

CEUB

EDUCAÇÃO SUPERIOR

ISSN 2237-1036

REVISTA DE DIREITO INTERNACIONAL
BRAZILIAN JOURNAL OF INTERNATIONAL LAW

**International Economic Law and
the COVID-19 Sanitary Crisis: An
Introduction**

**Direito Internacional Econômico
e a crise sanitária do Covid-19:
Uma introdução**

Julien Chaisse

VOLUME 18 • N. 2 • 2021

DIREITO INTERNACIONAL ECONÔMICO E A
CRISE SANITÁRIA DO COVID-19

Sumário

CRÔNICAS.....	13
REIMAGINING INTERNATIONAL RELATIONS TEACHING DURING (AND AFTER) COVID-19	15
Magdalena Bas	
DOSSIÊ TEMÁTICO: DIREITO INTERNACIONAL ECONÔMICO E A CRISE SANITÁRIA DO COVID-19 (INTERNATIONAL ECONOMIC LAW AND THE COVID-19 SANITARY CRISIS).....	19
SOME QUESTIONS ABOUT INTERNATIONAL ECONOMIC LAW RAISED DURING THE PANDEMIC	21
Hervé Ascensio	
INTERNATIONAL ECONOMIC LAW AND THE COVID-19 SANITARY CRISIS: AN INTRODUCTION	27
Julien Chaisse	
TRANSPARÊNCIA E COOPERAÇÃO REGULATÓRIA NO COMÉRCIO INTERNACIONAL DE PRODUTOS MÉDICOS PARA A COVID-19: UMA ANÁLISE DA ATUAÇÃO INSTITUCIONAL DA OMC E DAS NOTIFICAÇÕES DO BRASIL EM OBSERVÂNCIA AOS ACORDOS TBT E SPS	35
Magali Favaretto Prieto Fernandes e Michelle Rattón Sanchez Badin	
O DEVER HUMANO DE PROMOÇÃO DA SAÚDE: A AVIAÇÃO COMERCIAL INTERNACIONAL EM PERÍODOS DE CALAMIDADE SANITÁRIA E DO RETORNO À NORMALIDADE	56
Thiago de Oliveira Frizera, Luisa Cortat Simonetti Gonçalves e Adriano Sant’Ana Pedra	
POLICE POWERS DOCTRINE: A RELIABLE STATE DEFENSE IN TIMES OF COVID-19?	73
Thomas Lehmann	
A INEXISTÊNCIA DO CONTROLE PREVENTIVO LEGISLATIVO DE CONVENCIONALIDADE DA MEDIDA PROVISÓRIA N.º 936/2020	91
Danilo Garnica Simini, Gabriel Carvalho Moreira e Rafaela Souza Machado	

A CRITICAL ANALYSIS OF THE IMPLICATIONS OF COVID-19 ON PIRACY OFF THE NIGERIAN COAST.....	108
Kalu Kingsley Anele	
THE COVID-19 PANDEMIC AS AN IMPELLER FOR THE AGGRAVATION OF MARINE PLASTIC POLLUTION AND ECONOMIC CRISIS: THE REVERSE EFFECT OF HEALTH PROTECTION MEASURES ON HUMAN LIVES	135
Adriana Isabelle Barbosa Lima Sá Leitão e Tarin Cristino Frota Mont'Alverne	
ARTIGOS SOBRE OUTROS TEMAS	154
O DIREITO INTERNACIONAL HUMANITÁRIO NOS PARECERES CONSULTIVOS DA CORTE INTERNACIONAL DE JUSTIÇA: UMA CONJUGAÇÃO DE PERSPECTIVAS UTÓPICAS E APOLOGÉTICAS	156
Talis Prado Pinto Junior e Arthur Roberto Capella Giannattasio	
CONTESTING IMMUNITIES IN THE INTERNATIONAL CRIMINAL COURT: AN ANALYSIS OF THE RULINGS OF THE PRE-TRIAL CHAMBERS AND THE APPEALS CHAMBER IN AL BASHIR CASE AND ITS OUTCOMES.....	171
Luisa Giannini e Roberto Vilchez Yamato	
RUMO À PROFISSIONALIZAÇÃO DA PREVENÇÃO DE CONTROVÉRSIAS NOS ACORDOS DE COOPERAÇÃO E FACILITAÇÃO DE INVESTIMENTOS (ACFIs) DO BRASIL?	191
Nitish Monebhurrun e Leonardo Vieira Arruda Achtschin	
THE PREVENTIVE CHARACTER OF DISASTER LAW: TAX INCENTIVES IN ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) INVESTMENTS AS A RISK MITIGATION MECHANISM.....	212
Daniel Dela Coleta Eisaqui e Deilton Ribeiro Brasil	
A URGÊNCIA DE UM MODELO DE GOVERNANÇA INTERNACIONAL DA ÁGUA: ELEMENTOS PARA A DISCUSSÃO	235
José Irivaldo Alves Oliveira Silva	
O FIM DA HIERARQUIA SUPRALEGAL DOS TRATADOS INTERNACIONAIS: ANÁLISE DA ADI N.º 5.543/2020-DF: À LUZ DA TEORIA ARGUMENTATIVA DE NEIL MACCORMICK.....	263
Ana Maria D'Ávila Lopes e Patrícia K. de Deus Ciríaco	

