundaries").

96. See, e.g., CHARLES O. PANNENBORG, *A NEW INTERNATIONAL HEALTH ORDER: AN INQUIRY INTO THE INTERNATIONAL RELATIONS OF WORLD HEALTH AND MEDICAL CARE* 80-176 (1979) (analyzing the gap between developed and developing countries in health).

97. Andrew Hurrell & Benedict Kingsbury, *The International Politics of the Environment: An Introduction*, in *THE INTERNATIONAL POLITICS OF THE ENVIRONMENT* 1, 37-44 (Andrew Hurrell & Benedict Kingsbury eds., 1992) (discussing problems created in the environmental context between developed and developing states).

98. See INT'L HEALTH REG., *supra* note 55.

international health law.⁹⁹ By comparison, international environmental law has exploded in the last thirty years into one of the most important and rich areas in international law. Since the early 1970s, states have concluded hundreds of international environmental instruments.¹⁰⁰ Given the similar natures of the global public health and environmental problems, the drastic difference in how international law has been used to address these problems again places WHO's attitude towards international law into question.

IV. EXPLAINING WHO'S INTERNATIONAL LEGAL BEHAVIOR

WHO's ambivalence towards international health law described in Parts II and III of this Article requires explanation when it is compared to and contrasted with other international legal developments after 1945. The explanation is, not surprisingly, complex. Constructing an explanation also partially counteracts the criticism of WHO's behavior contained in Part II and Part III.

The common argument used to explain WHO's antipathy towards international law is that WHO is dominated almost exclusively by people trained in public health and medicine, which produces an ethos that looks at global health problems as medical-technical issues to be resolved by the application of the healing arts.¹⁰¹ This argument is commonly made because it explains a great deal of WHO's attitude towards international law. The medical-technical approach does not need international law because the approach mandates application of the medical or technical resource or answer directly at the national or local level.

General criticism of WHO's performance over the last twenty years frequently hones in on the medical-technical ethos issue.¹⁰²

99. See *supra* Part II.C.

100. See Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 675 (1993).

101. See Taylor, *Making the World Health Organization Work*, *supra* note 5, at 336 (noting that WHO's "officials are largely a specialized, professional circle of physicians, scientists, and public health specialists").

102. See Gill Walt, *International Organizations in Health: The Problem of Leadership*, in POCANTICO RETREAT: ENHANCING THE PERFORMANCE OF INTERNATIONAL HEALTH INSTITUTIONS 23, 25 (1996) (arguing that the WHO "remains dominated by medical professionals. Critical masses of nurses, economists, and social scientists have been conspicuously absent"); Godlee, *WHO in Crisis*, *supra* note 2, at 1425, 1426 (arguing that WHO has been slow to respond to the increasingly multisectoral nature of health and has retreated into its traditional technical-medical approach under Director-General Nakajima); Fiona Godlee, *WHO in Retreat: Is it Losing Its Influence?*, 309 BRIT. MED. J. 1491, 1494 (1994) ("The lack of clear policy is aggravated by WHO's failure to relinquish its hold on the traditional medical model of health."); Fiona Godlee, *WHO Reform and Global*

The globalization of public health makes WHO's mission inherently multifaceted, demanding much more than a clinical approach to health problems. The WHO has begun to realize the multidisciplinary challenge it faces as demonstrated by its recent argument for an intersectoral strategy to achieve the objective of health for all.¹⁰³

While helpful, the medical-technical ethos argument is not sufficient to explain WHO's attitude towards international law. Two other factors that support the medical-technical ethos argument need to be mentioned. First, the medical-technical ethos developed in the wake of scientific progress against infectious diseases. The medical-technical ethos reflects the confidence that science had engendered in the public health and medical professions in the first few decades following World War II. WHO's founding coincided with the beginning of the antibiotic revolution, which altered the balance of power in the struggle with infectious diseases in the favor of humanity. When public health benefits are perceived to flow from application of the fruits of modern public health, medicine, and science, those practicing the healing art naturally focus on applying those fruits directly and expansively. From this understandable perspective, international law has only indirect relevance in that it provides the international organizational framework that allows public health officials and doctors to ease human suffering.

The importance of scientific progress in the dominance of the medical-technical ethos at WHO also relates to the role of science in the development of international health law. Science was important in the development of international health law in the 1890s because it provided the breakthrough knowledge needed to allow states to finally agree to some common rules of behavior.¹⁰⁴ The scientific progress of the antibiotic revolution had the opposite effect on international health law because such progress allowed public health officials to go directly after the pathogenic

Health: Radical Restructuring is the Only Way Ahead, 314 BRIT. MED. J. 1359, 1360 (1997) (arguing that WHO "should incorporate a broader mix of skills and move away from the narrow biomedical model of the current organisation"); John W. Peabody, *An Organizational Analysis of the World Health Organization: Narrowing the Gap Between Promise and Performance*, 40 SOC. SCI. & MED. 731, 739 (1995) (arguing that "[e]mploying staff which only draw from the public health and medical culture limits the technical capacity of the Organization").

103. See World Health Organization, *Intersectoral Action for Health: A Cornerstone for Health for All in the Twenty-First Century—Report of the International Conference*, Apr. 20-23, 1997, WHO Doc. WHO/PPE/PAC/97.6; *Health for All in the 21st Century*, *supra* note 82, at Boxes 2, 7 (emphasizing intersectoral approaches to health).

104. See FIDLER, *INTERNATIONAL LAW AND INFECTIOUS DISEASES*, *supra* note 24, at ch. 2.

microbes rather than thinking about international legal regimes designed to contain diseases. Critics of WHO have complained about the prevalence of "eradicationitis" at WHO that is based on WHO's successful eradication of smallpox.¹⁰⁵ For those committed to eradicating—as opposed to controlling—diseases, international law may seem unnecessary because eradication is a medical-technical challenge.

In addition, it is misleading to conclude that public health and environmental protection are similar in nature because both rely on science. While science has directly and dramatically affected the process and substance of international health law, science does not play nearly as central a role in international environmental diplomacy because many environmental problems have often been surrounded by scientific controversy.¹⁰⁶ International health law waxed after the development of scientific certainty on germ theory and waned after the development of scientific certainty that antimicrobials are effective treatments.¹⁰⁷ A great deal of international environmental diplomacy takes place against the backdrop of scientific uncertainty, as evidenced by the controversies raging about the "science" of global warming.

As general criticisms of WHO's medical-technical ethos suggest, WHO's penchant for looking at global health as a clinical issue has proved ill-advised; but the steady advances of science gave physicians and public health experts powerful healing tools that they wished to apply globally. Science became a two-edged sword: advancing the healing art to ever higher effectiveness but gradually clouding from the picture the ongoing evolutionary processes in the microbial world and the economic, social, and political problems behind much human disease. The antibiotic revolution allowed many people to forget that pathogenic microbes would respond to pressures placed on them by human pharmaceuticals and to believe that drugs would permanently hold infectious diseases at bay. The developing crisis of antimicrobial resistance in many pathogens has reawakened people to the evolutionary powers of the microbial world and to the dangers of relying heavily on drugs to combat infectious

105. See Fiona Godlee, *WHO's Special Programmes: Undermining from Above*, 310 BRIT. MED. J. 178, 181 (1995) (noting that "eradicationitis remains highly prevalent within [the] WHO" despite many failures to eradicate diseases); see also Peabody, *supra* note 102, at 736 (discussing the importance of smallpox eradication to narrative myths of the WHO).

106. See LAWRENCE SUSSKIND, *ENVIRONMENTAL DIPLOMACY* 64-68 (1994).

107. See Fidler, *The Globalization of Public Health*, *supra* note 10, at 29 (arguing that "the national interest of developed states in the international control of infectious diseases was weakened by the impact, and perceived future impact, of adequate public health systems and antimicrobial pharmaceuticals").

diseases.¹⁰⁸ In addition, literature on emerging infectious diseases attributes new and returning disease threats to many underlying political, economic, and social changes and problems, such as a breakdown in public health infrastructures, social unrest and civil war, environmental degradation, changes in human behavior, urbanization, and poverty.¹⁰⁹ Recognition of these various factors shows that public health in the global era represents far more than a medical-technical challenge.

