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A Primary Analysis of the International Health Regulation Implementation Within China and New Zealand COVID Measures

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Abstract: This paper discusses an analysis of the legal framework of the 2005 International Health Regulations, specifically Article 43 in relation to the concept of "Additional Health Measures" and seeing how this Article, which currently lacks sufficient jurisprudence, is supposed to be applied within practice especially during pandemics such as COVID-19 . From such an assessment of its implementation will be done where we will find how countries like China, which has made restrictive health measures of the extreme, have violated the provision of the Regulation and how countries like New Zealand which have achieved its goal of reducing COVID cases by taking less restrictive measures, has complied with the Regulation. By assessing these two countries an important conclusion can be drawn on the importance of the interplay in how scientific evidence is used and followed when deciding how restrictive a measure should be when countries create "Additional Health Measures", giving a deeper insight of how Article 43 of the International Health Regulations operate.

Keywords: Additional Health Measures; China; International Health Law; 2005 International Health Regulations; New Zealand

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1. Introduction and Methodology

Ever since the COVID-19 pandemic started in 2019, States have been taking drastic health measures to curb the disease coming into their borders or to contain its spread by going outside. The extent of these health measures varies by State, with some taking more extreme restrictive measures, such as China with its "Zero-Covid" policy ,[1] and some States taking less restrictive measures like New Zealand.[2] This paper discusses these health measures made by States to the application of a vital international treaty that regulates it. This treaty signed and ratified by 196 States would be known as the 2005 WHO International Health Regulations ("IHR").

The legal research paper aims to find, as the main legal issue, exactly what "additional health measures", according to Article 43 of the IHR, are allowed under its regime, the provisions of which regulates what measures a State may take in situations of public health risks or public health emergencies of international concern ("PHEIC"). This is especially regarding what measures are considered not more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection ("ALOP") in relation to the COVID-19 pandemic. This is important as in past pandemics, such as the 2013 Ebola Pandemic, States have had tough times implementing measures that adhere to the IHR framework with the terms within it often vaguely defined, hence causing unnecessary violations of the IHR.[3] This is further not helped by the fact that there is a lack of international cases that relate to the IHR, and with the WHO itself not being a judicial body nor having a specific legal entity that helps resolve IHR disputes, the clarification of the legal requirements of the IHR is gray at best.

The methodology of this research was doctrinal, where we first focused on the text of interpreting the key terms and understanding the framework of Article 43 of the IHR, mainly, as is seen later it can be used, the rules of the 1994 World Trade Organization Sanitary and Phytosanitary Measures ("WTO-SPS") Agreement, being a international treaty which its provisions in regulating measures in health related contexts have distinct similarities with that of the IHR. Other primary sources of international law that are used includes the rules encompassed in the

1 Chen Gang, "China's Dynamic Zero COVID Policy: How Dynamic is it?" National University of Singapore (2022): 1, https://research.nus.edu.sg/eai/wp-content/uploads/sites/2/2022/03/EAIBB-No.-1632-Chinas-dynamic-zero-covid-policy-2-1.pdf [***China Zero Covid Policy***].

2 COVID-19 Public Health Response Act s 11(a)(ix), 13 May 2020 (New Zealand) [***NZ COVID Act***].

3 WHO, "Implementation of the International Health Regulations (2005) Report of the Review Committee on the Role of the International Health Regulations (2005) in the Ebola Outbreak and Response," WHO Doc A69/21 (13 May 2016).

1969 Vienna Convention on the Law of Treaties ("VCLT") due to its international customary nature in treaty interpretation. After such, we saw the Article 43 of the IHR application in practice by comparing them with a country that takes its COVID policy to an extreme level, like China, and New Zealand which has less restrictive measures in its implementation of additional health measures during the COVID-19 Pandemic. From such a conclusion was brought on what additional health measures can be considered illegal and legal, helping us understand the inner workings of the treaty in reality.

