New (and inevitable) Horizons for International Economic Law: The Aftermath of the 2020 Pandemic

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RESUMEN

El Derecho Internacional Económico (DIE) es una materia cuya fluidez le ha permitido cambiar significantemente a lo largo de los años. El DIE nunca ha sido un sistema rígido y fijo de reglas y, al igual que todas las áreas del Derecho, ha ido fluctuando conforme a las circunstancias socioeconómicas de una determinada época y este factor determinante del DIE le ha permitido adaptarse en el tiempo. Han sido siempre la acción, el pensamiento y la ideología humanas los que construyeron las bases sociales e internacionales para el desarrollo del DIE. La pandemia del 2020 ha sido indudablemente uno de esos eventos que cambiaron drásticamente las circunstancias de una determinada época. La pandemia ha establecido una "nueva normalidad". Sin embargo, es sabido que lo "normal" es un concepto que también fluctúa a lo largo del tiempo y que resulta del consenso de una determinada época. Lo que es normal hoy tal vez no haya sido normal 30 años atrás. Lo que era normal 50 años atrás tal vez no sea normal hoy en día.

No obstante, el DIE parece desconocer este hecho: la mayoría de las instituciones del Derecho Internacional Público han sido creadas dentro de un sistema de

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naciones-Estado organizado hace siglos con el Tratado de Westfalia y abrazando el Multilateralismo. Y aunque el DIE pretenda resolver los problemas internacionales que puedan surgir a través de una visión desfasada, el Multilateralismo no ha resultado ser tan eficiente como se pensaba, especialmente en los esfuerzos internacionales contra la pandemia del Covid-19. Quizás sea necesario algunos ajustes o actualizaciones.

A pesar de la mutabilidad del DIE, la mayoría de los postulados y premisas del Derecho Internacional han sido puestos a prueba con la emergencia de la tecnología como medio de interacción humana a nivel internacional. Esto ha alterado tanto al Derecho Internacional Público como al Derecho Internacional Privado.

Un ejemplo importante es el Arbitraje Comercial Internacional, cuyo marco legal está basado en un Tratado Internacional de los años 50 y cuya Ley Modelo más popular data de los años 80. Tal vez algunas actualizaciones sean convenientes también en este respecto.

La pandemia del año 2020 provocó una rotura sin precedentes en la cadena de contratos a nivel internacional, afectando directamente a la cadena de suministros. Las armas legales para hacer frente a este rompimiento contractual internacional masivo fueron los remedios legales diseñados precisamente para las situaciones de incumplimiento contractual cuando un factor externo ha ocasionado que la obligación contractual resultase demasiado onerosa o de cumplimiento imposible. Estos remedios legales provienen de dos fuentes: el Derecho positivo y el *soft law*. La ausencia de un Derecho positivo uniforme derivó en soluciones legales distintas a un mismo problema de derecho contractual internacional. Y aunque el DIE reconozca la diversidad cultural y sociológica de las diferentes jurisdicciones, aboga por la uniformidad y la previsibilidad.

Esta obra no contiene soluciones mágicas para estos asuntos internacionales: prefiere exponer algunos de los problemas concernientes al porvenir del DIE de una manera objetiva en lugar de la indiferencia actual hacia los mismos.

Palabras clave: Derecho Internacional Económico; Pandemia; Multilateralismo; *Lex arbitrii*; Remedio legal.

ABSTRACT

International Economic Law (IEL) is a fluid topic, and it has changed significantly over the course of years. It has never been a steady system and just as in all fields of the Law, IEL has been fluctuating in response of the social and economic circumstances of a determined period, and this determinant feature has enabled IEL to adapt itself over time. It has always been human action, thoughts and ideology what built the social and international basis for the development of IEL. The 2020 pandemic was certainly one of those events that changed drastically the circumstances of a determined period. It established a "new normality".

Nevertheless, it is understood that what is "normal" is a concept that also fluctuates over time and result from the consensus of a of certain period. What is normal today

has might not be so normal in 30 years. What was normal 50 years ago might not be normal today.

However, IEL seem to disregard this fact: most of the Public International Law institutions have been created within a system of nation-States orchestrated centuries ago with the Westphalian Treaty and praising Multilateralism. And even though IEL pretends to solve the international issues that may arise through an outdated vision, Multilateralism proved not to be as efficient or as consistent as it supposed to be, especially in the transnational battle against COVID-19 pandemic. Adjustments or updates may be conceivable.

Despite IEL mutable conditions, most of the core ideas, assumptions and postulates of International Law has been challenged since the emergence of technology as a medium for international human interaction. This fact altered Public International Law as Private International Law.

One significant example is International Commercial Arbitration, whose legal framework is based on a Treaty from the 50's and whose most popular Model Law of its field comes from the 80's. Perhaps an update is required here too.

The 2020 pandemic provoked an unprecedent break in the international contractual chain, cracking the supply chain worldwide. The legal munitions to face these massive international contractual breaches were the legal remedies designed precisely to deal with contractual underperforming or breach when an external factor rendered the contractual obligation too expensive or simply of impossible performing. These legal remedies came from two sources: from soft law and hard law. The lack of uniform hard law legal remedies resulted in different solutions to a same international contractual problem. And albeit IEL acknowledges the cultural and sociological differences that exist in the distinct domestic jurisdictions, it advocates for uniformity and predictability.

This paper does not provide magical solutions for these problems; it prefers to expose some of these international issues concerning the future of IEL in an objective manner in lieu of the current indifference on them.

Keywords: International Economic Law; Pandemic; Multilateralism; *Lex arbitrii*; Legal Remedy.

INTRODUCTION

Forecasting the shifts of the International Economic Law (IEL) is rather a titanic task. Nevertheless, is not just possible, but imperative to do so. Economic relations around the globe are changing and changing fast (Vargas, 2021).

The 2020 pandemic just accelerated this process and accentuated the emergence of a brand-new framework for concluding economic transactions among citizens. The rise of cryptocurrencies, the more and more regular utilization of the blockchain technology over private transactions and even over the public activities of Sovereign States, the A.I. and its legal challenges, the tech revolution on the financial sector (where the traditional 'doing business' scheme was totally tore apart by the new and

disruptive ways, products, instruments and connecting factors brought together since the early 2000 until nowadays[2]), the so-called uberization of work, the Internet of Things (IoT), the undeniable and objective influence of the social networks in almost every aspects of human life, and particularly in the entire democratic regime (let us not forget of the Cambridge Analytica scandal involved in the 2016 American elections (Chan, n.d.) and the role of Facebook in Brexit).

The shocking part is that all these examples were already existing before the 2020 pandemic, just like "the dramatic environmental degradation and the unacceptable inequalities between the poor and the rich"(Arcuri, 2020). It is indeed a brave new world. But is the law keeping the pace? Is International Economic Law also brave? Is International Economic Law ready to renew itself?

The next pages do not constitute a general (and void) proposal to 'change-everything-in-order-for-not-changing-anything'-kind of critique; this paper aims to really generate some self-consciousness on the IEL system and the real-post-pandemic brave new world.

Therefore, this paper will address the current status of IEL by analyzing some Public International Law (chapter I) and Private International Law (chapter II) situations generated as a consequence of the COVID-19 pandemic.

CHANGES IN PUBLIC INTERNATIONAL LAW AND CHANGES IN PRIVATE INTERNATIONAL LAW. COMPULSORY INSTRUCTIONS FOR A (FORCED) SHIFT IN THE INTERNATIONAL ECONOMIC LAW?

An inescapable reality is that the world has changed; the ways by which domestic corporations conclude international exchanges have changed; the ways multinational corporations settle their international payment has also changed; the relation between the 'average Joe' and a financial Institution is now observed as a consumer relationship, reaching an enormous variety of possibilities (which did not existed before) and helping the 'financial inclusion', the positive and negative impact of the technology in the way physical and legal persons relate with each other, and a lot of etcetera, are just examples of these sometimes gradually, sometimes disruptive, sometimes slow, sometimes violent and unruly winds of change.

But it is not the intention of this paper to expose a unique, 1-size-fits-all solution. Rather it prefers to acknowledge some of these problems and exposing, in a detailed manner, some of the many 'changes' of this brave new world that entailed an impact on IEL[3], in order to lead a proper introspection within the current IEL regime. IEL is

2 Like the Open Banking approach (enabled by big data), considering the value of Application Programming Interfaces (API), and the disruptive breakthrough of other non-banking FinTech companies.

3 The word impact is indeed a very kind and elegant way to avoid saying the objective truth: that some of the legal institutions or legal procedures which are the very foundations of the entire IEL system do not have any logical sense or raison d'être nowadays.

suffering a legitimacy crisis, there is no doubt about it (Arcuri, 2020), but the mere denial (or even worse, the complete avoidance of any debate about the raison d'être of some 'institutions') of this problem (the obsolescence of some of the current 'legal institutions' or 'legal practices' in front of the 2021 reality) can never be a real answer nor a proper solution for this legitimacy crisis.

