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ASIA PACIFIC DISPUTE RESOLUTION

# Asia Pacific Dispute Resolution Project

## Working Paper No. 18-10

# **China and the Human Right to Health: Selective Adaptation and Treaty Compliance**

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# **CHINA AND THE HUMAN RIGHT TO HEALTH: SELECTIVE ADAPTATION AND TREATY COMPLIANCE<sup>†</sup>**

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## **I. Introduction**

The international community has devoted considerable energy to dialogue and exchanges with China on issues of treaty compliance in areas of trade and human rights. While many improvements are evident in China's legal regimes for trade and human rights, problems remain—particularly in the areas of Party leadership, institutional performance, and conceptual orientation. In trade policy areas of national treatment, subsidies, and dumping and transparency, China's performance remains conflicted. Leaving aside delicate questions of political freedoms and civil liberties, China's human rights record on basic questions of human wellbeing in areas of labour standards, environmental quality, and health care invites continued critical scrutiny. Yet academic and policy discourses on China's trade and human rights policy and practice are all too often conflicted by normative differences, and illusions about them, which often undermine engagement and obscure analysis. Claims about universality of trade and human rights principles conflict with assertions that China's cultural particularity warrants special exceptions from international rule regimes, or at least requires interpretations of these standards that allow flexible application in China. The paradigm of "selective adaptation" (Potter 2004) offers a potential solution to this dilemma, by examining compliance with international trade and human rights treaties by reference to the interplay between normative systems associated with international rule regimes and local socio-cultural norms that affect treaty interpretation and application. After examining the concept of selective adaptation in the context of trade and human rights generally, this paper will focus particularly on China's policies and practices in the human right to health.

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<sup>†</sup> Contribution to "China's Human Rights Performance: Treaty Compliance in Light of Selective Adaptation and Institutional Capacity" prepared for United Nations High Commissioner for Human Rights (UNHCHR), October 30, 2006.

## **II. Selective Adaptation: Legal Culture and Treaty Compliance in Trade and Human Rights**

Selective adaptation involves a dynamic by which international rule regimes are mediated by local socio-cultural norms. Proceeding from typologies linking international rule regimes with associated sets of normative principles, and informed by concepts linking rule compliance with the existence of normative consensus, the paradigm of “selective adaptation” suggests that treaty compliance may require intermediation with local norms. Compliance with treaty rules involves a myriad range of interpretation and application, which in turn involve the intervention of interpretive communities comprised of political, legal and socio-economic elites (Fish 1980). In the trade area, for example, we have found that the international rule regime is grounded in liberal norms of popular sovereignty and limits on state agency (Biukovic 2004). In the health area, we have found that the international rule regime is grounded in norms about the links between health and social wellbeing, the importance of health in realizing values of human dignity, and shared social interests in prevention, monitoring, and treatment of infectious disease (Biddulph 2004). Selective adaptation analysis would examine the extent to which these norms are shared by interpretive communities in treaty member states.

While the interplay between rule acceptance and normative assimilation is at the heart of the selective adaptation process, the process depends on additional factors, including perception, complementarity, and legitimacy (Potter 2004).

- *Perception* influences understanding by interpretive communities concerning both non-local rule regimes and local socio-cultural norms. Perception may involve relatively simple elements of translation and distribution of the content of international rules, to more complex factors of cognition, ranging from misunderstanding to cognitive dissonance. Thus, selective adaptation of international trade rules on transparency raises questions about publication of trade rules that range from translation to cognitive understandings of notions of “public.” Selective adaptation of international human rights standards on self-determination might raise perception issues around translation of the term “freely” as well as questions of understanding what that term requires in terms of institutional response.