Scientific progress, especially in connection with infectious disease control, has had another negative consequence for the pursuit of global public health. With new, powerful tools at hand to address infectious diseases, whether indigenous or imported, developed states gradually lost interest in infectious disease control as an important element of interstate relations.¹¹⁰ As infectious disease control became less important to developed states as part of their international relations, international health law and organizations suffered, weakening infectious disease control as an objective of international society.¹¹¹

The second factor that augments the medical-technical ethos is the tension existing between voluntary compliance and compulsory compliance mandated by law. Public health experts argue that voluntary compliance provides a stronger basis for public health measures than legal compulsion.¹¹² When this argument is applied to international health cooperation, the

108. On antimicrobial resistance, see generally World Health Organization, *Emerging and Other Communicable Diseases: Antimicrobial Resistance, Report by the Director-General*, WHO Doc. A51/9 (Mar. 10, 1998). See also World Health Assembly, *Emerging and Other Communicable Diseases: Antimicrobial Resistance*, Res. WHA51.17 (May 16, 1998); ANTIMICROBIAL RESISTANCE: ISSUES AND OPTIONS (Workshop Report from the Institute of Medicine's Forum on Emerging Infections) (P.F. Harrison & J. Lederberg eds., 1998); STUART B. LEVY, *THE ANTIBIOTIC PARADOX: HOW MIRACLE DRUGS ARE DESTROYING THE MIRACLE* (1992); David P. Fidler, *Legal Challenges Posed by the use of Antimicrobials in Food Animal Production*, 1 MICROBES AND INFECTION (1999) (forthcoming Jan. 1999) [hereinafter Fidler, *Legal Challenges*]; David P. Fidler, *Legal Issues Associated with Antimicrobial Drug Resistance*, *supra* note 6, at 169.

109. See Fidler, *Return of the Fourth Horseman*, *supra* note 6, at 788-810 (discussing these factors contributing to the emergence and reemergence of infectious diseases).

110. See Fidler, *Microbialpolitik*, *supra* note 13, at 12-13; see also Fidler, *The Globalization of Public Health*, *supra* note 10, at 26-30 (discussing how developed countries lost interest in international infectious disease control during most of the twentieth century).

111. Fidler, *Microbialpolitik*, *supra* note 13, at 25-26.

112. See David P. Fidler et al., *Emerging and Reemerging Infectious Diseases: Challenges for International, National, and State Law*, 31 INT'L LAW. 773, 786-87 (1997) ("Disease prevention cannot rely on legal coercion. In the vast majority of cases, epidemiologists depend upon education and persuasion to secure voluntary compliance with their recommendations.").

difficulties with law-based duties multiply because of the structure of the international system, making voluntary compliance *the* key approach. Following such a strategy may seem to make developing international health law for public health purposes unnecessary. Where legal compulsion is necessary, it is more effectively applied by a government against a citizen under domestic law than by WHO against a government under international law. WHO's long-standing publication of national public health legislation suggests that WHO has preferred to stress the importance of national health law over international health law.¹¹³

These explanations of WHO's lack of interest in international law have a certain logic and plausibility. The explanations may assist understanding some of WHO's behavior in the post-1945 period. These explanations, however, do not vindicate WHO's behavior: the medical-technical ethos has damaged not only WHO's interest in international law but also the entire mission of the Organization. As the global crisis in emerging infectious diseases demonstrates, the medical-technical approach has failed and has left WHO relatively unprepared to deal with a crisis that cannot be resolved by the mere application of scientific advances. In fact, emerging infectious diseases and other global health problems may make the current situation more akin to the international situation in the earlier parts of this century than to the golden age of WHO's medical-technical ethos. In other words, we need international law to have a role in global public health.

V. WOULD INTERNATIONAL LAW REALLY HAVE MADE ANY DIFFERENCE?

While the case against WHO's historical attitude towards international law is powerful, one might ask whether global public health would really be better off today if WHO had been actively engaged in international law.¹¹⁴ This question could be

113. Article 63 of the WHO Constitution requires each Member State to "communicate promptly to the Organization important laws, regulations, official reports and statistics pertaining to health which have been published in the State concerned." WHO CONST. art. 63. The WHO publishes items received under Article 63 in the *International Digest of Health Legislation*. For a historical analysis of WHO's involvement with disseminating information about national health legislation, see generally S. S. Fluss, *The Role of WHO in Health Legislation: Some Historical Perspectives*, 49 INT'L DIG. HEALTH LEG. 113 (1998).

114. See, e.g., Taylor, *Globalization and Public Health*, *supra* note 5, at 4 ("Although the development and implementation of cogent national and international public health law can make an important contribution to global health, there is good reason for a healthy skepticism about the capacity of

considerably sharpened by noting that a great deal of the international legal revolution of the post-1945 period is sound and fury, not signifying much. In many areas, there is a large gap between what international lawyers say are the rules of international law and what states actually do in practice. In this respect, non-compliance with the IHR is no different from non-compliance with international human rights law. International environmental law may have exploded, but has the explosion really made a significant impact on global environmental degradation? Similarly, if WHO had developed international law for public health purposes, would a larger body of ignored norms have improved global public health? One might reasonably suspect that it would not.

This line of reasoning also leads to an examination of the reality of WHO's innovative international legal authority. While perhaps unprecedented for its time, the innovation may also have been too far ahead of its time. WHO Member States may have been reluctant to utilize the treaty and regulation powers because of the burdens placed on their sovereignty.¹¹⁵ Perhaps the political commitment from the Member States to make WHO active in international law was simply lacking. Absent that commitment, WHO might be considered handicapped in developing an international legal strategy. The same debilitating dynamic may be at work in connection with the proposed international framework convention for tobacco control. Yach notes that "[g]lobal intentions to control tobacco, however, have not been matched by financial support."¹¹⁶

The above discussion raises a more general skepticism about international law. To many people, international law is a weak institution in international relations that usually promises more than it delivers. Such skepticism is often expressed in sentiments such as "international law is not really law" or "international law is just morality because its rules cannot be enforced." These sentiments most often flow from a realist outlook on international relations. Realism focuses on states and their power as the driving focus of international relations; such a world view leaves little or no room for international law.¹¹⁷

These arguments from hard-headed realism have a seductive force, but they lead us to ask the wrong questions. Realism as a theoretical foundation for understanding the globalization of public health has very limited utility because its focus on states,

international organization to alter state behavior and encourage the codification and implementation of effective national and international legal instruments.").

115. See Fidler, *Return of the Fourth Horseman*, *supra* note 6, at 838.

116. See Yach, *supra* note 79, at abstract.

117. See Fidler, *The Globalization of Public Health*, *supra* note 10, at 38.

power, and anarchy marginalizes the types of challenges posed by global health problems.¹¹⁸ Realism remains relevant, however, by providing a skeptical voice about the potential for international cooperation on global health issues.¹¹⁹ While it is important to emphasize that any WHO international legal strategy (had one been formed) would have faced serious political obstacles, the existence of those obstacles would not have been a reason for international legal paralysis. Although it is necessary to stress that international law often has limited effectiveness, the inevitable gap between expectations and reality has not been a reason to abandon international law as an instrument of global policy development. Despite political obstacles and less than hoped for achievements, the development of international law carries with it important messages that become part of the landscape of international relations.

We can turn the tables on our original question—whether global public health would be better off today if WHO had actively utilized international law—by asking whether world health would be *worse* off today if WHO had developed international health law and had been sensitive to the developments in international law in other areas. Moreover, if this query is placed in a less hypothetical framework, one could ask, for example, whether the treatment of individuals by their governments would be worse today without the body of international human rights law. Or, do we prefer to have international environmental law of questionable efficacy or no international environmental law at all? Perhaps the most lasting achievement of human rights and international environmental law, and other areas of international law, is not so much the compliance record of states but the normative framework these bodies of international law provide in their respective areas. International law can be used to construct legitimate expectations and to transform discourse in international relations. These lessons about international law's role in international relations are taught by international relations theories other than realism, such as regime theory and liberalism. Constructing legitimate expectations and transforming discourse are also important functions of international law that WHO has so far failed to appreciate in connection with the role of international law in its work.