2. Ordinary meaning within Article 43 of the IHR:

2.1 Purpose, Principles, and Context of the IHR

As set through in the general rules of interpretation under Article 31 of the VCLT to find the meaning of Article 43 of the IHR we must interpret in *good faith* the ordinary meaning that is to be given to the terms of the treaty in their context and in the light of its object and purpose.[4] Any subsequent agreement, the practice of the parties, and any relevant rules of international law should also be taken into account together with the context.[5] Article 32 of the VCLT further stipulates that supplementary means of interpretation may be used "in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31(a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable."[6] An example of this supplementary means of interpretation would be to see the treaty's *travaux préparatoires* (preparatory works). Hence, we should see the purpose and principles that should be implemented outlined in Articles 2 and 3 of the IHR to help us see the context.[7]

According to Article 2, the purpose of the IHR is to "prevent, protect against, control, and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade."[8]

4 Vienna Convention on the Law of Treaties art. 31, 23 May 1969, 1155 UNTS 331 [***VCLT***].
5 *Ibid*.
6 *VCLT*, art. 32.
7 International Health Regulations arts. 2 and 3, 23 May 2005, 2509 UNTS 79 [***IHR***].
8 *IHR*, art. 2; Chowdhury, Ahmed Ragib. "Entry Regulation And Border Closures: Are States In Violation Of International Law Under The Mandate Of 'Responding To The COVID-19 Crisis'?" (2021). University of Asia Pacific Law Review Volume 1, Issue 1 (2021): 30-46, https://ssrn.com/abstract=4055402 [***Chowdhury***];

Principles that must be followed mentions that the IHR shall be implemented "with full respect for the dignity, human rights and fundamental freedoms of persons," "guided by the Charter of the United Nations and the Constitution of the World Health Organization," and "guided by the goal of their universal application for the protection of all people of the world from the international spread of disease."[9] It then elaborates that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to legislate and to implement legislation in pursuance of their health policies. In doing so they should uphold the purpose of these Regulations."[10]

Several terms and phrases outlined in Article 1 of the IHR would be of usefulness in defining the context for Article 43 of the IHR. Firstly, a "disease" is an illness or medical condition, irrespective of origin or source, that presents or could present significant harm to humans.[11] Secondly, a "public health risk" is defined as the "likelihood of an event that may adversely affect the health of human populations, with an emphasis on one which may spread internationally or may present a serious and direct danger".[12] Lastly, a "public health emergency of international concern" are extraordinary events that may occur if it (1) constitutes a public health risk to other states through the international spread of disease and (2) potentially requires a coordinated international response.[13] PHEICs are declared only by the WHO-director general,[14] who must actively consider the information given by affected States, the views of an Emergency Committee of international experts nominated under the IHR to provide advice,[15] scientific principles, as well as the available scientific evidence and other relevant information.[16]

Lastly, we should mention that a "health measure" under the IHR regime would involve any procedure "applied to prevent the spread of disease or contamination," to the exclusion of law enforcement or security measures.[17] With this, after seeing the purpose, principles, and context of the IHR, a further

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Dias Simões, Fernando, "COVID-19 and International Freedom of Movement: a Stranded Human Right?" 20(2) Yale Journal of Health Policy, Law, and Ethics (2022): 362-432, http://dx.doi.org/10.2139/ssrn.3781792 [***Dias***].

9 *IHR*, art. 3; *Chowdhury*; *Dias*.
10 *Ibid*.
11 *IHR*, art. 1; *Chowdhury*.; *Dias*
12 *Ibid*.
13 *Ibid*.
14 *IHR*, art. 12(1); *Chowdhury*; *Dias*.
15 *IHR*, art. 48.; *Chowdhury*; *Dias*..
16 *IHR*, arts. 12(4)(a)-(d).
17 *IHR*, art. 1.

specific interpretation of the key terms would be needed to understand the muchly debated provision of Article 43 of the IHR.

2.2 Interpreting the Specifics of Article 43 of the IHR

2.2.1 "Additional Health Measures"

The provision in the first paragraph of Article 43 mentions States may implement an "additional health measure" in one of two ways: if (1) it achieves the same or greater level of health protection than WHO recommendations; or (2) it is applied despite being prohibited otherwise within the regulation under Article 25, Article 26, paragraphs 1 and 2 of Article 28, Article 30, paragraph 1(c) of Article 31 and Article 33.[18]

There are also preliminary conditions with which States must comply when making additional health measures. First, additional health measures should be in line with the State's relevant national law and its obligations under international law.[19] The IHR concerning this stipulates that its provisions should be interpreted to be compatible with other relevant international agreements and that the provisions of the IHR "shall not affect the rights and obligations of any State Party deriving from other international agreements".[20] Such agreements may include "special treaties"[21] and the "common rules in force within a regional economic integration organization."[22] Second, the measures must have been taken in response to a specific public health risk or a PHEIC, while being "otherwise consistent" with the IHR.[23] Lastly, Article 43(1) of the IHR requires that the measures "shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the ALOP."[24] What is exactly meant by this last part will be discussed in the next part of this section.