IEL is a very hard subject to define since it covers a very broad range of topics among the various subjects of International Law (Aksar, 2011). In fact, there is no uniform and homogeneous definition of IEL. Some authors consider that IEL is a branch of International Law (Aksar, 2011); (The Principles and Standards of International Economic Law, n.d.), other authors strongly suggest that IEL is a branch of Public International Law (a less ambitious notion than the precedent one) but without saying so (Sykes, 2005) and some authors directly state that IEL is a branch of Public International Law (International Economic Law, n.d.).

However, it does not really matter whether IEL is just a branch of Public International Law (with elements that compliment that notion, extracted from Private International Law and International Arbitration Law, for example) or a very branch of International Law, combining the elements of Public and Private International Law (like Human Rights, Antitrust, Conflict of Laws, Conflict of Jurisdictions, International Trade Law, Investment Law, International Arbitration, the Lex Mercatoria, International Monetary Law, Intellectual Property Law, etc.).

The common thing among all notions, concepts, and definitions of IEL is the internationality of it. It does not matter if IEL is considered as a branch of International Law, or a sub-branch of Public International Law: the word 'international' is present anyways. Whether systems like International Trade Law or International Financial Law on one hand, or matières such as International Commercial Arbitration or International Contracts Law on the other hand, both enjoy a sine qua non particularity in the legal relationships they study: the international feature of those relationships.

But as observed by the modern society, there are many economic relations that are "freer" from the attachments of any given State or International Organization, thus constituting a more "transboundary" operation, which are, indeed, the object of IEL as well (Herdegen, 2021). Nevertheless, the battle between an "International" Legal Order and a totally "A-National" framework that is arising (with all the "Transnational" operations in between those two) escapes the objectives of this paper, notwithstanding the fact that, whether the most libertarians like it or not, all the major players in Non-Domestic Law (whether is International or Transnational, doesn't matter the label that they put it[4]) are all Government-based or Nation-State-based Organizations[5].

4 Whatever "they" means.

5 Like, for example, the United Nations (UN), the European Union (EU), the Organization of American States (OAS), the International Monetary Fund (IMF), el Mercado Común del Sur (MERCOSUR), l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), the International Court of Justice (ICJ), the International Centre for Settlement of Investment Disputes (ICSID)

Of course, IEL is first a legal framework between the diverse economic relations. The main (but not the only) difference between IEL and just Economic Law[6] is that IEL studies the impact of economic relations and the need for economic regulation in the international arena. Surely IEL is more than that, but for a simplicity purpose, one may just sustain that IEL is for international cases whether just Economic Law is reserved for the domestic arena.

In any case, the 2020 pandemic has entailed many changes concerning Public International Law (I) and Private International Law (II). The entire world order was shaken by the reality's hits *vis à vis* the Westphalian system, foundation of the entire Public International Law current regime. It also enhanced some of the already existing issues concerning purely private transactions among particulars, such as the competing remedies for contractual non-performance like hardship, force majeure, imprévision, etc., and the fictional displacement of the nexus that provokes the interference of certain laws in International Commercial Arbitration [the lex arbitrii], which in turn, poses some doubts about the efficiency of the 1958 New York Convention.

CHANGES IN PUBLIC INTERNATIONAL LAW: IS THE GATOPARDISM ENOUGH?

Gatopardism is a political strategy of advocating for revolutionary and structural changes for the political or economic order of the time, but in practice, only minor and superficial modifications affect the power structures (*se vogliamo che tutto rimanga uguale, tutto deve cambiare*[7]).

Basically, the Westphalian model of nation-states remains, until this day, ruling the International Politics of the world system, even though it has been more than 3 centuries from that Peace Treaty in 1648. Despite this fact, the world system continues to ignore truly transnational affairs. Affairs that go beyond the frontiers of States. Affairs that are not only international, but truly transnational. Affairs that do not enjoy a truly Public Transnational regulation, and therefore, must be satisfied with (i) the legal theories of International Practitioners[8] or (ii) with purely International Private regulation such as the Lex Sportiva (Fach, 2015). But no, there are no 'official' nor Public International regulation that binds States concerning some transnational affairs.

6 Some authors understand Economic Law as an ensemble of rules of law dictated within an Economic Policy purpose, whether they belong or not to Public or Private Law (Fromont, 1973), while other authors expressly expose that Economic Law is often confused with mere Public Law issues such as control pricing, public services, monopolies, labor law, etc., usually ensembled as a Droit Administratif Économique . Nevertheless, some authors acknowledge the large variety of issues nowadays concerning Economic Law (Racine, 2020, p. 9), just like happens with IEL.

7 "We must change everything if we want everything to remain the same". This very phrase is the notion of the Gatopardism.

8 Like in the case of International Arbitration and its "Transnational Legal Order", sustained by many authors and practitioners globally, being its main exponent Emmanuel Gaillard and his masterpiece Aspects Philosophiques Du Droit de l'Arbitrage International.

In other words: there may exist (and they do) certain regulations issued from Private Institutions regarding some transnational activities but there is not a single regulation issued from a Public Institution regarding such transnational activities[9]. And if they exist, they are alleged to be outdated. Institutions such as the World Trade Organization[10] (WTO), UNCITRAL[11], the Permanent Court of Arbitration[12] (PCA), The Hague Conference on Private International Law[13], UNIDROIT[14] and all the most important institutional players in the international arena are built upon the nation-state concept, i.e., upon a Westphalian model and that is a fact.

Nevertheless, i) the development of technology in the way people and corporations celebrate transactions, whether exchanging services, goods or currency, in an internal market or in a transnational market (thus trespassing the physical borders of States), ii) the rise of Big Tech corporations like Google, Amazon, Facebook and Apple (GAFA) and the way they do business (and most important, the way they provide their platforms for everyone to do business), iii) the e-commerce and the economic transactions not just through banks, but through WhatsApp or WeChat, and a big etcetera, cast serious doubts on the efficacity and the raison d'être of the entire system in IEL (of course, including Public International Law and Private International Law).

So, the main Institutions that intervene in Public International Law as in Private International Law (in IEL to sum up) are based on a system that no longer seems to be the reality of nowadays. In fact, the main characters of the whole system of Public International Law (i.e. the States) do not enjoy the high relevance they used to, centuries ago, in the current international trade framework either. Has the time to change arrived? Or the IEL will wait until the technology and all the current big players impose a change?

This paper does not answer that question nor intends to. Here we do not present a cure or a solution. We do not present a diagnose either. This paper rather exposes certain phenomena concerning IEL, that may represent a shift of International Law in the way it addresses some issues, just like a doctor that is not ready yet to find the final cure or to obtain a magical "solution" but is aware of the current symptoms on his patient. Only by doing so (that is, talking about the real state of art of all IEL) the objective of identifying its "true horizons" can be achieved. That is why, concerning the direct effects of the 2020 pandemic (in particular the failure on the equal distribution

9 Just like Frank Latty puts it: IEL possesses the particularity of dealing with rules that do not come from an exclusively public source [le droit de l'économie internationale possède celle [particularité] de n'être pas un droit d'origine exclusivement publique) (Latty, 2004)

10 See, for example, how the WTO is financed, in art. VII of the Agreement Establishing the WTO.

11 See Resolution 2205 (XXI) of 17 December 1966 from the General Assembly of the United Nations, especially art. II.

12 See art. 24 of the 1899 Convention for the Pacific Settlement of International Disputes (the PCA founding Convention).

13 See art. 2 of The Hague Conference on Private International Law Statute.

14 See art. 2 of the UNIDROIT Statute.

of the COVID vaccines) it must be addressed the fact that Multilateralism did not work (a). Later, it must be observed how despite all the globalization caused by the transnational economic transactions between all kinds of subjects (Sovereign States, corporations, NGOs, physical individuals, etc.) and all the titanic efforts of the Hard Law[15] and Soft Law[16] to harmonize the solutions given by the 'law' in transnational relations, the 2020 pandemic has awaken some (old) feelings that the International Community thought were a 'thing of the past': nationalism, imperialism and virulent diplomacy (b).

Why is so important the 2020 pandemic to the IEL? -one may ask. Like an International Monetary Fund (IMF) paper of May 2021 says (A Proposal to End the COVID-19 Pandemic, n.d.): 'It is well understood that there is no durable end to the economic crisis without an end to the health crisis'.

The pandemic killed the Multilateralism: the king is dead, long live the king?

The 'Coronavirus shock' tackled everything in front of it: economic activities, the traditional interrelation routes (travel and tourism suffered the worst part), the classic communication channels (such as television, printed media, and formal meetings) and even the politics as known up to those days. But on the other hand, the pandemic enhanced the already dominance of technology to unprecedent levels: almost all activities, from that moment on, would depend 120% on the technology (the banking industry, the public services from water provision and public lighting to garbage collection, and private services like the entire labor workforce, the legal, medical, accounting and consulting services, etc.).