Those who knowingly or unknowingly accept realism's premises about international relations and international law in the area of global public health forget or ignore that health

118. See *id.* at 37-41 (analyzing realism in connection with the globalization of public health).

119. See *id.* at 40.

threats like emerging infectious diseases and tobacco-related diseases challenge and undermine traditional concepts of the state and sovereignty.¹²⁰ With a global germ pool, there can be no such thing as a balance of power in public health terms. The meaning of a "sovereign state" changes because the globalization of public health undermines a state's ability to provide for its public's health. Although sovereignty still frustrates efforts to create international health cooperation,¹²¹ the nature of most global health threats combined with the structure of the international system inevitably creates the need for international cooperation and international law.¹²²

Even admitting, for argument's sake, that WHO Member States would never have developed international health law more than they actually did, the need for sensitivity to international law goes beyond the creation of more international health law. It includes being aware of, and playing an active role in, the development of other areas of international law. WHO officials are very good, and have been for decades, at stressing how interdependent the world is when it comes to health. One might think that because health cuts across many, if not all, aspects of international relations, WHO would prove to be sensitive to, and actively engaged in, international legal issues touching on health. But such a thought would be grossly incorrect. WHO has demonstrated no interest in the general developments of international law unless global disease problems compel it to consider international law.

Finally, arguing that global health would not be much better off today even if WHO had fully engaged the use of international law misunderstands the nature of the inquiry. WHO's ambivalence towards international law was not the result of a formal position adopted at WHO's inception in 1948. Accordingly, analysis should focus on actual developments rather than hypothetical "would have been" arguments. WHO's Legal Counsel did argue in 1989 that international law was not a useful instrument for dealing with global health problems because health problems moved too quickly while international legal machinery moved too slowly.¹²³ WHO's Legal Counsel made this

120. See *id.* at 38.

121. See Fidler, *Globalization, International Law*, *supra* note 6, at 83.

122. See *id.* at 79.

123. Vignes, *supra* note 49, at 18 ("The use of binding mechanisms would seem unrealistic. Leaving aside conventions, for which the future promises no more than the past, resort to regulations appears a very doubtful undertaking The real difficulty is that measures cannot be adopted quickly enough to meet the health requirements of the moment.")

argument specifically with the AIDS pandemic in mind.¹²⁴ Ironically, at the same time that the Legal Counsel advocated this position, WHO was embracing international human rights law as *the* paradigm for dealing with HIV/AIDS.¹²⁵ Presently, the Legal Counsel's position has been undermined by the growing realization at the Organization that perhaps international law is needed as global health problems accelerate in speed and increase in volume.

The position expressed by WHO's Legal Counsel about international law in connection with the HIV/AIDS pandemic raises the need to think about the nature and purpose of international law. Looking at international law through realism's lenses produces an attitude that limits both the practical effect and normative value of international law. In the future, WHO should more openly look at international law as a resource that provides tremendous practical and normative benefits for the pursuit of global public health. International law serves WHO's mandate because it is the institution of international relations in which WHO's existence and architecture are grounded. Through international law, WHO can pursue projects necessary to promote world health and attempt to transform the landscape of international relations on public health.

VI. INTERNATIONAL LAW AND WHO'S FUTURE

A. *The Present Situation: An International Legal Tsunami*

When contemplating WHO's future and the role international law should play in it, it is important to understand first how international law currently relates to WHO's mission. The current situation reveals that WHO faces an international legal tsunami because of the many areas of international law that directly affect WHO's work as an international health organization.¹²⁶ A complete catalog of all the important elements of international law that affect WHO's efforts is beyond the scope of this Article,¹²⁷ but

124. See *id.*

125. See Katarina Tomasevski et al., *AIDS and Human Rights*, in *AIDS AND THE WORLD I* 537, 568 (Jonathan M. Mann, et al. eds., 1992) ("The global response to AIDS included an emphasis on human rights from the very beginning.")

126. See *infra* notes 213-17 and accompanying text.

127. See Fidler, *The Role of International Law*, *supra* note 6, at 64-66 (discussing the relevance of international trade law, international human rights law, international environmental law, and international law on biological weapons to the global fight against infectious diseases).

this section can at least provide a glimpse of the international legal challenges now facing WHO.

First, one has to start by looking at specific international legal initiatives of WHO: the revised IHR and the proposed international framework convention for tobacco control. These initiatives address two of the greatest global health problems facing WHO, and thus are very important projects.¹²⁸ These problems, standing alone, present significant international legal burdens requiring serious human and financial resources, but they are only the beginning.

International legal challenges will come WHO's way if certain provisions in the proposed revision of the IHR remain. WHO has proposed to establish a Committee of Arbitration to settle disputes between Member States over the interpretation or application of the IHR.¹²⁹ Thus, WHO has, quite radically, proposed its own dispute settlement body that would engage in making international legal decisions and which would develop its own body of "case law." As a result, WHO would become involved in interpreting the IHR and thus would find itself in the realm of treaty interpretation under the rules embodied in the Vienna Convention on the Law of Treaties. Treaty interpretation is commonplace for the ICJ or for dispute settlement panels of the WTO, but not historically for any significant part of WHO's activities. In addition, the Committee of Arbitration would have to devise procedural rules to ensure that the Member States receive fair treatment in the proceedings, which is also beyond WHO's historical experiences. The Committee of Arbitration would perhaps also have to confront issues involving fact-finding and standards of review for national governmental decisions under the IHR. All this will require international legal capabilities that WHO has not previously thought important to develop. The IHR Provisional Draft suggests that WHO has not even started to think about the many international legal challenges the Committee of Arbitration would create; the annex that is to spell out the details was not drafted for the IHR Provisional Draft.¹³⁰

In connection with the proposed international framework convention for tobacco control, the framework-protocol approach will demand ongoing, systemic international legal effort from

128. See Hiroshi Nakajima, *Message from the Director-General, in* WORLD HEALTH ORGANIZATION, *THE WORLD HEALTH REPORT 1997: CONQUERING SUFFERING, ENRICHING HUMANITY* at v (1997) ("In the battle for health in the 21st century, infectious diseases and chronic diseases are twin enemies that have to be fought simultaneously on a global scale.").

129. See IHR Provisional Draft, *supra* note 75, at art. 56.

130. See *id.* at annex ix ("Annex IX—Committee of Arbitration—to be prepared").

WHO for the strategy to succeed. Treaty interpretation problems would arise with the framework convention and any protocols just as such problems arise under any international agreement. Once the framework convention is in place, WHO will have to continue to push for the development of protocols to fill out the international legal regime on tobacco control. A fundamental rationale behind a framework-protocol approach is to create an international legal dynamic that operates permanently, but WHO has to commit time, personnel, and resources to embed such a dynamic not only into the spirit of WHO but also into its day-to-day activities. It is perhaps telling that in its Project Proposal for the Preparation of the International Framework Convention for Tobacco Control the WHO includes nothing beyond the adoption of the convention by the WHA.¹³¹ Moreover, nothing in WHO's history suggests that it is prepared to undertake such a long-term process of international legal development.

Second, as previously noted, *Health for All in the 21st Century* indicates that WHO should begin to develop international health law more actively.¹³² Increasing WHO's international legal activity beyond the revised IHR and the tobacco control convention will demand even more international legal commitment from WHO. The *Health for All in the 21st Century* policy does not specifically mention areas of WHO's activities that require international legal attention,¹³³ but literature on the subject points to a few areas: (1) standards on the safety, purity, and potency of biological, pharmaceutical, and similar products flowing in international commerce, and on the international trade in blood and human organs;¹³⁴ (2) international regulations on xenotransplantation;¹³⁵ (3) rules to curb the misuse of antimicrobials;¹³⁶ (4) rules on health information and sales of health products and services over

131. See *Tobacco Convention Project Proposal*, *supra* note 81.

132. *Health for All in the 21st Century*, *supra* note 82, at para. 52.

