The role of interstate adjudication in public health emergencies: Incompatible at the core

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1. Introduction

Although there has been binding international law in the field since 1893, there has never been any instance of interstate international adjudication directly related to the cross-border spread of disease. While the COVID-19 pandemic is currently the focus of attention in this regard, the dearth of case law derives from deep-seated structural issues concerning the adjudicative fora, including their design. The present analysis discusses three factors that could influence the likelihood of an adjudicative dispute between States. First, the nature of the obligations under the primary rules in the field of the cross-border spread of disease that could...
theoretically lead to dispute settlement, with a focus on the World Health Organization (WHO)’s International Health Regulations (IHR) of 2005, the General Agreement on Tariffs and Trade (GATT) and the law of the World Trade Organization (WTO). Second, the existing mechanisms of international adjudication in the field of the cross-border spread of disease and their limitations. Third, the factual complexities associated with diseases with a cross-border dimension. The analysis concludes that the role of binding international law in the field does not end with third-party adjudication, thereby arguing for the need to overcome the perception of jurisprudence as the be-all and end-all when it comes to legal reasoning.

2. *International adjudication regarding the cross-border spread of disease: Why?*

The first step when assessing dispute settlement through adjudication in the field of the cross-border spread of disease involves indicating which primary rules of international law are susceptible to the invocation of a breach\(^4\) and by whom. Obligations stemming from these primary rules cover very specific aspects of States’ actions and omissions during disease outbreaks. As will be discussed in Section 4 below, the difficulties inherent in the surveillance of and response to such events affect the potential of international litigation.

According to the criteria governing State responsibility for internationally wrongful acts, a legal breach can be established regardless of its invocation by a specific party.\(^5\) Yet, affected parties (ie ‘injured States’) can certainly invoke a breach when requesting redress or, alternatively, the removal of measures that do not conform with the obligations under

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binding legal instruments. In certain circumstances, the invocation of a breach of a given international law obligation may be made by parties not directly affected by the facts of the breach, that is, when the obligation pertains to a community interest that extends beyond the damage caused to an individual State.

The aforementioned considerations form the basis for framing the potential responsibility of States under the obligations of the IHR (2005) concerning the cross-border spread of disease. Article 2 of the IHR (2005) signals the core objective and scope of the regulations, namely ‘[…] to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade’. This provision sets the scene by defining the rationale behind legal obligations that must be upheld by all States Parties to the IHR (2005).

Article 1 of the IHR (2005) further defines international traffic as ‘the movement of persons […] and goods […] across an international border, including international trade’. By way of clarification, the IHR (2005) are not intended to regulate migration per se. Indeed, the obligations towards individuals regularly include exceptions concerning those seeking to establish ‘temporary or permanent residence’. States retain the sovereign right to determine the health requirements for those seeking to enter their territory for a longer duration, as Article 1 of the IHR (2005) clarifies that national law will define the statutory period of stay for non-residence purposes.

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9 Art 1 of the IHR (2005) stipulates that temporary and permanent residence will be defined by national law. Thus, States fully retain their sovereign rights to regulate how ‘residence’ is to be understood in this context.
10 Art 1 of the IHR (2005) stipulates that both ‘temporary’ and ‘permanent’ residence will be defined by national law.
Furthermore, Articles 33, 34, 41 and 43 of the IHR (2005) foresee the possibility of applying certain measures in the case of the transit of goods on the grounds of potential health risks. Moreover, these provisions directly defer to obligations under ‘applicable international agreements’, thereby signalling the overlap between the IHR (2005) and the GATT/WTO law. Since the GATT was approved in 1947, it has gradually evolved into a sophisticated regime purporting to both stabilise and liberalise international trade. Detailed criteria have been developed for allowing the imposition of restrictions on the import of goods. For example, Article XX of the GATT includes public health as a possible exception that States could invoke when seeking to deviate from their obligations. Similarly, the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) establishes criteria for States’ invocation of health (ie the risk of the spread of communicable diseases) as a justification for restricting trade in agricultural goods.