In order to avoid these catastrophic effects to continue, a vaccine to give immunity to the COVID-19 was developed by certain Pharmaceuticals and tested among volunteers. The World Health Organization (WHO), the health branch of the UN, saw this issue and conceived a sane distribution framework, aimed to give equal and proper access to the COVID-19 vaccines to all Countries (considering it was a pandemic, i.e., a disease spread among the entire world and not just a local or regional disease). This distribution mechanism, led by the WTO and coordinated by the Global Alliance for Vaccines (GAVI)[17] and the Coalition for Epidemic Preparedness Innovations (CEPI)[18], was the COVAX mechanism, which was one of the three pillars

15 Like the Brussels I BIS and Rome I regulations in the EU and the Protocolo de Buenos Aires and the Convención de México de 1994 in the case of Latin America, for example.

16 Like the UNIDROIT principles or The Hague Principles on choice of law in international commercial contracts.

17 Which is a Partnership composed by the UNICEF, the WHO, the World Bank, the Bill & Melinda Gates Foundation, and other Civil Society Organizations (About Our Alliance, n.d.)

18 Which is a Partnership between public, private, philanthropic and civil society organizations, launched in Davos in 2017, to develop vaccines to stop future epidemics.

of the Access to COVID-19 Tools (ACT) Accelerator, launched in April 2020 by the WHO and its partners .

But the COVAX initiative was easier said than done. The access to medical treatment in order to deal with the COVID-19 cases or to prevent the massive contagion surely is a Human Right (Amon, 2020).Therefore, the mere international effort to procure an equitable distribution and fair access to the COVID-19 vaccines for all people across the world regardless of their wealth or economic status and notwithstanding their Countries of origin, implied a direct engagement on behalf of the Human Rights.

But what is said and what is done are very different things. As a matter of fact, the Inter-American Commission on Human Rights (hereafter IACHR) stated in its Resolution No. 1/2021 that it was imperative to promote the just and equitable distribution of the vaccines, particularly with regard to accessibility for middle and low income countries, suggesting there was a difference in the vaccination process between the American States and that such difference may harm human rights (OAS, Resolution 1/2021, 2021).

Even before the issuance of the Resolution 1/2021 by the IACHR, the Permanent Council of the Organization of American States (OAS) adopted the Resolution CP/RES.1165 (2312/21) at its meeting of February 17, 2021, expressing a 'grave concern' regarding inequality and discriminatory access and distribution of COVID-19 vaccines, linking such inequalities to the continuity of the pandemic in Latin America and the Caribbean (OAS, The Equitable Distribution of COVID-19 Vaccines, 2021).

Is clear that for the OAS, the Multilateralism, as a cornerstone of the fair and equitable access to the COVID-19 vaccines has failed.

But not only was the OAS, as a Multilateral Institution of International Law, the one that denounced this. Many head of States presented complaints against COVAX and against the unjust distribution of vaccines. One example of it is Paraguay, who's President Mario Abdo Benítez, expressed his disappointment on the Multilateral initiative over Paraguay before the 76th session of the General Assembly stating that even though the Paraguayan Government paid in advance for the purchase of the COVID-19 vaccines, they did not arrive in due time, a reality shared by many other Countries (UN, 2021).

As observed, the Multilateralism's response for combating the pandemic, consecrated in the COVAX mechanism did not work out as expected. The Westphalian model of the International Community did not update itself. And the XXI century has witnessed some major changes that influenced the classical politics in the international order; such changes should not be ignored.

Centuries or even decades before, the corporativism wasn't even a real force. Yes, the bourgeoisie was a real thing, but the bourgeoisie was among everything, a social status, whether corporativism is a political representation (Harris, 2014). Corporativism cannot fulfill that role of a social status, because simply it does not represent any (physical) member of the society, in fact is does not represent any physical person

or human being at all; instead, is limited to fight for the prerogatives of corporations (and that was not very in sight when conceiving the Westphalian model).

The key role of the technology was not considered when establishing the Westphalian model in most of the International Institutions concerning IEL either. The world nowadays, due to the technology advances, is used to 'transnational' legal relations rather than just 'international' legal relations. Will IEL keep the pace? Or it will "change everything in order to change nothing"?

Nationalism and the virulent diplomacy of the XXI century: a hazard for State Sovereignty? -a caseload of the 2020 pandemic

In the pages that precede it is observed that the main players in International Law are State-based Environments; therefore, and on one hand, all of them acknowledge very well the crucial role of State Sovereignty (Hirschmann, 2021). On the other hand, Sovereign States know that i) their very own existence and ii) the legitimacy of their actions depends on the portion of Sovereignty they enjoy, i.e., how much Sovereignty they truly have. The global society has witnessed this fact: it does not matter how Sovereign a State is in the domestic order. What really matter is its "Sovereignty" in the International Order.

All the cumulated knowledge, until this day, tried to overlook this fact, ignoring the way the "true game is played" and disregarding who really "pulls the strings" in the International Arena. However, in times of too much information access and massive communication, like was in March 2020, that script was partly unveiled. It seems necessary to re-write by the whole concept of "Sovereignty"[19].

Yes, Sovereignty (in the purest sense) plays a fundamental role in the existence and liability of the International Organizations (IOs) in a twofold manner: First, the very composition (that is, the existence itself) of the IOs is due by virtue of an ensemble of States that gather each other in order to create a Legal Person that takes part in the International Order, in other words, a combination of Sovereignties with the objective of coordinate a given matter with an international style. Second, those IOs are at the same time, challenged and menaced by the Sovereignty of its Member-States (e.g., through budget cuts[20], the non-compliance with core norms, obstruction of staff appointments[21] and membership withdrawal (Hirschmann, 2021).

19 David Scott put it best: "What is conceptually required for critically thinking through the problem of sovereignty in the contemporary Third World? What concepts and ideas call for reconsideration and perhaps revision?" (Scott, 2012)

20 Like the budgets cuts by some previous United States (US) Governments to various UN organizations.

21 Like the US veto to appoint new judges to the WTO's dispute settlement procedure (U.S. Blocks WTO Judge Reappointment as Dispute Settlement Crisis Looms | Reuters, n.d.) (U.S. Is about to Cripple the WTO Dispute-Settling System–Los Angeles Times, n.d.)

In fact, the 2020 pandemic showed that it wasn't important the piece of Sovereignty of a given State towards a given IO, what really mattered, is the size[22] of such State within that IO, that is, the "size" of that Sovereignty. This posture was already expressed back in the past (Scott, 2012):

> Is it the case, as some would argue, that sovereignty is now altogether irrelevant to world politics?
> Has state sovereignty been effectively supplanted by ideals of political order and political society more concordant with the mobile structures of globalization: the ideals, for example, of the universal empire on the one hand, or of cosmopolitan citizenship on the other?

Therefore, Sovereignty seems to be three-folded (internally, externally, and "globally"). And the 2020 pandemic helped to strip down this de facto reality. But what does that have to do with nationalism, imperialism and virulent diplomacy? It turned out that behind the economic recession, outrageous scarcity and legal restrictions was underlying the nationalism.

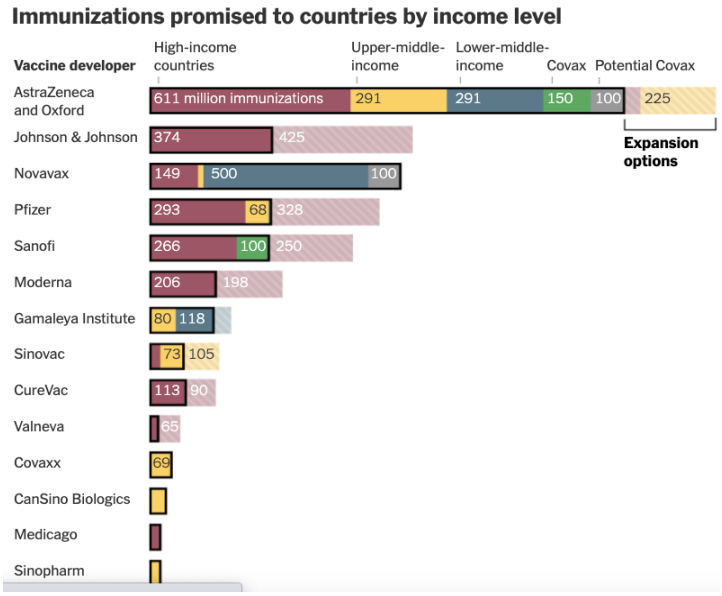
Most of the IOs are indeed built upon the basis of Multilateralism and International Cooperation, and the current International Law is also too "Multilateral"; therefore, the XXI global society is supposed to 'reject" nationalism. Nevertheless, the devastating effects of the 2020 pandemic and the progress made in developing the vaccines against the COVID-19 pushed for a Nationalist standpoint, a totally new (and "legal") approach, with new designs (built on the Internationality of the World Order): the Vaccine Nationalism.

