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## THE PERILS OF PANDEMIC EXCEPTIONALISM

By Julian Arato, \* Kathleen Claussen, \*\* and J. Benton Heath†

### ABSTRACT

*In response to the pandemic, most states have enacted special measures to protect national economies and public health. Many of these measures would likely violate trade and investment disciplines unless they qualify for one of several exceptions. This Essay examines the structural implications of widespread anticipated defenses premised on the idea of “exceptionalism.” It argues that the pandemic reveals the structural weakness of the exceptions-oriented paradigm of justification in international economic law.*

### I. INTRODUCTION

The COVID-19 pandemic erupted at a moment when systems of international economic and political cooperation were breaking down.<sup>1</sup> Predictably, the Trump administration responded to the disease by declaring, “It’s got to be America first.”<sup>2</sup> But the United States was not alone in turning inward. Governments worldwide took steps to restrict exports of medicines and medical equipment, close borders, and otherwise privilege domestic industry.

Many of these national responses to the virus implicate treaty commitments to liberalize the cross-border movement of goods and services and to protect the property and commercial rights of foreigners. As of this writing, it is too early to tell which measures will lead to trade and investment disputes—but states are clearly exposed. Some disruptions to commerce, while severe, have been widely recognized as necessary and appropriate pandemic responses, at least for now.<sup>3</sup> Others, like export controls on critical medical equipment, are more controversial, with some arguing that they will hurt, rather than help, the response.<sup>4</sup> And there is increasing concern among businesses that even widely accepted policies, like quarantines, are being “politicized.”<sup>5</sup>

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<sup>1</sup> G. John Ikenberry & Charles A. Kupchan, *Global Distancing*, WASH. POST (May 21, 2020).

<sup>2</sup> Franco Ordoñez, *Trump Pushes “America First” Approach to Boost Medical Stockpile*, NPR (May 14, 2020).

<sup>3</sup> See, e.g., World Health Organization (WHO), *Responding to Community Spread of COVID-19* (Mar. 7, 2020) (recommending that states consider workplace closures and other distancing measures).

<sup>4</sup> Chad P. Bown, *Trump’s Curbs on Exports of Medical Gear Put Americans and Others at Risk*, PETERSON INST. INT’L ECON. (Apr. 9, 2020).

<sup>5</sup> *Global Airlines Slam Tit-for-Tat Quarantine Rules*, REUTERS (May 26, 2020).

As the pandemic response and recovery continue, the likelihood of treaty challenges grows. Already practitioners are openly exploring which COVID-19-related measures might give rise to claims.<sup>6</sup> A central legal question will be whether national pandemic response measures can be justified by reference to exceptions in trade and investment law for public health, national security, or other covered interests.<sup>7</sup>

This Essay considers the implications of widespread invocations of exceptions in pandemic-triggered litigation. We argue that international economic law's responses to the pandemic are likely to accelerate an already-existing tendency toward *exceptionalism*—a paradigm of justification according to which deviations from primary rules are absolved by way of “exceptions” (express or implied), and in which claims of exception can be expected to proliferate. Yet, the pandemic reveals the weakness of exceptionalism, and the need for a new paradigm of justification in international economic law. After identifying the key rules and exceptions that might apply to states' pandemic responses (Part II), we argue that the pandemic reveals how exceptionalism poses significant risks for the legitimacy and stability of international trade and investment law (Part III). We then explore how various structural changes could better calibrate the relationship between liberalization and other values, and simultaneously help better manage future crises (Part IV).

## II. PANDEMIC RESPONSES AS EXCEPTIONAL MEASURES

Economic policy in response to the pandemic has been a mixed bag of restraints, mandates, and emergency measures. Some of the most widely applied measures include those that are most restrictive for business, such as lockdowns and other compulsory restrictions on business activities. Other measures include the reorganization or nationalization of health care and social service networks, issuance of compulsory licenses for medicines, provision of subsidies to domestic companies, and export controls on medical goods. At the time of writing, at least ninety-five states have put in place 150 or more export restrictions related to medical equipment, food, and other products.<sup>8</sup> Some states have also suspended or cancelled public contracts; revised tax provisions; imposed general restrictions of capital flows; and lowered thresholds for foreign investment screening. These measures have had a domino effect, with some governments responding to other states' restrictions by imposing constraints of their own.