2.2.2 "More restrictive of international traffic and not more invasive or intrusive to persons" and "reasonably available alternatives that would achieve the appropriate level of health protection"

18 *IHR*, art. 43(1); David P Fidler and Lawrence O Gostin, "The New International Health Regulations: An Historic Development for International Law and Public Health" 34 *Journal of Law, Medicine & Ethics* (2006): 86-91, 10.1111/j.1748-720X.2006.00011.x.
19 *IHR*, art. 43(1); *Chowdhury*; *Dias*.
20 *IHR*, art. 57(1); *Chowdhury*; *Dias*.
21 *IHR*, art. 57(2); *Chowdhury*; *Dias*.
22 *IHR*, art. 57(3); *Chowdhury*; *Dias*.
23 *IHR*, art. 43(1); *Chowdhury*; *Dias*.
24 Ibid; Wang, *Ng, and Brook, "RH Response to COVID-19 in Taiwan: Big Data Analytics, New Technology, and Proactive Testing" JAMA 323 (2020): 1341- 1342, doi:10.1001/jama.2020.3151* [***Wang***]; *Chowdhury*; *Dias*.

Most of these key terms mentioned in Article 43(1) of the IHR have already been defined in Article 1. There, it refers to "international traffic" as movements of persons, baggage, cargo, containers, conveyances, goods, or postal parcels across an international border, including international trade.[25] Additionally, a measure is "invasive" when it means possibly provoking discomfort through close or intimate contact or questioning, or "intrusive" when there is a puncture or incision of the skin or insertion of an instrument or foreign material into the body or the examination of a body cavity (unless the listed exceptions as seen in the article for medical purposes).[26] Seen in its overall context, it is clear this phrase concerns the principle of proportionality which States must take into account when making these additional health measures, including a requirement that such measures must be "commensurate with and restricted to public health risks."[27]

The contentious part of this paragraph comes in the phrase "more restrictive" and "reasonably available alternative that would achieve the ALOP."[28] It is unclear what the IHR sees as an "ALOP," although a guide that may be of use for us to understand is to look at a different jurisprudence altogether, the WTO-SPS Agreement. This is a possibility as the drafters of the IHR altered certain provisions of the treaty to make them mutually compatible with WTO law, which includes the WTO-SPS agreement.[29] Here, it should also be highlighted the rules stipulated in Article 31(3)(c) of the VCLT,[30] taking into account together with context any relevant rules of international law applicable in the relations between the parties (in which China and New Zealand are parties to the SPS Agreement for the purposes of this paper).

Article 5 of the WTO-SPS Agreement, titled "Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection", in its first paragraph mentions measures must be based "on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations."[31] The WTO-SPS agreement then clarifies

25 *IHR*, art. 1.
26 *Ibid*.
27 *IHR*, art. 2.
28 *IHR*, art. 43(1); *Wang*; *Chowdhury*; *Dias*.
29 "Intergovernmental Working Group on Revision of the International Health Regulations, Review and approval of proposed amendments to the International Health Regulations: relations with other international instruments", WHO, 30 September 2004, WHO Doc A/IHR/IGWG/INF. Doc./1.
30 *VCLT*, art. 31(3)(c).
31 World Trade Organization Sanitary and Phytosanitary Measures Agreement art. 5.1, 1 January 1995, 1867 U.N.T.S. 493 [***WTO-SPS***].

a "risk assessment" as:

> *"[t]he evaluation of the likelihood of entry, establishment or spread of a….disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human…health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs."*[32]

Additionally expounding on this definition of "risk assessment" in *EC-Hormones* (1998), a case where the European Community introduced a prohibition on the placing on the market and the importation of meat and meat products treated with certain hormones, the Appellate Body took a flexible approach in view of the risk assessment that not only does it involved "a risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die."[33]