Vaccine Nationalism takes place when Governments signs (in a very unilateral way) agreements with certain Manufacturers (in this context the so-called "Big Pharma") to purchase COVID-19 vaccines aiming to supply their own populations first, thus preventing such vaccines from being available for other countries ('Vaccine Nationalism' Threatens Global Plan to Distribute COVID-19 Shots Fairly, n.d.). Before their official approval and even before such vaccines completed their clinical trials, wealthy Countries such as the UK, the US, Japan and the European bloc had procured several million doses of such vaccines, leaving to chance the other Countries (specially the middle-and-low-income ones) and seriously undermining the effectiveness of the COVAX mechanism.

In this context, it is obvious that wealthier nations had an advantage in the race for immunity as the next chart illustrates:

22 Economic, geopolitical and diplomatic size, among other factors.

PICTURE 1[23]



These economic and geopolitical inequalities, that fueled Vaccine Nationalism, were emphasized by the doctrine, asserting that such inequalities reveal deep an ill-founded view of global health in which vaccines are treated as commodities rather than as a public good (Ingrid Katz et all, 2021).

Like most commodities in the current free-market economy, they (the COVID-19 vaccines) are sold to the highest bidder (a contrario sensu all the other bidders cannot access, or have a serious hard time in obtaining such commodities). Besides the fact that early procurement of vaccines installed a widely accepted idea that each country will be the only one responsible for its own population, such Vaccine Nationalism perpetuates the history of rich and powerful countries securing vaccines at the expense of the less-wealthy ones (Ingrid Katz et all, 2021).

Without discussion, Vaccine Nationalism is a term that would never have made headlines before the COVID-19 pandemic hit but this international behavior consisting in wealthy countries scampering to celebrate deals (often "APAs"[24]) with the Manufacturers directly to secure the COVID-19 vaccines for their own populations and limiting the stock available for the other countries, did not escape from the watch of the WHO, whose Director-General said that unequal distribution of vaccines "is not only a moral outrage, but economically and epidemiologically self-defeating"

23 Extracted from https://www.weforum.org/agenda/2021/01/what-is-vaccine-nationalism-coronavirus-its-affects-covid-19-pandemic/ last accessed 15 February 2021.

24 Advance Purchase Agreement.

(Unequal Vaccine Distribution Self-Defeating, World Health Organization Chief Tells Economic and Social Council's Special Ministerial Meeting | Meetings Coverage and Press Releases, n.d.)World Health Organization Chief Tells Economic and Social Council Special Ministerial Meeting | Meetings Coverage and Press Releases, n.d.).

The problem with Vaccine Nationalism is not only its moral and sociological consequences; it entails (a big) economic damage as well (Khanna, 2021). But alongside Vaccine Nationalism, was rising another phenomenon that global society thought was abandoned long time ago: Virulent Diplomacy under the terms of Vaccine Diplomacy. Vaccine Diplomacy is understood to be the behavior, from country A to country B, of abusing their position (country's A position) both in economic and political matters concerning their bargaining power over the COVID-19 vaccines in order to exercise some kind of pressure over country B that is in a desperate need for such vaccines, provoking a shift in their diplomatic relations due this practice.

Vaccine Diplomacy is a worst version of la Diplomatie du Portefeuille since at least la Diplomacia de la Billetera (its Spanish term) is a behavior abusing economic power and advantage from a State to another State with the sole objective of exercising pressure, in "regular, ordinary and common" circumstances. The 2020 pandemic was not one. It was an extraordinary, unforeseen, and irresistible event. That's why exercising international pressure in times of the COVID-19 pandemic is so dreadful, i.e., virulent.

Vaccine Diplomacy is the term various international analysts use to express what actually happened (and still happens) among the negotiations over the acquisition of the COVID-19 vaccines between countries that have a surplus of such vaccines and countries that are in need of them. As the Managing Director of the IMF, Kristalina Georgieva said: "Vaccine policy is economic policy".

The rise of Vaccine Nationalism summed up with the Vaccine Diplomacy blocked any attempt of enforcing international legal obligations under the Economic, Social and Cultural Rights International Covenant (1966) (ICESCR). The ICESCR is an international human rights treaty that, unfortunately, was never fully neither duly implemented by the States who signed it and the 2020 pandemic was the irrefutable evidence of it. The ICESCR mandates all member States at the UN that they must "take the steps to achieve the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health[25]" (Article 12). Although

25 The human right to health is also recognized in Art. 25 of the Universal Declaration of Human Rights; Art. 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965; Arts. 11.1 and 12 of the Convention on the Elimination of All Forms of Discrimination Against Women of 1979; Art. 24 of the Convention on the Rights of the Child of 1989; Art. 11 of the European Social Charter of 1961; Art. 16 of the African Charter on Human and People's Rights of 1981; Art. 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 and in the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care adopted by the UN General Assembly (GA) in 1991 (resolution 46/119).

the right to health is not to be understood as a right to be healthy[26], States do have an obligation to "refrain from interfering directly or indirectly with the enjoyment of the right to health"[27].

But negotiating APAs outside the COVAX mechanism may lead to a violation of this international obligation. Why? Because the same manufacturers (pharmaceutic companies) that sell the COVID-19 vaccines through APAs are also the manufacturers that sell such vaccines to through the COVAX mechanism. Therefore, a manufacturer may have had these two options: i) Sell the vaccines to a higher price to a determined State through an APA, (because the sale itself would mean the breach of some international obligations, such as COVAX, from such manufacturer (seller) or from such State (buyer) of that APA); ii) Sell the vaccines to the States that need them, at an affordable price, through an equal distribution programme, such as COVAX. It was (and still is) one way or the other.

States part of the ICESCR had an international obligation to "take steps, individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the Covenant, such as the right to health"[28]. This obviously did not happen, in violation also of the Alma-Ata Declaration[29] (International Conference of Primary Health Care, URSS, September 1978).

Moreover, regarding the international obligations of the ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR) stated in its General Comment 14 that States parties must respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, in accordance with the Charter of the United Nations and applicable international law[30].

However, those States (mainly the wealthy States) did not respect the enjoyment of the right to health in other countries, in case such States (taking advantage of their economic superiority) raced to purchase the available COVID-19 vaccines thus leaving the less-wealthy countries with the leftovers of such vaccines.

Furthermore, the (Home) States of the pharmaceutical manufacturers could and should have prevented them (the manufacturers) from celebrating APAs (for selling the COVID-19 vaccines) in a Bilateral way if such action would compromise the

26 Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12), ¶ 8.

27 Ibid., ¶ 32.

28 Ibid., ¶ 38.

29 Specially its Art. II "The existing gross inequality in the health status of the people particularly between developed and developing countries as well as within countries is politically, socially and economically unacceptable and is, therefore, of common concern to all countries".

30 Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12), ¶39.

Multilateral efforts concerning those same vaccines aimed to equal distribution among all Countries, or at least try to do so. But those (Home) States did not.

As the General Comment No. 14 on the ICESCR states: "*[D]epending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible, and provide the necessary aid when required*"[31]. Wealthy countries did just that, but right after their own population was fully vaccinated or at least vaccine-assured (following the "me first" approach).

Consequently, Vaccine Diplomacy has been very present, especially in those States that i) were in desperate need of such vaccines and ii) were amid diplomatic forces[32]. It seems the mere technique of Gatopardism cannot resolve these issues nor face these changes. This brave new world seems to demand something more than the classical institutions from IEL.

CHANGES IN PRIVATE INTERNATIONAL LAW: THE WORLD HAS CHANGED. MUST THE RULES CHANGE TOO?

One 'legal' issue that the 2020 pandemic outrage really exposed was the effectiveness of the legal remedies for the non-performance of contractual obligations. The COVID-19 pandemic impacted business and commercial relationships worldwide and made difficult or impossible the performance of the obligations agreed in a contract.

Suddenly, no one was able to fulfill their contractual obligations: from basic leasing contracts to complex public-private partnerships (PPP) operations, from domestic legal relationships such as a service contract to purely transnational operations like international franchises or international sale of goods. The lack of (exactly as was agreed) performance (or even a full non-performance due an "irresistible event") could not be handled with just the legal remedies of contract law (d). Hence, many contractual disputes arose. Consequently, many recurred to International Arbitration (c).

International Commercial Arbitration in the post-pandemic era – the legal framework disbalance before the virtual space: the Zoom Jurisdiction

This context of new international arbitrations summed up with the existing international arbitration proceedings and considering that the 2020 pandemic provoked (at the same time) a full stop in all judicial proceedings in most countries, turned into a very hectic activity for International Arbitration practitioners and institutions.

This active role of International Arbitration slowly started to question the very bases and grounds of International Arbitration itself (c). And why was International

31 Ibid.

32 (The U.S. and China Are Battling for Influence in Latin America, and the Pandemic Has Raised the Stakes, n.d.)