Such measures, even if popular, leave states exposed under existing international economic law regimes. Their legality will likely turn on the application of a limited set of treaty-based and customary exceptions. Bilateral and multilateral trade agreements offer parties numerous avenues to challenge one another's pandemic responses. Under the auspices of the World Trade Organization (WTO), a member may challenge another's pandemic response for running afoul of prohibitions on discriminatory treatment, restrictions on freedom of transit, or import and export restrictions, under the General Agreement on Tariffs and Trade (GATT)

<sup>6</sup> Caroline Simson, *COVID-19 Claims May Test Tribunals with Thorny Questions*, LAW360 (Apr. 30, 2020).

<sup>7</sup> *Id.*

<sup>8</sup> 21ST CENTURY TRACKING OF PANDEMIC-ERA TRADE POLICIES IN FOOD AND MEDICAL PRODUCTS, GLOBAL TRADE ALERT (2020).

or General Agreement on Trade in Services.<sup>9</sup> WTO panels generally do not consider regulatory aims when applying these disciplines.<sup>10</sup> A state's justificatory aim is typically relevant only after a *prima facie* violation is established and an exception is in play.<sup>11</sup> Thus, any pandemic-related measure that discriminates among trading partners *de jure* or *de facto*, or that burdens free transit or imposes export restrictions, would likely have to be justified by reference to some exception.

The GATT and most other major trade agreements provide an omnibus “general exceptions” provision, along with additional exceptions to specific obligations.<sup>12</sup> For example, GATT Article XX allows states to take measures necessary to protect human life or health, to conserve natural resources, to protect public morals, or to address certain shortages.<sup>13</sup> General exceptions are subject to the overarching requirement that such measures are not arbitrarily or unjustifiably discriminatory or otherwise disguised restrictions on international trade.<sup>14</sup> States can also take any measures they consider necessary for the protection of essential security interests, including in time of international emergency.<sup>15</sup> Some WTO members have already relied on these exceptions when notifying their pandemic-responsive measures.

Investment law is also coalescing around a norm/exception framework—often implicitly, through treaty interpretation, and increasingly explicitly in new agreements. Under investment treaties, foreign investors may seek relief from a range of state measures, such as: inadequate compensation for nationalizations or for indirect and regulatory takings;<sup>16</sup> discriminatory treatment on the basis of nationality;<sup>17</sup> breaches of state contracts protected by so-called “umbrella clauses”;<sup>18</sup> or violations of provisions requiring “fair and equitable

<sup>9</sup> General Agreement on Tariffs and Trade, Arts. I, III, V, XI, Oct. 30, 1947, 55 UNTS 194 [hereinafter GATT 1947]; General Agreement on Trade in Services, Arts. II, XVI, XVII, Apr. 15, 1994, 1869 UNTS 183 [hereinafter GATS].

<sup>10</sup> *E.g.*, Appellate Body Report, EC—Measures Prohibiting the Importation and Marketing of Seal Products, paras 5.90, 5.117, WTO Doc. WT/DS400/AB/R (May 22, 2014); Panel Report, China—Measures Related to the Exportation of Various Raw Materials, para. 7.224, WTO Doc. WT/DS394/AB/R (July 5, 2011); *see also* Russia—Measures Concerning Traffic in Transit, para. 7.173, WTO Doc. WT/DS512/R (Apr. 5, 2019).

<sup>11</sup> Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9, 47–48 (2016).

<sup>12</sup> There is a robust literature on exceptions that we do not rehearse here. *See, e.g.*, EXCEPTIONS IN INTERNATIONAL LAW (Lorand Bartels & Federica Paddeu eds., 2020); Tania Voon, *The Security Exception in WTO Law: Entering a New Era*, 113 AJIL UNBOUND 45 (2019); Lorand Bartels, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction*, 109 AJIL 95 (2015); Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AJIL 94 (2002).

