Forum: Legal compliance is not enough: cross-border travel and trade measures and COVID-19

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When the World Health Organization (WHO) declared the 2019-nCoV outbreak (now COVID-19) a Public Health Emergency of International Concern on January 30, 2020, it recommended against "any travel or trade restriction". Under WHO's International Health Regulations (IHR [2005])—the binding international agreement governing the response to major disease outbreaks and other health risks—member states agreed to follow WHO guidance regarding outbreak-related cross-border travel and trade measures. Yet, all 194 WHO member states subsequently adopted some form of restriction, raising questions about the utility of the IHR (2005). Most analyses have focused on whether these cross-border measures are legally compliant with the IHR. We argue that there is a need to move beyond a strict legal interpretation of compliance and instead make the case for focusing on "compliance as effectiveness"—a common approach taken in International Relations (IR) scholarship that assesses whether state behavior is consistent with the spirit of the law rather than just the letter.

Introduction

Under the World Health Organization's (WHO) International Health Regulations (2005) (IHR [2005]), member states agreed to follow WHO guidance with respect to outbreak-related travel and trade measures and, specifically, to refrain from imposing "additional health measures" that significantly interfere with international traffic and trade without justification (see IHR [2005], Article 43). When the WHO declared the 2019-nCoV outbreak (now known as COVID-19) a Public Health Emergency of International Concern (PHEIC) on January 30, 2020, it recommended against "any travel or trade restriction". Despite this recommendation, all 194 WHO member states subsequently adopted some form of restriction (WHO 2020). While adopting such restrictions when not recommended by WHO is nothing new, a far higher number of countries have imposed a wider variety of cross-border measures during this PHEIC compared to previous health crises (Kamradt-Scott and Rushton 2012; Worsnop 2017a; 2017b).

Most analysis and commentary about the widespread adoption of travel and trade restrictions during COVID-19 has focused on whether they are legally compliant with IHR Article 43, with recommendations calling for reducing legal and textual ambiguities (Habibi et al. 2020; Taylor et al. 2020). While we agree that identifying the measures that legally violate the IHR can be difficult (Lee et al. 2020; von Tigerstrom and Wilson 2020), we argue here that there is a need to move beyond a strict legal interpretation of compliance. In this piece, we make the case for focusing on "compliance as effectiveness"—a common approach taken in International Relations (IR) scholarship that assesses whether state behavior is consistent with the spirit of the law rather than just the letter. In what follows, we discuss how IR research on treaty compliance sheds light

on the politics of COVID-19 when it comes to cross-border measures and the IHR; and in turn, the challenges COVID-19 poses for the study of compliance with the IHR.

How Research on Treaty Compliance Informs Understanding of the Politics of COVID-19

While many IR scholars analyze legal compliance with treaty obligations (letter of the law), others focus on *effectiveness* at achieving the intended purpose of a treaty (spirit of the law) (for example, see Victor 1998; McNamara 2004; Kelley 2007). What does it mean to think about compliance as "effectiveness"? Research on international trade treaties offers an example. Simmons describes the difficulty of identifying legal (non)compliance in this issue area: "trade policies are implemented on thousands of products, and in the absence of authoritative [WTO] rulings, it is hard to know which policies are consistent with treaty obligations and which are not" (Simmons 2010, 284). As such, many scholars of international trade law view treaty effectiveness as a useful approximation of compliance. The overall goal—or spirit—of WTO trade law is to reduce unnecessary and/or inappropriate barriers and promote trade. As such, "if states are complying with their obligations…we might expect the reduction of trade barriers and growth in trade" (Simmons 2010, 284).

In the case of IHR Article 43, the distinction between compliance with the letter of the law versus the spirit of the law is complex. Article 43 stipulates that states can implement "additional health measures", including cross-border travel and trade restrictions, that deviate from WHO recommendations as long as: 1) those measures are not "more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection"; 2) states base their determinations on scientific principles and evidence, as well as guidance from WHO; 3) within 48 hours, states provide the public health rationale to WHO for measures that significantly interfere with international traffic and/or trade (where significant interference is refusal or delay of entry/departure of people or goods for more than 24 hours); and 4) states review such measures within 3 months (World Health Organization 2005, Article 43). At first glance, it seems possible to use these criteria to differentiate between legal compliance and non-compliance. However, as many have noted, there is actually significant ambiguity in the text, leaving room for interpretation and subjectivity (von Tigerstrom and Wilson 2020; Taylor et al. 2020). For instance, how is "more restrictive…than reasonably available alternatives" defined? What is the "appropriate level of health protection"? Who decides what counts as scientific principles and evidence? How, practically, should determinations be made about whether decision-makers considered evidence or WHO guidance?