Arbitration in such a rise? First, International Arbitration was, at the time of explosion of the 2020 pandemic, very familiarized with the use of technologies in their proceedings (Smit, 2022). International arbitrators, arbitral institutions and parties in international arbitration proceedings were used to the utilization of remote hearings, submitting claims and counterclaims in writing from State A to State B (country where the lawyers of the party from State A were based) to finally reach State C (country where the arbitration is made; country where the arbitral tribunal is "seated) or to States D, E and F (countries where one member of the arbitral tribunal actually is living at the moment and exercising his professional activities[33]) (Pinsolle, 2022). Moreover, international arbitrators, arbitral institutions and parties of International Arbitrations were already used to have hearings developed in an absolute digital environment, to produce evidence online, to store valuable proof in the cloud (designated only for that dispute by the arbitral institution), to store sensitive information in a shared cloud, accessible for 1 of the parties and its lawyers (administered by the lawyers in charge of that dispute within the Law Firm in which they work), and a big etcetera, before the 2020 pandemic (Ongenae & Piers, 2022).

Second, whilst local domestic courts were forced to suspend operations, numerous arbitral tribunals swiftly adapted to the new normal by shifting the proceedings into virtual space (Imposing Virtual Arbitration Hearings in Times of COVID-19, 2021). Third, many national borders were closed during 2020, and now some territories such as the EU demand a COVID-19 Passport, which makes much more desirable to have an International Arbitration with proceedings that are more digital than physical and thus do not demand a physical presence of the parties except for certain specific cases. Fourth and most importantly, many States issued travel restrictions (96% of global destinations have been affected by travel restrictions[34]) due the COVID-19 pandemic.

In this pandemic context, parties in international legal and economic relationships endured some hardships regarding their (international) disputes by the mere facts that i) travel was banned and ii) domestic courts were closed. Those parties had no other option than to turn to International Arbitration. In consequence, International Arbitration was not only an appealing resource for international dispute settling, but it was also the only option, besides being a fast, voluntary, predictable, and impartial mechanism.

The 1958 New York Convention (1958 NYC) still remains as the cornerstone Treaty for International Commercial Arbitration and is considered as the most successful International Treaty in the area of Private International Law (Sanders, 1979), (Forneris & Mocheva, 2018), (Káposznyák, 2019), even though the world changed a lot since 1958. Most of commentators agree that "despite its 60 years of existence, [the NYC] remains as fresh as when it was adopted and continues to serve its purpose of

33 Supposing is a 3-member arbitral tribunal.

34 (COVID-19 Response: 96% Of Global Destinations Impose Travel Restrictions, UNWTO Reports | UNWTO, n.d.)

allowing recognition and enforcement of arbitration agreements and arbitral awards in a consistent manner" (Joubin-Bret, 2019). Even some of them strongly argued that "the New York Convention should be left alone"[35].

Although this author agrees with all these positions, the truth is that the NYC came from 1958, an era without internet transactions, without virtual hearings, without smartphones, without personal computers (in fact, with no computers at all), without e-commerce and certainly without current themes like Artificial Intelligence[36] and Big Data, like it was highlighted before by many authors (Toth, 2019).

Perhaps in the decades after the NYC (from the '60s to the '90s) there was indeed an increase in international business relations, whether contractual or not. That could (and must) be cataloged as "international" relations.

But nowadays there is an increase of unregulated, transborder and private transactions, through the new technologies such as the blockchain, which are rather "a-national"[37] than "international". Maybe this is the future challenge for the NYC within the International Arbitration legal framework, and definitely for the IEL. This paper does not address the existence of online dispute resolution (ODR) mechanisms and does not deal with online arbitration because both mechanisms are an alternative to the classical International Arbitration procedure (Yu & Nasir, 2022) (Kallel, 2008).

International Arbitration has traditionally had two main areas: i) International Investment Arbitration, which aims to settle the disputes between a foreign investor and a State (ISDS) where Public International Law plays a major role (Collins, 2017) and ii) International Commercial Arbitration, which is by definition a private justice not attached to any legal order in particular (Loquin, 2015). Given the fact that most Investment Arbitrations are ICSID[38] Arbitrations and that the New York Convention does not apply to ICSID awards (Dolzer & Schreuer, 2012) This chapter will therefore focus on the current factual situation of the classical International Commercial Arbitration.

The legal framework of International Commercial Arbitration is widely known: i) the 1958 NYC, ii) the UNCITRAL Model Law, iii) some national statutes on International Arbitration that did not follow the Model Law such as French Law, English Law, U.S. Law and Swiss Law and iv) some arbitration rules such as the UNCITRAL rules,

35 Pursuant the famous three "Nos", namely that there is no need, no hope (for revising the NYC) and no danger (to left it just the way it is) (Gaillard, 2009).

36 The simple fact that an article published in the last edition of the Con-Texto Journal titled "Do androids dream with electronic rights? The challenges of the Artificial Intelligence vis à vis Intellectual Property" says it all. Not a single jurist of the '50s envisaged this "futuristic" environment around the NYC. Even tough International Arbitration in Intellectual Property (IP) disputes may be young, the party autonomy sanctity and the enforcement premium (like Gary Born always calls it) are features that simply position International Arbitration upon ordinary litigation (Cook & Garcia, 2010).

37 Meaning it does not pertain to a determined State or is attached to a State (or even attached to a national domestic legal order).

38 International Centre for Settlement of Investment Disputes.

the International Chamber of Commerce (ICC) rules, the London Court of International Arbitration (LCIA) rules, the Stockholm Chamber of Commerce (SCC) rules, etc., and the diverse national statutes on International Arbitration from other countries (whether Russian, Canadian, Argentinian, Peruvian or Paraguayan, for instance).

The 1958 New York Convention gave extreme relevance to the seat of the arbitration. This relevance was based solely on one ground: sovereignty from a given State over its territory. Nevertheless, the UNCITRAL Model Law seemed to move away from this direction stating that "the arbitral tribunal may meet at any place it considers appropriate" with a bit of incoherence, in its article 20 (2). The national laws followed suit. But in the middle of the 2020 Pandemic, with all forms of travel banned, borders were closed, and international transportation reduced to the essential, it was impossible to travel to the seat of an International Arbitration even if the parties wanted to. Therefore, art. 20 (2) of UNCITRAL's Model Law was also of impossible application.

We believe the basis of art. 20 (2) of the UNCITRAL Model Law may result incoherent because art. 1 of the same Model Law provides "The provisions of this Law apply *only if the place of arbitration* is in the territory of this State" tending towards a territorial approach and later sustains that notwithstanding such place [that was supposedly to be located in the territory of the State who enacted such law] the arbitral tribunal *may meet at any place it considers appropriate*. The relevance that the 1958 NYC gave to the place of arbitration (and therefore to the law of such place, the lex arbitrii) was based solely on territoriality[39].

In fact, most national laws on international arbitration adopt this territorial requisite, like the Paraguayan[40], Spanish[41], Argentinian[42], Uruguayan[43], Colombian[44] and English[45] laws. Refusing to focus on a purely territorial approach would mean to embrace an extra-territorial scope of application, like the French law[46], which has rather an "universal scope of application" (Gaillard, Le nouveau droit français de l'arbitrage interne et international, 2011).

Even though many authors argued before about the relevance of the "seat" in International Commercial Arbitration (Ferrari, 2021) (Born, 2020) linking the lex arbitrii to the law of the arbitral seat (Mance, 2016) and even arguing that the 1958 NYC considers only a territorial approach (Goode, 2001), the truth is that such approaches do not fit the Pandemic reality of the post-2020 era. If there is an impossibility of

39 Art. I of the 1958 NYC provides: "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" (emphasis added). See also arts. III and V (1.a, 1.d, 1.e).

40 See art. 1 of Law 1879/2002.

41 See art. 1 of Law 60/2003.

42 See art. 2 of Law 27.449/2018.

43 See art. 1 of Law 19.636/2018.

44 See art. 62 of Law 1563/2012.

45 See Section 2 of the 1996 Arbitration Act.

46 See art. 1505 of the French Code of Civil Procedures.

transportation and therefore of moving from point A to point B, the (physical) seat is useless. Even resorting to other places for arbitral procedures to take place was not possible. That is why the "seat" had no substantial meaning in the Pandemic reality. And if the (physical) seat have lost its relevance, why should the law of such seat must remain relevant? The scope of application of most national laws on international arbitration are based on a purely territorial link and if such link simply does not exist, such laws cannot be applied as lex arbitrii.

This is not another argument in favor of the French theory of an "autonomous legal order in international commercial arbitration" (Gaillard, Aspects philosophiques du droit de l'arbitrage international, 2008) or another set of ideas to reinforce the *délocalisation* theory via the reasoning of the *lex arbitrii* and the seat (Alland et al., 2014). The conduct of international arbitrations in the virtual space really did happen. The "seat" (meaning the place where the arbitration is supposed to take place) were digital platforms like Zoom, Google Meetings, Microsoft Teams, etc.

