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PUBLIC HEALTH POLICIES AND PHARMACEUTICAL SOVEREIGNTY THROUGH THE PRISM OF INVESTMENT AGREEMENTS IN THE ASIA-PACIFIC REGION

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Abstract

In many countries, the Covid-19 crisis was accompanied by shortages of medical equipment (masks, gowns, respirators,...) and medicines, before the issue of access to newly developed vaccines came to the fore. Pharmaceutical sovereignty became a growing concern. In many developed countries where a pharmaceutical industry had been built up over the last few centuries, the Covid-19 pandemic and the resulting shortage of medical equipment and medicines led to the discovery that this industry had relocated and was now only keeping part of its production lines in these countries. To remedy the shortages observed during the Covid-19 pandemic, the main response, particularly in Europe and France, is to propose a proactive policy based on relocating pharmaceutical production in order to restore pharmaceutical sovereignty. This new policy raises the question of its legal compatibility with the international commitments made by most of the world's states in investment agreements. The globalization of the economy and the relocation of industries, not just pharmaceuticals, have been supported by a network of international investment treaties. The goal of the present study is to consider firstly whether investment treaties authorize or regulate public health policies that may be adopted or modified by the States parties to these treaties, and in a second time whether measures designed to encourage the relocation of pharmaceutical production are compatible with the treaty obligations entered into by States in these investment protection treaties.

Keywords: *industry relocation, Covid-19 crisis, pharmaceutical sovereignty, new policies, state's aid, investment treaties, investments international mobility, states international obligations*
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In several countries, the early stages of the Covid-19 crisis saw significant shortages of medical supplies including masks, gowns, respirators, and medications before the focus shifted to challenges surrounding access to newly developed vaccines. Pharmaceutical sovereignty became a growing concern, even if the issue is not the same everywhere.

In countries without a pharmaceutical industry and dependent on imported health products, the Covid-19 pandemic came on top of previous pandemics (also accompanied by shortages of medicines), notably the AIDS pandemic at the end of the 20th century in many southern African countries. In many developed countries where a pharmaceutical industry had been built up over the last few centuries and was thought to be solid, the Covid-19 pandemic and the resulting shortage of medical equipment and medicines led to the discovery that this industry had relocated and was now only keeping part of its production lines in these countries.[1]

The reasons for this trend are well known, starting with profound changes in the healthcare industry over the last thirty years, which have resulted in a concentration of laboratories and numerous relocations. Four-fifths of the active ingredients in medicines marketed in Europe are no longer manufactured in Europe, but come from Asia.[2] Furthermore, as building up and maintaining stocks is costly, the supply of medicines and healthcare products is based on the "just in time supply chain" mechanism. This economic choice by the industry and importing countries exposes the latter to the risk of disruption in the supply chain. This was the case for many countries, including Member States of the European Union (EU) in 2020.[3]

To remedy the shortages observed during the Covid-19 pandemic, the main response, particularly in Europe and France, is to propose a proactive policy based on relocating pharmaceutical production in order to restore pharmaceutical sovereignty.[4]

First and foremost, this new policy raises questions of economic sustainability. Are consumers in Europe prepared to pay more for their medicines and vaccines because they will be manufactured in Europe?

1 Even if, in France for example, an increase in stock-outs of a certain number of medicines was observable before 2020. See Sonia, D. L. P., & Laurence, C. (2023, July 4). *Pénurie de médicaments: Trouver d'urgence le bon remède – Rapport* [Drug shortage: Urgent need to find the right remedy - Report]. Commission of Inquiry Reports. Report No. 828 (2022-2023), Vol. I. https://www.senat.fr/rap/r22-828-1/r22-828-1.html.