OS DIREITOS HUMANOS FRENTE À NORMATIVIDADE “IMPERIAL” E A RESPONSABILIDADE DAS EMPRESAS TRANSNACIONAIS POR VIOLAÇÃO AOS DIREITOS HUMANOS NA ERA DO “IMPÉRIO”280

Fernando Hoffmam e Jose Luis Bolzan de Morais

O RECONHECIMENTO FACIAL NAS SMART CITIES E A GARANTIA DOS DIREITOS À PRIVACIDADE E À PROTEÇÃO DE DADOS PESSOAIS.....302

Diogo Dal Magro e Vinícius Borges Fortes

O DESENVOLVIMENTO HISTÓRICO DA PROSCRIÇÃO DO DESAPARECIMENTO FORÇADO DE PESSOAS E SUA FENOMENOLOGIA NO DIREITO PENAL INTERNACIONAL E NO DIREITO INTERNACIONAL DOS DIREITOS HUMANOS 331

Marcus Vinícius Xavier de Oliveira

CONSTITUCIONALISMO COOPERATIVO GLOBAL E DIREITO INTERNACIONAL PRIVADO: INSTRUMENTOS PARA UMA GOVERNANÇA DE DIREITO TRANSNACIONAL NA INTEGRAÇÃO362

Anderson Vichinkeski Teixeira, Roberto Correia da Silva Gomes Caldas e Luciane Klein Vieira

PROTEÇÃO DA INOVAÇÃO PELA APLICAÇÃO DO DIREITO DA CONCORRÊNCIA DA UNIÃO EUROPEIA: ANÁLISE DA INDÚSTRIA FARMACÊUTICA379

Pablo Leurquin

International Economic Law and the COVID-19 Sanitary Crisis: An Introduction*

Direito Internacional Econômico e a crise sanitária do Covid-19: Uma introdução

Julien Chaisse**

Abstract

The sanitary crisis has already had a substantial influence on the global economy, with restrictions on sanitary material exports, interruption of international transportation, increased screening of foreign investment, and challenges to intellectual property rights. It has compelled states to reconsider their core interests and national security, for example, in terms of maintaining pharmaceutical and vaccine manufacturing capacity. In addition, the lockdowns adopted in many countries have raised questions about their conformity with the existing free trade and investment treaties, and about the rationale of exceptions and derogations in these treaties. The economic consequences of the crisis have resulted in huge stimulus packages by national governments, putting a strain on the public exchequer and increasing debt. Financial experts also anticipate that the public debt to GDP ratio of most developed as well as emerging nations would further skyrocket and therefore the IMF, development banks, and other international financial institutions have been mobilized to meet the current and forthcoming financial needs of the most affected economies. Consequently, these diverse topics need a legal discussion, with an emphasis on the States' unique reactions and practices in their economic interactions, as well as the possibility of a post-COVID-19 world economic order.

Keywords: State reactions, Pandemic, IMF, Economic Policy, Global approach.

Resumo

A crise sanitária já teve uma influência substancial na economia global, com restrições às exportações de material sanitário, interrupção do transporte internacional, maior seleção de investimentos estrangeiros e desafios aos direitos de propriedade intelectual. Obrigou os Estados a reconsiderar seus interesses centrais e a segurança nacional, por exemplo, em termos de manutenção da capacidade de fabricação de medicamentos e vacinas. Além disso, os bloqueios adotados em muitos países levantaram questões sobre sua conformidade com os tratados de livre comércio e investimento existentes e sobre a justificativa das exceções e derrogações nesses tratados. As consequências econômicas da crise resultaram em enormes pacotes de estímulo por parte dos governos nacionais, pressionando o erário público e aumentando

* Guest Editor (Editor Convidado).