The already impressive body of case law in the field of international trade has contributed to refining the criteria concerning how restrictions for reasons related to the protection of public health should be implemented. Thus, while the objective and purpose of the IHR (2005) according to Article 2 consist of the avoidance of unnecessary restrictions on the trade of goods on the grounds of health, the GATT and WTO law represent the main sources for determining the legality of restrictions to the cross-border transit of goods.

The overlap between the IHR (2005) and both the GATT and WTO law is yet another indication of the fragmentation of international law.

Nevertheless, unlike international trade law’s tilt towards national policies that restrict trade the least, the movement of individuals across borders on non-migratory grounds is not governed by similar principles. Instead, unless there are special agreements in place that provide for different obligations, States mostly retain the sovereign right to restrict the entry of travellers into their territory. The most comprehensive exception is the Schengen Agreement of 1985 and its acquis in Europe. The Schengen Agreement’s Preamble establishes ‘removing the obstacles to free movement’ as one of its guiding principles, while Article 2(1) of the Convention Implementing the Schengen Agreement of 1985 stipulates the freedom to cross the internal borders of States Parties without the need to undergo checks. However, Article 2(2) does permit States to take ‘immediate action’ in the form of additional checks, although they must inform the other parties when doing so. Conversely, there is no ‘global Schengen’ in which the free movement of individuals across territorial borders is enshrined as the starting point. This logic falls in line with a core tenet of the globalisation process, whereby the liberalisation of the movement of goods takes precedence over the movement of people.

Moreover, there are instances of international rules enshrining minimum standards for restricting travel. For example, the Chicago Convention on International Civil Aviation of 1944 deals with the cross-border movement of aircraft transporting individuals. Nevertheless, Article 1 allows a State to retain ‘complete and exclusive sovereignty over the airspace above its territory’. In addition, States do not commit themselves to providing general authorisation for transit within their territory.

Against this backdrop, Article 43 of the IHR (2005) foresees specific obligations related to the movement of people and goods across borders.

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19 For the opposing view, see BM Meier, R Habibi, T Yang, ‘Travel Restrictions Violate International Law’ (2020) 367 Science 1436.
20 See Arts 5, 6 and 7 of the Chicago Convention (1944).
It is arguably the most convoluted provision within the entire instrument, as it includes several caveats and exceptions. Indeed, the final paragraph of Article 43(1) of the IHR (2005) requires States parties to refrain from imposing public health measures that are more restrictive in relation to international travel and trade than is necessary, as compared with the available alternatives that achieve the ‘appropriate level of protection’. In the process of establishing what an ‘appropriate level’ is in this context, Article 43(1)(a) of the IHR (2005) mandates paying due attention to the WHO’s recommendations on the subject. Additionally, when deciding to impose public health measures that interfere with international travel and trade to a higher degree than recommended by the WHO, Article 43(3) of the IHR (2005) requires States to notify all other Member States and justify such a decision. These are the primary rules establishing the obligations that may be breached in the case of non-compliance through acts attributable\(^{21}\) to a State. The provision forms the basis for holding States responsible if they adopt measures that are overly restrictive of international travel and trade, particularly in so far as they negatively affect the interests of individual States by, for example, causing economic damage.

The core question concerns how ‘necessity’ is to be established. Article 43(2) of the IHR (2005) assigns the WHO’s recommendations weight in terms of determining whether a specific measure adopted to protect health is excessive or not. While multiple interpretations of the nature of Article 43 of the IHR (2005) have been advanced,\(^{22}\) the present analysis adopts the idea of States having leeway to go beyond the WHO’s recommendations as to whether to restrict travel or trade, so long as they notify all other Member States and justify their decision.\(^{23}\)