2 "According to the European Medicines Agency (EMA), 80% of active pharmaceutical ingredients are manufactured in China and India, and 40% of medicines marketed in the European Union are imported... In addition, the concentration of supply is such that there are only two or three suppliers in Asia for many molecules, which makes the supply chain more fragile in the event of a product hazard," see Nationale Assemblée. (2020, 11 June). *Report by Mrs. Dubost no. 3082 on the motion for a European resolution on the relocation of the manufacture of medicinal products and active pharmaceutical ingredients in Europe*. Commission des affaires européennes. Also, Sénat. (2023, July 4). *Report made on behalf of the commission of enquiry on the shortage of medicines and the choices made by the French pharmaceutical industry*. No. 828, p. 80.

3 On this issue as a whole, see Fortier, C. (2024). La 'Remondialisation' de la santé ou la construction d'une souveraineté pharmaceutique [The 'reglobalization' of health or the construction of pharmaceutical sovereignty]. In S. Bostanji & A. Aouij (Eds.), *Actualité du droit international de la santé* (pp. 11-52). Maison du Livre publisher; See also in the same book, Moine-Dupuis, I. (2024). La financiarisation de l'industrie pharmaceutique: un processus à briser ou à infléchir? [The financialization of the pharmaceutical industry: a process to be broken or influenced?] (pp. 85-108).

4 Haut-Commissariat au Plan. (2020, December 18). *Produits vitaux et secteurs stratégiques: Comment garantir notre indépendance* [Vital products and strategic sectors: How can we guarantee our independence?]. Opening note no. 2. https://www.info.gouv.fr/actualite/produits-vitaux-et-secteurs-strategiques-comment-garantir-notre-independance

Beyond its economic relevance, this desire for relocation raises the question of its legal compatibility with the international commitments entered into by most of the world's States, including the European countries, in investment agreements. The globalization of the economy and the relocation of industries, not just pharmaceuticals, have been supported by a network of international investment treaties. These promote free competition at the global level by ensuring the international mobility of factors of production, and therefore their location in the most economically attractive places, which are often in Asia. These investment treaties also protect investments from State measures that could undermine them.

The question today is whether the obligations set out in these treaties will not run counter to the relocation policies that have been announced. This is an important issue at global level, but even more so in the Asia-Pacific region, which has attracted a large number of pharmaceutical companies, and which may now fear a return of the pendulum.

Insofar as a policy of relocating the pharmaceutical industry in order to ensure sufficient access to medicines can be analyzed as much as a public health policy as an industrial policy, it is first necessary to verify whether investment treaties authorize or regulate public health policies that may be adopted or modified by the States parties to these treaties. It is then possible to examine more specifically whether measures designed to encourage the relocation of pharmaceutical production to Europe are compatible, or not, with the treaty obligations entered into by States in these investment protection treaties. In the context of this study,[5] particular attention will be paid to investment agreements in the Asia-Pacific region and to agreements of the same type concluded between these States and the European Union.

1. Public health policies in investment treaties

International investment treaties are likely to refer expressly to health, or even public health issues, with a view to taking them into consideration when identifying the commitments and their limits made by States in favor of foreign investors (1.1). However, the fact that other treaties are silent on health issues does not mean that health

5 This article is based on the paper presented at the conference at Ho Chi Minh City University of Law: Manciaux, S. (2023, October 20). *The pivot of trade to Asia-Pacific and its impacts on internal and external economic policies of the region in the fields of trade, investment and environment* [Conference presentation]. Ho Chi Minh City Law University Conference, Ho Chi Minh City, Vietnam.

will be ignored by arbitral tribunals when assessing the lawfulness of the State intervention challenged by the foreign investor (1.2).

1.1. Express references to public health in investment treaties

There is no mention of public health policies in the first generation of investment treaties.[6] This is the case, for example, of the Bilateral Investment Treaty (BIT) concluded between France and Vietnam in 1992, which entered into force on 10 August 1994.[7] It is only recently, in the latest generation of investment treaties in the form of more developed texts containing more articles with more detailed provisions, that things have changed.[8]

For example, the BIT concluded between Vietnam and Turkey in January 2014 and which entered into force in June 2017[9] contains three references to health issues, although it does not expressly refer to the concept of public health. In the preamble, the two States Parties express their conviction that the objectives of the bilateral treaty they are concluding can be achieved without relaxing the measures of general application in the areas of health, safety and the environment.[10]

Article 4 on the "Right of States to regulate" provides that:

"Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory measures:

a) designed and applied for the protection of human, animal or plant life or health, or the environment".