** Prof. Julien Chaisse is Professor, School of Law, City University of Hong Kong & President, Asia Pacific FDI Network. PhD-Law (University of Aix-Marseille).
E-mail: julien.chaisse@cityu.edu.hk

a dívida. Os especialistas financeiros também preveem que a relação entre dívida pública e PIB das nações mais desenvolvidas e emergentes dispararia ainda mais e, portanto, o FMI, os bancos de desenvolvimento e outras instituições financeiras internacionais foram mobilizados para atender às necessidades financeiras atuais e futuras dos mais afetados economias. Consequentemente, esses diversos temas precisam de uma discussão jurídica, com ênfase nas reações e práticas singulares dos Estados em suas interações econômicas, bem como na possibilidade de uma ordem econômica mundial pós-COVID-19.

Palavras-chave: Reação estatal, pandemia, FMI, política econômica, perspectiva global

1 Introduction

The COVID-19 pandemic (and the containment measures to which it gave rise) has deeply affected the way people live and work, before leading to a major economic and social crisis.¹ Some were able to discover new ways of organizing work on this occasion, others lost their jobs. Further, this crisis has not only affected humans in terms of life loss but has significantly affected trade-dependent economies.² In response to the same, several governments, central banks and monetary authorities have engaged in a series of interventions along with national governments adopting measures to address the health and economic consequences of the COVID-19 pandemic. In this, the whole global picture and scenario are worrying. Many States and the United Nations (UN) had earlier adopted the 2030 Agenda and the 17 Sustainable Development Goals (SDGs), including specific targets on the fight and prevention of

epidemics or the strengthening of health systems.³ Widening the SDG spending gap, the current situation got worsen with countries struggling to finance their public health, social and economic responses to COVID-19. The Covid-19 crisis will oblige nations and international organisations to find the ways and means for paradigm shift around the 2030 Agenda.⁴

The present special issue focuses on the issues raised by the COVID-19 pandemic under international economic law, including international trade law, international investment law, international financial law and international taxation. There is a growing body of studies addressing some aspects of the issues and challenge raised by the pandemic.⁵ Regulatory and economic response to the pandemic across countries have been uneven and divided.⁶ Thus as the pandemic continues to raise a number of issues, it makes it difficult to esti-

¹ Estimates indicate the virus “reduced global economic growth in 2020 to an annualized rate of -3.4% to -7.6%.” World Bank, “Global Economy to Expand by 4% in 2021; Vaccine Deployment and Investment Key to Sustaining the Recovery” (2020) <https://www.worldbank.org/en/news/press-release/2021/01/05/global-economy-to-expand-by-4-percent-in-2021-vaccine-deployment-and-investment-key-to-sustaining-the-recovery> accessed 20 August 2021

² James K. Jackson, et al., “Global Economic Effects of COVID-19” (2021) Congressional Research Service, July 9 2021 <https://fas.org/sgp/crs/row/R46270.pdf> accessed 20 August 2021; OECD Policy Responses to Coronavirus (COVID-19), “The impact of the coronavirus (COVID-19) crisis on development finance”, (2020) OECD Publishing, Paris <https://www.oecd.org/coronavirus/policy-responses/the-impact-of-the-coronavirus-covid-19-crisis-on-development-finance-9de00b3b/> accessed 20 August 2021.

³ Prior to the crisis, “levels and trends in domestic revenues and external flows to developing economies were already considered insufficient to support the Sustainable Development Goals (SDG)”. OECD (2021), “Global Outlook on Financing for Sustainable Development 2021”, (2021) OECD Publishing, Paris, <http://www.oecd.org/dac/financing-sustainable-development/> accessed 20 August 2021.

⁴ Gaspar, V. et al., “Fiscal Policy and Development: Human, Social, and Physical Investment for the SDGs”, (2019) International Monetary Fund, Washington D.C., <https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2019/01/18/Fiscal-Policy-and-Development-Human-Social-and-Physical-Investments-for-the-SDGs-46444> accessed 20 August 2021.