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The IHR (2005) includes other obligations that are not strictly related to international travel and trade but that could, theoretically, lead to dispute settlement. According to Article 6 of the IHR (2005), a State is obliged to ‘notify WHO, by the most efficient means of communication available […] within 24 hours of assessment of public health information, of all events which may constitute a public health emergency of international concern within its territory’. Under Article 10 of the IHR (2005), the WHO may then share information with other States Parties and the public at large. The rapid diffusion of information represents a component of the aforementioned goals of preventing and protecting against the cross-border spread of disease, as it is intended to alert others of an event that is occurring. Therefore, a breach of the obligation occurs when there is an omission that is attributable to a State and there are no circumstances precluding wrongdoing.24 It is worth underlining that the obligation to notify the WHO about diseases does not begin from the exact moment such diseases emerge; rather, it begins from when diseases are first ‘assessed’ by national authorities according to the criteria found in Annex 2 of the IHR. This is likely meant to prevent the imposition of unreasonable obligations on States, as the initial detection of an ‘unusual’ disease may be a complex endeavour that is directly linked to both States’ healthcare capacities and the epidemiological complexities inherent in disease identification. These are the underlying reasons why the 24-hour period only begins once the assessment has taken place. After that point, there is no reasonable justification for a delay in informing the WHO ‘through the most effective means’.

Perhaps due to the devastating magnitude of the COVID-19 pandemic, the obligation to notify the WHO about the disease initially stood at the centre of possible legal claims against China during 2020.25 Prior to this event, no claim had ever been put forward by any State regarding a potential breach. In fact, past instances in which specific States failed to comply with the obligation of notification were identified in official


WHO reports.26 Yet, no further legal action was ever taken when this occurred. Moreover, as any claim of a breach would have to demonstrate an omission by national authorities, this situation leads to the difficult question of how the burden of proof could be met and by whom. The case law of the International Court of Justice (ICJ) has affirmed that it is not necessarily up to the claimant State to provide evidence of an omission, considering how challenging it is to reconstruct a chain of events without conducting a thorough fact-finding process.27 Nevertheless, there still exists a need to establish, in a sufficiently convincing manner, awareness on the part of national authorities. Recent reports presented at the WHO include accounts of how the new coronavirus SARS-CoV-2 was assessed, for the purposes of Article 6 of the IHR, by local authorities in Wuhan at the end of December 2019.28 It is unclear whether the authorities furnished the necessary information to the WHO within a time span of 24 hours after the assessment. However, there are indications that, at most, the delay in notification was only a few days.

The breach of any of these legal obligations could, theoretically, lead to international adjudication. It is the first determinant of the likelihood of ever seeing such a dispute. In addition, two other elements come to the fore when establishing potential responsibility for internationally wrongful acts, namely (i) whether the act or omission is attributable to the State and (ii) who can invoke the breach and, therefore, initiate dispute settlement. The second element is considered further in Section 3 below.

In terms of attribution, according to the International Law Commission (ILC)’s Articles on the Responsibility of States for International Wrongful Acts (ARSIWA) of 2001, the question is whether the act or omission was performed by an agent of the State or by a non-State actor and, in the latter case, whether it fell upon the State to take additional

26 For example, there were direct claims of an unjustified delay by the government of Guinea with regard to reporting the presence of the Ebola virus in 2014. WHO, Report of the Review Committee on the Role of the International Health Regulations (2005) in the Ebola Outbreak and Response (13 May 2016) Doc A69/21 para 61.
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steps to prevent the private individual’s act or omission.\textsuperscript{29} Under certain circumstances, acts and omissions on the part of non-State actors may also be attributable to a State, especially if they occurred within the State’s territory and with the knowledge of the State’s agents, or if the latter failed to prevent such actions in specific instances.\textsuperscript{30} As highlighted above, the ICJ has dealt with the circumstances that may lead to the linking of the acts and omissions of non-State actors to States.\textsuperscript{31} Nevertheless, it remains unclear to what extent these criteria may be applicable in the case of the primary rules governing the cross-border spread of disease. In the case of the provisions of the IHR (2005), the obligations to notify the WHO about diseases within 24 hours after the assessment of a disease-related event, to refrain from imposing excessive health-related measures that are overly restrictive of international travel and trade, and to notify all relevant States Parties whenever the implemented measures go beyond those recommended by the WHO are incumbent upon a State’s authorities. A different discussion has emerged in the case of non-State actors, particularly with regard to Article 43 of the IHR (2005). If, for instance, private airlines decide \textit{motu proprio} to restrict international travel by cancelling all flights to a State in which the presence of a disease has been reported, it is not self-evident that such an act could be attributable to the State in question.\textsuperscript{32}

