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Sumário

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Hervé Ascensio**

The articles in the dossier that the *Revista de Direito Internacional (Brazilian Journal of International Law)* has decided to devote to the topic of international economic law in the face of the covid-19 health crisis raise major questions about the very discipline of international economic law and its evolution. This is not surprising because, as the text of the call for papers pointed out, the sudden emergence of the health issue has not only impacted the world economy significantly, but has also revealed weakenesses in its structure, and has induced States to reassess their essential interests and the needs of their peoples in the light of non-economic goals[1].

Of course, international economic law has never been completely isolated from extra-economic concerns. Both WTO law and preferential agreements contain exceptions that allow them to be taken into account. Sanitary and phytosanitary measures justifying restrictions on trade are the subject of a developed specific regime that departs to a large extent from a simple logic of exception, in order to strike a balance between free trade and protection while relying on scientific expertise. The international health regulations mirror this by aiming at a commensurate response to public health risks and the absence of "unnecessary interference with international traffic and trade"[2]. It is also true that a minimum harmonization of domestic regulations is realized through reference to international standards developed by international institutions such as WHO, FAO, ICAO, *etc.*, each of them pursuing objectives that involve reconciling economic development with other issues, such as health, food safety, air transport security, *etc.*

Nevertheless, in the panorama of international institutions and legal regimes dealing with economic relations, the main prism remains that of the free movement of factors of production. This is due in particular to the high degree of institutionalization of the areas of trade and investment, including in terms of dispute settlement, and their greater effectiveness. Moreover, exceptions clauses in investment treaties are still not so common, and international financial institutions have long been criticised for their indifference to long-term public policy objectives not directly related to macroeconomic rebalancing, such as the development of health or education systems. In this context, normative interactions between the health and trade branches of public international law remain limited. This is, in a way, the legacy of the 1990s and the economic conceptions of an era.

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[1] By contrast to strictly economic goals, if economy is understood as the part of human activity dedicated to the production of wealth.

[2] WHO, International Health Regulations (2005), article 2.

Under the influence of the sanitary crisis, questions were raised not only in legal literature, but also in mainstream media, about a larger scope of international economic law (1), linkages with other fields of international law (2) and enhanced global public policies for the health care sector (3).

1 Broadening the scope of international economic law

The dossier unfolds a broad view of international economic law on the part of a majority of the authors. This deserves attention, because it reintroduces within the field questions usually appraised as "contextual" – or externalities to use an economic concept.

For instance, crime at sea is a constant concern for the international community, because of the risks it poses to international maritime transport, which is an essential service for the supply of food and raw materials to many countries, but also for the smooth functioning of transnational value chains for manufactured goods. The link between the security of the seas and the global economy is therefore obvious and explains the strong involvement of the international community in the fight against piracy and armed robbery in the Western Indian Ocean, with undeniable success. But the Niger Delta and the Gulf of Guinea remain dangerous maritime areas. The prevailing socio-economic context in Nigeria, aggravated by the covid-19 crisis, would explain the persistence of criminal acts even during the period when maritime traffic decreased due to the pandemic[3]. Public policies that address all the causes of piracy, including poverty and insufficient redistribution of wealth, should therefore be encouraged.

Another broadening of the perspective concerns the interaction with environmental protection. The term "sustainable development", reflecting the convergence of the two fields, has of course been gaining prominence for many years now in the diplomatic arena and appears in a significant number of international legal instruments. However, its effects in international economic law remain tenuous, when one looks at the content of treaty obligations, including in the timid environmental clauses of investment treaties. Yet in 2015 the General Assembly adopted the Sustainable Development Goals, which are intended to influence the public policies of States and international institutions altogether[4]. The pandemic has slowed down these efforts, while revealing the need for a holistic vision even broader than sustainable development. The scale of the task is illustrated in this dossier by the problem of plastic pollution of the oceans, including the waste from masks widely used to combat the pandemic[5]. Moreover, the question has been raised of a possible link between the emergence of the new coronavirus and global warming. Whatever the answer in this case, it is certain that global changes in the environment increase the risk of future zoonoses – diseases passing from animals to humans or vice versa. To address this risk, the United Nations specialised agencies are now promoting the "One World - One Health" approach, considered as a new "principle" by the UN General Assembly.[6] This makes it all the more urgent to reorient the global economy, and the law that structures it, so as to limit global warming.