⁵ Eliana Close and Simon Young and Tina Cockburn and Lindy Willmott and Ben P White, ‘Legal Challenges to ICU Triage Decisions in the COVID-19 Pandemic: How Effectively Does the Law Regulate Bedside Rationing Decisions in Australia?’ (2021) 44 UNSWLJ 9 1; See Julien Chaisse, ‘Both Possible and Improbable: Could COVID-19 Measures Give Rise to Investor-State Disputes?’ (2020) 13(1) Contemporary Asia Arbitration Journal 97-184; See Frederick M Abbott and Jerome H Reichman, ‘Facilitating Access to Cross-Border Supplies of Patented Pharmaceuticals: The Case of the COVID-19 Pandemic’ (2020) 23 (3) Journal of International Economic Law 535–561; See also Gathii, James Thuo and Akinkugbe, Olabisi D. and Adebola, Titilayo and Mapefane, Nthope and Omiunu, Ohio, International Economic Law in the Global South and COVID-19 (May 18, 2020). Afronomics law Symposium on COVID-19 and International Economic Law in the Global South, 2020, available at <http://dx.doi.org/10.2139/ssrn.3604313>; See also Julien Chaisse & Nilanjan Banik ‘Global Health Law & Governance Amidst the Pandemic: Evidence, Lessons, and Reforms’ (2020) 30(1) Annals of Health Law & Life Sciences 207-269; See also Sara Dehm and Claire Loughnan and Linda Steele, ‘COVID-19 and Sites of Confinement: Public Health, Disposable Lives and Legal Accountability in Immigration Detention and Aged Care’ (2021) 44 UNSWLJ 60.

⁶ Julien Chaisse & Nilanjan Banik, ‘Global Health Law & Governance Amidst the Pandemic: Evidence, Lessons, and Reforms’ (2020) 30 (1) Annals of Health Law & Life Sciences 207-269.

mate the full cost to global economic activity. Against this fast-evolving background, this special issue offers a series of articles that critically discuss the latest legal problems raised by the pandemic under international economic law.

This Introductory article has been divided into various sections in order to clearly address the issue at hand. The following sections, beginning with Section 2 highlights State reactions and actions in the light of the Covid-19 pandemic including that of International Economic Organisations, consequently giving it an international economic law perspective. Further, Section 3 focuses on the indirect effects of the crisis and the need for a global approach to resolving it. Section 4 gives a conclusion to the paper along with an outline of the issue, thereby, summing it up in a nutshell.

2 States and International Organizations in the Context of IEL

The first sub-section under this part of the paper maps the state reactions to the pandemic with an International Economic Law perspective. It discusses the measures taken by various States having direct/indirect impacts on trade and investment. While the second sub-section analyses the reactions of various International Economic Organisations such as the IMF, the World Bank, WTO and, the G-7 countries and therefore covers a wide range of reactions and actions taken as a consequence of Covid-19.

2.1 States Measures

Although the COVID-19 pandemic is essentially a health catastrophe, it has become evident that it has had implications on many aspects of the international order and therefore, has led to reactions from numerous States across the globe. There have been various measures taken by the States as a reaction to the pandemic which had a direct/indirect impact on trade and investment. For instance, according to the International Trade Centre (ITC): 92 countries have imposed export-restrictive measures, with only two countries – Jamaica and Zambia – implementing export-liberalization

measures.⁷ Further, many productive operations had been hampered, initially in Asia, then in Europe, North America, and beyond, with significant border closures. This resulted in a significant increase in unemployment, particularly in the United States, as well as a decrease in demand for goods and services across the globe.

Exports of components for industries such as automotive, electronics, pharmaceuticals, and medical supplies were halted as a result of China's decisions in January (the temporary closure of Hubei Province and national borders). Due to a lack of alternative suppliers, companies throughout North America, Europe, and the rest of Asia were forced to shut down for several weeks. Trade-in Services had also been seriously harmed. In the first quarter of 2020, the value of exports from a group of 37 nations, which accounted for roughly two-thirds of global service exports in 2019, fell by 10.4 percent compared to the same time in 2019. Tourism, which accounted for 24% of all worldwide service exports in 2019, had been heavily impacted as well. International visitor arrivals fell by 44% globally between January and April 2020, compared to the same period in 2019.⁸

Many governments had also implemented restrictions on persons and businesses in order to slow the spread of COVID-19. Several countries ordered municipal or countrywide lockdowns to prevent the spread of COVID-19. International trade had undoubtedly been harmed as a result of these policies. People were allowed to go out during lockdowns to buy essential goods such as food, sanitary items, and medicine but due to the closure of large department stores and retail outlets, it became more difficult to obtain items that are were not available at grocery stores. As a result, consumption was reduced by leaps and bounds. Imports and exports also declined substantially as a result of stay-at-home orders and job closures, respectively. For instance, beginning in April 2020, various Japanese automakers ceased manufacturing for several days each month.⁹

⁷ 'Legal and Policy Implications of Covid-19-Related Export Restrictions' (*International Economics*, 28 August 2020) <https://www.tradeconomics.com/iec_publication/legal-and-policy-implications-of-covid-19-related-export-restrictions/> accessed September 5, 2021.