Concerning "restrictiveness" Article 43(1) should be read in conjunction with Article 5.6 WTO-SPS Agreement,[34] which asserts that a measure is overly trade-restrictive when other significantly less restrictive measures can achieve the State's ALOP.[35]

From here, it can be analogized that to find the "ALOP" a risk assessment is required by State parties, and this view is further supported by Article 5.4 of the WTO-SPS Agreement.[36] With this, it can be said a State will make a risk assessment first to find the ALOP, where then it uses that along with the requirements of the IHR to make its additional health measures. Additionally, a measure would only be overly restrictive if there are still alternatives to achieve the State's ALOP.[37] The details of the scientific evidence, such as its level and standard in determining this risk assessment, will be much clearer in the discussion of the next section.

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32 *WTO-SPS*, Annex A.

33 *European Communities-Measures Concerning Meat and Meat Products* ('***Hormones***') (13 February 1998) WT/DS26/AB/R, WT/DS48/AB/R, 187; Kevin C. Kennedy, "Resolving International Sanitary and Phytosanitary Disputes in the WTO: Lessons and Future Directions" 55 *Food & Drug Law Journal* (2000): 98, https://core.ac.uk/download/pdf/228468495.pdf.

34 *WTO-SPS*, art. 5.6.

35 Kym Anderson, Cheryl McRae, and David Wilson, "The Economics of Quarantine and the SPS Agreement: The 'appropriate level of protection': an Australian perspective" *University of Adelaide Press* (2001): 133, 10.1017/9781922064325.

36 *WTO-SPS*, art. 5.4.

37 *Wang*; *Chowdhury*; *Dias*.

2.2.3 Assessing the Validity of an Additional Health Measure

Article 43(2) of the IHR focuses on how States assess the validity of their additional health measures.[38] In doing so, the article mentions several limits to the decision framework that States must use to implement its measures as described in paragraph 1. State parties shall base the determination of their additional health measures upon (a) scientific principles;[39] (b) available scientific evidence of a risk to human health, or where such evidence is insufficient, the available information including from WHO and other relevant intergovernmental organizations and international bodies;[40] and (c) any available specific guidance or advice from WHO.[41] What each of these sources of information means will be further examined in the next section below.

(i) "Scientific Principles" and "Available Scientific Evidence"

Scientific evidence means information furnishing a level of proof based on the established and accepted methods of science.[42] Although the IHR does not give further guidance on what States must consider sources and standards of scientific evidence, it is noted that "methods of science" or "scientific methods," according to the *Oxford Dictionary of Public Health* typically involve steps to:

> *"...define the problem; if possible, frame the problem as a hypothesis; select in advance a valid and proven method and specify procedures to study the problem; conduct all observations according to a stated protocol that is or will be available for examination by peers; include all observations in the stated results; and, if any observations or measurements are discarded or disqualified, the reason must be stated and explained."*[43]

From this, we can infer that States should only implement health measures that can go through critical scientific scrutiny from the discipline of public health. This means that States need to go beyond merely just assessing scientific journals, they must be given deliberate care in finding quality scientific evidence which is sound in methodology, ethics, and integrity that supports the use of additional health measures.

There also may be cases in which there are uncertainties in the current

38 *IHR*, art. 43(2).
39 *IHR*, art. 43(2)(a); WTO, *Australia – Measures Affecting Importation of Salmon* (***'Australia Salmon'***) (20 October 1998) WT/DS18/AB/R, 194.
40 *IHR*, art. 43(2)(b); *Australia Salmon*.
41 *IHR*, art. 43(2)(c); *Australia Salmon*.
42 *IHR*, art. 1.
43 *Chowdhury*; *Dias*; Miquel Porta and John M. Last, *The Oxford Dictionary of Public Health* (Oxford: Oxford University Press 2008), 1072.

scientific evidence (i.e., the disease transmission methods and incubation period), wherein such scenario States additional health measures must be based upon scientific principles. Article 1 of the IHR refers to scientific principles as accepted fundamental laws and facts of nature known through the methods of science.[44]

