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INTERNATIONAL INVESTMENT POLICIES AND PUBLIC HEALTH

HIGHLIGHTS

- Public health is increasingly important for national and international investment policy making. The COVID-19 pandemic highlights the importance of reforming International Investment Agreements (IIAs) to balance investment promotion and protection with regulatory flexibility to respond to present-day challenges.
- Old-generation IIAs do not explicitly make room for regulatory action in the public interest, including for the protection of public health. New-generation IIAs fare significantly better in acknowledging public health as a regulatory objective. This underlines the urgency to accelerate holistic treaty reform towards a more balanced investment treaty regime.
- In total, at least 33 known Investor-State Dispute Settlement (ISDS) cases directly related to public health have been initiated against developed and developing countries. These cases cover a variety of issues and their link to public health may arise from the investment itself, the regulatory action taken by the defendant as well as the arguments raised by both parties. Investors most frequently relied on the fair and equitable (FET) and indirect expropriation standards.
- Holistic reform of old-generation IIAs is needed to safeguard the right to regulate in all public policy areas. Protecting regulatory space with respect to specific objectives is important but falls short of meeting the future needs of the international investment regime. Emerging concerns relating to climate for example, require an innovative and comprehensive reassessment of the concept of State regulation in IIAs.
- Holistic reform of IIAs must be part of countries' overall policy response to the pandemic, in investment and beyond. Especially capacity challenges in low- and lower-middle-income countries (LLIMCs) require concerted national and international action. UNCTAD proposes an Action Plan to address this issue.

Introduction

Public health increasingly becomes a center of attention in the area of national and international investment policy making. The COVID-19 pandemic, on the one hand, highlights the urgent need to invest in health (*WIR*21). On the other hand, it puts the spotlight on old-generation IIAs. In particular, their inability to balance the promoting and protection of sustainable development-oriented foreign investment, including in the health sector, while allowing governments to adopt domestic regulatory measures in the interest of public health becomes apparent.[1]

Public health features to a very limited extent in old-generation IIAs. Recently concluded treaties differ in that they frequently acknowledge health as a legitimate regulatory objective. This is increasingly done in an explicit manner by including provisions that reference the protection of health or implicitly by rebalancing investment protection with regulatory freedom. The number of old-generation treaties, however, far outweighs that of new-generation IIAs. As a consequence, most IIAs that are currently in force provide for limited safeguards that allow States to regulate in the interest of public policy objectives, including health. The record of existing ISDS disputes mirrors this imbalance and shows that health-related regulations by governments are not immune from challenge in arbitral proceedings.

1. The universe of IIAs and public health provisions

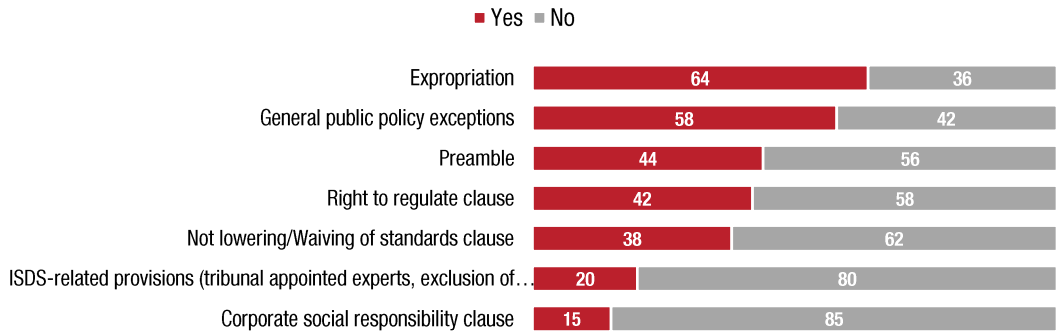
Old-generation IIAs fail to explicitly make room for regulatory action in the public interest, including for the protection of public health. New-generation IIAs fare significantly better in acknowledging public health as a regulatory objective. This underlines the urgency to accelerate holistic treaty reform towards a more balanced investment treaty regime.

More than 3000 IIAs (BITs and TIPs), representing more than 90 per cent of all IIAs, were signed between 1959 and 2011 (*WIR*19). The vast majority of these old-generation IIAs continues to be in force today, and few of them include provisions relating to public health. These IIAs may also apply to national policy responses taken to address the COVID-19 pandemic and its economic fallout, as pandemic-related government measures also affect the operations of foreign investors. Domestic measures have been adopted to contain the spread of COVID-19 or respond to sudden surges in cases (e.g. movement restrictions, requisitioning of hotels and means of transportation, export restrictions, threat of compulsory licenses) and to mitigate the economic impact of the pandemic (e.g. fiscal and financial support on the basis of potentially discriminatory criteria, equity investments in selected industries and companies). Old-generation IIAs generally contain few provisions that preserve States' regulatory space, with or without explicit reference to "health". For example, the preamble of old-generation IIAs references social investment aspects such as human rights, labour, health or poverty reduction in less than 7 per cent of agreements. General public policy exceptions are equally found in less than 7 per cent of old-generation IIAs, and only approximately 4 per cent of these treaties explicitly acknowledge a State's right to regulate. A carve-out for general regulatory measures features in the expropriation provisions of less than 2 per cent of old-generation IIAs.

