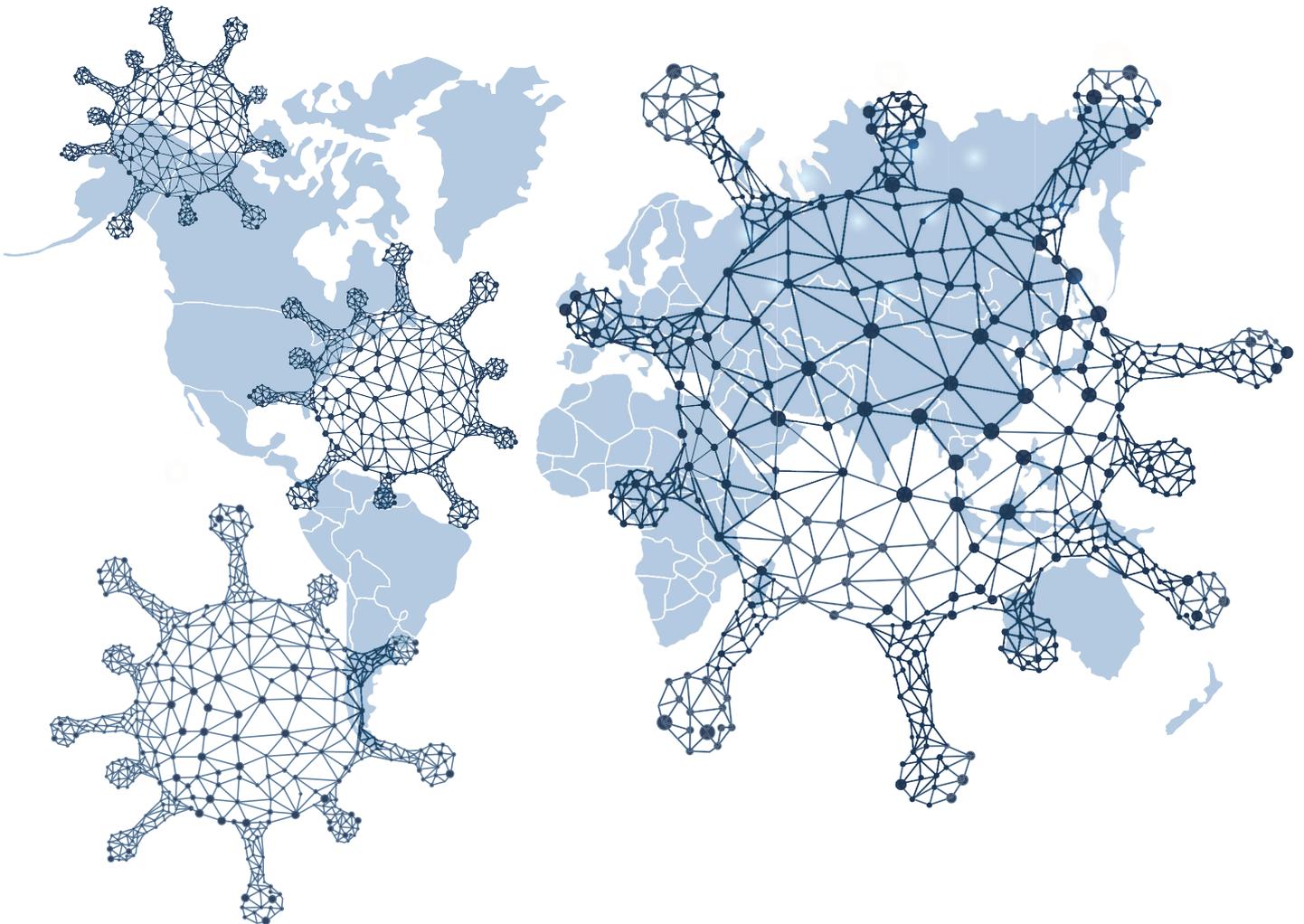


INTERNATIONAL  
AND COMPARATIVE  
LAW RESEARCH CENTER

# COVID-19 AND INTERNATIONAL LAW

## OVERVIEW OF PUBLICATIONS, ISSUE 3

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Moscow 2020

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# DESCRIPTION

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The International and Comparative Law Research Center presents the third issue of the overview of publications by academics and practitioners, as well as various documents prepared by intergovernmental and non-governmental organizations, on topics related to the spread of COVID-19 and various aspects of international law that were not included in the overviews of April 28\* and May 28, 2020\*\*, along with new publications that came out between May 28 and June 28, 2020.

Relevant publications and documents continue to cover issues related to responsibility of States, international cooperation, international human rights law, international investment law, and the law of the World Trade Organization. The classification used to place the issues considered in the overview under one or another “branch” is rather illustrative: it is mostly done so for the reader’s convenience.

This overview is not purported to be complete due to ongoing release of new materials. The overview does not constitute an analytical material and is to be used only for reference purposes.

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\* International and Comparative Law Research Center. COVID-19 and International Law. Overview of publications. URL: [http://iclr.ru/files/pages/research/papers/ICLRC\\_COVID-19-and-International-Law-Issue-1-ENG.pdf](http://iclr.ru/files/pages/research/papers/ICLRC_COVID-19-and-International-Law-Issue-1-ENG.pdf).

\*\* International and Comparative Law Research Center. COVID-19 and International Law. Overview of publications. Issue 2. URL: [http://iclr.ru/files/pages/research/papers/ICLRC\\_COVID-19-and-International-Law-Issue-2-ENG.pdf](http://iclr.ru/files/pages/research/papers/ICLRC_COVID-19-and-International-Law-Issue-2-ENG.pdf).

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# INTRODUCTION

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1. Within the framework of **State responsibility**, the possibility of holding China accountable is continued to be discussed, as well as possible legal consequences of the alleged violations of international law (**para. 6**).