Finally, Article 5 on "Expropriation and compensation" states in paragraph 2 that: "Non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation."

This treaty is emblematic of what can now be found in modern investment treaties, even if some of them contain even more references to the subject and/or more developed provisions.

For example, the draft investment agreement concluded between the EU and China in December 2020 contains provisions similar

6 This discussion pertains to investment treaties concluded between the 1960s and the early 21st century.

7 UN Trade and Development. (2025). *International ivestment agreements navigator*. IIAs by Economy. https://investmentpolicy.unctad.org/international-investment-agreements/by-economy

8 Baetens, F. (2022). Protecting foreign investment and public health through arbitral balancing and treaty design. *International and Comparative Law Quarterly, 71*(1), 139–182. https://doi.org/10.1017/S0020589321000488

9 *Ibid*.

10 Preamble of the 2014 Vietnam–Turkey Bilateral Investment Treaty: "Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application."

to those in the Vietnam-Turkey BIT regarding the right of States Parties to regulate for health reasons (Article 4), with an express reference to public health in Article 1 (Objectives of the Treaty).[11] Similarly, the investment agreement - not yet in force - between the EU and Vietnam expresses the general right of the States Parties to regulate for reasons of public health (Article 2.2),[12] a right reiterated in relation to national treatment or most-favored-nation treatment (Article 4.6.a).

But these new generation investment treaties are still few in number, far fewer than the previous generation of treaties which, as has already been pointed out, did not contain provisions specifically addressing health issues. But are health issues ignored when these older treaties are implemented by arbitral tribunals?

1.2. The consideration of health issues by arbitral tribunals in the absence of specific treaties provisions

From the outset, investment law - as developed in the earliest investment treaties - was designed to protect foreign investors and investments, while preserving the right of host states to act to protect the public interest for which they are responsible. For example, investment treaties have never prohibited the right for States to expropriate,[13] but have provided a framework for implementing this right, as do the domestic laws and constitutions of many States, such as the 2013 Constitution of the Socialist Republic of Vietnam (Article 32)[14] or the Constitution of the

11 Article 1.2 of the draft investment agreement concluded between the EU and China in December 2020: "The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, the environment, including the fight against climate change, public morals, social security or consumer protection, privacy and data protection or the promotion and protection of cultural diversity."

12 Article 2.2 of the Investment Protection Agreement between the European Union and the Socialist Republic of Vietnam: "The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection, or promotion and protection of cultural diversity."

13 On this issue, see Dolzer, R. (1981). New foundations of the law of expropriation of alien property. *The American Journal of International Law, 75*(3), 553-589. https://doi.org/10.2307/2200686; Manciaux, S. (2004). *Investissements étrangers et arbitrage entre Etats et ressortissants d'autres Etats: Trente année d'activité du CIRDI* [Foreign investments and arbitration between states and nationals of other states: Thirty years of ICSID activity]. LexisNexis, Paris, pp. 485-546.

14 "Article 32 of the 2013 Constitution of the Socialist Republic of Vietnam:
1 Everyone enjoys the right of ownership with regard to his lawful income, savings, housing, private possession, capital and assets in enterprises or other economic organisations.
2. The right of private ownership and the right of inheritance are protected by the law.
3. In cases made absolutely necessary by reason of national defence, security or national interest, in case of emergency and for protection against natural calamity, the State can make a forcible purchase of or can requisition pieces of property of individuals or organisations against compensation, taking into account current market prices."