3. \textit{Limitations of the current mechanisms of international adjudication}

Article 56 of the IHR (2005) currently envisages the Permanent Court of Arbitration (PCA) as the judicial forum for the settlement of disputes if there are disagreements as to the interpretation of any provision thereof. The option to initiate judicial proceedings is only available after States have pursued good offices and mediation through the WHO Di-

\textsuperscript{29} ILC, ‘Commentary to the Draft Articles on State Responsibility’ (2001) II/2 Yearbook of the International Law Commission art 7 para 8.
\textsuperscript{30} Aust, Feihle (n 4) 48.
\textsuperscript{32} Habibi et al (n 22).
rector-General in an effort to solve the matter, which represents an obligatory prerequisite. Furthermore, binding arbitration requires the explicit acceptance of both the claimant and the respondent, either for all IHR-related disputes or those deriving from a particular issue or event. If such consent is not secured, arbitration at the PCA is not possible. Yet, envisaging a clause within the IHR (2005) that provides compulsory jurisdiction to a court does not necessarily increase the likelihood of adjudication. In fact, both the International Sanitary Regulations of 1951 and the IHR of 1969 (i.e. the current instrument’s predecessor) foresaw the compulsory jurisdiction of the ICJ. No subsequent expression of acceptance on the part of the States Parties to a dispute was necessary. Even with this clause, in the decades that followed, no judicial dispute ever saw the light of day. Consequently, while the existence of clauses providing for compulsory jurisdiction may indeed be a major factor in relation to the possibility of international adjudication, it should not be considered the decisive factor.

Alternatively, if there is a disagreement related to the interpretation of the GATT/WTO law regarding any restriction on the international movement of goods, including on the grounds of preventing health risks, Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Annex 2 of the WTO Agreement, allows for States Parties to request the formation of a Panel after consultations have failed. The panel will eventually issue a report, which may be appealed within 60 days under Articles 16.4 and 17 of the DSU. In turn, the Appellate Body will circulate its own report, in which it may either confirm or overturn the Panel’s findings. Unchallenged reports by a Panel or

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33 On how these requirements have been interpreted by the ICJ as necessary steps in relation to other legal instruments, see LN Sadat, ‘Pandemic Nationalism, COVID-19, and International Law’ (2021) 20 Washington University Global Studies L Rev 561, 573-581.


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those issued by the Appellate Body will be accepted by the Dispute Settlement Body (DSB) unless all the parties oppose such acceptance – a decision-making mechanism known as ‘reverse consensus’. This all but ensures the acceptance of reports.

As for which States may invoke a legal breach of obligations under the IHR (2005) or the GATT/WTO law against the culprit State, the two fora for contentious proceedings, namely the PCA and the WTO’s DSB, provide States with the possibility to put forward legal claims against other States. However, these mechanisms of international dispute settlement are associated with two salient limitations in terms of addressing legal claims related to the cross-border spread of disease.

First, the mechanisms of international adjudication offered by both the IHR (2005) and the GATT/WTO law enshrine a series of requirements for having sufficient legal standing in relation to dispute settlement. In this context, standing defines which subjects of law may invoke the breach of obligations to initiate contentious proceedings. Second, each legal regime provides for different types of remedies if a breach of international law is determined. This sets the scene for a cost-benefit analysis to be undertaken by potential parties when considering whether litigation is actually worth the trouble. These two limitations are considered the major determinants of the likelihood of international adjudication taking place, as explained in more detail below.