2. In the context of **international cooperation**, attention is drawn to measures to prevent public health emergencies under the International Health Regulations 2005 (hereinafter, “**IHR**”) and their shortcomings (**paras. 7-8**), as well as to the problem of applying the IHR in practice (**para. 12**). In this regard, it is proposed to make a number of amendments to the document (**paras. 16-17**). It is also suggested that measures to prevent emergencies, such as pandemics, should also be based on the provisions of the Sendai Framework for Disaster Risk Reduction 2015-2030 (**para. 9**). In addition, the idea of adopting a new universal health treaty is also being proposed (**para. 18**). Apart from the critical assessment of the World Health Organization (hereinafter, “**WHO**”) (**paras. 10, 13-14**), discussions continue to be held on how to improve the coordinated international response to the spread of infectious diseases, both between the WHO and other international organizations (**para. 15**) and between individual States (**para. 19**), which in some cases have the right to take actions that go beyond the WHO’s recommendations (**para. 11**).

3. International human rights law publications continue to focus on possible limitations of human rights in the fight against the spread of COVID-19. In particular, this issue is analyzed in the context of ensuring a balance between individual human rights and demands of society to a State (**para. 20**). Cyberattacks on health systems that may lead to violations of human rights to life and health are considered in the light of individual human rights (**paras. 21-23**). In the light of these rights, as well as the right to the freedom of expression, state campaigns to spread disinformation are considered (**para. 24**). In addition, attention is paid to restrictions on the rights to a fair trial (**para. 25**), freedom of movement (**para. 26**), and the prohibition of discrimination (**para. 28**). The impact of corporate decisions on workers’ and communities’ rights (**para. 27**) and compliance of the possible introduction of immune passports and vaccination certificates with the requirements of international law and human rights protection standards are discussed (**paras. 29-30**).

4. Within the framework of international investment law, attention continues to be paid to mechanisms for protecting the rights of investors in the context of measures taken by States to combat COVID-19 (**para. 31**), as well as for protecting the interests of States (**para. 32**).

5. The law of the World Trade Organization (hereinafter, “**WTO**”) is touched upon in the area of the protection of intellectual property, in particular, the possible difficulties associated with production and distribution of the future COVID-19 vaccine are analyzed (**paras. 33-34**). Recovery of economies after the pandemic is viewed through the lens of multilateral cooperation of States in the field of trade (**para. 36**), including medicines and medical supplies (**para. 35**). In order to strengthen such cooperation, special attention is paid to the WTO Agreement on Trade Facilitation and related reforms of national rules and procedures in this field (**para. 37**).

# I. STATE RESPONSIBILITY

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6. As in the publications included in the overviews of April 28<sup>1</sup> and May 28, 2020<sup>2</sup>, the possibility of bringing China to international legal responsibility in connection with the spread of COVID-19 is still being discussed.<sup>3</sup> It is noted that satisfaction would be the most appropriate legal consequence for an alleged violation of the IHR by China since the following difficulties may arise when claiming compensation:

- the total economic losses because of the pandemic amount to more than 4 trillion US dollars, and this raises doubts that the International Court of Justice or an arbitration tribunal could order China to compensate such a large amount of money due to its unduly burdensome nature;
- similar to the decision of the ICJ in the *Bosnian Genocide* case of 2007, where, despite recognizing that a State was responsible for a violation of an international obligation, the Court did not order it to pay compensation, China could be exempt from this obligation since it would not be possible to prove that the spread of the coronavirus was directly dependent on China's actions;
- actions by injured States in response to the spread of the virus may significantly mitigate the level of reparation, and hence compensation claims.<sup>4</sup>

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<sup>1</sup> International and Comparative Law Research Center. COVID-19 and International Law. Overview of publications. P. 7-8, paras. 9-16. URL: [http://iclr.ru/files/pages/research/papers/ICLRC\\_COVID-19-and-International-Law-Issue-1-ENG.pdf](http://iclr.ru/files/pages/research/papers/ICLRC_COVID-19-and-International-Law-Issue-1-ENG.pdf).

<sup>2</sup> International and Comparative Law Research Center. COVID-19 and International Law. Overview of publications. Issue 2. P. 7, paras. 10-11. URL: [http://iclr.ru/files/pages/research/papers/ICLRC\\_COVID-19-and-International-Law-Issue-2-ENG.pdf](http://iclr.ru/files/pages/research/papers/ICLRC_COVID-19-and-International-Law-Issue-2-ENG.pdf).

<sup>3</sup> K. Creutz. China's Responsibility for the Covid-19 Pandemic. An International Law Perspective. FIIA Working Paper 115. URL: [https://www.fii.fi/wp-content/uploads/2020/06/wp115\\_chinas-responsibility-for-the-covid-19-pandemic.pdf](https://www.fii.fi/wp-content/uploads/2020/06/wp115_chinas-responsibility-for-the-covid-19-pandemic.pdf).

<sup>4</sup> Ibid. P. 9-10.

## II. INTERNATIONAL SECURITY LAW

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7. It is noted that in order to avoid the need to deal with the disastrous consequences of emergencies, such as the COVID-19 pandemic, States should pay more attention to preventive measures, in particular, those within the framework of the IHR (Articles 5, 13 and Annex A<sup>5</sup>).<sup>6</sup>

8. It is pointed out that the IHR provisions have a number of shortcomings that should be addressed in order to make States more prepared for the next pandemic.<sup>7</sup> These disadvantages include the following:

- lack of quantitative and qualitative parameters of the measures that States undertake to respond promptly and effectively to public health emergencies;<sup>8</sup>
- lack of a detailed strategy to support States with the least developed public health systems in building capacities;
- despite the development of three new tools aimed at identifying the most critical domestic problems of public health systems,<sup>9</sup> they do not constitute an effective response. In this regard, the imperfection of the existing monitoring system is highlighted since the use of these tools depends on the will of States to cooperate with the WHO. In addition, the effectiveness of the mechanism is negatively affected by States' freedom to self-assess their actions in the light of compliance with the IHR.<sup>10</sup>

9. It is suggested that measures to prevent emergencies such as pandemics should also be based on the provisions of the Sendai Framework for Disaster Risk Reduction 2015-2030.<sup>11</sup> In particular, it is essential to assess the level of the preparedness of economic and financial systems at the national and international levels for a pandemic and its consequences in order to prevent and address the negative consequences of the spread of viral infection. In addition, it is necessary to determine whether preventive and more effective economic, financial, and social measures, taking into account systemic risks, could have eased the burden on health systems and reduced the number of infections.<sup>12</sup>

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<sup>5</sup> See B. Toebes. States' Resilience to Future Health Emergencies: Connecting the Dots between Core Obligations and Core Capacities. ESIL Reflections 9:2. P. 6-8. URL: <https://esil-sedi.eu/esil-reflection-states-resilience-to-future-health-emergencies-connecting-the-dots-between-core-obligations-and-core-capacities/>.