The opening up of the discipline also addresses, beyond intergovernmental cooperation, the role of business enterprises as entities accountable to those within their sphere of influence. The transport sector was obviously in the front line at the beginning of the health crisis, which provides an opportunity to examine the international rules in force concerning the liability of transporters, for example in the event of contamination of travellers, and perhaps to deduce from them a form of duty stemming from international law and applicable to the relations between private persons in order to protect the right to health.[7]

2 Linking international economic law

[3] Kalu Kingsley Anele, "A critical analysis of the implications of Covid-19 on piracy off the Nigerian coast" (article published in this issue).

[4] UN General Assembly, A/RES/70/1, 25 September 2015, "Transforming our world: the 2030 agenda for Sustainable Development".

[5] Adriana Isabelle Barbosa Lima Sá Leitão, Tarin Cristino Frota Mont'Alverne, "The Covid-19 Pandemic as an Impeller for the Aggravation of Marine Plastic Pollution and Economic Crisis: the Reverse Effect of Health Protection Measures on Human Lives" (article published in this issue).

[6] A/RES/74/306, 11 September 2020, § 44.

[7] Thiago de Oliveira Frizera, Luisa Cortat Simonetti Gonçalves, Adriano Sant'Ana Pedra, "O dever humano de promoção da saúde: a aviação comercial internacional em períodos de calamidade sanitária e do rotorno à normalidade" (article published in this issue).

with other branches of international law

A second line of thought concerns the methods that can be used to link the branches of international law, or to better articulate the different legal regimes of international law. This classic theme of "linkage" in the legal doctrine, as a response to the so-called fragmentation of international law, has returned with force under the pressure of events. To avoid it would mean to opt for the idea that the pandemic, or at least the phase during which it led to a brutal and wide-ranging economic recession, was only a parenthesis. During this period, States intervened massively in the economy, without necessarily worrying about scrupulous compliance with the treaties, after which a return to normalcy would follow. But it is to be feared that the economic effects will be long-lasting and, above all, that other pandemics will occur. It should also be stressed that developing countries, including emerging economies, have been hit hardest and that the public debts of developed countries will weigh on the future of the world economy. The idea of a simple parenthesis therefore seems illusory. This, in our view, justifies questioning the legal means for a better linkage between international economic law and global health law.

In economic treaties, non-economic issues are usually dealt with either by reference to the State's power to regulate or in the form of exceptions. Is this sufficient?

The first method relies on policy space and the capacity of the State to arbitrate between different social needs, considering all its international obligations. But this space must be large enough not to make a choice impossible, or so limited that it seems to deprive democratic discussion – for those States with a democratic regime – and societal choices of all utility. And it may be considered that this space should be wider in certain circumstances, such as a new pandemic, to avoid the State being forced to derogate extensively. Hence the search for justifications in legal doctrines such as the police powers theory, in the event of investment disputes that would be directly linked to the crisis of covid-19[8].

Another, more radical, option deduced from States' discretionary powers would be an extensive vision of national security interests, including health security. There have been signs of this in the discourses of some States, whether the idea is based on a national security derogation clause, or on a flexible understanding of the state of necessity, or, and more basically, on a call to sovereignty and exceptional circumstances. Indeed, it represents a response, but one that is weakly framed in the rule of law at the international level, and one that may open the Pandora's box of self-judgment and weakening of international cooperation at a time when it is most needed.

The second method is health exceptions clauses, such as those drafted after Article XX (b) of the GATT. At first sight, their shortcoming is that they are still thought of as negative, temporary measures, creating obstacles to trade or limits to the protection offered – which may be justified, but obstacles and limits, nonetheless. The more developed regime for sanitary and phytosanitary (SPS) measures adopted at the WTO as a *lex specialis* may lead us to qualify this observation, insofar as it moves away from a logic of exception towards a balancing of interests, and it refers, in the form of a presumption of validity, to technical standards developed by external international bodies in view of non-economic objectives. But a step further might prove useful to fight a pandemic. As exemplified by the Covid-19, the circumstances may require much more far-reaching measures than those usually adopted under a specific sanitary agreement and covering trade in services as well as trade in goods.