- *Complementarity* describes a circumstance by which apparently contradictory phenomena can be combined in ways that preserve essential characteristics of each component and yet allow for them to operate together in a mutually reinforcing and effective manner. Complementarity may involve factors of institutional compatibility between, for example, public and private models for enforcement of human rights standards, or may extend to more complex issues of the normative ideals underlying these institutional arrangements. Thus, selective adaptation of international trade rules on transparency or human rights standards on self-determination may depend on the extent to which institutional remedies for correcting non-transparency are compatible with local processes.
- *Legitimacy* concerns the extent to which members of local communities confer on the purposes and consequences of selective adaptation a sense and expectation of justness. Legitimacy may involve factors ranging from personal preferences to broader social perspectives of idealism, nationalism, and ethnocentrism in the evaluation of procedural or substantive dimensions of international rule regimes. Thus, selective adaptation of international trade rules on transparency and human rights standards on self-determination may depend on the degree to which social actors conclude that the content of these standards and the processes for achieving them are just.

While much of the academic and policy work on treaty compliance focuses on rule enforcement, the rules themselves are subject to considerable variation in interpretation and application, which itself is driven by normative values. Accordingly, understanding treaty compliance requires more than simply comparing local performance with the text of international rules. Instead, treaty compliance may well involve local interpretation of treaty texts according to normative perspectives quite different from those that inform the treaty. Thus, treaty compliance can be understood more clearly by examining the extent to which norms underlying the international regime are consonant with local norms. This can help explain compliance outcomes, by differentiating between those situations where non-compliance is the result of normative conflict and those cases where local norms are consistent with the norms of the international regime but local practices fail to satisfy international standards. Such a norms-based approach invites expansive empirical research on the structure and content of local cultural norms, and the link

with acceptance of international rule regimes. The focus then shifts from state-centred discourses of compliance to socially grounded analysis of normative consensus.

The discourse of “selective adaptation” is most assuredly not an exercise in justifying non-compliance with international obligations by reference to government assertions about national and social interests or lack of institutional capacity. Rather, “selective adaptation” posits a model for understanding the reality that international trade rules and human rights standards will in practice be interpreted according to local norms, and the likelihood that enforcement of international rule regimes will depend on the extent of commonality between the norms underlying these rule regimes and local cultural norms. While “selective adaptation” offers the potential to understand legal culture dynamics of localization of international trade and human rights standards, it also limits efforts to justify non-compliance with treaty obligations. The key determinant in “selective adaptation” is the relationship between the norms underlying international trade and human rights standards and local socio-cultural norms—not as these are articulated by states, but rather as discerned empirically in society. Willful non-compliance driven by factors of political will and/or institutional capacity may thus be distinguished from non-uniform compliance that reflects the legitimate influence of normative diversity. In turn, remedies for non-compliance with international trade and human rights standards may vary depending on the normative relationship between international rule regimes and local societies. Demonstrated lack of normative consensus on the goals, processes, and outcomes associated with international treaty regimes may invite efforts to explore the potential for accommodation of normative difference and may support movement toward accepting normative diversity in the recognition and enforcement of trade and human rights standards. On the other hand, non-compliance in the absence of normative conflict may invite performance remedies and possibly institutional incentives to induce stronger compliance.

In sum, the focus on normative dynamics of compliance allows the paradigm of “selective adaptation” to limit the scope of claims to cultural relativism as an explanation for non-compliance with international trade and human rights standards. Where demonstrable conflicts exist between international rule regimes and local socio-cultural norms, accommodation to cultural differences might be useful. But non-compliance unrelated to factors of normative

consensus cannot be excused by reference to cultural relativism. Thus, “selective adaptation” suggests limits to cultural relativism in international trade and human rights discourse.