⁸ *Ibid*

⁹ Hayakawa K and Mukunoki H, 'Impacts of Lockdown Policies on International Trade' (2021) 20 *Asian Economic Papers* 123.

2.2 International Economic Organization Reactions

Under International Economic Law which is relevant in the COVID-19 crisis, key organizations, including IMF, WB, and WTO have provided various responses to COVID-19. Although the efforts and initiatives are certain, there has been certainly a lack of coordination among organizations and between organizations and States.¹⁰ The COVID-19 pandemic has resulted in an unprecedented demand for financial assistance. To counter this, International Monetary Fund has stepped forward and is ready to deploy approximately \$1 trillion—in response to the resulting economic crises.¹¹ This is in line with its fundamental mission of promoting global economic growth and financial stability. Further, it has undertaken several COVID-related programs in numerous countries¹² and has set up Catastrophe Containment and Relief Trust (CCRT), a “donor country trust fund to cover six months of debt payments owed by 29 low-income countries to the IMF”.¹³ In addition to loans, it has taken other policy steps including the creation of a Short-term liquidity line to bolster its COVID-19 response.

International organizations such as World Bank and World Trade Organisation have also been instrumental in mobilizing their resources to support developing countries. World Bank has approved more than 150 COVID-19 projects, totalling \$15 billion, in 99 countries.¹⁴ In addition to this, it has successfully deployed as much as \$160 billion to respond to the COVID-19 pandemic. To complement the donations, the Health Emergency Preparedness and Response Multi-Donor

¹⁰ Julien Chaisse and Nilanjan Banik, ‘Global Health Law & Governance Amidst the Pandemic: Evidence, Lessons, and Reforms’ (2020) 30 (1) *Annals of Health Law & Life Sciences* 207-269.

¹¹ IMF Managing Director Kristalina Georgieva’s Statement Following a G20 Ministerial Call on the Coronavirus Emergency, March 23, 2020. Some policy experts estimate the IMF’s current maximum lending capacity is about \$787 billion.

¹² IMF Lending Tracker, <https://www.imf.org/en/Topics/imf-and-covid19/COVID-Lending-Tracker> accessed 20 August 2021.

¹³ “IMF Adds Liquidity Line to Strengthen COVID-19 Response,” International Monetary Fund, April 15, 2020.

¹⁴ <https://maps.worldbank.org/>. accessed 20 August 2021.

¹⁵ Some of which include \$1 billion for India to support screening, contract tracing, laboratory diagnostics, and setting up new isolation wards and \$11.3 million for Tajikistan to expand intensive care capacity. World Bank, “World Bank Group Launches First Operations for COVID-19 (Coronavirus) Emergency Health Support: Strengthening Developing Country Response,” Press Release, April 2, 2020.

Fund (HEPRF)¹⁶ has been set up to help countries prepare for disease outbreaks. Similar policy responses to the economic outfall have also been undertaken by the leaders of G-7 countries.¹⁷ World Trade Organization which deals with rules of trade with nations has aided in the absorption of the blow resulting from the pandemic in three ways: first, by assisting members in aligning their trade policies; second, by guaranteeing transparency in pandemic-related measures; and third, by monitoring members’ trade reactions to the pandemic. This includes facilitating communication among its members, analysing the impact of the crisis and suggested measures to counter the adverse impacts¹⁸, reducing transaction cost of policy coordination, increasing transparency and collaborative assessment of countries’ policies through the adoption of WTO’s Trade Policy Review (TPR) Mechanism¹⁹. This has helped its members in reducing the negative effect of export restrictions and nationalist policies specifically in the context of COVID-19.²⁰

3 Indirect effects of the crisis and necessity of a global approach

The stringent dimensions of a firm international order conveniently balance the society, polity, and economy of states. The push to margins inhibits a characteristic deconstruction that dissects the world order into a falling wall – where the legal order symbolizes the bricks. It is the fall of these individual bricks that eventually collapses the continuity of the society and disturbs its equilibrium. The preemptory status of the

¹⁶ World Bank, “World Bank Group to Launch New Multi-Donor Trust Fund to help Countries Prepare for Disease Outbreaks” Press Release, April 17, 2020.

¹⁷ White House, G-7 Leaders’ Statement, March 16, 2020 <<https://www.whitehouse.gov/briefings-statements/g7-leaders-statement>> accessed 21 August 2021.