The absence of provisions that preserve States' regulatory space in old-generation IIAs stands in stark contrast to agreements signed more recently. New-generation IIAs, those concluded since 2012, far better acknowledge public health as a legitimate regulatory objective. For example, more than 92 per cent of treaties concluded since 2018 (for which texts could be analyzed) contain at least one explicit reference to health in the operative part of the treaty. Health-related aspects are covered in these IIAs mostly in expropriation provisions; general exceptions; the preamble; right to regulate clauses; and not lowering of standards clauses (figure 1).

[1] An abbreviated version of this IIA Issues Note was published as part of Chapter 3 of the World Investment Report 2021: Investing in Sustainable Recovery.

Figure 1. Public health provisions in IIAs concluded between 2018-2020 (Per cent)



Source: UNCTAD, IIA Navigator.
Note: This survey covers all IIAs signed from 2018 to 2020 for which texts were available that contain substantive provisions on investment protection. In total, 55 IIAs were analysed.

Indirect expropriation provisions in recent IIAs often directly clarify that measures of general application adopted in the pursuit of public health do not constitute regulatory takings. A total of 35 new-generation IIAs surveyed here (64 per cent) do so. In addition, new IIAs frequently exclude compulsory licensing, e.g. of medicines, from the scope of the expropriation provision (box 1).

General public policy exceptions can serve to justify measures adopted in pursuit of public health that are otherwise in violation of the substantive protection standards of an IIA. A total of 32 new-generation IIAs include such exceptions (58 per cent). It is important to note that respondents bear the burden of proof when relying on a general exception clause and rebalancing substantive protection standards remains important.

Preambles are non-binding in nature but may indirectly impact regulatory space for public health by influencing the interpretative approach of ISDS tribunals. Altogether 24 IIAs concluded in 2018-2020 reference public health in their preambles (44 per cent).

Right to regulate clauses clarify that IIAs are not intended to prevent States from regulating in the public interest. These new-generation clauses reference health in 23 IIAs analysed here (42 per cent). Their impact will largely depend on the specific wording adopted in the provision as well as the interpretative approach of an arbitral tribunal. Some clauses merely reaffirm the State's sovereign right to regulate in accordance with the IIA's investor protection standards whereas others adopt language that resembles general exception clauses.

Not lowering of standards clauses can enhance the sustainable development dimension of IIAs by including a prohibition to lower domestic health regulations to attract foreign investors or investments. They are found in 21 IIAs concluded in 2018-2020 (38 per cent). This clause may be of relatively limited relevance in ISDS proceedings but sends a clear signal that IIAs' goal is not to attract foreign investments to the detriment of local populations.

ISDS-related provisions referencing health specify that ISDS tribunals may appoint experts to draw up reports on factual issues concerning health or exclude claims relating to measures that seek to protect public health (e.g. tobacco control measures). Such clauses can be found in 11 new-generation IIAs (20 per cent).

Corporate social responsibility clauses referring to health generally impose a "best efforts" obligation on investors to refrain from seeking or accepting special exceptions from the host State's regulatory framework relating to health. These can be found in 8 IIAs surveyed here (15 per cent).

Other carve-outs from substantive treaty standards are found in an increasing number of IIAs. Generally, these feature in the form of annexes for existing and future non-conforming health-related measures or carve-outs for regulating health-related sectors such as health services. Most prominently, exclusions from the national treatment (NT) and most-favoured-nation (MFN) obligations are found. Other substantive treaty standards from which derogations are permitted include the prohibition to impose performance requirements and the transfer of funds provision.

Box 1. Compulsory licensing and access to medicines

The conditions for granting compulsory licenses for product or process patents are internationally regulated under the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement). The IIA regime also touches on issues of compulsory licensing as most investment treaties cover IP rights as protected investments. Foreign investors could challenge a compulsory licensing measure issued against their patents in ISDS proceedings. Less than 2 per cent of IIAs signed between 1959 and 2011 explicitly exclude compulsory licensing from the expropriation provision. Before the entry into force of the TRIPS Agreement in 1995, States may not have seen the need to do so in their IIAs. However, many of these old-generation IIAs (whether pre- or postdating the TRIPS Agreement) remain in force, and the absence of explicit carve-outs can more easily lead to investment disputes, the outcome of which will depend on exact treaty language and the interpretation adopted by the tribunal. To remedy this uncertainty, new-generation IIAs more frequently exclude compulsory licensing from the entire IIA or from the scope of the provision on expropriation, provided that the compulsory licensing measure was taken in conformity with the TRIPS Agreement.
Source: UNCTAD.