133. See generally *id.*

134. See Katarina Tomasevski, *Health*, in 2 UNITED NATIONS LEGAL ORD. 859, 882-89 (Oscar Schacter & Christopher C. Joyner eds., 1995) (discussing pharmaceutical safety and trade in human blood and organs).

135. See *Review of the Constitution and Regional Arrangements of the World Health Organization*, *supra* note 71, at 6 (recommending Article 21 powers for setting standards on transplantation of tissues).

136. See *The Medical Impact of the Use of Antimicrobials in Food Animals: Report of a WHO Meeting, Berlin, Germany, 13-17 October 1997*, WHO Doc. WHO/EMC/ZOO/97.4, at 9 ("On the international level, agreements are needed to reduce the risk of transmitting resistance between countries."); Fidler, *Legal Challenges*, *supra* note 108 (arguing the international legal rules to deal with resistance problems generated by the use of antimicrobials in food animal production); Fidler, *Legal Issues Associated with Antimicrobial Drug Resistance*, *supra* note 6, at 172 (arguing for international legal rules to deal with antimicrobial drug misuse).

the Internet;¹³⁷ and (5) diverse issues arising from the link between international trade and health (e.g., tobacco, alcohol, food safety, and the relationship of intellectual property protections to pharmaceuticals).

Third, WHO has to pay more attention to the many and diverse areas of international law that relate to its global health mission. These areas include, but are not limited to: (1) international trade law, (2) international human rights law, (3) international environmental law, (4) international law on biological, chemical, and nuclear weapons, (5) international maritime law, (6) international labor law, (7) international civil aviation law, (8) the law of the sea, (9) international telecommunications law, (10) international humanitarian law, (11) international intellectual property law, and (12) international law on bioethics. The revolutionary changes in international law since 1945 can clearly be seen in this list. In addition, the list demonstrates that WHO's policy of ignoring other areas of international law has been a serious mistake.

One of the most important bodies of international law touching on the WHO's activities is international trade law. The WTO's Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)¹³⁸ directly affects WHO's work with the Food and Agricultural Organization because of the role that the standards set by the Codex Alimentarius now play in international trade law.¹³⁹ More generally, the importance of international standards, guidelines, and recommendations in the SPS Agreement and other WTO agreements, such as the Agreement on Technical Barriers to Trade (TBT Agreement), could place many WHO recommendations and guidelines directly into the realm of international legal discourse and action.¹⁴⁰

137. See concerns raised in *Cross-Border Advertising, Promotion and Sale of Medical Products Using the Internet*, WHA, Res. WHA50.4 (May 12, 1997). See also *Cross-Border Advertising, Promotion and Sale of Medical Products Using the Internet*, WHA, Res. WHA51.9 (May 16, 1998).

138. Agreement on the Application of Sanitary and Phytosanitary Measures, Dec. 15, 1993, MTN/FA II-A1A-4 (1994).

139. See generally discussion in Fidler, *Trade and Health*, *supra* note 7, at 321-22.

140. See generally Fidler, *Legal Issues Associated with Antimicrobial Drug Resistance*, *supra* note 6, at 173 (discussing Codex's Code of Practice for Control of the Use of Veterinary Drugs and Guidelines for the Establishment of a Regulatory Programme for Control of Veterinary Drug Residues in Food as international standards in the fight against drug resistance); Colette Kinnon, *World Trade: Bringing Health into the Picture*, 19 WORLD HEALTH F. 397 (1998) (discussing the possibility that WHO standards on pharmaceuticals moving in international commerce could be used by WTO dispute settlement panels in disputes under the Agreement on Technical Barriers to Trade).

For example, this Author has challenged the European Union's ban on fresh fish imports from cholera-stricken East African countries as violative of both the IHR and the SPS Agreement.¹⁴¹ The SPS Agreement argument relies on WHO's Guidelines for Cholera Control, and maintains that the European Union's import ban was not based on relevant international standards nor was it supported by risk assessment or scientific evidence.¹⁴² Similar international legal use could be made of WHO's standards, guidelines, and recommendations on other topics, such as the safety of biologicals and pharmaceuticals. The linkage between the SPS Agreement and WHO standards, guidelines, and recommendations changes the environment in which WHO will adopt such measures in the future. The linkage has already affected the Codex process for setting food safety standards,¹⁴³ and recent revisions to the International Plant Protection Convention were made expressly to prepare its standards for use in SPS Agreement disputes.¹⁴⁴

Other important aspects of the WTO regime are also of direct relevance to the WHO, namely: (1) how the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) will affect the global pharmaceutical market; (2) how the TBT Agreement will affect technical standards for health products; and (3) how the General Agreement on Trade in Services will affect transnational provision of health services.¹⁴⁵

For an international organization that has not developed any serious internal international legal capabilities, the international legal challenges WHO now confronts must seem like an unmanageable international legal tsunami. The immediate task

141. See David P. Fidler, Postings on ProMED-mail, under subject heading Cholera, Impact on Commercial Fishing—E. Africa (Jan. 13 and Jan. 17, 1998) (on file with author).

142. WHO's Director-General stated in connection with the European Union's import ban that "the placing of embargoes on the importation of food such as seafood, fresh water fish and vegetables is not an appropriate course of action to prevent the international spread of cholera" *Director-General Says Food Import Bans Are Inappropriate for Fighting Cholera*, WHO Press Release WHO/24 (Feb. 16, 1998).

143. See Fidler, *Trade and Health*, *supra* note 7, at 325 (discussing the impact of the SPS Agreement on the Codex process).

144. See Food and Agriculture Organization of the United Nations, *International Plant Protection Ready for the New Century* (last modified Jan. 30, 1998) <<http://www.fao.org/NEWS/1998/980106-e.htm>>.

145. See also *Measuring Trade Liberalization Against Public Health Objectives: The Case of Health Services*, WHO Doc. WHO/TFHE/TBN/97.2 (1997); *The Uruguay Round and Drugs*, WHO Doc. WHO/TFHE/97.1 (1997); *WTO: What's In It for WHO?*, WHO Doc. WHO/TRHE/95.5 (1995). See generally Kinnon, *supra* note 140.

for the future is to build up WHO's international legal capabilities so that it can begin to face these challenges.

B. *The Future: A Sea Change Required*

At present, WHO does not have any permanent or part-time staff members that have primary responsibility for matters of public international law.¹⁴⁶ The Legal Counsel's Office is already overburdened with day-to-day legal matters and the functioning of the Executive Board and WHA.¹⁴⁷ This lack of internal international legal capacity must be addressed. This proposition will elicit groans of protest from those familiar with WHO's financial problems.¹⁴⁸ Spend precious resources on international lawyers?

The Author answers this question affirmatively because, as argued in this Article, WHO should take international law more seriously in the future. However, the task of building internal international legal capacity faces the same financial constraints as all other existing or desired WHO programs. Thus, building international legal capacity has to be approached creatively to overcome the problems created by financial constraints.

146. Interviews with WHO staff members, March 1998. See also Taylor, *Globalization and Public Health*, *supra* note 5, at 14 ("Currently, there is no specific unit or division at WHO, or even attorneys within any particular division, with the specific mandate to work on the elaboration of national and international health norms.").