<sup>13</sup> GATT 1947, *supra* note 9, Art. XX; *see also* GATS, *supra* note 9, Art. XIV *bis*. The WTO Agreement on Sanitary and Phytosanitary Measures (SPS) provides that *any* health measure that affects trade should be applied “only to the extent necessary to protect human, animal or plant life or health” and should be “based on scientific principles.” Agreement on Sanitary and Phytosanitary Measures, Art. 2.2, 1867 UNTS 493; *see also* Arts. 2.3, 5.6. The SPS Agreement does not follow a rule/exception paradigm. *See* Appellate Body Report, EC—Measures Concerning Meat and Meat Products, para. 104, WTO Docs. WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998). But it follows much of the logic of the GATT Article XX model, and extends that logic to even nondiscriminatory measures.

<sup>14</sup> GATT 1947, *supra* note 9, Art. XX.

<sup>15</sup> *Id.* Art. XXI.

<sup>16</sup> *See generally* Steven R. Ratner, *Regulatory Takings in Institutional Context*, 102 AJIL 475 (2008); RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2d ed. 2012).

<sup>17</sup> *See* Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AJIL 48 (2008).

<sup>18</sup> *See, e.g.*, James Crawford, *Treaty and Contract in Investment Arbitration*, 24 ARB. INT'L 351 (2008).

treatment”—an open-ended term that has been interpreted to impose a range of administrative law-like disciplines on regulatory decision making.<sup>19</sup> Such claims could arise from measures that affect a range of investments, including real property, contract rights, stocks and shares, intellectual property, and sovereign debt.<sup>20</sup> While most older bilateral investment treaties (BITs) do not contain GATT-style general exceptions detailing permissible public policy safety valves, such provisions have appeared in more recent treaties.<sup>21</sup> Many BITs also contain specialized exceptions for state action in circumstances of “public emergency,” to protect “essential security interests,” for “public order,” or sometimes to “protect public health.”<sup>22</sup> Customary international law also permits states to deviate from their treaty obligations in circumstances of necessity or *force majeure*.<sup>23</sup>

The role of exceptions is murkier in investment law than it is in trade law. Because most older investment treaties lack GATT-style general exceptions, one might expect investment tribunals to interpret investment standards flexibly to take account of a state’s circumstances and policy justifications.<sup>24</sup> A few have gone this route.<sup>25</sup> But in practice, the legality of a state’s crisis response has often turned on the application of treaty-based or customary exceptions, rather than on an interpretation of the underlying investment-protection standards.<sup>26</sup> This turn to an exceptions paradigm may accelerate if more states adopt general exceptions provisions in new investment treaties.<sup>27</sup> In this context, it is unsurprising that much of the commentary on investment law and COVID-19 has focused on exceptions.<sup>28</sup>

<sup>19</sup> See GUS VAN HARTEN, *INTERNATIONAL INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 89 (2007).

<sup>20</sup> See, e.g., Julian Arato, *The Private Law Critique of International Investment Law*, 113 AJIL 1 (2019); Stratos Pahis, *BITs and Bonds: The International Law and Economics of Sovereign Debt*, 115 AJIL (forthcoming 2021); Michael Waibel, *Opening Pandora’s Box: Sovereign Bonds in International Arbitration*, 101 AJIL 711 (2007).

<sup>21</sup> Kenneth J. Vandeveld, *Rebalancing Through Exceptions*, 17 LEWIS & CLARK L. REV. 449 (2013); Sungjoon Cho & Jürgen Kurtz, *Convergence and Divergence in International Economic Law and Politics*, 29 EUR. J. INT’L L. 169 (2018).

<sup>22</sup> See, e.g., UN Conference on Trade & Development, *The Protection of National Security in IIAs*, UN Doc. UNCTAD/DIAE/IA/2008/5 (2009).

<sup>23</sup> Kathleen Claussen, Comment, *The Casualty of Investor Protection in Times of Economic Crisis*, 118 YALE L.J. 1545 (2009); see also Alan O. Sykes, *Economic “Necessity” in International Law*, 109 AJIL 296 (2015).

<sup>24</sup> See Cho & Kurtz, *supra* note 21, at 191–92.

<sup>25</sup> See, e.g., Philip Morris v. Uruguay, ICSID Case No. ARB/10/7, Award, paras. 287, 291 (valid exercise of police powers, including protecting public health, cannot be expropriatory), and para. 399 (with respect to fair and equitable treatment, “[t]he responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs . . .”); see also Julian Arato, *The Margin of Appreciation in International Investment Law*, 54 VA. J. INT’L L. 545 (2014).