¹⁸ ‘Legal and Policy Implications of Covid-19-Related Export Restrictions’ (*International Economics*, 28 August 2020) <https://www.tradeconomics.com/iec_publication/legal-and-policy-implications-of-covid-19-related-export-restrictions/> accessed 7 September 2021.

¹⁹ Tembey U, ‘WTO and Its Role in Reducing the Economic Shock of the Pandemic’ (*ORF*, 11 February, 2021) <<https://www.orfonline.org/expert-speak/wto-its-role-reducing-economic-shock-pandemic/>> accessed 7 September 2021.

²⁰ WTO, “EXPORT PROHIBITIONS AND RESTRICTION (Information Note)” (2020) https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf

legal order is a complex mixture of a wide array of institutional mechanisms. Each institutional mechanism subserves a higher legal order to maintain the legitimacy of well-founded law. The advent of the coronavirus pandemic represents a titular challenge to this legal order – as States, either by deliberate effort or as an incidental consequence are emerging as an antagonist sovereign, whereas the remaining sheath of the legal order is collapsing in the arms of divine coercion.

Contract tracing emerged as a potent weapon for different states to caterpillar their advance toward fighting the novel virus.²¹ It was established in the early phases of the pandemic that monitoring movements of citizens was a stern prescription against COVID-19.²² There were multiple strands of strategies adopted by different countries: where Israel chose to collect previously-established cell-phone location data²³, Italy adopted acquired cell-phone location data to ensure compliance with lockdown orders.²⁴ The troves of data being collected, stored, and utilized in the middle-of-a-pandemic, had no legal backing. In Singapore's case, the dilution of citizen privacy was attained through systematic sharing of data with law enforcement agencies.²⁵ The abiding courtesy of citizens being left to the courtesy of the state during a crisis invites the darker pastures of a surveillance state.²⁶

A figurative tryst with broken economies is not new to the world. The global economy has witnessed fourteen (14) global recessions since 1870. Ayhan Kose and Naotaka Sugawara noted that the “COVID-19 recess-

sion will be the deepest since 1945-46”.²⁷ The basket of the economy has many eggs within it: banking, contractual ties, and the tyranny of the market. The pandemic exacerbated the need to streamline bankruptcy law. The combined element of take-up, liquidity, and system capacity cumulatively prejudiced a bankruptcy law-based response to tackle the default lines within business.²⁸ At the cusp of the three: a liquidity-based model succumbed to the cash-strapped nature of the banks which could not resist the onslaught of the pandemic.²⁹ In the pyramid of economic stress, contractual liabilities posed the highest frequency of tension. Immediately in the aftermath of coronavirus, the International Chamber of Commerce renovated its *force majeure clause* as: “The occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract.”³⁰ The response of many states was equally adaptive: for instance, Germany permitted their consumers and enterprises to withhold the performance of contracts on economic grounds for a stipulated period of time.³¹

In the paradigm of international law, States as sovereign have an equitable hyphenation of power and responsibility. The pandemic grants an invariable leeway to states through the International Law Commission's Articles on the Responsibility of States using pleas of force majeure, state of necessity, and distress.³² This is, however, not at the altar of the International Health Regulations whose emergence has ensured that states can no longer adopt an isolation-based policy to shield themselves from global responsibility.³³

²¹ Alan Rozenshtein, ‘Digital Disease Surveillance’ (2021) 70 *American University Law Review* 1511.

²² Katharina Pistor, *Law in the Time of Covid* (Columbia Law School, 2020).

²³ David M. Halbfinger and Isabel Kershner, ‘To Track Coronavirus, Israel Moves To Tap Secret Trove of Cellphone Data’ (*New York Times*, 16 March 2020) <<https://www.nytimes.com/2020/03/16/world/middleeast/israel-coronavirus-cellphone-tracking.html>> accessed _____

²⁴ Ed Yong, ‘How the Pandemic Will End’ (*The Atlantic*, 25 March 2020) <<https://www.theatlantic.com/health/archive/2020/03/how-will-coronavirus-end/608719/>> accessed October 19, 2021

²⁵ Kirsten Han, ‘Broken Promises: How Singapore lost trust on contact tracing privacy’ (*MIT Technology Review*, 11 January 2021) <<https://www.technologyreview.com/2021/01/11/1016004/singapore-tracetogether-contact-tracing-police/>> accessed October 19, 2021

²⁶ Stephen Humphreys, ‘Legalizing Lawlessness: On Giorgio Agamben's State of Exception’ (2006) 17(3) *Eur J Int Law* 677– 87; See also Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight For A Human Future At the Frontier of Power* (Public Affairs, 2019).