147. Interviews with WHO staff members, March 1998.

148. See Leon Gordenker, *The World Health Organization: Sectoral Leader or Occasional Benefactor?*, in U.S. POLICY AND THE FUTURE OF THE UNITED NATIONS 167, 176 (Roger A. Coate ed., 1994) ("The reluctance of WHO member states to provide increased funding places real constraints on the organization's ability to fund its broad agenda of health activities."). In 1997, the World Health Assembly expressed its "concern at the increasingly large number of Members that have been in arrears in the payment of their contributions in recent years to an extent which would justify invoking Article 7 of the Constitution and the unprecedented level of contributions owed by them." *Members in Arrears in the Payment of Their Contributions to an Extent Which Would Justify Invoking Article 7 of the Constitution*, WHA, Res. WHA50.8 (May 12, 1997). Under Article 7 of the WHO Constitution, the WHA can "suspend voting privileges and services to which a Member is entitled" if a Member States "fails to meet its financial obligations to the Organization or in other exceptional circumstances." WHO CONST. art. 7. Similar financial concerns were expressed by the WHA in 1998. See *Members in Arrears in the Payment of Their Contributions to an Extent Which Would Justify Invoking Article 7 of the Constitution*, WHA, Res. WHA51.2 (May 12, 1998); see also *Status of Collection of Assessed Contributions: Report by the Director-General*, WHO Doc. A51/13 (May 8, 1998) (reporting that the percentage of collection of assessed contributions of the Member States for the first four months of 1998 "is the lowest in the past 10 years for that period of time").

Despite financial concerns, the task of building international legal capacity in WHO will require allocations from WHO's regular budget to fund the development and maintenance of a core international legal effort at WHO.¹⁴⁹ A WHO international legal office should be able to service the needs of WHO staff members working on diverse global health questions. In addition, such an office also needs to work closely with the Director-General's office in using international law to help shape the practical and normative agenda of WHO. Given that the functions of the proposed international legal office differ significantly from those of the existing Legal Counsel's Office, the former should not be housed within the latter, although coordination between the two would be required. Ideally, the international legal office would sit within or directly under the Director-General's office to assure the integration of international law with all WHO policy.

Funding for a WHO international legal office should come from WHO's regular budget, but it would also be possible for WHO to seek extra-budgetary funds from Member States as is often done in financing WHO programs. Member States could provide direct monetary assistance or send trained lawyers to work with WHO international legal office. Clearly, such extra-budgetary support carries with it dangers, for Member States may attempt to influence international legal efforts or the interpretation of WHO's mandate. However, given the reality of regular WHO finances, it may prove necessary to solicit extra-budgetary funds.

In financing an international legal office, WHO should also tap into potential support from private foundations, which could provide direct operating funds or fund fellowships for international lawyers to work with WHO on international legal projects. International and national bar associations may also be willing providers of financial and human resource support.¹⁵⁰

While WHO has to provide a core capability, it should not neglect outreach efforts in building its international legal capacity. Just as WHO has established WHO Collaborating Centers on various issues of international health in order to access public health, medical, and scientific knowledge in different geographic regions, WHO could also establish a global

149. See also Taylor, *Globalization and Public Health*, *supra* note 5, at 14 (suggesting the creation of a health law division in WHO and arguing that WHO must devote financial resources to fund it).

150. Existing law initiatives by bar associations could be useful models for the public health context. See, e.g., American Bar Association Central and East European Law Initiative (visited Oct. 26, 1998) <<http://www.abanet.org/ceeli/home.html>> ("a public service project... designed to advance the rule of law in the world by supporting the law reform process underway in Central and Eastern Europe and the New Independent States of the former Soviet Union.").

network of WHO Collaborating Centers on Global Health Law at leading law schools around the world to seek analyses, ideas, and guidance on international and national legal issues. New information technologies, such as the Internet and electronic mail, make it realistic to craft a global web of WHO Collaborating Centers focusing on the international and national legal aspects of global public health. In addition, WHO's growing use of global electronic conferences in other areas, through which experts from all over the world share papers, and comments on presented papers can be harnessed for legal purposes as well.¹⁵¹

Law schools around the world may also be useful to the WHO international legal office through the encouragement of academics to undertake pro bono legal work for WHO and through the sponsorship of internships for law students to work with WHO on international legal issues. International law firms may also be willing to sponsor some of their lawyers to work on pro bono projects with the WHO, especially in the areas of international trade law and intellectual property protection.

In building internal international legal capabilities, WHO should also establish legal links with other international organizations, such as the WTO, World Intellectual Property Organization, and other U.N. specialized agencies that work in fields that touch upon human health (e.g., human rights, environmental protection). As noted earlier, other international organizations have decades of international legal involvement; WHO could learn from their experiences in belatedly starting down this path. In addition, these links can provide WHO with the opportunity to inform other international organizations about health concerns arising in their respective areas.¹⁵²

Nor should WHO neglect international legal collaboration with NGOs on international legal issues of common concern.

151. The WHO has, for example, conducted two global electronic conferences on antimicrobial use in food animal production. See *The Medical Impact of the Use of Antimicrobials in Food Animals*, *supra* note 136, at 3 (noting that of the 39 papers presented in Berlin, 31 "were distributed electronically for discussion and comments over a four-week period prior to the meeting in Berlin, to 522 experts from at least 45 countries on all continents"); see also *Use of Quinolones in Food Animals and Potential Impact on Human Health: Report of WHO Meeting, Geneva, Switz. June 2-5, 1998*, WHO Doc. WHO/EMC/2DI/98.10 (following same electronic pre-distribution as 1997 Berlin meeting).

152. This suggestion parallels the desire that Director-General Elect Brundtland expressed in her May 1998 speech to the WHA to support U.N. interagency cooperation and to reach out to international financial institutions. See Dr. Gro Harlem Brundtland, Speech to the Fifty-First World Health Assembly, WHO Doc. A51/DIV/6 (May 13, 1998); see also *Collaboration within the United Nations System and with Other Intergovernmental Organizations: Report by the Director-General*, WHO Doc. A51/19 (Mar. 23, 1998) (summarizing WHO progress on collaboration within and outside the U.N. system).

NGOs have had a significant impact on the development of contemporary international law, particularly in the areas of human rights, environmental protection, and international humanitarian law, and their influence will continue in the future.¹⁵³ WHO should tap into the international legal energy provided by transnational civil society as it attempts to build its international legal capabilities.¹⁵⁴

The preceding suggestions have more in mind than creatively cobbling together human and financial resources. While it will be necessary as a practical matter to pursue a diverse range of possibilities, the more important objective behind such a broad-based approach is the creation of a transnational community of individuals, NGOs, governments, and international organizations dedicated to building-up knowledge and capabilities for dealing with the intersections of global health and international law. In academic literature, this transnational community concept is often called an "epistemic community"—"networks of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area."¹⁵⁵ Any international legal project at WHO cannot become an insulated program claiming a monopoly on international legal information, knowledge, and resources. WHO's international legal project should build transnational networks in international law and health that deepen and widen the commitment to the Organization's objectives. But WHO, as in other areas of international health policy, must be the initiator, leader, and overall coordinator of the epistemic community on international law and health. This objective clearly falls within WHO's function of assisting the development of an informed public opinion among all peoples on matters of health.¹⁵⁶

153. See David P. Fidler, *The Potential Role of Transnational Civil Society in Health Development in the Americas: Lessons from the NGO Revolution in International Law and International Relations*, presented at Seminar/Workshop on Health & Human Development in the New Global Economy: Experiences, Opportunities and Risks in the Americas, Oct. 26-28, 1998, Galveston, Texas (unpublished manuscript on file with author) [hereinafter Fidler, *Lessons from the NGO Revolution*].

154. In her May 1998 speech to the WHA, Director-General Elect Brundtland stated that WHO "must reach out to the NGO community" and that she plans to "convene a conference with the NGO community to draw up new guidelines for our cooperation [and] to establish new mechanisms for interaction with civil society in Member States." Brundtland, *supra* note 152, at 4.

155. Walt, *International Organizations in Health: The Problem of Leadership*, *supra* note 101, at 31.

156. See WHO CONST. art. 2(r).

VII. INTERNATIONAL LAW AND GLOBAL HEALTH JURISPRUDENCE

A. *The Concept of Global Health Jurisprudence*

Although building the global epistemic community on international law and global health is a necessary step in crafting a role for international law in WHO's future, it is not a sufficient step. It would be simplistic to argue that global health for all can be achieved through international law alone. Ian Brownlie observed that, until national systems of law improve their performance, it is naive to place faith in international legislation alone.¹⁵⁷ This observation raises the important connection between international and national law on public health. As Michel Bélanger argued, the general objective of international health law "is to support, guide, and coordinate national health law."¹⁵⁸ This connection requires the development of a *global health jurisprudence* that encompasses both national and international law on health.