<sup>26</sup> See, e.g., Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, paras. 161, 263–64 (Sept. 5, 2008) (analyzing Argentina’s measures first under an “essential security” exception and using that analysis to also frame its application of fair and equitable treatment El Paso Energy Int’l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Award, paras. 325, 515, 562 (Oct. 31, 2011) (finding that a nonarbitrary, “reasoned scheme to answer a major crisis” so altered the legal framework that it violated fair and equitable treatment, and had to be justified under a security exception).

<sup>27</sup> See, e.g., Amelia Keene, *The Incorporation and Interpretation of WTO-Style Environmental Exceptions in International Investment Agreements*, 18 J. WORLD TRADE & INV. 62 (2017); cf. Céline Lévesque, *The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy*, in PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 363, 366–67 (Roberto Echandi & Pierre Suavé eds., 2013) (arguing that express exceptions could shrink, rather than expand, states’ discretion).

<sup>28</sup> See, e.g., Federica Paddeu & Kate Parlett, *COVID-19 and Investment Treaty Claims*, KLUWER ARB. BLOG (Mar. 30, 2020), at <http://arbitrationblog.kluwerarbitration.com/2020/03/30/covid-19-and-investment-treaty-claims>.

The application of exceptions in both trade and investment law tends to follow a typical pattern. First, exceptions are only available where the state is pursuing a legitimate regulatory aim, such as the protection of “human . . . health,”<sup>29</sup> “essential security interests,”<sup>30</sup> or other “essential interests.”<sup>31</sup> Second, the measure must have the requisite nexus to this regulatory aim—this might require that it be “reasonably related,” “necessary,” or “the only way” to safeguard that interest. This often entails an inquiry into whether less-restrictive alternatives were available to achieve the state’s purpose. Third, the measure may need to meet overarching requirements of nonarbitrariness, nondiscrimination, or good faith.<sup>32</sup> There are important differences across provisions, treaties, and regimes, but these basic elements are relatively constant.

This Essay is less concerned with charting the nuances of how these rules and exceptions would apply to the array of pandemic measures. Rather, we focus on the consequences of this accelerating turn to exceptions in light of the global pandemic. To be sure, these concerns are speculative: in trade law, for example, it is possible that states simply will not bring cases, either on a “glass house” theory of mutual forbearance, or because the collapse of the WTO Appellate Body leads to a more general turn away from dispute settlement.<sup>33</sup> But we anticipate that claims will come, and that states will rely on exceptions to justify their pursuit of legitimate health policy and economic recovery, as well as self-serving disguised restraints on trade. The next Part examines what a full turn to pandemic exceptionalism could look like and why it matters.

### III. THE EXCEPTIONALISM PARADIGM

A turn to exceptions as the preferred vehicle for justifying COVID-19-related measures is a double-edged sword for international economic law. In the short run, recourse to exceptions provides states with latitude and demonstrates the system’s flexibility. But exceptionalism also threatens to distort and destabilize these regimes in ways that may become untenable. Here, we focus on two such risks—the ossification of underlying rules and the colonizing expansion of international economic law. We argue that these risks call into question the ability of the trade and investment regimes to respond adequately to crises.

#### A. *The Risks of Exceptionalism*

The invocation of exceptions to justify COVID-19 response measures poses two related systemic risks. First, reliance on exceptions reinforces the perception that states’ trade and investment obligations *normally* forbid the kinds of measures taken in response to problems like the pandemic. Justifying pandemic-related measures only through exceptions implies that similar measures would likely violate those same rules under less extreme circumstances.

<sup>29</sup> GATT 1947, *supra* note 9, Art. XX(b).

<sup>30</sup> *Id.* Art. XXI(b).

<sup>31</sup> Responsibility of States for Internationally Wrongful Acts, Art. 25, GA Res. 56/83, Annex (Jan. 28, 2002).

<sup>32</sup> Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, paras. 161–76, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998).

<sup>33</sup> *Revisiting the Multilateral Trading System: Anatomy of the WTO Impasse*, 112 ASIL PROC. 315 (2019).