### **III. Selective Adaptation Applied: Perspectives on China’s Human Rights Discourse and Practice**

China’s human rights discourse on human rights to subsistence and development, and China’s practices around the human right to health provide useful examples of “selective adaption.” China’s official policies on the right to subsistence and development reveal the power and resiliency of official norms of governance and their capacity to temper international standards on human rights. While this normative paradigm affects practices on the human right to health, selective adaptation analysis suggests that China’s shortcomings in meeting international standards are more the product of political will and institutional capacity than normative diversity

#### **A. The Right to Development: Human Rights in Light of Patrimonial Sovereignty**

China’s official discourses on human rights draw on official norms of the state as the source of rights and social welfare. China’s norms of governance reflect a paradigm of “patrimonial sovereignty” (Potter 2004), by which administrative agencies and regulators have responsibility for the wellbeing of society, but are not responsible (accountable) to society for their political authority. State officials are accountable primarily to their bureaucratic and political superiors, and as a result have few incentives to attend to the substantive needs of human wellbeing for the subjects of rule. This helps to set an ideological context by which protection of individual human rights is relegated to secondary status behind the primary status of the state.

China’s human rights policies reflect these assumptions about the centrality of the state as the source of rights and as the determinant of the beneficiaries of rights. China’s 2004 Human Rights White Paper formally integrated themes of subsistence and development, drawing on the international discourse of the right to development to complement China’s ongoing emphasis on the right to subsistence. Yet continued emphasis is given to China’s particular circumstances as justification for a particularistic approach to balancing these rights with civil and political human rights under the theme “political development with Chinese characteristics.” (State Council Information Office 2005). The 2005 White Paper stresses the development of China’s socialist

legal system and emphasizes constitutional arrangements for enforcement of human rights. Yet these remain constrained by China's constitutional system, which limits rights to those expressly granted by the Party/state, and qualifies the exercise of rights on upholding Party rule and protecting the interests of the state (Constitution 1982, Arts 1, 51). In contrast to natural rights theories that view rights as inalienable and intrinsic to the human condition, the PRC Constitution speaks of rights being granted by the state. Article 33 of the PRC Constitution goes yet farther, and conditions the extension of legal and civil rights on performance of the "duties prescribed by the Constitution and the law."

Under this approach, rights are not inherent to the human condition, but rather are specific benefits conferred and enforced at the discretion of the state. The state's role as patrimonial sovereign entails not the recognition of fundamental rights of members of society but rather the conferring of rights on particular members of society subject to specific conditions. As indicated by the 2005 Human Rights White Paper, human rights remain generally subject to the needs of national development. Thus, China's conditions are seen to require conditioning human rights on the pursuit of reform, development and stability. This has significant implications for securing human rights to health, as issues of access to health care; detection, reporting, treatment and monitoring of disease; and protection of systemic supports for human health come to be subject to broader state goals of national development.

## **B. Administrative Law and Governance in China**

### **C. Health Care in China: Human Rights in Practice**

Questions about China's compliance with international standards pertaining to human rights in health warrant particular attention, not only because of the global implications of China's handling of health issues of SARS, HIV, Avian Flu, and *Streptococcus*, but because of the effects on the wellbeing of the Chinese people. China has committed itself to compliance with international human rights standards on the right to the "highest attainable standard of physical and mental health" (International Covenant on Economic, Social and Cultural Rights, Art. 12). Yet China's performance has been conflicted by factors largely unrelated to the normative consensus underlying human rights to health.



China's public health system has long been presented as a model for developing economies. While the "barefoot doctor" model of the Maoist period was heavily mythologized, the PRC did succeed in bringing basic levels of health care to an unprecedented number of Chinese people. However, the modernization policies of the 1980s and the attendant social and political consequences of income disparities, declining public budgets, and official corruption have eroded significantly the standards of public health care (Henderson 1990). The crises of HIV and SARS have revealed in stark detail the extent to which policies and practices on public health remain subject to imperatives of political expediency, and suggest that the fundamental human right to health remains compromised. Government efforts in areas of health education and the prevention, reporting, and treatment of disease involve individual members of society not only as passive recipients of the exercise of government authority but as active stewards of their own physical well-being. While the collaboration between public and private is essential to public health policy, this interdependence is obstructed by abuses such as government censorship and secrecy on public health conditions, and popular stigmatization of disease. China's recent experience with HIV and SARS reflects the ways in which these factors affect human rights to health.