It is also hinted in paragraph 2(b) of the Article that States shall reference information from the WHO or other relevant intergovernmental organizations and bodies when there is insufficient evidence.[45] This evidence level is not explained in detail within the IHR, along with the sources and standards in which scientific evidence is used. But just as in previous sections, we may use again the jurisprudence of the WTO-SPS Agreement to guide us on what this means. Under Article 2 Section 2 of the WTO-SPS Agreement, such measures "are applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5".[46] The WTO Panel and Appellate Body in *Japan – Measures Affecting Agricultural Products* (1999) case then agreed that the requirements for "sufficient scientific evidence" under Article 2.2 need a rational or objective relationship between the SPS measure and scientific evidence.[47] Furthermore on the "sufficiency of scientific evidence", in *Japan – Measures Affecting the Importation of Apples* (2003), a case concerning. certain Japanese measures restricting imports of apples on the basis of concerns about the risk of transmission of fire blight bacteria, the Appellate Body distinguished between scientific uncertainty (i.e. where diverging conclusions may each be supported by a degree of scientific evidence) and "scientific insufficiency."[48] According to the Appellate Body, relevant scientific evidence would be insufficient if it "does not allow, in qualitative or quantitative terms, for the performance of an adequate assessment of risks as required under Article 5.1."[49]

To summarize, firstly we can say States should consider whether there is a rational relationship between the measure being implemented and the scientific principles and available scientific evidence at hand before

44 *IHR*, art. 1.
45 *IHR*, art. 43(2)(b).
46 *WTO-SPS*, art. 2.2.
47 *Japan – Measures Affecting Agricultural Products* (***'Japan/Agricultural Products'***) (19 March 1999) WT/DS76/AB/R., 84.
48 *Japan – Measures Affecting the Importation of Apples* (***'Japan/Apples'***) (26 November 2003) WT/DS245/AB/R, 184.
49 *Ibid*, 179.

implementing their additional health measures. Lastly, such scientific evidence must consist of a bona fide risk assessment as to its level of and standards used.

(ii) "Information from WHO or Other Relevant Intergovernmental Organizations and Bodies"

This source as said under Article 43(2)(b) of the IHR is not of much debate within the international community in practice. It is simply that States shall use information when evidence is insufficient given by the WHO or other relevant international bodies.[50] Therefore, unless there exists sufficient scientific evidence or supporting information from the WHO or relevant international bodies, additional health measures would be not permissible under Article 43(2) of the IHR.

(iii) "Any Available Specific Guidance or Advice from WHO"

Additional health measures shall also be based upon any specific guidance or advice from the WHO.[51] For States who do this, the WHO will have to make a positive binding recommendation, specifically those of formal recommendations made by the WHO director-general under Articles 15 to 18 of the IHR. As such, the director-general may issue recommendations after considering: the affected State's views; advice from the emergency committee, scientific principles, and available scientific evidence; appropriate health measures which are not more restrictive to international traffic and trade than reasonably available alternatives that would achieve the ALOP; relevant international standards, instruments, and activities by other international bodies; and other information.[52] When a PHEIC is declared, the director general will give temporary recommendations to affected States or other States that are non-binding.[53] These recommendations may include health measures.[54] Finally, under Article 13 States may also ask WHO for guidance or advice concerning appropriate responses to public health risks or PHEICs.[55]

3. Applying Article 43 of the IHR by comparing it to two measures: China and New Zealand

3.1 China

50 *IHR*, art. 43(2)(b); *Chowdhury*; *Dias*.
51 *IHR*, art. 43(2)(c); *Chowdhury*; *Dias*.
52 *IHR*, art. 17; *Chowdhury*.
53 *IHR*, arts. 1 and 15(1); *Chowdhury*; *Dias*.
54 *IHR*, art. 15(2); *Chowdhury*; *Dias*.
55 *IHR*, art. 13(3) and (6); *Chowdhury*; *Dias*.

After seeing the rules and the basic inner workings of Article 43 of the IHR, the final part of the paper will see the applications of Article 43 of the IHR by looking at a country that made additional health measures to the extreme. Hence, we will see why these additional health measures are illegal under the IHR regime. The first measure we will be reviewing will be of China, especially in relation to their "Zero-COVID" policy.[56]