Exceptionalism thus posits that the existing system of rules and exceptions is sufficiently flexible to handle crises, and need not bend any more than it already does to accommodate governmental interventions into markets.<sup>34</sup> This paradigm may seem well equipped to handle the occasional extraordinary event like the global response to a once-in-a-generation pandemic, but less so new forms of national industrial policy and intervention that emerge from the crisis.<sup>35</sup> And as Timothy Meyer demonstrates elsewhere in this *Agora*, the crisis-orientation of exceptions can make forward-looking preventative regulations difficult to justify.<sup>36</sup> Moreover, exceptionalism could decrease flexibility over time—indeed a consensus that the pandemic represents the archetypal public-health emergency might, over time, suggest that lesser disruptions do not qualify.<sup>37</sup>

Second, the exceptions paradigm tends to expand the disciplinary reach of trade and investment adjudicators, particularly into the realm of health law. The International Health Regulations (IHR)—the key binding international instrument with respect to disease control—share trade and investment law’s normative orientation toward minimizing burdens on international commerce.<sup>38</sup> When quarantine policies or other national health measures exceed WHO recommendations, those measures must not be “more restrictive of international traffic and not more invasive or intrusive to persons . . . than reasonably available alternatives that would achieve the appropriate level of health protection.”<sup>39</sup> This requirement echoes the WTO exceptions paradigm, as well as some tribunals’ interpretations of BIT security exceptions. In the present context, the similar exceptionalist logic of these regimes makes it likely that parties to economic disputes will refer to the IHR, opening the door to tribunals pronouncing on their scope and interpretation.<sup>40</sup> It is questionable whether international economic lawyers have the mandate or expertise to decide difficult and often unresolved issues of global health law—but proliferating invocations of public health exceptions make this difficult to avoid.<sup>41</sup>

In sum, treating COVID-19 responses as exceptional reinforces the perception that competition-distorting policies are per se illegal unless they meet the strictures of treaty-based and customary exceptions where the state bears the burden of persuasion. This is both normatively unsatisfying and a risky legitimization strategy. And the risk is especially pronounced where tribunals appear to overstep their bounds by reaching deep into the domestic regulatory apparatus or across international legal regimes. Even if politically astute tribunals manage to

<sup>34</sup> See Daria Davitti, Jean Ho, Paolo Vargiu & Anil Yilmaz Vastardis, *COVID-19 and the Precarity of International Investment Law*, MEDIUM (May 6, 2020), at <https://medium.com/iel-collective/covid-19-and-the-precarity-of-international-investment-law-c9fc254b3878>.

<sup>35</sup> This view is shared across a range of ideological perspectives. See generally Anthea Roberts & Nicolas Lamp, *Is the Virus Killing Globalization?: There’s No One Answer*, BARRON’S (Mar. 15, 2020).

<sup>36</sup> Timothy Meyer, *Trade Law and Supply Chain Regulation in a Post-COVID World*, 114 AJIL 637 [§ IV.B] (2020).

<sup>37</sup> Cf. *Continental Casualty*, *supra* note 26, para. 180 (stressing that the economic crisis at issue was accompanied by a “real risk of insurrection” and “partial breakdown of political institutions,” implying that other crises may not rise to the same level).

<sup>38</sup> See, e.g., LAWRENCE O. GOSTIN, *GLOBAL HEALTH LAW* 296–97 (2016).

<sup>39</sup> International Health Regulations (2005), Art. 43, May 23, 2005, 2509 UNTS 79 [hereinafter IHR 2005].

<sup>40</sup> Cf. Julien Chaisse, *Both Possible and Improbable: Could COVID-19 Measures Give Rise to Investor-State Disputes?*, 13 CONTEMP. ASIA ARB. J. 99, 165 (2020).

<sup>41</sup> J. Benton Heath, *Suspending Investor-State Arbitration During the Pandemic*, INT’L ECON. L. & POL’Y BLOG (May 12, 2020).

navigate these issues and leave states with plenty of policy space,<sup>42</sup> the normative messaging is troubling.<sup>43</sup>

### B. Extensions and Implications

This is not just a short-term problem. As governments forge divergent paths in the long-term response and recovery from COVID-19, their exposure to trade and investment claims is likely to increase. It is telling that the few reported threats of pandemic-related investor-state claims have not arisen from the types of policies that are being enacted now by nearly every government worldwide, such as lockdown orders. Instead, disputes are more likely to involve idiosyncratic measures—those that are specific to the political economies of the states concerned, or that are controversial even among national legislators and regulators.<sup>44</sup> These are likely to multiply in the post-pandemic recovery, as states take diverging measures to repair their national economies, nationalize industries, or reorganize supply chains. In this recovery phase—which could last for years—defenses based on the existence of an emergency or a public-health crisis will be far more contentious and less clear-cut.