China's first reported case of HIV involved a foreign tourist visiting southeast China in 1985 (Human Rights Watch 2003b). The intersection in Yunnan and neighboring provinces in China and Myanmar between drug trafficking, illegal migration, and sex tourism offers a rich array of vectors for disease, and provided government officials with ample justification for treating HIV initially as a foreign-related anomaly that could be managed through conventional approaches of quarantine and repression. However, twenty years later, HIV infection rates in Yunnan alone are reported as high as 80,000 and rising at a rate of 30% per year (Watts 2004). Nationally, China's official figures estimate that 840,000 people are living with HIV while some 100,000 are reported to have died from the disease (Yardley 2004). The United Nations estimated that China could have as many as 10 million AIDS sufferers by 2010 (Koss 2004).

The virtual explosion of HIV/AIDS cases in China reflects a combination of factors ranging from poverty in the midst of rapid economic development, corruption, government paternalism, and popular attitudes toward disease. Although the conventional perception that HIV/AIDS was introduced to China from abroad and was concentrated among intravenous drug users, prostitutes, and gay men remained prevalent and helped retard government action, the blood

donor crisis that emerged in Henan and other central provinces greatly expanded the reach of the disease (Brown 2004; Lim 2004; Park 2003; Human Rights Watch 2003b). While China's cities and suburban areas (mostly but not exclusively along the eastern seacoast) have in the main profited from the rapid economic growth of the past few decades, interior provinces and rural areas have often been left out of the race to development. With prosperity has come the possibility of expanded and more sophisticated health care, including greater needs for blood plasma. Economic growth policies have also seen both decreases in government budgets, as the replacement of state enterprise remittances with tax receipts has been weakened by lax enforcement and by tax preference policies aimed at stimulating investment. While, as elsewhere, the poor have long been a favored source of blood donations, state regulation of blood collection work has become weaker and riddled with corruption, such that screening of donors became highly problematic especially in rural areas (Watts 2003). As a result, the transmission of HIV/AIDS through the blood system brought the disease into the mainstream of Chinese society.

China has now officially acknowledged the importance of active measures to address the crisis of HIV/AIDS. No less a personage than Vice Prime Minister Wu Yi announced in May 2004 new "urgent measures" for prevention and education and to ensure proper reporting on outbreaks (Yardley 2004). While official attention from the highest levels of the government undoubtedly reflects the views of many that significant changes are needed in China's policies and practices on HIV/AIDS, there is a sad echo of past pronouncements. In November 1998, the State Council issued a "strategic plan" for HIV/AIDS prevention and control (State Council 1998). That document stressed the extent of the government's commitment to HIV/AIDS prevention and control, but also underscored the ideological role of Communist Party leadership in areas of spiritual civilization, suggesting an approach still rooted in notions of patrimonial sovereignty aimed at "behavioral change" rather than norms of responsible agency aimed at government accountability for protecting the public welfare. While the attention to education was welcomed by most observers, the document paid most attention to issues of surveillance, reporting and control—efforts which, bereft of public accountability, invited abuse and a general orientation toward concealment and suppression. Thus, academicians and health care professionals attempting to address the crisis complained repeatedly of concealment and repression from local officials (Yang 2000).

In 2001, in response to the scandal of the blood collection tragedy, China's Ministry of Health announced an "action plan" for preventing the spread of HIV/AIDS (State Council 2001). While the plan acknowledged the potential role for social participation, the government retained "primary responsibility" for AIDS/HIV work, with particular attention to prevention and secondary attention to public education and treatment. The "action plan" included work objectives to close down illegal blood collection centres and to strengthen testing of blood supplies. The plan also reiterated the importance of the "socialist spiritual civilization" rhetoric of the 1998 strategic plan. While the "action plan" was notable for its candor in recognizing past deficiencies and in providing specific guidelines for treatment of sufferers, it also retained a general tenor emphasizing state-led surveillance and ideological guidance and thus remains dependent on the capacity of state institutions and regulation. Questions continue to arise over the institutional capacity for HIV/AIDS prevention, as well as the disturbing tendency to punish HIV/AIDS victims (U.S. Embassy 2001).