The WHO declared a PHEIC on January 30th, 2020, and recommended against "any travel or trade restrictions".[57] States may only take their own health measures as mentioned in previous sections if those measures "go beyond or as effective as WHO recommendations", and be based on "scientific principles and evidence", while not "intruding on international traffic and trade, nor invasive or intrusive to persons" then "reasonably available alternatives." Such measures also should be remembered before must "fully respect people's rights, dignity, and fundamental freedoms." During this time public researchers noted that there was little evidence that travel restrictions were effective in pandemics of viruses like COVID,[58] where the WHO advised that such restrictions did more harm than good.[59] Lockdowns also according to the WHO could only be justified for large-scale gatherings and closing of schools and workplaces, not mass stay-at-home orders and internal travel restrictions.[60] Hence, the WHO gave several alternatives to these restrictions, including "risk communication, surveillance, patient management, and screening at ports of entry and exit."[61] China on the other hand took little attention to these recommendations and current scientific evidence at that time, imposing tight limits on their citizens' movement telling them to stay at home, and even using their emergency authorities to undermine democracy and violate human rights.[62] Furthermore,

56 *China Zero Covid Policy* .

57 *Dias*; "Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)", WHO, last modified January 30, 2020, https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).

58 *Dias*; Roojin Habibi et al, "Do not violate the International Health Regulations during the COVID-19 Outbreak" 395 *Lancet* (2020): 644, https://doi.org/10.1016/S0140-6736(20)30373-1; "COVID-19 and International Law Series: WHO's Pandemic Response and the International Health Regulations", Just Security, last modified December 8 2020, https://www.justsecurity.org/73753/covid-19-and-international-law-series-whos-pandemic-response-and-the-international-health-regulations/.

59 *Ibid*.

60 *Chowdhury*; *Dias*; Gwee, S.X.W., Chua, P.E.Y., Wang, M.X. et al, "Impact of travel ban implementation on COVID-19 spread in Singapore, Taiwan, Hong Kong and South Korea during the early phase of the pandemic: a comparative study" BMC Infect Dis 21, 799 (2021). https://doi.org/10.1186/s12879-021-06449-1.

61 *Dias*; "Lockdowns compared: tracking governments' coronavirus responses", Financial Times, last modified December 23, 2022, https://ig.ft.com/coronavirus-lockdowns/.

China has downplayed the severity of the COVID outbreak during the start of the pandemic, claiming that the virus was not spreading from human to human for days after Chinese officials reportedly knew that it was.[63]

China may have violated specifically Article 43(2) of the IHR, failing to consider WHO recommendations and available scientific evidence at that time for imposing their measure and failing to establish its rational relationship between the scientific principles and evidence with the measure imposed. Additionally, it failed to make an adequate risk assessment of its ALOP, as China-based its measure on an ALOP which had flawed assessments of the risks, making a measure that then was more restrictive of international travel and trade. It has also violated the principles set out in Article 3 of the IHR, as undermining people's human rights. There were clearly reasonably available alternatives given by the WHO that were less restrictive of international travel and trade. Thus, the health measures made by China in relation to its fight against the COVID pandemic have violated several provisions as required by the IHR.

3.2 New Zealand

New Zealand on the other hand, while the health ministry have recognized that a complete border closure (similar to China) are an option, it was still possible to achieve an effective management of the public health risk through less restrictive means.[64] The government took a detailed view on the current scientific evidence at the time of the start of the COVID pandemic, in addition to current WHO opinions, and concluded that while COVID does have a high rate of transmission through human-to-human contact as well as low case

62 *Dias*; "Chinese doctor was warned to keep quiet after sounding the alarm on coronavirus", CBS News, last modified February 4 2020, https://www.cbsnews.com/news/wuhan-china-doctor-warned-to-keep-quiet-after-sounding-alarm-coronavirus-december-2020-02-04/; "Factbox: What is China's zero-COVID policy and how does it work?", Reuters, last modified November 3 2022, https://www.reuters.com/world/china/what-is-chinas-zero-covid-policy-how-does-it-work-2022-11-03/.

63 *Dias*; "China knew the coronavirus could become a pandemic in mid-January but for 6 days claimed publicly that there was no evidence it could spread among humans", Business Insider, last modified April 15 2020, https://www.businessinsider.nl/coronavirus-china-hid-pandemic-news-six-days-2020-4?international=true&r=US; "China delayed releasing coronavirus info, frustrating WHO", The Associated Press, last modified June 2 2020, https://apnews.com/article/united-nations-health-ap-top-news-virus-outbreak-public-health-3c061794970661042b18d5aeaaed9fae.