A derogation regime specific to periods of pandemic, or at least a consistent set of guidelines with normative value under economic treaties, could prove useful, especially when it causes a disruption of traffic and international trade, and impacts severely the functioning of national markets. It would also help mitigating the systemic – or rather anti-systemic – risk of poorly or uncoordinated national responses, as experienced during the first weeks, or even months, of the Covid-19 crisis. In this respect, it is worth recalling the call for a global reflection on international trade and health launched by the World Health Organization in 2006[9].

[8] Thomas Lehmann, "Police Powers Doctrine: a reliable State Defense in times of Covid-19" (article published in this issue).

[9] Resolution WHA 59.26, 2006, and the Report by the Secretariat, EB116/4, 28 April 2005.

The first difficulty to be resolved is that of identifying the risk of a pandemic and the qualification that triggers the application of a particular legal regime. An express reference to the WHO and the International Health Regulations would be the answer that reflects the best international cooperation. It exists in air law, where one of the – rare – normative links with international health law appears. Annex 9 to the Chicago Convention refers to a situation of a "public health emergency of international concern", as qualified by the WHO, in case of which the State that would like to adopt health measures in addition to those recommended by WHO shall do so in conformity with the criteria of the international health regulations (2005).[10] The linkage probably needs to remain fairly flexible, as the precautionary principle may lead some States to opt for stricter measures. Another difficulty lies in the weight placed on the Director-General and the scientific committees of the World Health Organization, whose independence and rapid access to information must be guaranteed. Flexibility also depends on the form of normative linkage envisaged. In this respect, international economic law, and particularly WTO law, has already been able to invent forms of linkage that are more nuanced than the automaticity resulting from an obligation, for example the presumption of validity of national measures in accordance with an international standard or the reference to external norms as a relevant criterion.

As for the content, some lessons may be drawn from the Covid-19 crisis too. Given the information now available, transmission through objects seems limited: it occurs essentially between human beings. Trade in goods could therefore continue, and even been facilitated, with certain precautions and sustained attention to the situation of crews – sometimes very badly treated during the crisis[11]. Conversely, trade in services was more strongly affected, at least for those that require the movement of people, *i.e.* modes 2 and 4 according to the GATS categories. In contrast, cross-border services that do not involve the movement of people have benefited from an acceleration effect, especially in the digital economy. Digitalisation has also offered solutions for trade facilitation, such as the easing of certain control procedures at points of entry in customs territories. The crisis has also reminded us of the particularity of certain goods, such as foodstuffs of course, but also medicines, vaccines, and medical equipment – including the simplest ones like masks. Of course, the characteristics of a health crisis could be different for other viruses, but one can imagine adaptations according to the hypotheses. Taking these different elements into consideration, a possible regime for the economic aspects of a health emergency is outlined.

A final aspect of this theme is that of a better link between international law and national procedures. The stake here is how to make international law more effective in national law, including in periods of urgency in the adoption of national measures. This is illustrated in this dossier by the article on the timing and function of judicial review to ensure compliance with ILO conventions of the interim measures adopted by Brazil during the health crisis in relation to workers' rights.[12]

3 Enhancing global public policies in the health care sector

The third axis of the dossier consists of examining the current state of international economic law and its capacity to contribute to international public policies such as the strengthening of the health sector and universal health coverage[13].

The first steps in a process of international cooperation are often essential, though not sufficiently emphasised by legal doctrine: it starts with access to information and information sharing. Hence the great interest of the article by Magali Favaretto Prieto Fernandes and Michelle Ratton Sanchez Badin on the facilitating national measures adopted by Brazil in relation to medicines during the first months of the pandemic[14]. The authors

[10] Annex 9, "Facilitation ", 15th ed., October 2017, standard 2.5.

[11] See, in response, the resolution concerning maritime labour issues and the COVID-19 pandemic adopted on 8 December 2020 by the International Labour Organisation (ILO, GB.340/Resolution (Rev.2)).

[12] Danilo Garnica Simini, Gabriel Carvalho Moreira, Rafaela Souza Machado, "A inexistência do controle preventivo legislativo de convencionalidade da Medida Provisória n° 936/2020" (article published in this issue).