The intrusion of ideology and local prejudice into public health process on HIV/AIDS was also reflected in the Central Committee and State Council's 2002 decision on promoting rural health work (Central Committee and State Council 2002), whose repeated references to the "three represents" and the building of socialist modernization set the tone for the provisions. While the measures indicated a renewed commitment to rural health care, the localization of health treatment raised the possibility of further entrenching discriminatory attitudes about HIV/AIDS (Human Rights Watch 2003b). Suppression of information has also continued, supported by the text of the State Secrets Law (1988) and its Implementing Regulations (1996), which prohibit unauthorized dissemination of information on outbreaks of infectious disease. The arrest of the health official who had first broached the subject of the blood collection scandal in Henan was purportedly justified by reference to the State Secrets regime (Human Rights Watch 2003b). China's regulations on reporting infectious disease (PRC Ministry of Health, 2003a), while mandating the responsibility of health care professionals to report on outbreaks, still reiterate the importance of internal state-sanctioned reporting processes.

The orientation toward patrimonial sovereignty in the government's handling of human rights to health was also evident in China's handling of the SARS crisis of 2003. The deadly atypical pneumonia first emerged near Guangzhou in November 2002, apparently jumping the species

barrier to humans from civet cats, a local delicacy. In late January, the central government sent to Guangdong Province, where the virus apparently originated, a “top secret” document alerting local health authorities about the novel pneumonia-like disease spreading through the region (Pomfret 2003a). Despite this early knowledge, Beijing did not formally request assistance from the World Health Organization (WHO) until March 10, 2003 and began to provide information on the disease a week later. China permitted WHO researchers into Guangdong only in early April. This delay permitted SARS to migrate unchecked to Hong Kong in February and to other provinces of China. Canada’s own SARS crisis derived from a traveler from Hong Kong. On April 3, drawing on a State Council declaration the previous day, Minister of Health Zhang Wenkang announced confidently that the disease was under control. However, Dr. Yang Jiangyong of the Beijing No. 301 Military Hospital almost immediately sent e-mails to Chinese and Hong Kong television stations indicating that the actual number of SARS cases and deaths in Beijing was significantly higher than the figures admitted by the Minister of Health (Pomfret 2003b). Clearly there were significant gaps in the government’s reporting on the SARS crisis. Following an extraordinary session of the PRC Politburo on April 17, Health Minister Zhang and Beijing Mayor Meng Xuenong were dismissed, although this seemed to suggest the beginning rather than the end of a top-level power struggle between President Hu Jintao and his ally Premier Wen Jiabao on the one hand, and hold-over political operatives loyal to Jiang Zemin (Pomfret 2003b; Lam 2003).

China’s efforts to control SARS in major cities and particular the countryside faced continued uncertainty. Efforts at public reporting on the numbers of SARS cases (PRC Ministry of Health 2003b), were compromised by questions about methodology and persistent rumours about the re-routing of SARS patients out of municipal hospitals to ensure lower reported rates of infection. Orders issued May 7, 2003 from the Ministry of Health on SARS measures in rural areas highlighted the seriousness of the SARS epidemic. By identifying epidemic areas as including Guangdong, Beijing, Shanxi, Inner Mongolia, and Hebei, the regulations acknowledged the wide-spread nature of the epidemic while still suggesting artificial limits on government attention in other locations. By calling for particular attention to monitoring migrant workers, the measures revealed the depth of the challenge to control this heretofore nearly uncontrollable vector of contagion.

While editorials in the authoritative People's Daily in June and July 2003 (People's Daily 2003a; People's Daily 2003b) suggested a renewed commitment to greater openness in governance, the sustainability of this approach remains uncertain. Thus, Guangdong Governor Huang Huahua and 1st Party Secretary Zhang Dejiang were spared dismissal, despite their poor handling of the crisis, because of their links to Jiang Zemin. As well, the Ministry of Health backtracked on putative apologies for its handling of SARS and minimizing the whistle-blowing role of Dr. Yang Jiayang (who was later placed under house arrest in mid-2004 for challenging another government orthodoxy, concerning the Tiananmen massacre).