<sup>6</sup> G. Bartolini. Are You Ready for a Pandemic? The International Health Regulations Put to the Test of Their 'Core Capacity Requirements'. URL: <https://www.ejiltalk.org/are-you-ready-for-a-pandemic-the-international-health-regulations-put-to-the-test-of-their-core-capacity-requirements/>.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Those instruments are the following: simulation exercises for outbreaks and public health emergencies (URL: <https://apps.who.int/iris/bitstream/handle/10665/254741/WHO-WHE-CPI-2017.10-eng.pdf?sequence=1&isAllowed=y>), the Guidance for after Reaction Review (URL: <https://extranet.who.int/iris/restricted/bitstream/handle/10665/311537/WHO-WHE-CPI-2019.4-eng.pdf;jsessionid=11BC34B2F4E3FD52C900F2F46F19B4F8?sequence=1>), and the Joint External Evaluation that provides for independent assessments of progress made toward achieving the targets under Annex 1 IHR (URL: <https://www.who.int/ihr/procedures/mission-reports/en/>).

<sup>11</sup> G. Bartolini. Op. cit.

<sup>12</sup> M. Toscano-Rivalta. Disaster risk reduction in light of the COVID-19 crisis: Policy and legal considerations. 2 QIL 70 (2020). P. 39, 41-42. URL: [http://www.qil-qdi.org/wp-content/uploads/2020/06/04\\_COVID-Impact-on-UN-Setting\\_TOSCANO-RIVALTA\\_FIN.pdf](http://www.qil-qdi.org/wp-content/uploads/2020/06/04_COVID-Impact-on-UN-Setting_TOSCANO-RIVALTA_FIN.pdf).

10. As in the publications included in the overview of May 28, 2020,<sup>13</sup> attention is paid to the issues of cooperation between States and the WHO in the field of public health. It is suggested that the lack of cooperation between States in the fight against the pandemic is related to the above-mentioned monitoring system (**para. 8**), which involves a dialogue between the WHO and government officials but excludes consultations with civil society and non-governmental organizations.<sup>14</sup> It is noted that the focus of the WHO governance structure exclusively on States and the limited external accountability of both the WHO and member States do not allow the international community to cooperate in the fight against COVID-19.<sup>15</sup> In this regard, the emphasis is placed on the need for inclusive participation of various actors in the fight against the pandemic,<sup>16</sup> and the idea of creating a Committee C in the structure of the World Health Assembly is put forward. Such a committee would facilitate a constructive discussion of major health initiatives, allow various actors to present and share their achievements at the international level, and address coordination challenges in this area.<sup>17</sup>

11. It is well-known that in the mid-February 2020, 47 States closed their borders, denying entry to people who came from China or transited through it.<sup>18</sup> In this regard, it is suggested that such actions have ignored the recommendations of the WHO against travel bans.<sup>19</sup> However, it is noted that Article 43 of the IHR leaves space for States to take actions that go beyond those recommended by the WHO and are aimed at achieving the same or greater levels of health protection than WHO recommendations.<sup>20</sup> However, States' decisions and measures should be based on scientific evidence, the level of sufficiency of which is not defined in the IHR. In order to better understand how the IHR may function in relation to border closures, it is proposed to consider their provisions in the light of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures<sup>21</sup> that confirms the thesis that States can close their borders in the event of global public health emergencies.<sup>22</sup>

12. The ability of States to make their own decisions in the field of public health is seen necessary since there are currently many problems with the implementation of the IHR in practice.<sup>23</sup> Meanwhile, special attention is drawn to the critical importance of following the procedure and requirements of the IHR by the WHO when declaring a public health emergency of international concern, which were not followed during the COVID-19 outbreak.<sup>24</sup> Deviation from the established procedure resulted in the delay of such an announcement. As a result, time was lost to start taking pre-emptive action to effectively address the spread of the virus, which raises the question of the need to establish a time frame for the WHO Director-General to make a decision of declaring an emergency of international concern and making appropriate recommendations.<sup>25</sup>

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<sup>13</sup> International and Comparative Law Research Center. COVID-19 and International Law. Overview of publications. Issue 2. P. 10, paras. 19-20. URL: [http://icirc.ru/files/pages/research/papers/ICLRC\\_COVID-19-and-International-Law-Issue-2-ENG.pdf](http://icirc.ru/files/pages/research/papers/ICLRC_COVID-19-and-International-Law-Issue-2-ENG.pdf).

<sup>14</sup> T.L. Lee. Why the WHO is failing and how to fix it. URL: <https://www.ejiltalk.org/why-the-who-is-failing-and-how-to-fix-it/>.

<sup>15</sup> Ibid.

<sup>16</sup> See J.A. Lorenzo. To sue or not to sue. URL: <https://voelkerrechtsblog.org/to-sue-or-not-to-sue/>.

<sup>17</sup> T.L. Lee. Op. cit.; see also G. Silberschmidt, D. Matheson, I. Kickbusch. Creating a committee C of the World Health Assembly. The Lancet. URL: [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(08\)60634-0/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(08)60634-0/fulltext).

