

Can the United States Sue China over COVID-19 in an International Court?

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Some Members of Congress assert that China should bear international legal responsibility for its alleged role in failing to contain the COVID-19 pandemic in its early weeks. Proposed options to impose accountability include initiating [investigations](#) of China, giving the President [authority](#) to impose COVID-19-related sanctions, [reforming](#) World Health Organization (WHO) regulations, and [narrowing](#) China's foreign sovereign immunity so that it could face litigation in U.S. courts. In addition to these proposals, some [Members of Congress](#) have urged the United States to sue China in an international forum for damages arising from COVID-19's spread.

Of the advocates for suit in an international court, some contend that China bears legal responsibility because it violated the 2005 [International Health Regulations](#) (IHR (2005)) promulgated by the World Health Assembly, WHO's governing body. China's critics often focus on [Articles 6 and 7](#) of IHR (2005), which require WHO member countries to notify and share information with WHO about any "public health emergency of international concern." Had China more fully complied with these regulations, its critics argue, COVID-19 would have been better contained and resulted in fewer cases. But just as attempts to sue China for COVID-19 damages in U.S. domestic courts face difficult legal hurdles (discussed in this [Sidebar](#)), a suit in an international forum would raise complex legal questions. This Sidebar examines these legal questions and discusses whether an international forum would hear a dispute over China's alleged failure to comply with IHR (2005)'s notification and information-sharing requirements.

What Did IHR (2005) Require China to Do About COVID-19?

As discussed in this [In Focus](#), IHR (2005) generally requires countries to build core public health capacities and to notify WHO of and respond to disease outbreaks. Article 6 requires countries to notify WHO of "all events which may constitute a public health emergency of international concern" and, after notification, to communicate "timely, accurate and sufficiently detailed public health information" about the event. Article 7 provides:

If a [member country] has evidence of an unexpected or unusual public health event within its territory ... which may constitute a public health emergency of international concern, it shall provide to WHO all relevant public health information.

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Some have [accused](#) China of withholding information during the virus's outbreak in violation of Articles 6 and 7. China [denies](#) concealing information. While resolution of the factual dispute is outside the scope of this legal analysis, a detailed chronology of China's handling of the outbreak is available in this [CRS Report](#).

Is There an International Forum with Jurisdiction to Hear a Case Against China?

If factual events support a claim that China did not comply with Articles 6 and 7, the United States would still have to identify an international forum with jurisdiction to hear the dispute. [Article 56](#) of IHR 2005 allows member countries to enter negotiations and mediation concerning disagreements over the regulations. If the parties are unable to resolve a dispute between themselves, they [may refer](#) the disagreement to the WHO director-general, "who shall make every effort to settle it." If those efforts do not succeed, Article 56 authorizes countries to submit disputes to the Permanent Court of Arbitration, one of the [world's oldest](#) institutions for international dispute resolution. But Article 56 of the IHR (2005) does not require member countries to resolve their differences in the Permanent Court of Arbitration, and participation is voluntary.

Some [commentators](#) have [examined](#) whether the parent international agreement to the IHR (2005)—the 1946 [Constitution of the World Health Organization](#)—could create jurisdiction in the International Court of Justice (ICJ). The WHO Constitution is a binding international agreement that formed WHO. [Article 75](#) of the WHO Constitution provides that:

Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the [World] Health Assembly shall be referred to the International Court of Justice ... unless the parties concerned agree on another mode of settlement.

By stating that disputes *shall* be referred to the ICJ, Article 75 binds member countries to the ICJ's compulsory (i.e., non-optional) jurisdiction for disputes that fall within its terms. (Whether China would comply with the ICJ's lawful exercise of compulsory jurisdiction is a separate matter outside the scope of this Sidebar.) As explained in this [CRS Sidebar](#), the ICJ is the "[principal judicial organ](#)" of the United Nations. To invoke the ICJ's jurisdiction, Article 75 requires that the disagreement be one that is "not settled by negotiation or by the [World] Health Assembly"—meaning that an effort at non-judicial resolution must precede the suit. In interpreting a similar clause in Article 22 of the [International Covenant on the Elimination of All Forms of Racial Discrimination](#), the ICJ [concluded](#) that these prerequisites were alternative rather than cumulative. If the ICJ were to apply this reasoning to the WHO Constitution, *either* negotiation or reference to the World Health Assembly would need to take place before the United States or another country could invoke Article 75.