Historically, WHO has shown some interest in domestic health legislation, as evidenced by its publication of the *International Digest of Health Legislation*.¹⁵⁹ Despite this interest in domestic health law, a recent WHO pilot study of national public health law in thirty-seven WHO Member States revealed a global lack of capacity on public health law.¹⁶⁰ The pilot study determined that WHO has to provide leadership in building public health law capacity in WHO Member States, especially in the developing world.¹⁶¹

The pilot study's conclusion and the argument that WHO should be more actively engaged with international law both underscore the importance of the role of law in the future of WHO. The two legal tasks cannot, however, be seen as separate ones that can be pursued independently. International law and

157. See Brownlie, *The Expansion of International Society*, *supra* note 87, at 368.

158. Michel Bélanger, *The Future of International Health Legislation*, 40 INT'L DIG. HEALTH LEGIS. 1, 2 (1989).

159. See *supra* note 113. But see Taylor, *Globalization and Public Health*, *supra* note 5, at 8 (arguing that the *International Digest of Health Legislation* is an example of WHO's vision of its legal role "as neither active nor even reactive, but merely observational" and noting that "WHO has traditionally devoted only a mere fraction of its regular budget to support all the organization's legislative efforts").

160. See Aude L'hironde & Derek Yach, *Develop and Strengthen Public Health Law*, 51 WORLD HEALTH STATISTICS Q. 79, 84-86 (1998).

161. See *id.* at 86.

national law are interdependent. Presenting the WHO pilot study's findings, Aude L'hirondel asked: "What would be the use of a framework convention on tobacco if countries have absolutely no capacity to adopt and implement domestic legislation in accordance with this convention?"¹⁶² This question captures the fundamental interdependence: national public health reform often depends on international legal activity, and international legal norms often depend on implementation in national public health law.

Thus, international law in the public health field has to be seen as part of a legal dynamic rather than an insulated level of law. This legal dynamic is horizontal through international law across the international system and vertical through domestic law within a country. At present, neither the horizontal nor vertical elements of the dynamic operate well. Just as this Article argues for the creation of an international legal epistemic community to serve WHO, WHO's pilot study advocates analogous legal capacity-building within WHO Member States.¹⁶³

The interdependence between international and national law, and the need for WHO to take leadership in building legal capacities at both these levels of law articulate the challenges of generating a global health jurisprudence. Global health jurisprudence can be defined as that body of rules, strategies, and procedures that allows law in all its forms to support public health. The objective of developing a global health jurisprudence is to identify concepts, standards, and approaches that best promote public health. Although the world's diversity will ensure that any global health jurisprudence remains complex, global health jurisprudence seeks to generate a common discourse about the relationship between law and health. This discourse will emanate from treaties, international regulations, international recommendations and standards, international soft law norms, customary international law, national statutes and administrative regulations, and cases settling disputes. But the discourse has to be fostered and nurtured by WHO as the world's health advocate.

162. Aude L'hirondel, *An Initial Assessment of the Needs for Capacity in Public Health Law*, presented at the International Conference on Global Health Law, New Delhi, India, Dec. 5-7, 1997. See also the concern expressed by Yach that "most countries have virtually no institutional or human capacity capable of mounting a comprehensive and sustainable approach to tobacco control." Yach, *supra* note 79, at abstract.

163. L'hirondel & Yach, *supra* note 160, at 84 (arguing that WHO "should address the global lack of capacity in public health law"); see also Taylor, *Making the World Health Organization Work*, *supra* note 5, at 344 (arguing that "promoting national and international legislation and legal institutions to implement the right to health can make a critical contribution to furthering WHO's health objectives").

Global health jurisprudence will not spontaneously appear for the benefit of human health.

B. *Dynamics of Global Health Jurisprudence*

Although the concept of global health jurisprudence focuses on law, it is important to note that it is also connected with the formulation of global public health policy. Global health jurisprudence only forms part of the response to the globalization of public health. Foreign policy experts and international legal scholars are actively debating how globalization is affecting state power and policy-making in international relations.¹⁶⁴ A common debate is whether globalization spells the end for the sovereign state and the traditional Westphalian international system.¹⁶⁵ Often noted is the state's decreasing ability to control what happens within its territory, which also draws attention to problems facing the use of national law to pursue political, economic, and social objectives. When confronted with problems created by globalization, states typically have responded legally by: (1) pursuing ad hoc, national harmonization of law, or (2) cooperating in the creation of international legal regimes.¹⁶⁶ Behind these legal responses to globalization are interesting dynamics that are important to understanding global health jurisprudence.

Literature addressing globalization often argues that traditional territorial-based notions of governance are losing their relevance.¹⁶⁷ Experts and scholars urge states to adopt more creative and flexible approaches to policy-making that move away from territoriality as a guiding principle. Wolfgang Reinicke advocates, for example, that states contribute to the development of "global public policy" that "uncouples governance from the nation-state and government."¹⁶⁸ He believes that "public-private partnerships" between states and non-state actors, such as multinational corporations and NGOs,

164. See, e.g., Jan Aart Scholte, *The Globalization of World Politics*, in *THE GLOBALIZATION OF WORLD POLITICS: AN INTRODUCTION TO INTERNATIONAL RELATIONS* 13, 21 (John Baylis & Steve Smith eds., 1997) (analyzing developments undercutting state sovereignty).

165. See *id.* (noting that "it can be argued that, largely owing to globalization, the Westphalian system is already past history").

166. See Fidler, *The Globalization of Public Health*, *supra* note 10, at 16-17.

167. See, e.g., Wolfgang H. Reinicke, *Global Public Policy*, *FOREIGN AFF.*, Nov./Dec. 1997, at 127, 131 (arguing that two types of national responses to globalization, protectionism and interventionism, "emphasize territoriality as an ordering principle of international relations . . . [and] are at odds with globalization . . .").

168. *Id.* at 132.

“could provide the foundation for global public policy.”¹⁶⁹ On the other hand, Anne-Marie Slaughter sees the development of networks between governments on functional issues of concern producing “a new, transgovernmental order” for international relations that “offers answers to the most important challenges facing advanced industrial countries.”¹⁷⁰ Reinicke’s and Slaughter’s ideas help identify arguments in favor of developing new types of horizontal relationships (e.g., transgovernmentalism) and vertical relationships (e.g., public-private governance partnerships).

Global health jurisprudence incorporates these ideas and specifically applies them in the context of global public health. Developing global health jurisprudence will require not only vertical relationships among international organizations, states, and NGOs, but also horizontal relationships between international organizations, governments, and non-state actors. Global health jurisprudence calls for the intensification of transintergovernmentalism, transgovernmentalism, and transnational civil society. The earlier suggestion that WHO establish links with other international organizations in building its international legal capabilities represents transintergovernmentalism because it advocates an intensification of the relationships among international organizations for purposes of improving global public health through law. Transintergovernmentalism supports more sophisticated approaches to creating international and national legal regimes in response to the globalization of public health.

Transgovernmentalism will also be important to the development of global health jurisprudence. Slaughter sees transgovernmentalism operating between judges and courts of different nations, and she argues that “[j]udges are building a global community of law.”¹⁷¹ Similarly, transgovernmental networks on public health law can contribute to the development of global health jurisprudence. A serious problem with transgovernmentalism in connection with global health jurisprudence is, however, the lack of public health law capabilities in many developing countries. Slaughter’s conception of transgovernmentalism offers promising opportunities for developed countries because they possess sophisticated governmental and regulatory units capable of entering into functional transgovernmental dialogue.¹⁷² Transgovernmentalism

169. *Id.*

170. Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept./Oct. 1997, at 183, 184, 197.