French Republic (Article 17 of the 1789 Declaration of Rights of Man and of the Citizen).[15]

When it comes to the question of indirect expropriation, with the exception of a few debatable and long-standing arbitration awards, the enactment of proportionate and non-discriminatory measures in the general interest is not regarded as an indirect expropriation giving rise to a right to compensation, but as the right of any State to use its power to enact laws and regulations in the public interest.[16]

With regard to the full and complete security (FPS) obligation owed by States to foreign investors, it has never been absolute or complete, despite its title.[17] As for the obligation to grant fair and equitable treatment (FET) to foreign investors, this standard of conduct has never sought to prohibit possible legal proceedings against them or to prohibit the enactment of measures concerning them, provided that such measures are neither discriminatory nor arbitrary.[18]

15 Article 17 of the 1789 Declaration of Rights of Man and of the Citizen: "La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité." (As property is an inviolable and sacred right, no one may be deprived of it, except when legally established public necessity obviously requires it, and subject to fair and prior compensation).

16 On Indirect expropriation, see Nouvel, Y. (2002). Les mesures équivalant à une expropriation indirecte dans la pratique récente des tribunaux arbitraux [Measures amounting to expropriation in recent practice of arbitral tribunals]. *Revue Générale de Droit International Public, 106*(1), 79-101; Manciaux, S. (2006). Les mesures équivalentes à une expropriation dans l'arbitrage international relatif aux investissements [Measures tantamount to expropriation in international investment arbitration]. In F. Horchani (Ed.), *Où va le droit de l'investissement? Désordre normatif et recherche d'équilibre* (pp. 73-94). Paris, France. https://shs.hal.science/halshs-00112444v1; Gazzini, T. (2010). Drawing the line between non-compensable regulatory powers and indirect expropriation of foreign investment: An economic perspective. *Manchester Journal of International Economic Law, 2010*(7), 36-51; Nikiéma, S. H. (2012). *L'expropriation indirecte en droit international des investissements* [Indirect expropriation in international investment law]. Presses Universitaires de France. https://doi.org/10.4000/books.iheid.875

17 On the FPS standard, among many publications, see Giuditta, C. M. (2008). Full protection and security. In A. Reinisch (Ed.), *Standards of investment protection* (pp. 131-150). Oxford University Press; Dolzer, R., & Schreuer, C. (2012). *Principles of international investment law* (2nd ed., pp. 160-166). Oxford University Press; Nouvel, Y. (2015). Les standards de traitement: Le traitement juste et équitable, la sécurité pleine et entière [Treatment standards: Fair and equitable treatment, full and complete security]. In Ch. Leben (Ed.), *Droit international des investissements et de l'arbitrage transnational*. Pédone, p. 287; Manciaux, S. (2019). The full protection and security standard in investment law: A specific obligation?. In K. F. Gómez, A. Gourgourinis, & C. Titi (Eds.), *International Investment Law and the Law of Armed Conflict* (pp. 217-228). European Yearbook of International Economic Law, Springer. http://dx.doi.org/10.1007/978-3-030-10746-8_11

18 On the FET standard, among many publications and in addition to some of the references quoted in the previous footnote, see Tudor, V. I. (2008). *The fair and equitable treatment standard in the international law of foreign investment*. Oxford University Press, p. 348. https://doi.org/10.1093/acprof:oso/9780199235063.001.0001; Paparinskis, M. (2013). *The international minimum standard and fair and equitable treatment*. Oxford University Press, p. 320. https://doi.org/10.1093/acprof:oso/9780199694501.001.0001; Schill, S. W. (2010). Fair and equitable treatment, the rule of law, and comparative public law. In S. W. Schill (Ed.), *International investment law and comparative public law*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199589104.003.0005

There is therefore a real attempt to strike a balance between protecting the private interests of foreign investors and preserving the right of States to act in the general interest. Whether this balance, as established in the texts and then implemented by the arbitral tribunals seized in the event of disputes, is considered satisfactory is another question, which leaves more room for a certain subjectivity.