The pandemic may also enshrine exceptionalism as a permanent feature of the system. In prior work, we have charted the ways in which the trade system incorporates a kind of “security exceptionalism,” whereby the rules give way in the face of overriding claims to national security.<sup>45</sup> Historically, these kinds of overriding security claims were rare, in part because preserving and extending the liberal economic order itself was seen as a security imperative.<sup>46</sup> Today, the relationship between security and liberalization is far more contested, even in countries that once championed globalization.<sup>47</sup> At the same time, the liberal economic order is confronting security claims arising from a new generation of threats, including infectious disease and climate change.<sup>48</sup> Most extreme is the emerging narrative that “economic security is national security,”<sup>49</sup> which, if carried to its conclusion, could “create a permanent state of exception” in economic law, “justifying broad protection/protectionist measures across time and space.”<sup>50</sup> The pandemic could accelerate this slide toward permanent exception, as states increasingly consider self-sufficiency to be an overriding security priority.<sup>51</sup>

The slow-moving climate emergency is another area where exceptionalism could soon be put to the test. The climate crisis demands significant regulatory and political interventions, many of which would implicate—and potentially violate—economic treaty law. As the crisis

<sup>42</sup> See, e.g., *Philip Morris v. Uruguay*, *supra* note 25, para. 388 (stressing “. . . the margin of appreciation enjoyed by national regulatory agencies when dealing with public policy determinations”).

<sup>43</sup> Howse, *supra* note 11, at 47.

<sup>44</sup> See, e.g., Cosmo Sanderson, *Peru Hit with Claim by Road Concessionaire*, GLOB. ARB. REV. (June 11, 2020).

<sup>45</sup> Kathleen Claussen, *Trade’s Security Exceptionalism*, 72 STAN. L. REV. 1097 (2020); J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020 (2020); see also JAMES THUO GATHII, *WAR, COMMERCE & INTERNATIONAL LAW* 182 (2009).

<sup>46</sup> BARRY BUZAN, OLE WÆVER & JAAP DE WILDE, *SECURITY: A NEW FRAMEWORK FOR ANALYSIS* 106 (1998).

<sup>47</sup> See generally ROBERT D. BLACKWILL & JENNIFER M. HARRIS, *WAR BY OTHER MEANS* (2016).

<sup>48</sup> See Oona A. Hathaway, *After COVID-19, We Need to Redefine “National Security,”* SLATE (Apr. 7, 2020).

<sup>49</sup> NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, WHITE HOUSE 17–20 (Dec. 2017), *available at* <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

<sup>50</sup> Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Toward a Geoeconomic Order in International Trade and Investment*, 22 J. INT’L ECON. L. 655 (2019).

<sup>51</sup> E.g., Jacob M. Schlesinger, *How the Coronavirus Will Reshape the Trade World*, WALL ST. J. (June 19, 2020).

worsens, governments may be tempted to seek maximum flexibility through broad exceptions for emergencies and national security.<sup>52</sup> Advocates are also exploring legislative fixes to trade and investment treaties to exempt climate measures from some or all economic disciplines. For example, it has been suggested that WTO members adopt a system of “climate waivers” permitting states to adopt nonarbitrary climate policies, consistent with the Paris Agreement, that could otherwise violate trade rules.<sup>53</sup> Similar carve-outs have been proposed for investment treaties.<sup>54</sup> To date, these approaches have not gained significant traction with states,<sup>55</sup> though this could change as the climate crisis becomes more acute.

While well-intentioned, these interventions do not avoid the troubling aspects of the exceptions paradigm. Public policy exceptions, waivers, and carve-outs, no matter how generous, continue to reinforce the view that existing rules are insufficiently flexible or reliable to allow states to confront pressing global problems. Moreover, carve-outs for measures “consistent” with the Paris Agreement effectively empower trade panels and investment tribunals to adjudicate and even interpret states’ obligations under international environmental law.