New-generation approaches to drafting IIAs generally help to rebalance the dual objectives of investment protection and the preservation of regulatory space to pursue legitimate policy objectives. UNCTAD has proposed reformed approaches to IIA drafting, including through the development of its Investment Policy Framework for Sustainable Development (launched in 2012, and updated in 2015), through its consolidated Reform Package for the International Investment Regime (launched in 2018) and most recently with the International Investment Agreements Reform Accelerator (launched in 2020).

For example, the preambles of many new-generation IIAs refer to broader concepts such as legitimate regulatory objectives or sustainable development. All of these are sufficiently wide to cover public health. Moreover, reformed approaches to drafting important treaty clauses can help to clarify that measures in pursuit of public health do not violate investment protection standards. This can be done, and often is, without explicitly referring to health. For example, reformed FET clauses can rely on a closed list of good governance obligations, the concept of like circumstances in non-discrimination standards can be specified, and new IIAs could exclude indirect expropriations from the scope of an agreement. Consequently, many new-generation IIAs preserve space in pursuit of public health without any need for explicit language. The benefits of this broader approach to treaty drafting include the fact that regulatory action in pursuit of other public-interest objectives, for example environmental and labour protection, is equally covered.

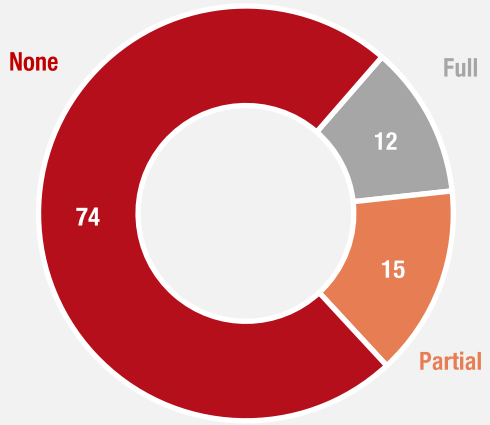
In addition to IIAs, modern free trade agreements covering trade in services as well as the WTO General Agreement on Trade in Services (GATS) also include international commitments affecting investment in health (box 2). These provisions related to trade in services often impose liberalization obligations with respect to market access and NT. The commitments include rules that cover trade in health services such as hospital services or professional medical services, including during the pre-establishment phase.

Box 2. Mode 3 trade in health services – GATS liberalization commitments

IIAs are not the only treaties including liberalization commitments and treatment standards affecting foreign investments in the health sector. International trade agreements covering trade in services may also contain such commitments. The GATS is the most prominent treaty covering trade in services.

Generally, services can be traded through different modes of supply. Mode 3 is the supply of a service by a foreign service supplier through a commercial presence in the territory of another treaty party, largely similar to foreign investments covered under IIAs. Overall, however, few of the 164 WTO members have entered commitments to provide market access and NT for health services and health-related professional services. Figure 2 details commitments relating to hospital services.

Figure 2. Country market access and national treatment commitments under GATS for hospital services (mode 3) (Per cent)



Source: UNCTAD.

In addition to hospital services, 25 WTO members (15 per cent) have entered full or partial market access and NT commitments under mode 3 in the category of other human health services. A total of 46 WTO members (28 per cent) have scheduled mode 3 obligations for professional medical and dental services. The services schedules of 19 WTO members (12 per cent) cover the mode 3 supply of services provided by midwives, nurses, physiotherapists and paramedical personnel. Where no such commitments have been entered into, countries are not required to grant market access or NT to foreign service suppliers.

WTO members are free to exceed these GATS commitments in their bilateral or regional FTAs, subject to GATS Article V, or by unilaterally further opening their markets to investment in health services on an MFN basis.

2. ISDS disputes and public health

In total, at least 33 known ISDS cases directly related to public health have been initiated against developed and developing countries. These cases cover a variety of issues and their link to public health may arise from the investment itself, the regulatory action taken by the defendant as well as the arguments raised by both parties. Investors most frequently relied on the FET and indirect expropriation standards. The outcomes of these health-related proceedings do not significantly differ from non-health-related cases.