In this respect, however, it is possible to refer to an interesting study carried out by the United Nations Conference on Trade and Development (UNCTAD) three years ago on investment arbitration proceedings in which public health issues were raised.[19] In the summer of 2021, UNCTAD identified 33 arbitration proceedings in this field, involving disputes that were quite different from one another, since the relationship with public health in each of the cases considered depended to a greater or lesser extent on the investment in question and/or the measure taken by the State and/or the arguments developed by the parties before the arbitral tribunals.[20]

In some cases, the dispute concerned a public infrastructure critical to public health, such as water distribution and treatment (e.g. *Biwater v. Tanzania*).[21] The *Achmea v. Slovakia* case,[22] which is well known in the European Union for other reasons, involved the acquisition of a stake in a health insurance company. The withdrawal of an authorization to sell a medicine, coupled with the authorization to sell its generics, was at the root of *Servier v. Poland*.[23] *Eli Lilly v. Canada* arose from the invalidation by the Canadian courts of a patent on a molecule, and so on.[24] As for the famous *Philip Morris v. Australia* case, it concerned a government measure designed to reduce tobacco consumption.[25]

Interestingly, in 30 of these 33 different cases, older generation treaties that came into force before 2000, and in which public health issues were not specifically addressed, were applicable. However, of these 33 cases, only 13 resulted in an award finding a breach by the

19 UN Trade and Development. (2021, July). International investment policies and public health. *IIA Issues Note*, Issue 2, UNCTAD/DIAE/PCB/INF/2021/5.

20 Most of these cases are presented by Baetens (2022), *supra* note 8.

21 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania.* ICSID Case No. ARB/05/22, Award (2008, July 24).

22 *Achmea B.V. v. Slovak Republic.* UNCITRAL, PCA Case No. 2008-13, Final Award (2012, December 7).

23 *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., & Arts et Techniques du Progrès S.A.S. v. Republic of Poland*. UNCITRAL, Final Award (2012, February 14).

24 *Eli Lilly and Company v. The Government of Canada.* UNCITRAL, ICSID Case No. UNCT/14/2, Final Award (2017, March 16).

25 *Philip Morris Asia Limited v. The Commonwealth of Australia.* UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (2015, December 17).

State of at least one of its treaty obligations. These 13 awards, out of 33, in favor of the foreign investor resulted in damages totaling 108 million US dollars, i.e. slightly more than 8 million US dollars per award granting, in whole or in part, the foreign investor's claims.[26]

The conclusion to be drawn at this stage is therefore that public health policies are indeed taken into account, either expressly by the new generation of investment treaties, or as a way for States to exercise their sovereign right to act in defense of the general interest by arbitration tribunals applying the rules of older generation treaties.[27]

In view of the consequences of the health crisis caused by the Covid-19 pandemic, the question now is whether these same investment treaties, whether old or new generation, allow the new policies of relocation in Europe of pharmaceutical factories sought by certain States for reasons of access to medicines, and therefore public health.

2. The relationship between pharmaceutical sovereignty and investment treaty obligations

Any policy aimed at relocating part of the production of medicines and healthcare products considered essential to France and/or Europe can and must be based on a series of measures, the legality of which must be verified in the light of States' international commitments. First, State aid may be granted to help manufacturers relocate factories that have left elsewhere to France or Europe. State participation in the capital of these manufacturers' companies may also be envisaged, either to help relocate a company and/or to exercise a degree of control over it in order to prevent production from being relocated abroad. It is then necessary to place orders with these relocated factories so that they can operate, which may involve "protecting" them from external competition when invitations to tender are issued.

It should be noted here that some of the state measures envisaged fall under World Trade Organization (WTO) law, which regulates state subsidies through its Agreement on Subsidies and Countervailing Measures (SCM Agreement) and regulates customs duties imposed on goods, including medicines, manufactured elsewhere through its General Agreement on Tariffs and Trade (GATT). It should also be noted, in passing, that in Europe these areas are also governed by EU law, which regulates State aid - under competition law and more specifically articles 107 to 109 of the Treaty on the Functioning of the European Union (TFEU) - and has replaced the law of the Member States in customs

26 *Ibid*.