Does not matter if the parties chose a determined place as a "seat". It may be an indirect election of the law of such "seat" as sustained by many doctrinal authorities (Kaufmann-Kohler, 2003) but such election by the parties is not as fruitful as is thought simply because the final word on the application of the law of the seat [or any law qualifying as *lex arbitrii*] is in that national law itself, not in the "will of the parties". And that final word demands a territorial connection. In other words, the parties when choosing a seat, think they are the ones designing a specific legal system [that of the "seat"] whereas the real decision on exercising judicial powers over an international arbitration and to mobilize the entire judicial system (courts, enforcement authorities, etc.) is taken by those States pretending to serve as "seats" of international arbitrations.

Although all that did not exist in the virtual space (which resulted in a true and reliable place for pursuing international arbitration's proceedings from the submission of the parties to the final award) that did not stopped technology for developing itself in order to provide a qualified virtual space for the international arbitration disputes to take place. Nonetheless, such "Zoom Jurisdiction[47]" lacked any jurisdictional rules for arbitration proceedings. The virtual space claimed to be a place for the arbitration proceedings to take place but without the jurisdictional rules to act like one.

While the authors were debating on the autonomy and transnationality of international arbitration and on its core foundation vis à vis the domestic legal order of a State (Paulsson, 2013), technology has built a reliable and easy-to-use virtual place for international arbitrations to take place, for awards to be rendered, interim measures to be ordered and claims to be submitted with no physical contact at all between the parties, their lawyers, the arbitral tribunal and the institution that administers the arbitration.

47 The first time this author heard the words "Zoom Jurisdiction" was in a Masterclass of the LL.M on International Arbitration from the Austral University of Buenos Aires, after several emphasis of Professors Diego Fernández Arroyo and Elina Mereminskaya available at https://www.youtube.com/watch?v=TT8PdniuYrM.

There may be many arguments on the legal foundations of international commercial arbitration. But regardless of such doctrinal positions and the eternal debate on the legitimacy of international commercial arbitration (Facultad de Derecho Universidad Austral, 2021), technology has resolved the unexpected problem of displacing the parties or the arbitral tribunal in international arbitrations due to the fact that travel was banned, borders were closed and access to other States was highly difficult, through the provision of a virtual space in which i) the parties could meet under the authority of the arbitral tribunal, ii) interim measures can be applied and obtained, iii) submissions can be made and iv) awards can be rendered and all this without any physical connection.

The 1958 NYC is based in physical connections with "the place of the arbitration". The UNCITRAL Model Law also is based in a purely territorial connection. The national laws on international arbitration [whether they follow the Model Law or not] too, with very well-known exceptions. The virtual space does not concern any physical connection and is based in a purely consensual basis, rejecting any exercise of national sovereignty based in territoriality. These are the challenges for the 1958 NYC and the entire international arbitration legal framework worldwide. The future of the French *délocalisation* theory have had an unexpected turn and the value of the seat and the *lex arbitrii* must be revised. The virtual space will continue to permeate through the international arbitration procedures to the point of the issuance of a truly "*décision de justice internationale*"[48].

The legal remedies for contractual non-performance: a subtle competition. Petit hommage à la Prof. Catherine Kessedjian

It was March of the year 2020. The WHO just released a statement declaring a pandemic due the COVID-19. Schools started to suspend their classes. Malls started to shut their doors. Businesses started to fail. The borders started to shut. Traveling from State to State was starting to be forbidden. Airports were empty. The Judicial Public Service was suddenly cancelling its activities. And of course, contracts were starting to suffer from a non-performance phenomenon never seen before.

In response to these astronomical contractual breaches in all around the world, contractual parties started to invoke certain legal remedies that existed with the sole purpose to adapt the rigidity of the pacta sunt servanda to the current circumstances. And just like that, all the legal academia and practitioners, in domestic and in international environments, from almost all legal orders were saying a few words on these remedies. By those times everyone was talking about force majeure, hardship, l'imprévision, frustration and impossibility of contract, rebus sic stantibus and material adverse change, all at once.

48 Sentence Putrabali, French Cour de Cassation, 2007.

Even though legal academia and practitioners from all jurisdictions tried to give a logical explanation to each legal remedy (from the standpoint of their domestic law), some inconsistencies started to pop up.

The contradiction (or maybe confusion) among lawyers regarding such remedies vis à vis the performance duty of a contract was becoming more and more notorious. A very accurate study of this issue is the article wrote by Prof. Catherine Kessedjian titled "Competing Approaches to Force Majeure and Hardship", published years ago, in the issue 25 of the International Review of Law and Economics.

Force majeure (FM), hardship, l'imprévision, frustration and impossibility, rebus sic stantibus, material adverse change (MAC), etc., they all have one thing in common: they are a legal remedy for moderate a too strict pacta sunt servanda. As such, they are based in equity, a legal concept that is conceived to reach a corrective justice[49], especially in unforeseen situations (Titi, 2021). Although they all are based in equity and are legal remedies, there are important differences among each other. These differences sometimes give rise to a competitive approach among those legal remedies. That is why is very relevant to acknowledge these (sometimes subtle, sometimes not) differences. To deny such competition is to deny the very existence of such legal remedies. Like Prof. Kessedjian said: "It is not surprising that there are so many competing approaches in force majeure and hardship" (Kessedjian, 2005).

First, it must be stated that many of these remedies are, particularly in Latin America, a result of legislative tropicalization from the western rules (European and American legal orders) to the Latin-American regimes or even a transfer from the legal order of a Latin-American Country to another Latin-American Country (e.g., what happened with the Paraguayan Civil and Commercial Code of 1985 and the former Argentinian Civil Code of 1869 -named as "Código de Vélez"[50]).

This case can be observed when comparing Art. 426 of the Paraguayan Civil and Commercial Code (hereafter PCC) of 1985 with the Art. 513 of the Argentinian Civil Code of 1869 (also known as "Código de Velez"):

> The debtor will not respond for the damages and interests that are derived from the non-performance of the obligation, when these are a result of acts of God or force majeure, unless the debtor took the risks and charges of such acts of God or force majeure [in the Agreement] or if such acts of God or force majeure were occasioned by him or unless the debtor was already in default by circumstances outside such acts of God or force majeure[51]

49 As in opposition of the blind application of the law, which may lead to undesired (for both parties) results.

50 In honor of his author, Dalmacio Vélez Sarsfield.

51 Art. 426, Paraguayan Civil Code of 1985. Free translation by the author.

The problem arises if a second, more paused, lecture is given to Art. 426 of the Paraguayan Civil Code. The FM remedy in the Paraguayan legal norm, in fact, just aims to liberate the debtor of all the "damages and interests" caused by the (total) non-performance of the obligation. Even though it does not intend to liberate the debtor from the non-performance of the obligation per se[52], Art. 426 of the PCC only seems to address situations of absolute and permanent FM, i.e., of total non-performing. It does not foresee an underperformance situation due to a FM.

For example: A enters a sale contract with B, agreeing the sale of 12,000 apples at the price of US $ 5,000. B agreed to buy the 12,000 apples for the accorded price of US $ 5,000 because A is a fruit provider for other food companies, and had to deliver 4,000 apples to C, another 4,000 apples to D and another 4,000 apples to E. Due a force majeure event, A cannot deliver the product to B (i.e., the 12,000 apples); one understands that A entered a non-performance situation and therefore is liable for the i) value of such performance (i.e., the price of the product, i.e., US $ 5,000) and ii) damages and interests that have been caused to B due the absence of the product (dommages-intérêts in French; daños y perjuicios in Spanish).

This example does not intend to expose the difference between "responsabilidad civil" of some Latin-American civil law countries (which is divided, as explains the classical theory of civil liability, between contractual and non-contractual liability[53]) and the common law's tort law (in opposition of contract law) (Pejovic, Caslav —- "Civil Law and Common Law: Two Different Paths Leading to the Same Goal" [2001] VUWLawRw 42; (2001) 32 Victoria University of Wellington Law Review 817, n.d.).

The sole objective of the example above is to expose a contractual situation that might happen and how the Art. 426 of the Paraguayan Civil Code may just not address this issue. It only addresses the "damages and interests". And how one can jump into the conclusion that Art. 426 PCC may not address the price of the 12,000 apples (US $ 5,000; i.e., it may not address the underlying obligation of a contract[54]) but only the "damages and interests" caused by the non-performance?

52 Art. 450 is the Grundnorm for the contractual liability and stipulates that "The damages [to be claimed by the creditor] include i) the value of the loss suffered by the creditor and ii) the utility not perceived by the creditor as a consequence of the default by the debtor". Free translation by the author.

But in the example above (about the apples), supposing is a sales contract, the creditor (A) will not pay any amount of money until he knows that effectively, the apples are being delivered.

So, A did not suffer any "direct loss". He suffered instead multiple damages caused i) by the utilities not perceived with C, D and E and ii) by the indirect losses that A suffered as being labeled as an "non-performer" (that is, contracts resigned with other food companies such as C, D and E, the sudden termination of negotiations with potentially new partners, etc.).