<sup>18</sup> C. Foster. Justified Border Closures do not violate the International Health Regulations 2005. URL: <https://www.ejiltalk.org/justified-border-closures-do-not-violate-the-international-health-regulations-2005/>.

<sup>19</sup> R. Habibi, G.L. Burci et al. Do not violate the International Health Regulations during the COVID-19 outbreak. URL: [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30373-1/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30373-1/fulltext).

<sup>20</sup> C. Foster. Op. cit.

<sup>21</sup> The emphasis is placed on Article 5.7 of the Agreement that states: "[i]n cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members."

<sup>22</sup> C. Foster. Op. cit.

<sup>23</sup> C.F. Lo. The Missing Operational Components of the IHR (2005) from the Experience of Handling the Outbreak of COVID-19: Precaution, Independence, Transparency and Universality. Asian Journal of WTO and International Health Law and Policy 15:1. P. 4. URL: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3563370](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3563370).

<sup>24</sup> Ibid. P. 9-10.

<sup>25</sup> Ibid. P. 12-14.

13. In view of the perceived inability of a number of international organizations to take effective action in the midst of the pandemic,<sup>26</sup> the following questions are being considered: can the organization's mandate impose legal obligations on it and can its failure to comply entail accountability?<sup>27</sup> It is noted that, for example, the relevant wording of the UN Charter and the WHO Charter does not explicitly establish specific obligations to take action in connection with the spread of the virus. Therefore, in order to determine their existence and content, the specific competencies of those organizations or their bodies should be considered.<sup>28</sup> In addition, it is stated that it is difficult to assess the extent of their accountability since each international organization decides for itself whether the situation requires mandatory action and determines the measures it takes. However, the failure of the organization to act in accordance with its mandate concerns also States parties that have obligations both under constituent treaties (for example, obligations to pay contributions<sup>29</sup>) and general international law (for example, taking measures to enable the organization to fulfill its obligations<sup>30</sup>).<sup>31</sup>

14. It is noted that the COVID-19 pandemic and its consequences have exposed shortcomings in the legal framework and the governance structure for infectious diseases to protect global public health.<sup>32</sup> In particular, the WHO finds itself in a situation that requires it to balance global public health issues, including the need to serve as the world's authority in the fight against infectious diseases, on the one hand, and caution in criticizing member States on which the organization's financial resources depend, on the other.<sup>33</sup> The latter explains the WHO's reluctance to use its implied powers to monitor States' compliance with their human rights obligations during pandemics under the IHR.<sup>34</sup>

15. It is suggested that the COVID-19 disaster has demonstrated that it is time to rethink the future of infectious disease management.<sup>35</sup> It is proposed to consider the need for a coordinated international response from relevant organizations within and outside the UN system.<sup>36</sup> It is emphasized that the WHO has neither the legal and political authority nor the technical capacity to deal with the economic and/or social consequences of devastating global pandemics alone. In this regard, an effective response to the pandemic requires the WHO to engage in multisectoral

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<sup>26</sup> See, e.g., C. D. Gaver, N. Perera. COVID-19 Symposium: Will the UN Security Council Act on COVID-19? URL: <http://opiniojuris.org/2020/04/04/covid-19-symposium-will-the-un-security-council-act-on-covid-19/>; The Guardian. The WHO v. coronavirus: why it can't handle the pandemic. URL: <https://www.theguardian.com/news/2020/apr/10/world-health-organization-who-v-coronavirus-why-it-cant-handle-pandemic>.

<sup>27</sup> L. Gasbarri. The Failure to Pursue the Mandates of International Organizations in the Midst of the COVID-19 Pandemic. URL: <https://www.ejiltalk.org/the-failure-to-pursue-the-mandates-of-international-organizations-in-the-midst-of-the-covid-19-pandemic/>.

<sup>28</sup> Ibid.

<sup>29</sup> G.L. Burci. The USA and the World Health Organization: What has President Trump actually decided and what are its consequences? URL: <https://www.ejiltalk.org/the-usa-and-the-world-health-organization-what-has-president-trump-actually-decided-and-what-are-its-consequences/>.

<sup>30</sup> International Law Commission. Draft articles on the responsibility of international organizations. ILC Report, A/66/10, 2011. URL: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf).

<sup>31</sup> G.L. Burci. Op. cit.

<sup>32</sup> A.L. Taylor, R. Habibi. The Collapse of Global Cooperation under the WHO International Health Regulations at the Outset of COVID-19: Sculpting the Future of Global Health Governance. URL: <https://www.asil.org/insights/volume/24/issue/15/collapse-global-cooperation-under-who-international-health-regulations>.

<sup>33</sup> Ibid; see also C.F. Lo. P. 11-12. Op. cit.

<sup>34</sup> R.M. Essawy. The WHO: The Guardian of Human Rights during Pandemics? URL: <https://www.ejiltalk.org/the-who-the-guardian-of-human-rights-during-pandemics/>. The existence of such powers is justified by the Advisory Opinion by the International Court of Justice on Reparation for Injuries Suffered in the Service of the United Nations of 1949 that noted: "[u]nder international law, that organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."

<sup>35</sup> For the WHO's criticism see, e.g., D.P. Fidler. The World Health Organization and Pandemic Politics. URL: <https://www.thinkglobalhealth.org/article/world-health-organization-and-pandemic-politics>; A. Mehta, S. Ajmera. World Health Organisation: Is it the Right Shield against Covid-19? URL: <https://silpnujs.wordpress.com/2020/06/06/world-health-organisation-is-it-the-right-shield-against-covid-19/>.