An alternative focus on the spirit of the law—compliance as effectiveness—is arguably more appropriate. The explicit purpose of the IHR is 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" (World Health Organization 2005). This carefully crafted provision is intended to convey the inherent balance that member states sought to achieve, when updating the treaty in 2005; that in order to halt the international spread of disease, some disruption to international traffic and trade may be warranted, even necessary. However, any disruption needs to be kept to the absolute minimum to avoid gratuitous harm to economies and societies. These harms can extend to public health and outbreak response itself since travel and trade restrictions can delay outbreak reporting by governments seeking to avoid being the target of restrictions,

discourage the disclosure of health information by individuals, and disrupt the movement of health workers and supplies.

To that end, during a PHEIC the IHR (2005) empower WHO to make temporary recommendations about which measures achieve the dual purpose of protecting public health with minimal interference in international traffic and trade. Yet, as some have noted, since the IHR's entry into force there have been considerable inconsistencies in how the letter of the IHR law has been interpreted and applied (Mullen et al. 2020). If, however, these provisions are interpreted consistently with the spirit of the IHR, whereby only measures which are absolutely essential to halting the international spread of disease are deemed appropriate, states that impose measures that unjustifiably inhibit international travel and trade may be viewed as acting contrary to the overall intent of the IHR, even though it is difficult to say whether these states are technically violating the letter of the agreement.

This approach, admittedly, may still be deemed by some to be highly subjective. We argue, however, that measures weighed against the purpose of the IHR are far less likely to fall between the interpretative chasms of textual ambiguity that exist within the current IHR. While many measures implemented during the COVID-19 pandemic may be legally justifiable on account they do not technically breach the terms of Article 43, or because countries sought to justify their actions—despite the challenges of measuring effectiveness of these measures during an outbreak (Grépin et al. 2020)—such measures may be considered far less valid when evaluated against the overall purpose, or spirit, of the IHR. For instance, measures that target specific nationalities rather than travelers from particular geographic areas are likely inconsistent with the spirit of the IHR: Paraguay's suspension of visas for Chinese citizens in early February would fall under this category (Paraguay Ministry of Foreign Affairs 2020). Similarly, measures that target a group of countries while excluding others with a similar epidemiological profile and similar trade and travel connections are less likely to be based on scientific evidence or public health rationale. The United States (US) suspension of travel to and from the Schengen area while initially excluding the United Kingdom in mid-March is an example (Aratani et al. 2020).

Beyond the practical difficulties of defining compliance using the letter of the law approach, IR scholarship points to two key reasons why focusing on legal compliance is insufficient for Article 43 of the IHR. First, the gap between the letter and the spirit of the law may be too large for legal compliance to be meaningful in this case. While one might hope for the letter and the spirit of the law to perfectly align, IR scholarship tells us that states sometimes make shallow international agreements that require little change in behavior (Abbott et al. 2000). As such, in some cases legal compliance could have limited impact on the overall desired outcome of the agreement. In the case of the IHR, the number of states imposing a wide variety of travel and trade measures during COVID-19 demonstrates that the gap between the letter of the law and the spirit may be quite large. Many of the measures imposed by governments are not covered by the IHR even though they significantly interfere with international traffic and/or trade. Export restrictions on personal protective equipment are a clear example because they are not even covered under the IHR (2005) since they do not constitute a "health measure" which is defined to include only "procedures applied to prevent the spread of disease or contamination" (World Health Organization 2005, 8). Further, most countries imposing trade or travel restrictions during COVID-19 provided their public health rationale to WHO, at least for measures imposed early on (World Health Organization 2020, 5). As such, a majority of countries arguably may well be in legal compliance with the IHR during COVID-19, yet, international travel and trade is severely disrupted. Accordingly, focusing exclusively on legal compliance without the broader context of

whether such actions are consistent with the overall purpose of the IHR to protect public health while minimizing unnecessary interference in international traffic and trade, risks missing the forest for the trees.