53 Raúl Torres Kirmser, a former Member of the Supreme Court of Paraguay, clearly stated that "[…] no se puede soslayar la clásica distinción entre los dos grandes ámbitos o categorías de actos dañosos: la responsabilidad contractual y la responsabilidad extracontractual o aquiliana" (Kirmser, 2008)

54 Whereas art. 7.1.7 of the UNIDROIT principles clearly states: "Non-performance by a party is excused…" (it does not talk about the damages or interests, it talks directly about the performance). In the same sense, see Art. 8:108 of the PELC ("A party's non-performance is excused…"); Art. 79 of the 1980 CISG ("A party is not liable for a failure to perform any of his obligations…"); the ICC

Having regard of other provisions of the PCC[55], it is undeniable that the direct source of the entire PCC, is the Draft for the Paraguayan Civil Code elaborated by Luis De Gásperi in 1964 (hereafter the Anteproyecto). For his Anteproyecto, Luis De Gásperi was inspired by the French Code Civil, the Italian Codice Civile and the Argentinian Civil Code of 1869 (el Código de Vélez), the German BGB, among others sets of rules. Art. 426 of the current PCC is a literal copy of Art. 846 of the Anteproyecto (the Draft) of Luis De Gásperi.

Force majeure was contemplated in the Draft (Anteproyecto) in various Articles, from Art. 843 onwards, and not just in Art. 846. Art 843[56] was, in turn, inspired by the Arts. 1218 of the Italian Codice, 1146, 1147 and 1148 of the French Code Civil, 1279 of the Dutch Civil Code, 1924 and 1925 of the Louisiana Civil Code, 286 of the German BGB, 506 and 511 of the Argentinian Civil Code[57] (Código de Vélez), etc. At the same time, Art. 513 of the former Argentinian Civil Code of 1869 (Código de Vélez[58]) provides the exact same text of Art. 846 of the Anteproyecto and of Art. 426 of the current Paraguayan Code.

In 2014, a new Argentinian Civil and Commercial Code was enacted (the New CCC). Its provision about Force Majeure is very different from the one of his predecessor (el Código de Vélez of 1869). Art. 1730 of the New CCC stipulates:

> An act of God or force majeure is the event that could not been foreseen by the parties or being foreseen by the parties could not be avoided. Acts of God and force majeure release of liability, unless provided on the contrary.
> This Code uses the terms "acts of God" and "force majeure" as synonyms[59]

It is notable the difference between the old Art. 513 of el Código de Vélez of 1869 and Art. 1730 of the New CCC. Moreover, the New Argentinian CCC provided another legal remedy, besides force majeure: it consecrated the impossibility of performance (Art. 1732):

> The debtor is released of the performing obligation and non-liable if such obligation was extinguished due an objective and absolute impossibility of performance not caused by the debtor. Such impossibility of performance shall be appreciated through the rules of good faith and the prohibition on abuse of rights[60]

2020 Force Majeure Clause [short form] ("A party successfully invoking this Clause is relieved from its duty to perform its obligations under the contract and from any liability in damages", undoubtedly differentiating between the non-performance per se and the damages).

55 Esp. Arts. 450 and 451 of the PCC.

56 Nevertheless, Art. 843 of the Anteproyecto was moved into the current CCP in the Art. 421, but without any reference about force majeure. The policymakers literally erased some lines.

57 (Gásperi, 1964)

58 In force in Argentina from 1869 until 2015.

59 Free translation by the author.

60 Free translation by the author.

Of course, this new Impossibility of Performance legal remedy does not exist in the Paraguayan Civil Code.

The reason for all these examples is to understand how a domestic legal order can contemplate a Force majeure exception but in a deficient manner. No man is an island wrote John Donne centuries ago even before the independence of the countries of the whole American continent. The adoption by civil law countries of Civil Codes through the techniques of Comparative Law or the adoption by common law countries of rules or doctrines also through the techniques of Comparative Law unveils a common reference between legal orders around the world. But a common reference does not mean the existence of an exact same legal rule or doctrine or the absolute identity of them. Nevertheless, John Donne was right.

The "competitive approaches" of legal remedies for a non-performance legal situation do not end in the existence or abundance of enough legal remedies for contractual obligations vis à vis an inevitable, irresistible and unforeseen event like the 2020 Pandemic. They "compete" in their scope as well, i.e., the way they address the contractual performance obligation and the requirements for their exercise by the parties. This, for example, is the main difference between force majeure (FM) and hardship.

In most of domestic legal systems, for a FM event to take place, a party must prove that the FM event renders the obligation of performance (or a part of it) totally impossible[61]. That is, the FM annuls any possibility of contractual performing by the party who claims it[62], notwithstanding the temporal or permanent effect of the FM event on the non-performance of the contract[63]. Whether a hardship provision only needs that the performance of the contract to become excessively onerous. That is, the performance is still possible (it's not absolutely impossible like in a FM), is just extremely onerous[64].

61 An official Comment on Art. 1730 of the Argentininan new Civil and Comercial Code states: "Se está hacienda referencia a un hecho que, por resultar imprevisible o inevitable, fractura totalmente la cadena causal…" (Marisa Herrera, 2015). Oher jurisdictions

62 For clarification of the argument set above, the Comment on Art. 8:108 of the Principles of European Contract Law (PELC) states: "(l'article 8:108) se limite aux cas où un empêchement interdit toute execution" (Fauvarque-Cosson, 2003). Authorized doctrine on European contract law stated "Sometimes there is an unexpected change in circumstances after the contract has been concluded. Such change may in some cases make it impossible for the debtor to perform the contract… Continental legal systems and the international set of rules form a separate category for cases in which intervening events make performance more difficult for the debtor or render performance pointless for him or her" (Kötz, 2017). On the opposite argument, it also has been asserted that "since Art. 8:108 is applicable to cases in which performance becomes more difficult, but not impossible…" (Jansen & Zimmermann, 2018). However, it seems that the absolute impediment entails a FM is the opinion of most authors.

63 See for example Art. 1218 of the French Civil Code.

64 See for example the definition of hardship in Art. 6.2.2 of the UNIDROIT Principles. In fact, Art. 6.2.2 of the UNIDROIT Principles acknowledge hardship and l'imprévision as legal equivalents whereas for FM it reserves an entirely other provision, Art. 7.1.7

The FM seeks to end certain contract obligation due to an unforeseen, irresistible and inevitable event whereas hardship intends to maintain the contractual obligations adapting them to the new circumstances. In other words, FM provides a solution concerning the non-performance of a contractual obligation. Hardship concerns the performance of contractual obligations (adapting them to the new circumstances). This is a major difference between those legal remedies.

This different approach taken by FM and hardship can be expressly found following the fact: both of these legal institutes were positioned in different chapters of the same body of rules, like in the UNIDROIT Principles[65], in the Principles of European Contract Law (PELC)[66], in French Law[67], in Argentinian Law[68] and in Paraguayan Law[69].

FM finds its origins in civil law legal orders; hardship finds its roots in common law jurisdictions. But in this highly intercommunicated world, it is not that common law countries don't know (at all) the Force Majeure and that civil law countries ignore Hardship either.

In fact, there is a very well-known civil law – version of hardship: l'imprévision. In essence, hardship and imprévision aim at the same target: the continuity of the contract, adapting the performance to the new circumstances (the performance has become excessively onerous). That is why, the PELC named their Art. 6:111 as "Change of Circumstances", avoiding using a civil law term like "imprévision" or a common law term such as "hardship", because essentially that's what it is: a change of circumstances.

French Law, as one of the highest models of civil law, does not know about hardship. But it does know about l'imprévision. At first, French Law only recognized l'imprévision as a legal doctrine in regard of Civil and Commercial matters (meaning it did not have a recognition of a rule in the Civil Code or in the Law) and it was developed by the French Courts and authors. L'imprévision doctrine only applied to administrative cases[70] (where is involved the State or a Public Service) resolved by

65 The FM provision is on Art. 7.1.7 of the Chapter 7 (Non-performance) whereas the hardship provision is on Arts. 6.2.1 – 6.2.3 of Section 2 of Chapter 6 (Performance)

66 The FM provision, wisely titled as "Excuse Due to an Impediment" is on Art. 8:108 of Chapter 8 (Non-performance and Remedies in General) whereas the hardship provision, titled as "Change of Circumstances" is on Art. 6:111 of Chapter 6 (Contents and Effects -of the contract-).

67 The FM provision is on Art. 1218 of the Code Civil whereas there is not a hardship provision, but the provision for imprévision (a Civil Law counterpart of the hardship institution) is on Art. 1195. It must be noted that Art. 1195 (i.e., a legal provision for imprévision) was introduced in French Law after the reform of the Napoleon Code in 2015. In other words, l'imprévision did not exist as a legal rule of the Civil Code in France since its appearance in 1804, and only existed as a legal doctrine.

68 The FM provision is on Art. 1730 of the New CCC whereas the imprevisión provision is on Art. 1091.

69 The FM provision is -supposedly- on Art. 426 of the CCP whereas the imprevisón provision is on Art.672.

70 See sentence « Compagnie générale d'éclairage de Bordeaux », Conseil d'Etat, 1916.

an Administrative Judge (Juge Administratif) and rejected by Civil and Commercial cases[71], mainly due the pacta sunt servanda principle (la force obligatoire du contrat)[72].