171. *Id.* at 188.

172. Slaughter argues that transgovernmentalism “offers answers to the most important challenges facing *advanced industrialized countries.*” *Id.* at 197 (emphasis added).

in public health law specifically and public health generally is limited because of the inadequacy or non-existence of public health capabilities in many developing countries.¹⁷³ Given that the greatest global public health problems, infectious diseases and the global tobacco pandemic, primarily threaten people in developing countries, transgovernmentalism between developed states is necessary, but not sufficient in approaching the globalization of public health.

This Author has argued elsewhere that, lurking in the many regional and bilateral initiatives on infectious diseases among developed states is the possibility of developing a two-tier international infectious disease control system where: (1) developed states occupy the top tier and enjoy higher public health standards through bilateral and regional cooperation, and (2) developing countries occupy the lower tier, have lower standards of public health, and remain dependent on WHO and traditional notions of internationalism.¹⁷⁴ Before transgovernmentalism can become a more powerful strategy for dealing with the globalization of public health, much work needs to be done by international organizations and developed states in improving public health systems in developing countries. As such public health capabilities develop, transgovernmentalism can help guide ad hoc, national harmonization of public health law as a response to globalization.

This observation highlights some changes global health jurisprudence would force on WHO's vertical relationships with its Member States. Reinicke argues that international organizations, such as the World Bank and the International Monetary Fund, are increasingly focusing on matters of internal sovereignty, "the relationship between the state and civil society,"¹⁷⁵ such as

173. See Eoin O'Brien, *The Diplomatic Implications of Emerging Diseases*, in PREVENTIVE DIPLOMACY 244, 252 (Kevin C. Cahill ed., 1996) (arguing that "[w]hereas the developed countries have public health systems of varying efficiency, many developing countries have non-existent or inefficient public health services"). Transgovernmentalism in public health law may even be a problem for some developed states. See, e.g., LAWRENCE O. GOSTIN ET AL., IMPROVING STATE LAW TO PREVENT AND TREAT INFECTIOUS DISEASE (1998) (arguing that infectious disease law in the United States is deficient and needs reformation); see also Lawrence O. Gostin, et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99, No.1, COLUM. L. REV. (forthcoming Jan. 1999) (arguing the same).

174. Fidler, *The Role of International Law*, *supra* note 6, at 69. Examples of transgovernmental efforts on infectious diseases by the United States with the European Union, Japan, Russia, South Africa, and India are briefly described in Maureen Bezuhly et al., *International Health Law*, 31 INT'L LAW. 645, 651 (1997) and Maureen Bezuhly et al., *International Health Law*, 32 INT'L LAW. 539, 541 (1998).

175. Reinicke, *supra* note 167, at 129.

poverty and good governance.¹⁷⁶ Similarly, the United Nations finds itself increasingly involved in civil conflicts and civil wars. The WTO also faces pressure to deal with labor standards and environmental practices in the WTO Member States. WHO's initiative on public health law takes it into the realm of internal sovereignty as well because it involves analyzing and reforming how a state protects and promotes the health of its civil society. WHO has been accused of being "slavishly in thrall to its Member States" and for allowing "[a]ppropriate respect for national sovereignty" to be "overtaken by blind obeisance to narrow national wishes."¹⁷⁷ Global health jurisprudence will require WHO to reorient its attitude towards Member State sovereignty.

The third horizontal dynamic important to the development of global health jurisprudence is transnational civil society. Much has been written about the growing role of NGOs in international relations generally and international law specifically.¹⁷⁸ NGOs can contribute individually and through transnational networks to the development of global health jurisprudence as they have contributed to the development of international law in such areas as human rights, environmental protection, and humanitarian law.¹⁷⁹ WHO is becoming more aware of the potential benefits of transnational civil society activity on global public health as it participates in the creation of a NGO network called Global Health Watch.¹⁸⁰ The WHO recognizes that "NGO networks have a unique capacity to monitor the state of health and social welfare at country, regional and global levels."¹⁸¹ The intensification of transnational civil society activities addressing global public health will benefit the development of global health jurisprudence, and global health jurisprudence could become a focus of NGO networks on global public health.¹⁸²

As suggested by the recommendation that WHO intensify its relationships with NGOs on international law, the vertical

176. See *id.* at 135.

177. *Fortress WHO: Breaching the Ramparts for Health's Sake*, *supra* note 69, at 203.

178. See, e.g., Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183 (1997); see also Stephan Hobe, *Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations*, 5 IND. J. GLOBAL LEGAL STUD. 191 (1997); Peter J. Spiro, *New Players on the International Stage*, 2 HOFSTRA LAW & POLY SYMPOSIUM 19 (1997).

179. See Fidler, *Lessons from the NGO Revolution*, *supra* note 153, at 31-32.

180. See World Health Organization, *Concept Paper and Proposal for the Initial Stage of the Global Health Watch (GHW)* (NGO Forum for Health, Geneva, Switzerland) (on file with author).

181. *Id.* at 3.

182. Fidler, *Lessons from the NGO Revolution*, *supra* note 153, at 32.

relationship between WHO and NGOs should undergo changes. Reinicke argues that public-private partnerships provide the foundation for global public policy,¹⁸³ and such partnerships between international organizations and NGOs could also support the development of global health jurisprudence. Deepening the vertical relationship between WHO and NGOs does not imply, however, that the state has become irrelevant to the pursuit of global public health. The state remains central to public health because public health problems require central governmental authorities to deliver services and conduct disease surveillance within specific territories. Infectious disease control cannot, for example, be handled through neo-medievalism in which power is decentralized into the hands of supra-state actors and sub-state actors that form global networks through new information technologies.¹⁸⁴ Slaughter's argument that "private power is still no substitute for state power"¹⁸⁵ is particularly apt in the public health context. The purpose of deepening the vertical relationship between the WHO, NGOs, and NGO networks is not only to assist the WHO, but also to place additional pressure on states to improve their public health policies, laws, and practices.

C. *Some Principles of Global Health Jurisprudence*

Even given the problems with international and national law on public health, global health jurisprudence derives some substance through principles which have been the subject of international discourse. For example, after the HIV/AIDS pandemic broke, public health officials quickly saw that respect for human rights is not only required by international law but is also the best *public health* approach to the HIV/AIDS problem.¹⁸⁶ In *Health for All in the 21st Century*, WHO stresses the importance of human rights because human rights problems have arisen in many countries in connection with a variety of government actions on public health.¹⁸⁷ Frequent human rights violations occur when governments: (1) discriminate against individuals or groups suffering from diseases by denying them access to public health services or by singling them out in applying public health measures; (2) deprive people of their liberty and security by

183. Reinicke, *supra* note 167, at 132.

184. See Jessica T. Mathews, *Power Shift*, FOREIGN AFF., Jan./Feb. 1997, at 50; see also BULL, *supra* note 36, at 264-76 (analyzing the "new medievalism").

185. Slaughter, *supra* note 170, at 184.

186. For an extensive analysis of human rights and HIV/AIDS, see generally LAWRENCE O. GOSTIN & ZITA LAZZARINI, HUMAN RIGHTS AND PUBLIC HEALTH IN THE AIDS PANDEMIC (1997).

187. See *Health for All in the 21st Century*, *supra* note 82, at Box 5.

applying compulsory public health measures against them without clearly establishing that they pose a significant risk to society or without providing due process of law; (3) fail to protect private health information gathered by public health systems; and (4) fail to provide their people with the infrastructure, services, and information necessary to prevent and control diseases.¹⁸⁸ In addition, other human rights abuses, such as torture or inhumane treatment of prisoners, produce health problems by causing death or dismemberment and by deterring people from seeking medical care out of fear of reprisal.¹⁸⁹ Human rights law will factor prominently into global health jurisprudence.