<sup>36</sup> A.L. Taylor, R. Habibi. Op. cit.

collaboration with a range of agencies each working within its own mandate. These institutions include, among others, the International Monetary Fund, World Bank, United Nations High Commissioner for Refugees, Office of the United Nations High Commissioner for Human Rights, and others.<sup>37</sup>

16. The lack of cooperation at the proper level was one of the reasons for the proposal to introduce a number of amendments to the IHR. In particular, it is proposed to amend paragraph 5 of Article 12 of the Rules as follows:

*“Upon declaration of a public health emergency of international concern, the Director-General shall notify relevant intergovernmental organizations of the determination together with relevant factual information and rationale, and seek consultation with them, as appropriate, in issuing recommendations to States Parties in accordance with Article 15. When requested, the Director-General may issue to other intergovernmental organizations an opinion on the nature and urgency of the public health emergency of international concern.”<sup>38</sup>*

17. The problem of fragmentation of international law that has emerged in practice has also led to proposals for amendments to the IHR. In particular, it is noted that the IHR, on the one hand, stipulates that other treaties and agreements are not affected by it, and States must comply with the rules and regulations contained in other treaties and agreements. On the other, the IHR contains a provision on the sovereign right of all States to legislate and to implement their health policies. Such provisions put States at a standstill in a situation like a pandemic, when they have to deal with a wide range of potentially conflicting obligations under various treaties and agreements.<sup>39</sup>

18. In addition, the idea of adopting a new universal treaty to deal with a global emergency, which would follow the model of the Antarctic Treaty of 1959, is being put forward.<sup>40</sup> In this context, the high level of international cooperation within the framework of this Treaty is indicated, which is carried out through the exchange of information, observations, and freely available results. The significance of the legal definition of the concept of “humanity” in the Treaty that refers in its content to solidarity and recognition of rights common to all human beings, such as the right to health, is particularly emphasized.<sup>41</sup> The inclusion of these provisions in the new treaty would give some certainty to the process of information exchange between States, reduce the level of distrust between them, and strengthen international cooperation in the fight against pandemics.<sup>42</sup>

19. In addition to the cooperation between the WHO and other international organizations, attention is also paid to the need for global cooperation among States in the field of security. In particular, three directions are highlighted:

- cooperation to ensure both global and domestic human security. Examples of that include mandatory collaboration during the COVID-19 vaccination campaign, transparency in research, and creation of a full-fledged platform for collaboration among doctors, scientists, and laboratories;

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<sup>37</sup> Ibid.

<sup>38</sup> J. Lee. IHR 2005 in the Coronavirus Pandemic: A Need for a New Instrument to Overcome Fragmentation? URL: <https://www.asil.org/insights/volume/24/issue/16/ihr-2005-coronavirus-pandemic-need-new-instrument-overcome-fragmentation>.

<sup>39</sup> Ibid. In view of those shortcomings, it is also proposed to amend Articles 3, 17, 49, 57 of the IHR.

<sup>40</sup> A. Spedaletti. The subjects of Public International Law and Covid-19 in G.L. Gardini. *The world before and after Covid-19: Intellectual reflections on politics, diplomacy and international relations*. P. 46. URL: [https://www.ieeiweb.eu/wp-content/uploads/2020/06/Full\\_book\\_FINAL\\_EN2.0-UNIDO.pdf](https://www.ieeiweb.eu/wp-content/uploads/2020/06/Full_book_FINAL_EN2.0-UNIDO.pdf).

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

- coordination of the international community's efforts in the field of law enforcement – countering terrorism and crime in the digital space;
- ensuring the sustainable and safe functioning of the world economy and national economies.<sup>43</sup>

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<sup>43</sup> Д. Медведев. Сотрудничество в сфере безопасности в период пандемии нового коронавируса. URL: <https://globalaffairs.ru/articles/bezopasnost-v-period-pandemii/>.

### III. INTERNATIONAL HUMAN RIGHTS LAW

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20. It is noted that the COVID-19 pandemic and measures taken by States to combat the spread of the virus have made humanity think again about the problem of determining and maintaining a balance between individual human rights and the demands of a society to a State, for example, such as securing a safe environment for each person within the State.<sup>44</sup>

21. In the context of individual human rights, the commission of cyberattacks is considered. It is emphasized that cyberattacks committed against health care systems of individual States can cause irreparable harm to people's lives and health. This conclusion is made along with the fact that such cyberattacks are also legally qualified as an infringement on state sovereignty or as a violation of the prohibitions on interference in domestic affairs of the other States and use of force.<sup>45</sup>

22. It is suggested that if a State, by conducting cyber operations, knowingly and intentionally increases the risk that the population will be exposed to the virus, or hinders effective treatment, then its actions may be qualified as a violation of the prohibition of arbitrary deprivation of life.<sup>46</sup> This position applies both to cyber operations affecting individuals within the State's own territory and to situations where such operations are deployed extraterritorially since in the latter case the negative obligation of States to respect the rights to life and health applies outside its territory as well.<sup>47</sup>

23. Under the concept of due diligence, States should take all possible measures to prevent cyber operations against their health systems that reduce the ability of private or public health facilities to treat patients with COVID-19 and pose a threat of harm to human life or health. In this regard, it does not matter whether such a cyberattack comes from a non-State actor or another State.<sup>48</sup>

24. Public disinformation campaigns ranging from downplaying the dangers of COVID-19 (for example, in Brazil) to denying the existence of a virus or, at least, its ability to be transmitted (for example, in Nicaragua and Turkmenistan) have raised some questions about their impact on human rights.<sup>49</sup> It is emphasized that State agents that systematically distribute false information and prevent the population from gaining access to accurate information violate the human right to seek and receive information that is an integral part of freedom of expression.<sup>50</sup> In addition, the dissemination of misinformation that directly affects human health or exposes people to increased risks is a violation of the State's obligation to respect and protect the rights to life and health.<sup>51</sup>

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<sup>44</sup> S.L. Karamanian. Rights in the time of COVID-19. URL: <https://www.thepeninsulaqatar.com/article/25/05/2020/Rights-in-the-time-of-COVID-19>.