64 Ministry of Health of New Zealand, "Responding to Public Health Threats of International Concern at New Zealand Air and Sea Ports: Guidelines for Public Health Units, Border Agencies and Health Service Providers" (2016): 50, https://www.health.govt.nz/system/files/documents/publications/responding-to-public-health-threats-at-new-zealand-air-and-seaports-apr22.pdf: Matt Boyd, Michael G. Baker, and Nick Wilson, "Border closure for island nations? Analysis of pandemic and bioweapon related threats suggests some scenarios warrant drastic action" 44 *Australian and New Zealand Journal of Public Health* (2020): 90, doi: 10.1111/1753-6405.12991 [***M Boyd***].

fatality, widespread testing, case isolation, contact tracing, and quarantine of contacts are just as if not more effective in managing the pandemic.[65] They also considered all the necessary implications a restriction may have caused to both the limitation of human rights and the effect on the country's economy.[66] All this is reflected seen within New Zealand's COVID-19 Public Health Response Act 2020.[67] In fact, we can refer here to the WHO themselves where they explicitly recommended State Parties to "facilitate international contact tracing".[68] The success of these alternative less restrictive measures can be exemplified by the number of cases in the first wave of COVID-19, which have been reported in New Zealand since the PHEIC was first announced, being much less than those in comparison to China.[69] Such success was recognized by the WHO.[70]

Therefore, we can conclude that New Zealand took an adequate risk assessment to establish an ALOP, taking into account not only the available scientific evidence at the start of the pandemic and current WHO recommendations but also seeing its implications on the human rights and economical aspects by making the measures, in contrast where China simply disregarded these concerns. This gives a bright precedent in fully complying with its obligation under the IHR.

4. Conclusion

In conclusion we can see from our analysis the fundamental importance of having an additional health measure which is not more intrusive or invasive of persons, nor more restrictive of international traffic, than reasonably available alternatives that would achieve an ALOP as a key requirement for the implementation of Article 43(1) of the IHR. To ensure such from the analysis as seen in the case of China and New Zealand there will always have to be a continuous interplay in the ever changing scientific evidence at hand and the measure being implemented.

65 *M Boyd*, 90.
66 *NZ COVID Act* ; K Piogou, "Keeping Track of the Risks of Contact Tracing: An International Law Analysis of Contact Tracing in New Zealand and the Prospect of Cross-Border Contact Tracing" 27 *Auckland University Law Review* (2021): 250 - 256, http://www.nzlii.org/nz/journals/AukULawRw/2021/10.pdf [***Piogou***].
67 *NZ COVID Act*, s 11(a)(ix).
68 *Piogou*, 257; "Statement on the fourth meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of coronavirus disease (COVID-19)", WHO, last modified 1 August 2020, https://www.who.int/news/item/01-08-2020-statement-on-the-fourth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-coronavirus-disease-(covid-19).
69 "New Zealand takes early and hard action to tackle COVID-19", WHO, last modified 15 July 2020, https://www.who.int/westernpacific/news-room/feature-stories/item/new-zealand-takes-early-and-hard-action-to-tackle-covid-19.
70 *Ibid*.

We can see the degree to which extreme measures like China have violated the IHR. The scientific evidence used by China when deciding to lockdown Wuhan was not based on available information, specific guidance, and advice, including the WHO and other relevant international organizations and bodies. There were also no justifications that the measures made by China, which were significantly more restrictive of international trade and traffic, were as or more effective than those given by WHO recommendations (as a reasonably available alternative). From practice, following guidance and advice from WHO recommendations or other relevant international organizations tends to be the best health measure for States to take while fulfilling their obligations as required by the IHR. This is in contrast with New Zealand, where they made a valid risk assessment of the ALOP based on what is required in Article 43(1) of the IHR, taking into account currently at the time existing available scientific evidence and information and recommendations from the WHO and other internationally recognized bodies. They further fulfilled their obligations taking into account the restrictiveness and implications of their possible measure to the human rights of person, where with all this found a much less restrictive measure which achieved better results as compared to China.

Article 43 of the IHR is the key provision for how the world should respond to a global health pandemic. Only with a more concrete and clearer overview of Article 43(1) of the IHR in the future will States like China be able to adhere to its obligations and will it be useful in holding violations of such possible.

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