With regard to standing, dispute settlement under both the IHR (2005) and the GATT/WTO is available for States as subjects of international law. As such, individuals lack direct access. References to the respect for individuals’ human rights are made in Articles 2 and 32 of the IHR (2005), although no recourse for individuals or civil society non-governmental organisations (NGOs) in the case of wrongdoing by States

38 On recent discussions concerning States’ cost-benefit analysis in international law, see A van Aaken, B Simsek, ‘Rewarding in International Law’ (2021) 115 AJIL 195, 199-203.
is provided. Therefore, if travellers’ rights under the IHR (2005) are violated, recourse depends on the willingness of authorities from their home States to bring forward a claim through the espousal of their claims.\(^\text{40}\) In the past, and perhaps due to cost-benefit analyses, potential disputes between States arising out of the treatment of travellers have been settled diplomatically.\(^\text{41}\)

International and regional human rights quasi-judicial and judicial fora represent a parallel possibility wherein affected individuals could argue that a breach of the obligations found in the IHR (2005) has restricted their liberties and freedoms. However, given the chosen focus, two difficulties prevent a deeper analysis in the present paper. First, it is unclear to what extent a restriction of international travel, as understood within the IHR (2005), could lead to a human rights violation.\(^\text{42}\) Article 12 of the International Covenant on Civil and Political Rights of 1966, which enshrines the freedom of movement, cannot be read as guaranteeing movement across borders in all cases. The Human Rights Committee has interpreted this obligation as applicable within a State’s territory not only to nationals but also to other persons (‘aliens’) lawfully present within it.\(^\text{43}\) The Committee has also affirmed every State’s sovereign prerogative to determine lawful presence in its territory according to the criteria of domestic law.\(^\text{44}\) Second, even if the obligations of the IHR (2005) were invoked as a source of breach in human rights fora, it would serve as a secondary source mostly aimed at interpreting other primary rules.


\(^\text{41}\) For example, in 2009, a group of Mexican travellers was detained in China during the H1N1 influenza pandemic, despite no scientific basis for the detention being provided. The two governments reached a solution without initiating dispute settlement. PA Villarreal, Pandemias y Derecho: Una perspectiva de gobernanza global (UNAM 2019) 186-187.

\(^\text{42}\) Again, for the opposing view, see Meier, Habibi, Yang (n 19).

\(^\text{43}\) Human Rights Committee, CCPR General Comment No. 27, Article 12 (Freedom of Movement) adopted on 2 November 1999 CCPR/C/21/Rev.1/Add.9 para 4 <www.refworld.org/docid/45139c394.html>.

\(^\text{44}\) Ibid.
The latter are subject to different criteria concerning responsibility than the rules applicable to interstate disputes.45

4. International adjudication and disease-related events: An unsuitable match

Finally, a third possible explanation of the lack of international adjudication in the field of the cross-border spread of communicable diseases concerns the factual nature of such events. It is only through determining what is actually feasible to expect as an obligation that legal claims can have any chance of succeeding. According to the principle of sovereign equality enshrined in Article 2(1) of the Charter of the United Nations of 1945, the reach of a State Party’s obligations as stated within the provisions of the IHR (2005) and the GATT/WTO law is interpreted similarly for all other States Parties. This does not apply if there are provisions enshrining differential treatment.46 Moreover, it remains to be seen how a given obligation should be understood in diverging factual circumstances. In the case of diseases with a cross-border dimension, delving deeper into their medical and public health features should shed light on the likelihood of international litigation taking place as a result of potential violations of international law.

Communicable diseases with a cross-border dimension vary considerably with regard to the velocity of their spread, as exemplified by the ‘rate of reproduction’ (R0 or Rr).47 The difficulty associated with detecting

45 In human rights law, the evidentiary burden regarding claims of a breach of obligations most commonly falls upon the respondent State. T Stirner, The Procedural Law Governing Facts and Evidence in International Human Rights Proceedings (Brill 2021) 149-274.