Could the United States Bring a Case in the ICJ?

While Article 75 of the WHO Constitution provides the ICJ with compulsory jurisdiction in some cases, it does not require the ICJ to hear every dispute. According to the ICJ in [Armed Activities on the Territory of the Congo](#), Article 75 creates jurisdiction only for disputes that "specifically concern" how countries interpret or apply the WHO Constitution. Whether the United States could frame a complaint against China to meet this standard is a difficult question.

The WHO Constitution is predominantly a framework document that defines WHO's institutional structure and membership. It does not include the same substantive reporting and information-sharing requirements as Articles 6 and 7 of IHR (2005). The United States might argue that, because the WHO Constitution authorized the World Health Assembly to issue IHR (2005), a dispute about application of IHR (2005) is, in effect, a dispute about application of the WHO Constitution. But such a position would likely face the counterargument that IHR-based claims do not sufficiently concern interpretation or application of the WHO Constitution to lie in the ambit of Article 75.

Some [legal analysts](#) suggest that the United States may have a stronger case for ICJ jurisdiction under Article 75 if it alleged that China violated provisions of the WHO Constitution rather than IHR (2005). For example, observers have discussed whether China's COVID-19 response implicates the following provisions of the WHO Constitution:

- Article 37, which states that each WHO member country “undertakes to respect the exclusively international character of the [WHO] Director-General and the [WHO] staff and not to seek to influence them.”
- Article 63, which requires WHO member countries to “communicate promptly to the [WHO] ... official reports and statistics pertaining to health which have been published in the State concerned.”
- Article 64, which provides, “Each Member shall provide statistical and epidemiological reports in a manner to be determined by the [World] Health Assembly.”
- The general international legal obligations (reflected in the [Vienna Convention on the Law of Treaties](#)) to carry out the WHO Convention in good faith and not defeat its object and purpose.

Whether the United States or another country could invoke the ICJ's jurisdiction based on these requirements is a fact-dependent issue. Given the strictures of Article 75 and barriers to the ICJ's compulsory jurisdiction, some observers advocate for alternative forms of accountability, such as [reforming](#) the IHR (2005) to create stronger enforcement mechanisms in the regulations themselves.

Other [observers](#) have examined whether Article 75's grant of compulsory jurisdiction is so narrow that pursuing an “[advisory opinion](#)” from the ICJ is a more plausible option. Unlike judgments arising from Article 75, advisory opinions are not legally binding—although they may aid in clarifying international law. Individual countries such as the United States may not unilaterally request an advisory opinion from the ICJ. But the U.N. General Assembly, U.N. Security Council, and certain other international bodies, including WHO, [may request](#) them for some questions. WHO has previously requested at least two advisory opinions from the ICJ: [Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt](#) in 1980 and [Legality of the Use by a State of Nuclear Weapons in Armed Conflict](#) (*Nuclear Weapons Advisory Opinion*) in 1996.

The ICJ's jurisdiction to hear a WHO-requested advisory opinion has limitations. Under WHO's [international agreement](#) with the U.N., WHO may request advisory opinions only “on legal questions arising within the scope of its competence[.]” And the [U.N. Charter](#) requires advisory opinion requests from specialized agencies, such as WHO, to concern legal questions within the scope of the agency's activities. In *Nuclear Weapons Advisory Opinion*, for example, the ICJ [declined](#) to provide an answer to WHO's question on whether use of nuclear weapons during an armed conflict would violate the WHO Constitution and other forms of international law. According to the ICJ, WHO's functions as a specialized health agency did not have a sufficient connection with the legality of the use of nuclear weapons to satisfy the jurisdictional requirements for the court to exercise advisory jurisdiction.