²⁷ M. Ayhan Kose and Naotaka Sugawara, ‘Understanding the depth of the 2020 global recession in 5 charts’ (*World Bank Blogs*, 15 June 2020) <<https://blogs.worldbank.org/opendata/understanding-depth-2020-global-recession-5-charts>> accessed October 19, 2021

²⁸ Pistor (n 2) 136.

²⁹ Sara Pie Woo, ‘Regulatory Bankruptcy: How Bank Regulation Causes Fire Sales’ (2011) 99 *Geo L J* 1615.

³⁰ International Chamber of Commerce, *ICC Force Majeure and Hardship Clauses* (2020) <https://iccwbo.org/content/uploads/sites/3/2020/07/icc-forcemajeure-introductory-note.pdf>

³¹ M. Schmidt-Kessel and C. Mollnitz, ‘Coronavertrechtsrecht – Sonderregeln für Verbraucher und Kleinstunternehmen’ (2020) *NJW* 1103.

³² Federica Paddeu and Ferya Jephcott, ‘COVID-19 and Defences in the Law of State Responsibility: Part I’ (*EJIL:Talk!*, 17 March 2020) <<https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-i/>> accessed October 19, 2021

³³ David P. Fidler, ‘The Globalization of Public Health: Emerging Infectious Diseases and International Relations’ (1997) 5 *Ind J L Stud* 1, 11; See also Julien Chaisse and Nilanjan Banik, ‘Global

The international economic law (IEL) order is centered on global cooperation. The coronavirus pandemic has eviscerated cooperation and intruded isolation and exclusivity as a hallmark of the IEL.³⁴ Exclusivity is a misnomer in an IEL-centric world which is based on: “open markets, freedom of navigation, migrant workers, and global value chains.”³⁵ Consequently, IEL is faced with the double-edged sword of mitigating a health crisis and maintaining the global economic order.

The pandemic has largely dictated stern shrift towards a reduced flow of goods. States have chosen to adapt and ferment a nationalized and restrictive approach towards the export of goods. Global Trade Alert reported that “at least ninety-five states have put in place 150 or more export restrictions related to medical equipment, food, and other products”.³⁶ The IEL model had achieved an expansionist honorific³⁷, and was primarily intended to “tame States’ protectionist and mercantilist instincts which played a significant role in the outbreak of World War II” through the establishment of institutional mechanisms such as the International Trade Organization (ITO).³⁸ As the throne heir to ITO, the World Trade Organization was seen as a fetter on states’ ability to act in exclusion of other states for its personal predicaments. There are specifically emboldened provisions to establish this fetter during a pandemic: Article I, III, V, XI of the General Agreement on Tariffs and Trade (GATT) empower a member state to challenge another’s pandemic response for running afoul of prohibitions on discriminatory treatment, restrictions on

freedom of transit, or import and export restrictions.³⁹ The European Union issued a directive restricting the export of personal protective equipment (PPE).⁴⁰ Similarly, Switzerland restricted the export of masks, gloves, and swabs, whereas India banned the export of ventilators and sanitisers.⁴¹ The “blank exception” of export-related to essential commodities exposes the cracks within IEL.⁴²

International investment is fixated around the framework of treaties, similar to trade. A binocular vision of international investment experts reciprocates the idea that foreign states may seek a palette of relief from the host state including: inadequate compensation for nationalizations,⁴³ discriminatory treatment on the basis of nationality,⁴⁴ breaches of state contracts protected by umbrella clauses,⁴⁵ or violations of fair and equitable treatment⁴⁶ Within the framework of investment dispute settlement, a host of Bilateral Investment Treaty (BIT) provisions has specific exemptions to protect “public health”. This has effectively brought to the fore a crucial enigma of dispute settlement, which Federica Paddeu and Kate Parlett describe as: “whether States will be insulated for measures taken in response to the emergency presented by COVID-19 or will investors be indemnified for the substantial losses they will likely suffer?”⁴⁷ An additional facet is the largely unconcerned

Health Law & Governance Amidst the pandemic: Evidence, Lessons, and Reforms’ (2021) 30(1) *Ann Health Law* 222.