The exceptionalist approach to threats like COVID-19 and climate change may therefore fail to secure economic law’s legitimacy, and may even further destabilize it. For those who think the existing rule/exception framework is insufficiently flexible, wholesale exit is gaining ground as a viable alternative. In May 2020, the economist Jeffrey Sachs spearheaded a call for a “moratorium” on all investment claims—not just those related to COVID-19—and a permanent bar on claims arising from the pandemic.<sup>56</sup> If this initiative gains traction, it could build support for a more comprehensive withdrawal from investor-state dispute settlement, a move that has many sympathizers among nongovernmental organizations, the academy, and some political leaders,<sup>57</sup> but to date has not gained widespread support from national governments. That same month, U.S. Senator Josh Hawley invoked the pandemic in calling for the United States to withdraw from the WTO and restore U.S. “economic sovereignty.”<sup>58</sup> Proliferating demands for pausing or even exiting international economic agreements underscore a need to reconsider the field across the board.

#### IV. ENHANCING THE HEALTH OF THE SYSTEM

Given the significant risks associated with the present path, a structural reappraisal is urgently needed. Despite the current pressure on the system, structural change is not a foregone conclusion, and we do not presume that it is easily achieved. Multilateral lawmaking on the scale of the WTO was a singular achievement this is not easily replicated, and even

<sup>52</sup> J. Benton Heath, *Trade and Security Among the Ruins*, 30 DUKE J. COMP. & INT’L L. 223 (2020).

<sup>53</sup> James Bacchus, *The Content of a WTO Climate Waiver* (Centre for Int’l Governance Innovation Papers No. 204, Dec. 4, 2018).

<sup>54</sup> Kyla Tienhaara, *Regulatory Chill in a Warming World*, 7 TRANSNAT’L ENVTL. L. 229 (2018).

<sup>55</sup> THE ECONOMIST INTELLIGENCE UNIT, CLIMATE CHANGE AND TRADE AGREEMENTS: FRIENDS OR FOES? 18 (2019).

<sup>56</sup> James Bacchus & Jeffrey Sachs, *Why We Need a Moratorium on Investment Disputes During COVID-19*, HILL (June 9, 2020).

<sup>57</sup> See, e.g., Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015).

<sup>58</sup> Josh Hawley, *The WTO Should Be Abolished*, N.Y. TIMES (May 5, 2020).

bilateral renegotiation of investment treaties can prove difficult.<sup>59</sup> For this reason, we suggest reforms that could be pursued in the near term, without necessarily amending the underlying agreements, along with more structural changes for the medium and long term.

In the near term, actors within the system should reconsider the division of labor between rules and exceptions. Exceptions are not the only way to accommodate extraordinary events like the pandemic—or less urgent, but still legitimate policy goals. Even on current models, key trade and investment rules need not require a preliminary finding of breach prior to considering public policy justifications. A new jurisprudence could focus on identifying space for flexibility within the primary rules themselves—even if this means revisiting settled doctrinal questions. Now may be the time, for example, to resuscitate the view that trade adjudicators should consider regulatory aims (not just effects) when deciding whether a measure discriminates against “like” products or services.<sup>60</sup> In investment law, we should ask whether obligations like fair and equitable treatment ought to impose a blanket and justiciable requirement of reasonableness toward foreign investors, or whether its application should be more limited. Treaty drafters should also consider reframing these obligations, or discarding them entirely, rather than introducing an increasing number of carve-outs and exceptions.<sup>61</sup>

In the medium term, policymakers ought to reconsider their outsized reliance on dispute settlement. Contrary to its intended design, dispute settlement has dominated the further elaboration of norms and rules in trade and investment—to these regimes’ detriment.<sup>62</sup> Already in the context of the Appellate Body crisis, proposals have emerged to recover “institutional balance” between the adjudicatory and legislative arms of trade lawmaking.<sup>63</sup> New models of investment treaties would shift the regime toward diplomatic cooperation and toward maintaining ongoing relationships rather than relying on the threat of investors obtaining *ex post* compensation to discipline host states.<sup>64</sup> Many of these reforms would require treaty amendment, though adjudicators could also contribute by, for example, reviving previously discarded notions of justiciability.<sup>65</sup> Reduced reliance on dispute settlement would entail significant tradeoffs,<sup>66</sup> but the pandemic lays bare the substantial downside to deciding so much of the relationship between liberalized trade and other values through litigation.