Nevertheless (which is quite strange) Latin-American countries such as Argentina, Paraguay and Peru[73] decided to include the theory of imprévision (its Latin-American version) inside their Civil Codes as legal rules for contractual matters, even before the French Law decided to incorporate l'imprévision to its Civil Code in 2015. Something that is also strange is the fact that within those same jurisdictions that consecrated l'imprévision as a legal rule in their Civil Codes, this legal remedy has a different scope, mainly, due to a difference in the text of their legal provisions (the case of Paraguayan Law[74] and Argentinian Law[75]).

But what is even stranger is the fact that, even though French Law (one of the "roots" of such doctrine) recognized its application only to administrative contracts for almost 100 years, the imprevisión is not recognized in the Law of Administrative contracts in some of those same Latin-American jurisdictions that adopted it in their legislation. In fact, that is forbidden by law in administrative cases (in Public Law reigns the Legality Principle[76], known under the legal reasoning "everything that is not expressly authorized is thus forbidden"[77]; therefore, if there is not an express recognition or authorization for the imprevisión, it is because it is not allowed).

This paper tries to expose such legal incoherencies through the lens of Paraguayan Law; the status of l'imprévision in Public Procurement contracts can be observed in the Law No. 2051/2003 "On State Contracts". Even though la imprevisión it is not expressly recognized in that law, a party is (expressly) allowed to invoke FM in a State Contract. This goes for the public-employer and for the private-contractor[78].

71 See sentence "Canal de Crappone" by the Cour de Cassation, 1876.

72 Art. 1.3 of the UNIDROIT principles; Art. 1103 of the French Civil Code; Art. 959 of the Argentinian New CCC; art. 715 of the Paraguayan Civil Code.

73 See Art. 1440 of the current Peruvian Civil Code.

74 Art. 672 of the Paraguayan Civil Code starts with: "En el contrato de ejecución diferida, si sobrevinieren circunstancias imprevisibles y extraordinarias…"

In other words, l'imprévision in Paraguayan Law applies only to "contratos de ejecución diferida", which, is not the same as "contrato de tracto sucesivo" (Lacasa, Arbitraje de la construcción y un triángulo amoroso: donde el Arbitraje Comercial Internacional y el Arbitraje de Inversiones chocan (Parte I), 2021).

75 Art. 1198 of the former Argentinian Civil Code of 1869 (el Código de Vélez) states: "En los contratos bilaterales conmutativos y en los unilaterales onerosos y conmutativos de ejecución diferida…" clearly contemplating a much more ample specter of contracts than his Paraguayan counterpart.

In the New Argentinian CCC l'imprévision is in Art. 1091 which starts "Si en un contrato conmutativo de ejecución diferida o permanente…"; the addition of the term "permanent is highly relevant.

76 Also known (in common law jurisdictions) as the Rule of Law.

77 The State Contracts, considering they belong to the Public Sector, are bound by the rules of Public Law, particularly the rules of Public Procurement Law, the main of which seems to be the Legality Principle (Lacasa, Infraestructura Municipal: Personería Jurídica, Contratos de Construcción y Arbitraje, 2021)

78 See arts. 58 (termination by agreement of both sides); 59 (unilateral termination by the public-employer); and 60 (termination by the private-contractor).

Ironically, when entering a Public Procurement (the default rule is to follow a competitive process for public acquisitions, known in Latin-American legal orders as "licitación")[79], one legal exception to avoid a "licitación" (i.e., to avoid the most transparent and competitive acquisition procedure) is precisely to invoke a FM event[80]. Put differently, the FM plays a role to avoid the "licitación", that is, before any contract is signed. It clearly concerns a pre-contractual stage. But this rule says nothing about imprevisión.

Also, regarding FM in pre-contractual stages in Public Procurement, the public party in any Public Procurement is allowed to cancel the acquisition process (i.e., to cancel a "licitación") invoking a FM event[81]. It must be noted that all provisions of the Law No. 2051/2003 also apply to Turnkey Projects[82]. However, the legal provision of a Paraguayan-Public-Law set of rules that explicitly cuts the borders between a FM and imprevisión is Art. 99 of the Decree No. 4183/2020 which regulates the Public-Private Partnerships[83].

Also, the Law No. 1618/2000 "The Concession's Act" contemplates the FM but in a more pessimistic manner. Art. 27 states[84]:

> The licensee will assume all the damages that the public works may suffer due a force majeure event

These legal phenomena take place in most of jurisdictions and such subtle incoherencies can only be identified through a comparative-law analysis just like the one exposed above (with elements of international law -UNIDROIT and PELC Principles-, French Law and some Latin-American legal regimes such as the Argentinian, Peruvian and Paraguayan) as observed by other authors such as Prof. Kessedjian.

CONCLUSIONS

There are many conclusions that come out of the above pages but that can be summed up in a very simple and single conclusion: the world has changed and the IEL has not. These changes, that altered every rule there was about international relations among States whilst framing an entire new landscape for international trade and international disputes, were rushed by the 2020 pandemic and during the aftermath of it, is time to review all the classical instruments and elements of IEL and their current relevance in the world of today.

79 In common law may be known as bidding procedure.

80 See Art. 33 of the Law No. 2051/2003.

81 See Art. 31 of the Law No. 2051/2003.

82 Art. 2 of the Law No. 5074/2013.

83 "[…] No se considerarán casos de fuerza mayor o caso fortuito los actos o acontecimientos que hagan el cumplimiento de una obligación únicamente más difícil o más onerosa".

84 Furthermore, a Concession may be suspended due to a force majeure event (art. 42).

The classical institutions that coordinate the interactions in Public International Law as in Private International Law are rooted on a system that no longer fits with the reality of today. The world is an entirely different thing that it was 60, 100 or 200 years ago. Should not the IEL update itself as well?

The answer, although affirmative, does not match with the current situation of IEL. And the author believes that such disbalance is precisely what is wrong. This paper does not intend to provide a magical solution for the update issue of IEL. It rather prefers to expose some facts in order to question the core basis of IEL today.

Regarding Public International Law it is no novelty that Multilateralism is still a (after more than half a century of international attempts) "work in progress". But it is the process chosen by the international community, and for very good and proved reasons. Nevertheless, the 2020 pandemic showed an increased rise of Nationalism and Virulent Diplomacy, reducing the notion of Sovereignty to a geographical localization or the economic power of a State. That is not what Multilateralism stands for. And the mere fact that those old forces such as Nationalism and Virulent Diplomacy are in vogue again should make the international institutions question the efficacity of the Westphalian system they are based upon.

The disproportionate allocation of the vaccines against the COVID-19 worldwide was an international failure rather than a multilateral success. Once again, the world witnessed an irrational behavior from the leader countries, which on one hand uphold the idea of a necessary equal distribution of the vaccines in order to truly fight the pandemic, but that were on the other hand negotiating the purchase of those same vaccines in a unilateral way showing off their economic and geopolitical power and unveiling their true intentions, keeping their populations safe first, without regard of the populations of other countries. Those facts seem enough evidence of something missing in the Public International Law current framework.

Regarding Private International Law, the COVID-19 pandemic generated a challenge for international disputes resolution and at the same time has forced the stakeholders and decision-makers of such dispute resolution frameworks to open themselves to new possibilities (Vargas & Geuna, 2021). Hence, the need of the international commercial relationships to resolve their disputes during the COVID-19 pandemic (and also in the post-pandemic era) has resulted in a remarkable increase of international commercial arbitrations taking place in the virtual space (Bateson, 2020).

Nevertheless, this situation does not fit properly with the territorial standard of the 1958 NYC or with the UNCITRAL Model Law and all national laws that followed it either. It does not also fit properly to some national legal orders that decided to not follow the Model Law. These circumstances recall the fervent debate on the legal foundations of international arbitration and the role of the "seat" and its nexus with the lex arbitrii. Will the 1958 NYC update itself in order to fit into the post-pandemic reality? And will national legislations follow through? The progression of the technologies inside the international arbitration legal framework is an undisputable fact. The need for modernization is exposed.

With the devastating effects of the pandemic, several international contracts suffered breaches and underperforming issues. As a consequence, the legal remedies for fixing these contractual bypasses became very relevant. But the problem was that such legal remedies were domestic provisions trying to fix an international relation. Therefore, some inconsistencies took place when applying the same legal remedy into the same international relationship (suppose a sale contract) since such legal remedies were in most of cases purely domestic remedies addressing an international situation.

This competitive approach of such legal remedies should be addressed and reviewed, in order to build more uniform solutions to the same international problems, and such task can be done only via a Comparative-Law methodology. This is not only a duty for the international community, but a responsibility for domestic legal orders.

Before attempting to find real solutions to these legal problems, perhaps is sound to analyze some of IEL legal postulates through a practical standard, and not just the classical legal point of view. More simply: is more important to ask the challenging questions than to find vain answers.

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