Second, while clarifying the textual ambiguities in the IHR would make it easier for states and others to identify legal (non)compliance, such ambiguities may have been purposive. Expectations that future iterations of the IHR can improve clarity may thus be unrealistic. IR scholarship tells us that states often intentionally build ambiguities into agreements during the design phase, especially in mixed motive situations where disagreements among states make negotiation costs high (Abbott and Snidal 2000). States hope that scope for interpretation will allow them to prosecute their own interests later. Even in negotiating the IHR (2005) following the 2003 outbreak of Severe Acute Respiratory Syndrome, in which WHO's role was widely celebrated, states were unwilling to agree to precise language committing them to follow WHO recommendations during outbreaks. It is therefore doubtful states will support clarifying textual ambiguities within the IHR following COVID-19, especially when WHO's role has been criticized by some, including its advice not to adopt travel and trade measures. In short, challenges to identifying legal (non)compliance are likely to persist.

The Challenges of COVID-19 for the study of IHR Compliance

For these reasons, the COVID-19 pandemic makes clear that legal compliance is not enough. As we evaluate WHO's response and look ahead to future revisions of the IHR, a first order task will be assessing the extent to which state behavior was consistent with the overall purpose of the IHR to protect public health while minimizing unnecessary interference in international traffic and trade. Specifically, focusing on the spirit of the law, rather than the letter, raises the key question that must be answered before pursuing the legal specifics of revision: should the IHR's dual purpose be reconsidered or reemphasized in light of the widespread adoption of measures that interfere with traffic and trade during COVID-19, and how? Though focusing on the overall purpose and spirit of the IHR, rather than a strictly legal interpretation is more meaningful in this case, given the potentially large gap between the letter and the spirit of the law, the pandemic also makes clear that we are still far from being able to evaluate whether actions are consistent with even the spirit of the law. Doing so requires a reevaluation and strengthening of the evidence base for the benefits and harms of such measures.

COVID-19 has underscored that evidence of the effectiveness of different cross-border travel measures is weak (Grépin et al. 2020; Burns et al. 2020). For example, cross-border measures may interact with domestic public health measures adopted concurrently or other confounding contextual factors like geography, underlying health status, or political system. We also know little about the comparative effectiveness of different types of measures under different circumstances. And there has been little analysis of the utility of cross-border measures at later stages of an outbreak. For instance, while Canada's restriction of non-essential travel from the US did not prevent outbreak spread at the outset, it is certainly possible that the decision to extend that restriction through the fall of 2020 is justifiable given the failed US response and colder weather which is expected to drive cases up (McMahon 2020). Yet, the reciprocal US restriction of non-essential travel from Canada may make comparatively less sense given relatively lower transmission in Canada. Further, the added value (and harms) of these border restrictions given the domestic public health measures in both countries remain unknown and are likely variable.

Relatedly, research on these measures must look not only at impact on disease spread, but also at the potential social, economic, and political consequences that can be inequitably experienced at the individual, community, and country level. As with domestic "lockdowns" (Fisher and Bubola 2020), COVID-19 makes clear that cross-border measures likely disproportionately harm those with preexisting vulnerabilities (Bottan et al. 2020). For example, Filipino migrant workers employed abroad have been particularly hard hit by travel restrictions during COVID-19 (Cabato 2020). Flight restrictions have also disrupted the delivery of medical equipment and personnel to countries and communities in need (Devi 2020). Some economies—and the individuals living within them—have been more seriously harmed by cross-border measures than others due to varied reliance on tourism or trade (UNCTAD 2020). Furthermore, not all governments' first priority is public health protection—an ability to claim that cross-border measures are outbreak related may provide political cover for governments to take otherwise discriminatory trade and immigration measures, or to pursue some other domestic or geopolitical goal. Yet these differential impacts and rationales are not currently accounted for in the IHR or WHO's recommendations about cross-border measures which cannot capture the nuance required for varied country contexts, interests and needs.

A strengthened evidence base to help weigh the public health, social, economic, and political benefits and harms of cross-border measures will make it possible to assess the utility of the dual purpose of the IHR, whether it is achieved during COVID-19 and future outbreaks, and how to better align the letter and the spirit of the law as the IHR revision moves forward. While IR scholarship helps to navigate the terrain between the letter and the spirit of the law when it comes to cross-border travel and trade measures and the IHR, COVID-19 highlights key challenges that remain in assessing IHR compliance. This demands a rethink of its overall purpose and implementation, supported by a more robust research agenda on the impacts of cross-border measures, and governments' varied motivations for imposing specific measures at certain times.

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