[13] See UN General Assembly, A/RES/74/2, 10 October 2019, "Political Declaration of the high-level meeting on universal health coverage", a resolution adopted after preparatory works of the World Health Organization (WHA72/2019/REC/1).

[14] Magali Favaretto Prieto Fernandes and Michelle Ratton Sanchez Badin, "Transparência e cooperação regulatória no comércio internacional de produtos médicos para a COVID-19: uma análise da atuação institucional da OMC e das notificações do Brasil em ob-

rightly emphasise transparency as a primary condition for international cooperation and its intrinsic value, as well as the analysis of national experiences under the WTO agreements on sanitary and phytosanitary measures and technical barriers to trade. Such analysis is of particular benefit to developing countries, in order to reduce information asymmetry.

Moreover, the multilateral trade regime has proven its worth in the face of a pandemic. In the first months of 2020, restrictions on free trade due to over-reaction by States had seriously disrupted food and agricultural supplies and increased global poverty and inequality. The Group of Twenty (G20) and the UN General Assembly expressed concern and called for measures to be taken in accordance with WTO law[15]. After this initial phase, many States became aware of the problem and sought to facilitate trade, for example by lowering tariffs on medical supplies and simplifying health controls[16].

But a global health risk may also be tackled by building long-term responses, with intervention by the public authorities in the form of incentives and/or targeted investments. Until now, this has been the role of national economic policies, while international economic law has promoted and guaranteed the free movement of factors of production. Perhaps is it time to add a strong capacity-building component to international economic law, especially as this would concur with the goals and values the international community expressed during the pandemic, not only through WHO or other agencies pursuing non-economic objectives, but also through the G20 and the main bodies of the United Nations. For instance, in its resolution 2565 (2021), the UN Security Council "*stresses* the need to develop international partnerships particularly to scale-up manufacturing and distribution capabilities, (…) *notes* the need to maintain incentives for the development of new health products; and *recognising* the role of extensive immunisation against COVID-19 as a global public good for health" [17]. The idea of immunisation as a global public good had also been put forward earlier by the UN General Assembly[18].

However, the implementation of these generous objectives into free trade and investment treaties is a work in progress – assuming it has begun –, as these have been conceived in terms of non-interference by the state in the economy, except to offer a stable legal and economic environment. The main development at the international level is the creation by the WHO of the ACT Accelerator, with its COVAX branch for vaccines[19]. But the effectiveness of the mechanism remains to be demonstrated and the choice of a public-private partnership restricted to a given pandemic keeps it for the time being on the margins of international economic law. It is nevertheless a welcome initiative.

The issue of intellectual property rights is, as is well known, being debated, as several countries have proposed a new amendment of the Agreement on Trade-Related Aspects of Intellectual Property Rights to waive rights on Covid-19 vaccines[20]. This proposal, which may be viewed mostly as a way of putting pressure on the pharmaceutical industry to lower the price of vaccines, especially for developing countries, does not solve however the other problems, namely access to components at a fair price, increased production capacity, and strengthened distribution channels. The same holds true for medicines, medical supplies, and care services.

If the promises made in international fora are to be taken seriously, it is likely that the funding offered during the crisis by international financial institutions will need to be extended in the long term and directed towards building effective health systems. It would also require a reassessment of the current international rules governing States' interventions in the economy, including the subsidy regime, which may need more flexibility when public support is directed to the health sector or designed to mitigate climate change. Under these conditions, one could speak of a shift to a new post-Covid-19 world economic order.

servância aos Acordos TBT e SPS".

15 G20, Trade and Investment Ministerial Statement, 30 March 2020 ; Leaders' Declaration, Riyadh Summit, 21 November 2020, §§ 12-13 [available at: www.g20.utoronto.ca]; UN General Assembly, resolution A/RES/74/306, 11 September 2020, § 18.

16 See WTO, *Annual Report*, 2021, pp. 76-79.

17 S/RES/2565 (2021), 26 February 2021, § 1.

18 A/RES/74/306, 11 September 2020, § 13.

19 See [https://www.who.int/initiatives/act-accelerator]

20 WTO, Communication of India and South Africa, IP/C/W/669, 2 October 2020. See also addenda 1 to 16 for the other States joining the proposal.

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