46 For a discussion of the meaning of this concept and when it is at stake, see P Cullet, ‘Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations’ (1999) 10 Eur J Int L 549-582.

47 It should be noted, however, that the rate of reproduction is not a fixed number; rather, it is subjected to fluctuations due to changing circumstances. On the relationship between COVID-19’s R0 or Rr and public health measures during the initial stages of the pandemic, see A Pan et al, ‘Association of Public Health Interventions With the Epidemiology of the COVID-19 Outbreak in Wuhan, China’ (2020) 323 J of the American Medical Association 1915-1923.
and assessing new and re-emerging pathogens depends on their epidemiological features. For example, the diagnostic tools and procedures for detecting Ebola virus differ from the tools and procedures employed in the case of the various strains of influenza.\(^48\) As stated in official reports related to *ad hoc* investigations within the WHO, the availability of a robust disease surveillance system does not guarantee that every disease will be detected immediately.\(^49\) This explains why the obligation within the IHR (2005) to notify all States Parties only begins after an ‘assessment’ has been completed.\(^50\) It also underscores how the assessment of a legal breach will focus on its objective elements, rather than on its subjective ones.\(^51\) By contrast, expecting States to be obliged to identify a new or re-emerging pathogen in a certain period of time may not be realistic. The determination of what is a reasonable expectation in terms of States’ prompt action in stemming cross-border health threats must be made on a pathogen-by-pathogen basis.

In a similar vein to the epidemiological features of diseases, the nature of the measures adopted to address them is also subject to rapidly evolving scenarios. Restrictions on international travel and trade on the grounds of health risks may sometimes last for weeks and sometimes merely for days. The rapid velocity of public health responses to cross-border health threats undermines any possibility of initiating international (and, possibly, even national) dispute settlement while a measure is in force. In turn, such difficulty effectively limits the possibility of resorting to an adjudicative forum in which the effects of decisions are merely prospective (ie the WTO’s DSB).\(^52\) As there is no possibility of asking for damages due to incidents in the past, only of asking to ‘suspend

\(^48\) The latter has long been known to be a ‘slippery disease’ due to the challenges it poses in terms of accurate medical diagnosis. See the investigation by R Neustadt, H Fineberg, *The Swine Flu Affair: Decision-Making on a Slippery Disease* (National Academies Press 1978).

\(^49\) On the challenges associated with the rapid detection and containment of the H1N1 influenza pandemic in 2009, see WHO, *Report of the IHR Review Committee on the Functioning of the International Health Regulations (2005) and on Pandemic Influenza (H1N1) 2009* (France 2011) xvi.


\(^51\) On the distinction between objective and subjective elements in the ILC’s ARSIWA, see Aust, Feihle (n 4).

\(^52\) Art 3.7 of the DSU; see also Matushita, Schoenbaum, Mavroidis, Hahn (n 13) 89.
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obligations’ for as long as the non-compliant party refuses to remove the challenged measures,53 the current situation begs the question of how exactly a State could challenge fast-moving trade restrictions.54

Moreover, and closely related to the issue of velocity, the damages caused by health emergencies response measures may have a dramatically different scale depending on the case on question. Thus, for example, restrictions on international travel might have either minimal or devastating effects on the economic interests of a State. If the damages are not of a considerable magnitude, the home State is unlikely to invest financial resources in costly international litigation. In addition, as is well known to all jurists, reaching a favourable outcome in third-party adjudication is not a predictable affair. Furthermore, as noted elsewhere,55 the reluctance of States to initiate proceedings may also be due to self-interest. While today a State might file claims against other States’ actions and omissions in relation to disease outbreaks, given the latter’s unpredictability, in the future it might be that State facing a similar scenario.