<sup>45</sup> M. Milanovic, M.N. Schmitt. Cyber Attacks and Cyber (Mis)information Operations during a Pandemic. *Journal of National Security Law & Policy* (Forthcoming). May 27, 2020. P. 12. URL: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3612019](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3612019); see also *International and Comparative Law Research Center. COVID-19 and International Law. Overview of publications. Issue 2. P. 9, paras. 16-18.* URL: [http://iclr.ru/files/pages/research/papers/ICLRC\\_COVID-19-and-International-Law-Issue-2-ENG.pdf](http://iclr.ru/files/pages/research/papers/ICLRC_COVID-19-and-International-Law-Issue-2-ENG.pdf).

<sup>46</sup> M. Milanovic, M.N. Schmitt. *Op. cit.* P. 13.

<sup>47</sup> *Ibid.* P. 16.

<sup>48</sup> *Ibid.* P. 21.

<sup>49</sup> *Ibid.* P. 17; see also R. Bani-Hashemi, D. Dapaah-Afriyie, A. Levine, J. Li. What's the Cure? Misinformation and Platform Responses in the Era of COVID-19. P. 8-9. URL: [https://cyber.harvard.edu/sites/default/files/2020-06/What%27s%20the%20Cure\\_%20Misinformation%20%26%20Platform%20Responses%20in%20the%20Era%20of%20COVID-19%20%281%29.pdf](https://cyber.harvard.edu/sites/default/files/2020-06/What%27s%20the%20Cure_%20Misinformation%20%26%20Platform%20Responses%20in%20the%20Era%20of%20COVID-19%20%281%29.pdf).

<sup>50</sup> *Ibid.* P. 18.

<sup>51</sup> *Ibid.*

25. Measures taken in response to the COVID-19 pandemic have resulted in restrictions on various rights,<sup>52</sup> including the right to a fair trial. It is indicated that in most countries, including Russia, such restrictions cannot be considered just since no state of emergency has been declared and no derogation from the relevant obligation under the International Covenant on Civil and Political Rights (hereinafter, “**ICCPR**”) and/or the Convention for the Protection of Human Rights and Fundamental Freedoms has been announced.<sup>53</sup> It is suggested that the right to a fair trial in Russia has been subject to the following restrictions:

- 1) impossibility of confidential communication between a lawyer and a client since it now takes place in the presence of investigators or through the glass and on the phone which is monitored by the administration of the place of deprivation of liberty;
- 2) ignoring the lawyers’ need in personal protective equipment when they visit the police, courts, places of detention for the purposes of participation in investigative actions, court hearings or meetings with clients;
- 3) the violation of the principle of transparency when conducting court sessions via videoconference (the courts do not allow either journalists or ordinary listeners to enter, and recordings of video broadcasts are not available for public access).<sup>54</sup>

26. In an attempt to prevent further COVID-19 infections, Samoa<sup>55</sup> and India<sup>56</sup> denied entry to both their citizens and other individuals, sparking a discussion about a possible violation of the right to freedom of movement under Article 12 of the ICCPR. It is emphasized that even in times of emergency caused by a pandemic, a State party cannot interfere with a person’s right to enter his/her own country, since other alternatives and proportionate measures exist, such as screening on entry, close monitoring for 14 days after arrival, and, if necessary, isolation and quarantine.<sup>57</sup>

27. The view is expressed that in the context of the pandemic, the growing lack of respect for human rights by large corporations is of great concern.<sup>58</sup> It is noted that COVID-19 and its economic consequences have increased the risk of the negative impact of corporate decisions on the workers’ and communities’ rights.<sup>59</sup> In this regard, it is highlighted that enterprises should exercise due diligence in identifying, preventing, mitigating, and eliminating adverse human rights consequences that arise as a result of their operations and in all supply chains and product creation.<sup>60</sup> For example, businesses are required to provide appropriate working conditions to

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<sup>52</sup> See A. Spadaro. COVID-19: Testing the Limits of Human Rights. *European Journal of Risk Regulation*. Vol. 11:2. URL: <https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/covid19-testing-the-limits-of-human-rights/DED8334F9C1D793ACDB43054A2A9F19C>; S. Joseph. COVID-19 and Human Rights: Past, Present and Future. Griffith Law School Research Paper No. 20-3. URL: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3574491](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3574491).

<sup>53</sup> O. Старцева. Право на справедливый суд в условиях пандемии COVID-19 в России. URL: <https://legal-dialogue.org/ru/the-right-to-a-fair-trial-in-the-context-of-covid-19-in-russia>.

<sup>54</sup> Ibid.

<sup>55</sup> See S. Retzlaff. Eight Samoan Nationals Denied Entry at Faleolo Airport. URL: <https://samoaglobalnews.com/eight-samoan-nationals-denied-entry-at-faleolo-airport/>.

<sup>56</sup> See ET Bureau. Now, India bans entry of Indians from EU, Turkey and UK. URL: <https://economictimes.indiatimes.com/news/politics-and-nation/government-prohibits-entry-of-passengers-from-eu-turkey-uk-from-march-18/articleshow/74657194.cms>.

<sup>57</sup> R. Martha, S. Bailey. The right to enter his or her own country. URL: <https://www.ejiltalk.org/the-right-to-enter-his-or-her-own-country/>; see also J.P. Hernández. COVID-19: The legality of travel restrictions under international law. URL: <https://treatyexaminer.com/covid-19-travel-restrictions/>.