³⁴ Yuval Noah Harari notes: “Given the global nature of the economy and of supply chains, if each government does its own thing in complete disregard of the others, the result will be chaos and a deepening crisis”. Yuval Noah Harari, ‘Yuval Noah Harari: the world after coronavirus’ (*Financial Times*, 20 March 2020) <<https://www.ft.com/content/19d90308-6858-11ea-a3c9-1fe6fedcca75>> accessed _____

³⁵ Anne Orford, ‘Theorizing Free Trade’ in Anne Orford & Florian Hoffmann (eds), *The Oxford Handbook Of The Theory Of International Law* (OUP 2016); See also Francisco-Jose Quintana and Justina Uriburu, ‘Modest International Law: COVID-19, International Legal Responses, And Depoliticization’ (2020) *ASIL* 691.

³⁶ Global Trade Alert, *21st Century Tracking Of Pandemic-Era Trade Policies In Food And Medical Products* (2020) <https://www.global-tradealert.org/reports/54>

³⁷ Tullio Treves, ‘The Expansion of International Law’ (2015) 398 *Recueil des Cours de l’Académie de Droit International* 219–261.

³⁸ Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (Salem: Butterworth Legal Publishers 1990).

³⁹ Julian Arato, Kathleen Claussen, and Benton Heath, ‘The Perils of Pandemic Exceptionalism’ (2020) 114 (4) *ASIL* 628–629.

⁴⁰ European Union, *Commission Implementing Regulation 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorisation* (2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2020.077.01.0001.01.ENG&toc=OJ:L:2020:077:TOC>

⁴¹ ‘India Bans Export of All Ventilators and Sanitizers’ (*Reuters*, 24 March 2020) <<https://www.reuters.com/article/brief-india-bans-exports-of-all-ventilat/brief-india-bans-exports-of-all-ventilators-and-sanitizers-govt-order-idUSFWN2BH10V>> accessed October 19, 2021

⁴² Najina Annabel, ‘Justifying COVID-19 Exportation-Related Quantitative Restriction within the framework of the World Trade Organization Law’ (*AfronomicsLaw*, 10 May 2020) <<https://www.afronomicslaw.org/2020/05/10/justifying-covid-19-exportation-related-quantitative-restrictions-within-the-framework-of-the-world-trade-organization-law/>> accessed October 19, 2021

⁴³ Rudolf Dolzer and Christoph Schreuer, *Principles Of International Investment Law* (2nd edn, OUP 2012).

⁴⁴ Nicholas DiMascio and Joost Pauwelyn, ‘Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’ (2008) 102 *AJIL* 48.

⁴⁵ James Crawford, ‘Treaty and Contract in Investment Arbitration’ (2008) 24 *Arb Int’l* 351.

⁴⁶ Gus Van Harten, *International Investment Treaty Arbitration And Public Law* (OUP 2007).

⁴⁷ Federica Paddeu, Kate Parlett, ‘COVID-19 and Investment

prism of International Investment Agreements towards the environment⁴⁸ which further reduces affinities between IEL and a balanced pandemic regurgitation.

4 Conclusion

The sanitary crisis has already impacted the world economy significantly, with the restriction on exports of sanitary materials, disruption of international transportation, strengthened screening of foreign investment, and challenging of intellectual property rights in times of sanitary crisis. It has induced States to reassess their essential interests and national security, for instance in order to maintain a production capacity of medicines and vaccines. In addition, the lockdowns adopted in many countries have raised questions about their conformity with the existing free trade and investment treaties, and about the rationale of exceptions and derogations in these treaties. The economic implications of the crisis have resulted in massive stimulus packages by national governments which have resulted in the burden of public exchequer and debt. The public debt to GDP ratio of most developed well as developing countries is also predicted by financial intuitions to increase drastically. The IMF, development banks, and other international financial institutions have been mobilized to meet the current and forthcoming financial needs of the most affected economies. These different themes deserve a legal discourse, focusing on the States' novel responses and practices towards their economic relations and a possible shift to a new post-COVID-19 world economic order.

Treaty Claims' (*Kluwer Arbitration Blog*, 30 March, 2020) <<http://arbitrationblog.kluwerarbitration.com/2020/03/30/covid-19-and-investment-treaty-claims/>> accessed October 19, 2021

⁴⁸ Francesco Mantanaro and Federica Violi, 'The Remains of the Day: The International Economic Order in the Era of Disintegration' (2020) 23 *J Int Econ Law* 299, 310.

Para publicar na Revista de Direito Internacional, acesse o endereço eletrônico
www.rdi.uniceub.br ou www.brazilianjournal.org.
Observe as normas de publicação, para facilitar e agilizar o trabalho de edição.