27 In the same vein, see Baetens (2022), *supra* note 8.

matters.[28] However, in view of the approach adopted in this study, we will focus here only on the rules proposed by investment law and likely to be applied to subsidies (or State aid) (2.1) and to regulate calls for tender (2.2.).

2.1. The legality of using State aid to relocate companies

Some European countries - including France - have made no secret of the fact that they intend to provide financial assistance for the establishment or relocation of pharmaceutical production units in France or in Europe. In France, for example, this has taken the form of several calls for projects, enabling public aid to be granted totaling 803 million euros.[29] Investment treaties do not take into account the effects of these subsidies or state aid on trade, nor is this their purpose.

On the other hand, certain provisions of these treaties deal with the distortions that such aid would create between investors wishing to invest in the same territory. The specific rules potentially concerned are the rules of national treatment and most-favored-nation treatment, if the aid granted were intended for national investors only (the case of aid reserved for French companies only by the French relocation plan), or for a category of foreign investors only (the case of aid reserved for EU companies only for the same relocation plan).

A distinction undoubtedly needs to be made according to the type of aid granted, as it appears that some of the planned aid is intended for the relocation in France of factories manufacturing drugs that are already known, while others are aimed at pharmaceutical innovation. In the case of the former, it does not appear that they are intended solely for French, or even European, investors. In its communication in June 2023, for example, the French government highlighted the GSK (GlaxoSmithKline) group's project in the west of France, with aid of 22 million euros to relaunch amoxicillin production in France.[30] However, GSK is a British multinational, which means it is based outside France and now outside EU following Brexit.

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28 For more details on this issue, see Fortier (2024), *supra* note 3.

29 A Call for Projects (CFP) "Résilience" (funded by the "France Relance" plan) for 66 million euros to strengthen supply chains, a *Capacity Building* CFP (funded by a Future Investment Program) for a total of 625 million euros to support projects relating to the production of vaccines or drugs used in the treatment of Covid-19, and a "Capacities and Industrialisation 2030" CFP (financed by the "France 2030" plan and the "Health Innovation 2030" plan) for 62 million euros, to which a further 50 million euros will be added, see Sonia & Laurence (2023, July 4), *supra* note 1, p. 325. It should be noted that the report is fairly critical of the effectiveness of these aids, and of the risk that they will *ultimately* benefit an investor from outside the EU who takes over a company that has benefited from them.

30 On this project, see Mayenne. (2023, June 15). GSK investit 22 millions d'euros à Mayenne [GSK invests 22 million euros in Mayenne]. *Le Journal des Entreprises*. https://www.lejournaldesentreprises.com/breve/gsk-investit-22-millions-deuros-mayenne-2063422

However, if a policy of State aid for relocation favors only national investors or only some of the foreign investors, it is not certain that this policy will be considered to comply with the treaty commitments of the State that decides on it with regard to investment law, because the State's right to regulate for public health purposes is not unlimited and is subject, including in new generation investment treaties, to the obligation not to discriminate. (See, for example, Article 4 of the BIT concluded between Vietnam and Turkey referred to above).

Aid for pharmaceutical innovation must be assessed using the same evaluation grid. Aid paid to locate a pharmaceutical research and innovation activity in France will not be contrary to France's international investment commitments, provided that it is not reserved solely for French or European investors.

Where a State acquires a stake in the capital of a pharmaceutical company by transferring shares held by private shareholders to the State, this is less an aid than an expropriation, the lawfulness of which will have to be assessed in the light of the rules applicable to such a decision.[31] However, the rules of international investment law will only apply if the State expropriates a foreign company. A minority stake by the State in the capital of pharmaceutical companies can also be envisaged with the aim of exercising a degree of control over them to avoid relocating their production, as was recently the case in France at the end of the summer of 2024 when the French company Sanofi sold its Opella subsidiary producing the Doliprane drug to a US investment fund.[32]

2.2. Preserving the industrial fabric and giving priority to the local market

Relocating pharmaceutical plants in Europe is a first step. But this step is pointless if the relocated plants do not receive the orders that will enable them to operate. There are two problems here. The first is that, despite the efforts made, and according to a report by the French Senate dated 4 July 2023, the basic molecules produced in France and Europe are still 30% to 40% more expensive than those produced in Asia, particularly India and China.[33]

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31 Whether one applies the rules of domestic law or the provisions of an international treaty, in general an expropriation is only lawful if it is made in the general interest, in compliance with the rules established in the matter, and provided that it is not discriminatory and is accompanied by fair compensation (see also *supra* note 15 and 16).