Another principle of global health jurisprudence appears in the trade context: public health measures should not restrict trade without scientific justification. Public health measures that are not so justified disrupt trade without protecting public health. The WTO's SPS Agreement enshrines this basic principle by requiring trade restrictive SPS measures to be based on a risk assessment and to be supported by scientific evidence.¹⁹⁰ The IHR also embody the principle that trade restrictive measures need to be based on a scientific understanding of the infectious disease in question.¹⁹¹

The precautionary principle also forms part of global health jurisprudence because it allows public health authorities to err on the side of caution in the face of scientific uncertainty. The precautionary principle supports public health in the context of international environmental protection because it legitimates environmental measures that ultimately protect human health. The precautionary principle also plays a role in international trade law because it is found in the SPS Agreement.¹⁹² It is also

188. See David P. Fidler, Statement on the Proposed Japanese Law for the Prevention of Infectious Diseases (May 11, 1998), in Habataki Welfare Project Special Report, *New Infectious Disease Law in Japan*, June 20, 1998, at 2 (on file with author).

189. See Lawrence O. Gostin, *Health Legislation and Communicable Diseases: The Role of Law in an Era of Microbial Threats*, 49 INT'L DIG. HEALTH LEGIS. 221, 229 (1998). In connection with the adverse health consequences of human rights violations, WHO's recent awarding of a Health-for-All Gold Medal to Fidel Castro, a notorious violator of human rights, is certainly not a mark in WHO's favor in recognizing the importance of human rights. See Citation, *Award of the World Health Organization Health-for-All Gold Medal to His Excellency Dr. Fidel Castro, President of the Republic of Cuba*, WHO Doc. A51/DIV/7 (May 15, 1998).

190. SPS Agreement, *supra* note 108, arts. 2.3, 5.1.

191. See Fidler, *Trade and Health*, *supra* note 7, at 312.

192. SPS Agreement, *supra* note 108, art. 5.7.

flexible enough to be applied in new public health situations to help protect human health.¹⁹³

Another principle of global health jurisprudence is found in the tenet of international humanitarian law that prohibits the use of weapons that cause superfluous injury or unnecessary suffering.¹⁹⁴ This principle acknowledges the reality of armed conflict but focuses attention first and foremost on the health impact of weapons.¹⁹⁵

As these examples suggest, a challenge for global health jurisprudence is balancing health and other political, economic, or military objectives. Striking such balances provides the key to the utility of the laws touching on health. Balancing health and other objectives is not easy in any of the human rights, trade, environmental, and humanitarian contexts mentioned above. Exactly when individual rights must yield to the interests of society remains a much disputed issue.¹⁹⁶ The type of risk assessment and scientific evidence needed to justify a trade-restricting health measure also continues to be hotly debated.¹⁹⁷ Whether the precautionary principle is really helpful in environmental or public health contexts can be doubted.¹⁹⁸ How military necessity relates to principles of international humanitarian law remains a

193. See Fidler, *Legal Challenges*, *supra* note 108, at 17-18 (arguing that the precautionary principle is relevant to scientific controversies about the public health impact of antimicrobial use in food animal production).

194. See 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 35(2), *reprinted in* DOCUMENTS ON THE LAWS OF WAR 387, 409 (Adam Roberts & Richard Guelff eds., 2d ed. 1989).

195. See INTERNATIONAL COMMITTEE OF THE RED CROSS, *THE SIRUS PROJECT: TOWARDS A DETERMINATION OF WHICH WEAPONS CAUSE "SUPERFLUOUS INJURY OR UNNECESSARY SUFFERING"* (1997).

196. See Fidler et al., *Emerging and Reemerging Infectious Diseases: Challenges for International, National, and State Law*, *supra* note 112, at 793-94 (noting the continuing controversy in American public health law about the balance between individual rights and community protection).

197. See Fidler, *Trade and Health*, *supra* note 7, at 323-24 (analyzing the problems raised in applying scientific disciplines of the SPS Agreement in WTO dispute settlement cases); Dale E. McNeil, *The First Test of the World Trade Organization's Agreement on the Application of Sanitary and Phytosanitary Measures: The European Union's Ban on Imports of Beef Derived from Cattle Treated with Certain Hormones for Growth Promotion*, 39 VA. J. INT'L L. 89 (1998) (criticizing the WTO Appellate Body's handling of scientific disciplines under the SPS Agreement in the *Beef Hormones Case*).

198. See, e.g., Daniel Bodansky, *Scientific Uncertainty and the Precautionary Principle*, ENV'T, Sept. 1991, at 4 (expressing skepticism that the precautionary principle is a part of customary international law); see also SUSSKIND, *supra* note 106, at 80 ("Even if the precautionary principle were mandated by international law and the participants in global environmental treaty negotiations adopted a no-regrets strategy whenever possible, political disagreements would still emerge.").

problematic issue.¹⁹⁹ The development of global health jurisprudence will not permanently resolve these inherent tensions between public health and other objectives, but work on the concept can bring such tensions further into the critical spotlight and foster a more transparent global dialogue about the delicate balancing acts called for by principles of global health jurisprudence.

On a broader scale, global health jurisprudence will also involve examining questions of equity and justice. These questions are important in both domestic and international legal realms. The equity issue is especially acute for WHO at the international level where differential power, wealth, and national interests can easily skew international trade law and other fields of international law towards developed countries at the expense of public health in the developing world. The importance of these questions is seen in the Organization's belief that its *Health for All in the 21st Century* strategy is fundamentally a call for social justice.²⁰⁰ Global health jurisprudence cannot fail to be affected by such a call.

While the concept of global health jurisprudence may still seem vague, it cannot be well-defined in the absence of more serious attention to international and domestic law relating to public health. Global health jurisprudence is offered not as a blueprint or a substantive end goal, but as a dynamic process through which WHO can develop both international law and domestic law and integrate them together as important elements in its global agenda for health.²⁰¹

D. *Global Health Jurisprudence: Theory and Reality*

A serious problem with the concept of global health jurisprudence is the same problem that confronts much of the "rule of law" activities that international organizations, states, and NGOs mount in other areas: the gap between theory and reality. As Thomas Carothers has observed, a gap exists between the law reform recommended to a country and the ability of that country to reform its law and operate the resulting legal

199. See Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213, 231 (1998) (observing that "[t]oday, military necessity is widely regarded as something that must be overcome or ignored if international humanitarian law is to develop . . .").

200. *Health for All in the 21st Century*, *supra* note 82, at para. 3.

201. For an attempt to find principles of global health jurisprudence in the context of public health problems created by antimicrobial use in food animals, see Fidler, *Legal Challenges*, *supra* note 108.

system.²⁰² In connection with international law, the same applies for the gap between theory and reality in WHO's current lack of capability to function effectively in international legal activity. Planting seeds in inhospitable or barren soil is not the mark of good husbandry. The pursuit of global health jurisprudence should involve the close study of the successes and failures of other "rule of law" and "good governance" efforts to avoid making avoidable mistakes and to learn how to narrow the gap between theory and reality.²⁰³ A major purpose of this Article is to begin preparing the soil at WHO for the planting of international law and global health jurisprudence; but the tilling, sowing, and nurturing remain still distant chores.

VIII. CONCLUSION

This Article has tried to provide a comprehensive analysis of the role of international law in WHO's future. Whether WHO realizes it, international law has had and will continue to have effects on international health policy. In the future, WHO has a choice: It can continue to act as if international law plays no role in global public health or it can build the commitment and capacity needed to integrate international law into its endeavors and into the creation of global health jurisprudence. Building such commitment and capacity will not resurrect WHO to its past glories, but they may very well help WHO become more adept at facing the multidimensional challenges now multiplying that will complicate the successful implementation of WHO's global agenda for health. In addition, such commitment and capacity will be necessary to promote the development of global health jurisprudence, to stimulate vertical and horizontal dynamics supporting this development, and to generate dialogue on the principles of global health jurisprudence.

Lawyers are not doctors' best friends. But the globalization of public health makes at times for strange bedfellows. WHO's new leadership should be encouraged to make both international law and global health jurisprudence new and essential elements of global health policy.

202. See Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar./Apr. 1998, at 95, 97-98, 105.

203. See *id.* (evaluating existing "rule of law" initiatives).