5. Beyond adjudication: For a thick vision of international law and pandemics

The arguments presented above have offered potential explanations for why international adjudication has not yet played a role in interpreting States’ obligations regarding measures to respond to the cross-border spread of disease. The combination of delayed judicial remedies, the costs involved and the complexities inherent in understanding the factual nature of such events serves to explain why international litigation has not so far played any role in the field. It is quite telling that, to date, international dispute settlement through the adjudication of disputes between States deriving from the cross-border spread of disease has only


54 For example, the term ‘carousel retaliation’ refers to constantly shifting restrictions concerning international trade imposed on different products on a periodic basis. T Zimmermann, ‘The DSU Review (1998-2004): Negotiations, Problems and Perspectives’ in D Georgiev, KV Borch (eds), Reform and Development of the WTO Dispute Settlement System (Cameron May 2006) 446.

55 Hoffman, Villarreal, Habibi, Campbell (n 35).
been at stake in a Jessup Moot Court competition.\textsuperscript{56} The lack of jurisprudence increases the uncertainty related to the interpretation of both the IHR (2005) and the GATT/WTO law when it comes to their application in relation to pandemic events such as COVID-19.\textsuperscript{57} Both national authorities and the public at large are left to attempt to grasp the arguments in support of one interpretation or the other.

Nevertheless, as mentioned at the beginning of this analysis, the lack of case law does not entail a lack of the elements required for legal analysis. State practice regarding the fulfilment of obligations in the field of the cross-border spread of disease is visible in periodic reports by both the WHO\textsuperscript{58} and WTO Secretariats.\textsuperscript{59} All of these reports offer a glimpse of the patterns of State practice related to measures for restricting international travel and trade in order to protect human health. Yet, they are certainly no substitute for interpretation by adjudicators. Secretariats are not in a favourable position to decide who is correct in a case when they ponder opposing claims by Member States of an organisation. The need to consider claims, counterclaims and evidence in support of each side in a dispute is dealt with through case law. Article 56 of the IHR (2005) envisages a role for the WHO Director-General in terms of good offices and mediation. However, as explained throughout this analysis, States have not resorted to using the provisions of the IHR (2005) to invoke any potential breach. It is possible that most sources of disagreements are settled behind the scenes.

A broader perspective on legal interpretation could lead to a more in-depth appraisal of the daily implementation of international law. Given the incompatibility between international adjudication and fast-paced

\textsuperscript{56} The issues in question during the 2020 competition included the cross-border spread of a disease as part of a hypothetical dispute at the ICJ. See P Tzeng, J Kaiser, ‘“The students bring it to life”. An Interview with the Author of the 2021 Jessup Problem’ Völkerrechtsblog (24 May 2021) <voelkerrechtsblog.org/the-students-bring-it-to-life/>.

\textsuperscript{57} On the role of dispute settlement as a means to both reduce uncertainty and expand upon binding rules, see H Lauterpacht, \textit{The Development of International Law by the International Court} (CUP 1982) 155; see also Trachtman (n 36) 339.

\textsuperscript{58} The most recent report on the IHR’s implementation of restrictions on international travel (and, incidentally, trade) covering measures adopted during the COVID-19 pandemic is visible in WHO, ‘Implementation of the International Health Regulations (2005)’ Doc A74/17 (12 May 2021) paras 20–23.

developments such as pandemics caused by communicable diseases, different tools are required for understanding what States are supposed to do in such circumstances. For this purpose, international law in the field of the cross-border spread of disease, and particularly the IHR (2005) and the GATT/WTO law, should be seen as a matter of practice beyond courts, involving numerous events that never result in a dispute. This would help to support the idea of a more streamlined fulfilment of obligations on the part of States. Yet, it should certainly not represent a substitute for the adjudicative role, since States cannot be the sole interpreters of their own compliance with international law. Future high-level debates ought to be informed by a thicker vision of legal interpretation, one that is not heavily focused on the possibility of initiating contentious interstate proceedings. After all, beyond international litigation, States’ compliance with international law obligations represents an everyday matter.