32 The French government could have prohibited the sale on the grounds of foreign investment control, but opted instead to acquire a 2% stake at the time of the sale in order to gain a say in the company's business. See Vass, S. (2024, November 13). Doliprane: l'État pouvait-il empêcher la vente? [Doliprane: could the State prevent the sale?]. *The Conversation*. https://theconversation.com/doliprane-letat-pouvait-il-empecher-la-vente-242865

33 See Sonia & Laurence (2023, July 4), *supra* note 1, p. 325.

The second is that in Europe in general, and in France in particular, the major purchasers of medicines are often public bodies (public hospitals) subject to public procurement rules. In other words, a large proportion of orders are put out to tender, and Asian production is the cheapest. If price is the only criterion taken into account, the factories relocated in Europe will remain without orders.

It is therefore recommended that other criteria, such as social and environmental criteria, be included in invitations to tender for the purchase of medicines. Working conditions in the various pharmaceutical plants competing around the world should therefore be taken into account, as well as the environmental impact of manufacturing processes and transport. Taking this second category of criteria into account will undoubtedly partly favor products manufactured in Europe, if only because the supply chain is shorter and therefore has a smaller environmental footprint.

Leaving aside the economic dilemma posed by the State's decision to pay more for the products its hospitals need (a cost that will be passed on to social security mechanisms and will no doubt increase compulsory levies), the question remains as to the legality of such measures in the light of the international obligations included in investment agreements. This time, it is more the standard of fair and equitable treatment that could be invoked. This norm or standard protects foreign investors against arbitrary or discriminatory treatment. Assuming that the foreign producer has invested in France or Europe in order to acquire protected investor status, the fact that these products are not chosen even though they would have won the tender could be analyzed as arbitrary treatment.

On the other hand, we do not believe that adding social and environmental criteria to calls for tender constitutes an arbitrary measure. The right of States to regulate, affirmed by the treaties relating to investments of all generations, allows States to legislate in the general interest. And it seems complicated to assert that the inclusion in public procurement legislation of criteria that take account of workers' social rights and environmental protection should be considered arbitrary. On the contrary, the new generation of investment treaties explain that the protection they provide must not be to the detriment of these issues of general interest.[34]

Conclusion

In the final analysis, therefore, it seems that the pharmaceutical industry relocation policies that are beginning to be adopted, and the measures taken to implement them, should be considered compatible with the treaty commitments entered by States in investment treaties.

34 *Ibid*.

The only reservation to this blank check is the requirement that the measures taken should not discriminate against foreign investors. The latter must also be able to come to Europe and France to produce medicines and medical products, benefiting from the same support and incentives as national investors. This conclusion is in line with the ultimate aim of international investment law, which is to allow the free movement of international investments around the globe and to locate them in those territories that they consider attractive, with the conditions of attractiveness remaining a matter for States and the means they are prepared to implement to this end.

This objective of international investment law may seem amoral, but is it when it allows states to seek to attract investment in order to preserve their pharmaceutical sovereignty and the health of their citizens? In reality, what is lacking - and investment treaties were not created for this purpose - is inter-State cooperation at global level to make up for the shortcomings of the dangerous interdependencies described above, a "remondialisation"[35] whose advent unfortunately seems to be getting further and further away every day in view of the way our world is evolving. ●

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Author Contribution

The author solely contributed to the study conception and design. The author read and approved the final manuscript.

Declarations

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