Aside from the question of elite-level political struggle, the SARS crisis revealed yet again the deeply entrenched effects of political and institutional arrangements aimed at preserving patrimonial sovereignty over responsible agency as norms of governance. As has often been the case with HIV/AIDS, doctors and other health care professionals were among the first to call for public action, only to be silenced by government bureaucrats. Health care workers bore the brunt of the disease, suffering up to 45% of cases in Guangdong for example. As with HIV/AIDS, China's management of SARS was crippled by an information control system, supported by the PRC State Secrets Law and its various implementing and ancillary regulatory regimes, under which epidemics are considered state secrets. Although the 1989 Epidemic Control Law requires officials to report accurately on epidemics, this still keeps reporting and information within government control, with little if any accountability to the public. Politics also determined Beijing's decision to block the WHO from helping Taiwan with its own SARS outbreak. The WHO meanwhile concluded that China was not cooperating adequately in on-going efforts to combat SARS (Crampton 2003).

In light of selective adaptation analysis, China's practices in the area of human rights seem unrelated to factors of cultural diversity, limiting the scope for cultural relativism as a defense to international human rights criticism. Public statements by the Chinese government, together with the results of preliminary interviews in China and Hong Kong suggest there is a basic normative consensus around the human right to health. Neither elite and government norms, nor local popular norms appear to conflict with norms associated with the international health regime. In the area of *perception*, statements by senior Chinese leaders and actions taken to rebuke and remove officials who failed to ensure prompt reporting of infectious disease suggest that

international standards on health were perceived accurately and accepted. While officials responsible for health law and policy engaged with conflicting local conditions—particularly institutional constraints on responses to health crises in HIV/AIDS and SARS—their perceptions about the applicability of international standards seemed consistent with international expectations. This suggests that there were few normative conflicts between Chinese and international rule regimes. Factors of *complementarity* did pose particularly difficult operational problems in areas of public access and information dissemination. However, this appeared to reflect tensions between governance norms and the socio-cultural norms of local communities, rather than conflict with the norms of the international rule regime. Complementarity between international and local patterns of institutional response to public health crises will remain a challenge, as China’s official legal culture themes of patrimonial sovereignty conflict with international human rights themes of responsible agency.

The importance of *legitimacy* was evident throughout China’s health care crisis, as the Party/state was seen as failing to deliver on the promises to provide social wellbeing, that have served as a foundation for the regime’s political authority. Domestically, public confidence in government services in public health has been sorely tested, raising questions about the government’s commitment and capacity to protect public welfare more generally. China’s handling of the HIV/AIDS and SARS crises has undermined its search for international legitimacy as well, as the government seems unable to uphold its own commitments to protecting the Chinese people’s right to development.

#### **IV. Conclusion**

Developed as a tool for understanding trade and human rights treaty compliance generally, “selective adaptation” offers potential to strengthen understanding of China’s compliance with international standards in the human right to health. Under China’s state-centric discourse on human rights, the human right to health is one that is conferred by the state and thus subject to state interests and the state’s interpretation of social interest. In practice, protection of the human right to health in China faces significant operational challenges, as government officials give priority to social stability, China’s international image, and inter-bureaucratic rivalries. China’s health crisis does not seem to be the result of conflicts between local socio-cultural norms and the norms underlying international health standards. The paradigm of selective adaptation

suggests that questions about China's compliance with international standards on human rights to health cannot be explained by reference to normative conflict or to the particularities of China's socio-historical conditions. Rather, the problems seem primarily political and institutional. This in turn can help share local and international responses. Government commitments to greater transparency in reporting on infectious disease, increased government financial support for public access to health care, and a greater level of cooperation with international organizations charged with implementing human rights to health will be essential components of China's effort to improve its record of compliance with international human rights standards concerning health.

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