<sup>58</sup> S.B. Traore. Every Cloud Has a Silver Lining: COVID-19 as a Catalyst for Human Rights in Business. URL: <https://opiniojuris.org/2020/05/31/every-cloud-has-a-silver-lining-covid-19-as-a-catalyst-for-human-rights-in-business/>.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid. For a more detailed analysis of companies’ human rights compliance during the pandemic, see S. Tripathi. Companies, COVID-19 and Respect for Human Rights. *Business and Human Rights Journal*. URL: <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/companies-covid19-and-respect-for-human-rights/DFB12D160787100AC5EFFC1A8E8A08A5>.

reduce the risk of infection with the virus, including water for regular hand washing to prevent the spread of COVID-19.<sup>61</sup>

28. Since the outbreak of the COVID-19 infection, there has been an increase in xenophobia among inhabitants of Western States.<sup>62</sup> In addition, there is a more frequent resort to racial stereotypes in relation to Asian people,<sup>63</sup> who are called responsible for the emergence of the virus,<sup>64</sup> and residents of the African continent, who are offered to be subject to vaccines against COVID-19 trials.<sup>65</sup> The emergence of this discourse, as noted, demonstrates the prevailing colonialism of the international structure of power and domination.<sup>66</sup>

29. The issue of discrimination is also raised when discussing the proposal to introduce immune passports — digital or physical documents that certify that a person who has had a coronavirus is presumed to be immune to it.<sup>67</sup> It is noted that these passports would make an unjustified distinction between those who can and cannot participate in social and economic activities. However, a perverse incentive to obtain them could cause the desire to be infected with the virus, especially for those who cannot afford not to work, which would eventually exacerbate existing gender, racial, ethnic, and national inequalities.<sup>68</sup>

30. The opposite position is expressed with regard to vaccination certificates which fix information about a person's vaccination against the virus. It is emphasized that under the IHR, States can require travelers to provide vaccination certificates, but this is limited to specific diseases explicitly listed in Annex 7, which currently only includes yellow fever, or to the ones included in WHO recommendations.<sup>69</sup> Once a vaccine is developed, COVID-19 vaccination certificates may be included in the revised WHO recommendations for COVID-19, and its member States could consider revising Annex 7 to the IHR and adding a reference to COVID-19.<sup>70</sup>

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<sup>61</sup> See, e.g., WHO. Getting your workplace ready for COVID-19. P. 2. URL: <https://www.who.int/docs/default-source/coronaviruse/getting-workplace-ready-for-covid-19.pdf>.

<sup>62</sup> S. Shukla. The Viral Blame Game: Need for Elaboration and Implementation of Global Anti-Xenophobic Norms in the times of COVID-19. URL: <https://silpnujs.wordpress.com/2020/06/03/the-viral-blame-game-need-for-elaboration-and-implementation-of-the-global-anti-xenophobic-norms-in-the-times-of-covid-19/>.

<sup>63</sup> B. Gonclaves. Racial violence and COVID-19. URL: <https://voelkerrechtsblog.org/racial-violence-and-covid-19/>.

<sup>64</sup> See, e.g., A. Chiu. Trump has no qualms about calling coronavirus the 'Chinese Virus'. That's a dangerous attitude, experts say. URL: <https://www.washingtonpost.com/nation/2020/03/20/coronavirus-trump-chinese-virus/>.

<sup>65</sup> See, e.g., BBC News. Coronavirus: France racism row over doctors' Africa testing comments. URL: <https://www.bbc.com/news/world-europe-52151722>.

<sup>66</sup> B. Gonclaves. Op. cit.

<sup>67</sup> A.L. Phelan. COVID-19 immunity passports and vaccination certificates: scientific, equitable, and legal challenges. The Lancet. URL: [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31034-5/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31034-5/fulltext).

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

# IV. INTERNATIONAL INVESTMENT LAW

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31. Mechanisms for protecting the interests of investors in the light of the measures taken by States to combat COVID-19 that restrict their activities are continued to be discussed in the context of international investment law. In addition to the grounds for challenging such measures indicated in [the overview of April 28, 2020](#),<sup>71</sup> it is noted that so-called “military” reservations, or reservations about military risks, can also be the ground for claims by investors regarding measures taken by States. Most of these reservations depend on the discretion of a State to compensate investors (only 33% of all investment agreements explicitly grant investors the right to compensation/restitution). In addition, their use directly depends on the remaining provisions of bilateral investment agreements. Along with that, it is suggested that “military” clauses could offer some investors a different, perhaps forgotten, way to protect their interests.<sup>72</sup>

32. With regard to State protection, it is noted that potential investor claims pose a direct threat to the ability of developing countries and the global community as a whole to respond to the COVID-19 pandemic.<sup>73</sup> In this respect, upon consultations with various experts, the International Institute for Sustainable Development has developed a draft Agreement for the coordinated suspension of investor-state dispute settlement with respect to COVID-19 related measures and disputes.<sup>74</sup> It is suggested that it could immediately impose a moratorium on all arbitration claims by private corporations against governments based on international investment treaties. It is also stated that there should be a permanent restriction on all arbitration claims related to government measures taken to combat the consequences of the pandemic in the medical, economic, and social fields.<sup>75</sup>

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<sup>71</sup> International and Comparative Law Research Center. COVID-19 and International Law. Overview of publications. P. 18, para. 42. URL: [http://iclr.ru/files/pages/research/papers/ICLRC\\_COVID-19-and-International-Law-Issue-1-ENG.pdf](http://iclr.ru/files/pages/research/papers/ICLRC_COVID-19-and-International-Law-Issue-1-ENG.pdf).

<sup>72</sup> Such reservations are generally applicable not only in situations of armed conflict, but also in other emergencies, such as the pandemic COVID-19, see K.D. Vriese. COVID-19 and ‘War’ Clauses in Investment Treaties: A Breach through the Wall of State Sovereignty? URL: <https://www.ejiltalk.org/covid-19-and-war-clauses-in-investment-treaties-a-breach-through-the-wall-of-state-sovereignty/>.

<sup>73</sup> P. Bloomer, J.P. Bohoslavsky et. al. Call for ISDS Moratorium During COVID-19 Crisis and Response. URL: <http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/>.

<sup>74</sup> International Institute for Sustainable Development. Consultations on a Concerted Response to COVID-19 Related ISDS Risks. URL: <https://www.iisd.org/event/consultations-concerted-response-covid-19-related-isds-risks>; For analysis of this draft Agreement, see B. Heath. Suspending Investor-State Arbitration During the Pandemic. URL: <https://ielp.worldtradelaw.net/2020/05/guest-post-suspending-investor-state-arbitration-during-the-pandemic.html>; For criticism of this draft Agreement, see P. Ranjan. Covid-19 and ISDS Moratorium – An Indiscreet Proposal. URL: <http://opiniojuris.org/2020/06/15/covid-19-and-isds-moratorium-an-indiscreet-proposal/>.