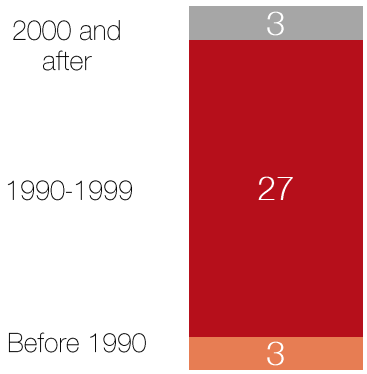
An assessment of known ISDS cases identified 33 health-related treaty-based disputes. This total is likely to significantly underestimate the actual number of health-related cases, as many cases are still pending, or case documents may not (yet) be public. The analysis below also excludes settled and discontinued proceedings, for which case documents tend not to be publicly available.

The 33 health-related cases address different issue areas whose impact on public health varies. The relationship with public health in each of these cases is more or less direct depending on the particular investment in question, the regulatory action taken by the defendant as well as the arguments raised by the parties to the dispute.

For example, a number of cases relate to investments in public infrastructure critical for the health of the local population such as water supply and treatment. The *Biwater v. Tanzania* case concerned an investment in a water and sewerage infrastructure project. The Tanzanian government argued that its interference with the investment, the seizure of assets and takeover of the business, was necessary to protect public health and welfare. According to the State, taking control of the investment was necessary to ensure the supply of vitally important water and sanitation services. Other cases concern investments in services, products and intellectual property which are related to public health. For example, the dispute in *Achmea v. Slovakia (I)* involved an investment in a health insurance provider. The investor claimed treaty breaches in response to regulatory action with respect to this services sector. The marketing of medicines was at stake in *Servier v. Poland*. In *Eli Lilly v. Canada* the investor raised claims in response to the invalidation of certain patents for pharmaceuticals.

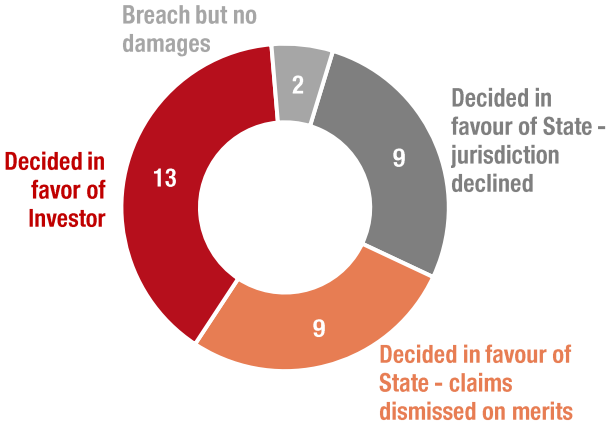
Cases can also directly relate to public health because of the particular measure taken by the host State rather than the investment itself. Generally, these cases concern regulatory action aimed at protecting individuals from imminent and future harm to their health. For example, *Roussalis v. Romania* dealt with food safety and the *Philip Morris v. Uruguay* and *Philip Morris v. Australia* cases involved an investor challenge of measures seeking to curb the prevalence of smoking.

Figure 3. IIAs invoked in health-related cases (By year of signature)



Source: UNCTAD, ISDS Navigator.

Figure 4. Outcome of proceeding in health-related cases (Number of cases)



Source: UNCTAD, ISDS Navigator.
Note: Discontinued and settled cases are excluded from the analysis as case documents are not publicly available. The percentage of health-related cases decided in favor of the respondent (55 per cent) or the investor (39 per cent) do not significantly differ from all treaty-based cases when settled and discontinued proceedings are ignored.

There are also cases where the protection of public health was one among several interrelated regulatory objectives or where health-related arguments were raised during the ISDS proceedings to further underline the legitimacy of the State's regulatory measure. Many of these cases concern the relationship between environmental protection and human health. For example, past proceedings dealt with regulatory action with respect to hazardous waste (*SD Myers v. Canada*), the prohibition to use certain pesticides (*Chemtura v. Canada)* and counterclaims relating to the environment and human health (*Perenco v. Ecuador*).

IIAs invoked. A sizeable share of health-related cases, 13 out of 33, were filed against developed countries. Similar to all known treaty-based ISDS cases, old-generation IIAs, which rarely explicitly or effectively protected the States' right to regulate in the interest of public health, were predominantly invoked in these proceedings (figure 3).

Breaches alleged. A violation of the FET standard/the minimum standard of treatment and indirect expropriation was alleged in 33 and 30 cases respectively (out of 33 health-related cases). The tribunal found an FET violation in 13 cases and sided with the claimant on the issue of indirect expropriation in 6 cases. Both substantive protection standards feature as the most widely invoked IIA clauses as well as the most commonly found violations. Other notable standards include full protection and security (invoked in 15 cases, violation found in 4 cases), NT (invoked in 12 cases, violation found in 2 cases) and the prohibition of arbitrary, unreasonable and/or discriminatory measures (invoked in 10 cases, violation found in 2 cases). On average, investors claimed damages