Would U.S. Withdrawal from WHO Affect a Suit in the ICJ?

The United States recently sent a letter formally notifying the U.N. Secretary-General, the depository for the WHO Constitution, of the United States' intent to withdraw from the WHO. According to the [Office of the U.N. Secretary General](#), the letter states the withdrawal will be effective July 6, 2021. As discussed in this [CRS Legal Sidebar](#), a [joint resolution](#) in U.S. law appears to require the President to give one-year advance notice before withdrawal is effective. As such, the United States remains a party to the WHO Constitution until its withdrawal is complete. Under [ICJ jurisprudence](#), the court's jurisdiction is determined at the time of filing and, once established, is not terminated by withdrawal from the

jurisdiction-creating instrument. Accordingly, if the United States were to use the WHO Constitution to invoke the ICJ's compulsory jurisdiction before July 6, 2021, the case could still proceed even after withdrawal is effective.

Is China Responsible for Damages Caused by COVID-19's Spread?

Legal observers disagree on whether international law would require China to pay damages if China did not comply with IHR (2005). Neither IHR (2005) nor the WHO Constitution expressly requires payment of compensation to foreign countries for damages caused by the spread of an infectious disease. But [customary international law](#), which is derived from countries' general and consistent practice followed out of a sense of legal obligation, provides some secondary rules on the issue. One potentially relevant source of rules for customary international law is the [Draft Articles on State Responsibility for Internationally Wrongful Acts](#) (Draft Articles) prepared by the [International Law Commission](#), a U.N.-based body charged with the codification and "progressive development" of international law. The Draft Articles are not a binding international agreement, and countries [do not fully agree](#) on how much they reflect customary international law. But the [ICJ](#) has cited certain articles as representing agreed-upon rules of customary international law.

The Draft Articles provide general standards for evaluating when a country bears international legal responsibility for certain "wrongful acts." "Wrongful acts" are acts or omissions that are "attributable to the state under international law" and that constitute "a breach of an international obligation." According to the Draft Articles, when an organ of a country's government commits a wrongful act, the country is obligated to, among other things, "make full reparation for the injury caused by the internationally wrongful act." Reparation includes restitution ("re-establish[ing] the situation that existed before the wrongful act") and compensation for the damage, including any financially assessable damage. Article 39 of the Draft Articles provides that damages must take into account any willful or negligent conduct by the injured country that contributed to its own harm.

Some [observers](#) argue that, under this legal framework, China may be liable for monetary damages resulting from COVID-19's spread. Others [disagree](#), citing a lack of historical precedent for seeking damages from the spread of infectious diseases and the challenge of proving causation under the principles of state responsibility. According to the International Law Commission's [commentary](#) on the Draft Articles, there must be a causal link between the alleged wrongful act and the injury. The commentary states that, for an injured state to obtain reparation and compensation, an injury must be "ascribable to the wrongful act rather than any and all consequences flowing from an internationally wrongful act." Under this reasoning, the Draft Articles would likely not render China responsible for "any and all" financial damages caused by COVID-19's spread. If China has international legal responsibility, damages would likely be limited to harm causally connected to China's alleged failure to notify WHO of the COVID-19 outbreak within IHR (2005)'s prescribed time frame. Separating what damages stem from China's alleged delayed reporting and what harms arose because of the disease's inherently infectious nature may present complexities if the United States or another country were to pursue a claim in an international forum.

Finally, while the Draft Articles may supply standards for evaluating international legal responsibility for monetary damages, neither the Draft Articles nor customary international law in general create jurisdiction in an international forum. International agreements, rather than customary international law, normally provide international courts with jurisdiction over cases against countries. A country pursuing a claim against China in an international forum would need to identify a jurisdictional basis on which the forum can hear the dispute and evaluate claims for damages.

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