<sup>75</sup> P. Bloomer, J.P. Bohoslavsky et. al. Op. cit.; see also A. Arcuri, F. Violi, S. Paulini, S. Triefus. Investment Law in Corona Times: How Myths Fuel Injustice. URL: <https://verfassungsblog.de/investment-law-in-corona-times-how-myths-fuel-injustice/>.

## V. THE LAW OF THE WTO

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33. Within the framework of intellectual property law, special attention is paid to possible difficulties associated with the production and distribution of an eventual COVID-19 vaccine.<sup>76</sup> It is suggested that in order to overcome them, compulsory licensing should be used. It is stated that through such licenses the government allows any private enterprise to produce a patented product without the consent of the patent owner, which contributes to the rapid distribution of potentially vital pharmaceuticals within a State.<sup>77</sup> It is noted that Article 31 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter, “**TRIPS**”) provides for mandatory licensing under certain conditions.<sup>78</sup>

34. In addition, the possibility of using this regime for countries with insufficient research and production capacity for the development of pharmaceuticals and a COVID-19 vaccine is also being considered.<sup>79</sup> It is emphasized that in accordance with paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health of 2001, WTO members who have insufficient or no production capacity in the pharmaceutical sector can receive copies of pharmaceutical products produced under compulsory licenses in other countries, if necessary.<sup>80</sup> In this regard, there is a great potential for compulsory licensing<sup>81</sup> as a tool to ensure global access to the COVID-19 vaccine.<sup>82</sup>

35. In addition to ways to distribute the vaccine, attention is also paid to the need to liberalize trade in medicines and medical supplies. It is pointed out that the WTO Pharmaceutical Tariff Elimination Agreement of 1994, with only 20 members of the WTO being participants, could be used as a regulatory basis for such a liberalization. To successfully achieve that goal, the Agreement requires a number of additions.<sup>83</sup> In particular, it should include medical devices and personal protective equipment, and the list of participating countries importing goods covered by this agreement should be expanded. In addition, consideration should be given to expanding the scope of the Agreement in the areas of export restrictions,<sup>84</sup> non-tariff barriers, and services.<sup>85</sup> Taking these provisions into account would be extremely useful both from the point of view of public health in general and in the event of subsequent waves of COVID-19 or similar viral infections.<sup>86</sup>

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<sup>76</sup> G.S. Escamilla. Compulsory licensing of a COVID-19 vaccine: Ensuring global access. URL: <https://www.tradeexperettes.org/corona>; L. Tonti. COVID-19: Walking the Tightrope of Vaccination Obligations. URL: <https://verfassungsblog.de/covid-19-walking-the-tightrope-of-vaccination-obligations/>.

<sup>77</sup> G.S. Escamilla. Op. cit.

<sup>78</sup> See WTO. Agreement on Trade-Related Aspects of Intellectual Property Rights. Arts. 31 and 31bis. URL: <http://base.garant.ru/4059989/>.

<sup>79</sup> G.S. Escamilla. Op. cit.

<sup>80</sup> This amendment to TRIPS entered into force on January 23, 2017. See WTO. Annex to TRIPS. URL: <https://base.garant.ru/4059989/53f89421bbdaf741eb2d1ecc4ddb4c33/>.

<sup>81</sup> International and Comparative Law Research Center. COVID-19 and International Law. Overview of publications. P. 19, para. 46. URL: [http://ictrc.ru/files/pages/research/papers/ICLRC\\_COVID-19-and-International-Law-Issue-1-ENG.pdf](http://ictrc.ru/files/pages/research/papers/ICLRC_COVID-19-and-International-Law-Issue-1-ENG.pdf).

<sup>82</sup> G.S. Escamilla. Op. cit.

<sup>83</sup> I. Berglund. An Ambitious Agenda on Trade and Multilateralism is Needed for the Recovery of the Global Economy. URL: <https://www.tradeexperettes.org/corona>.

<sup>84</sup> See S.J. Evenett, L.A. Winters. A Trade Bargain to Secure Supplies of Medical Goods: Preparing for a Second Wave of COVID-19. URL: <https://www.globaltradealert.org/reports/52>.

<sup>85</sup> I. Berglund. Op. cit.

<sup>86</sup> Ibid.

36. It is noted that in order to restore national economies after the pandemic, the efforts of countries should be aimed at enhancing multilateral cooperation in the field of trade that should go beyond the promotion of trade in medicines and medical supplies.<sup>87</sup> Attention is drawn to the fact that the WTO reform is necessary for more effective cooperation that meets the needs of modern realities. It is seen important to maintain the WTO dispute settlement system, while possible areas of reform should include the development of international standards for digital trade and the negotiation of new rules, in particular, in areas such as investment, and industrial subsidies.<sup>88</sup>

37. The recovery of States' economies after the pandemic is also viewed through the lens of the WTO Agreement on Trade Facilitation and reforms of national rules and procedures in this area related to its implementation. They are aimed at simplifying the rules and procedures for importing and exporting the most important medical products, eliminating supply chain disruptions, and preparing the global economy for business resumption.<sup>89</sup> Such reforms include measures intended to promote the swift release and clearance of goods (for example, pre-arrival processing when importers begin the process of clearing their goods through customs even before the products arrive at the point of entry), as well as extended trade facilitation benefits for authorized economic operators (trusted traders) that may include low requirements for product and document inspection and deferred payment of duties, taxes, and charges.<sup>90</sup> It is noted that changes to national rules and procedures that optimize processes, reduce costs, take full advantage of technology, and promote transparency and cooperation play an important role in streamlining trade and providing a good basis for economic recovery in the near future.<sup>91</sup>

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> L. Griffin. Trade Facilitation and the Response to COVID-19: An Update on the WTO Trade Facilitation Agreement. URL: <https://www.tradeexpertes.org/corona>.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