<sup>59</sup> There nonetheless appears to be an emerging, if fragile, consensus that the pandemic requires multilateral cooperation. See Extraordinary G20 Leaders’ Summit, Statement on COVID-19, available at [https://g20.org/en/media/Documents/G20\\_Extraordinary%20G20%20Leaders%E2%80%99%20Summit\\_Statement\\_EN%20\(3\).pdf](https://g20.org/en/media/Documents/G20_Extraordinary%20G20%20Leaders%E2%80%99%20Summit_Statement_EN%20(3).pdf).

<sup>60</sup> This approach, though previously rejected by the Appellate Body, is not inconsistent with the treaty text. Appellate Body Report, EC—Measures Affecting Asbestos and Asbestos-Containing Products, para. 154, WTO Doc. WT/DS135/AB/R (Apr. 5, 2001).

<sup>61</sup> See generally SONIA ELISE ROLLAND & DAVID M. TRUBEK, EMERGING POWERS IN THE INTERNATIONAL ECONOMIC ORDER 104–10, 133–35 (2019).

<sup>62</sup> E.g., Kathleen Claussen, *The Other Trade War*, 103 MINN. L. REV. HEADNOTES 1, 13 (2018); Markus Wagner, *The Impending Demise of the WTO Appellate Body: From Centerpiece to Historical Relic?*, in *THE APPELLATE BODY OF THE WTO AND ITS REFORM* 67, 74–78 (Chang-fa Lo, Junji Nakagawa & Tsai-fang Chen eds., 2020).

<sup>63</sup> See, e.g., Robert McDougall, *The Crisis in WTO Dispute Settlement*, 52 J. WORLD TRADE 867 (2018).

<sup>64</sup> E.g., Geraldo Vidigal & Beatriz Stevens, *Brazil’s New Model of Dispute Settlement for Investment*, 19 J. WORLD INV. & TRADE 475 (2018).

<sup>65</sup> Cf. Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT’L L. 733 (1999).

<sup>66</sup> See generally Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AJIL 361 (2018).

Ultimately, the pandemic reveals the need for rethinking the place of economic liberalization in relation to other values in the long term.<sup>67</sup> International economic law today prioritizes trade and investment by treating values like health and environmental protection as “exceptions.”<sup>68</sup> This commerce-first stance is then mirrored in instruments on public health.<sup>69</sup> The pandemic offers an opportunity to imagine what globalization institutions would look like if they had been driven by these “other” values.<sup>70</sup> Consolidating a new vision would involve deep and protracted political struggle, as the failure of the Doha Round underscores. Nevertheless, by revealing the structural weakness of the status quo, the pandemic provides an unprecedented opportunity to develop a truly integrated regime for global health and economic prosperity.

## V. CONCLUSION

The central response of international economic law to this crisis must not be limited to sorting legal from illegal responses on the basis of existing rules and exceptions.<sup>71</sup> Treating the pandemic as a global exception to economic rules carries significant costs, and reveals the vulnerability of international economic law’s paradigm of justification. But it is not too late for states to shift course for the future. By revisiting the primary substantive rules in international economic law, and by re-calibrating away from a reactive model of dispute settlement, our trade and investment institutions may yet serve as sources of strength in times of need.

<sup>67</sup> See generally Harlan Grant Cohen, *What Is International Trade Law For?*, 113 AJIL 326 (2019).

<sup>68</sup> Cho & Kurtz, *supra* note 21, at 183.

<sup>69</sup> See IHR 2005, *supra* note 39, Art. 2.

<sup>70</sup> Dani Rodrik, *Globalisation After COVID-19: My Plan for a Rewired Planet*, PROSPECT (May 4, 2020); cf. Michael Fakhri, *A History of Food Security and Agriculture in International Trade Law, 1945–2017*, in *NEW VOICES AND NEW PERSPECTIVES IN INTERNATIONAL ECONOMIC LAW* 55 (John D. Haskell & Akbar Rasulov eds., 2020) (taking a similar approach to trade and food security).

<sup>71</sup> See Mona Pinchis-Paulsen, *Thinking Creatively and Learning from COVID-19, How the WTO Can Maintain Open Trade on Critical Supplies*, OPINIO JURIS (Apr. 2, 2020).