CHAPTER III

RECENT POLICY DEVELOPMENTS AND KEY ISSUES

INTRODUCTION

The COVID-19 pandemic evoked a significant investment policy response. In 2020, the number of policy measures introduced that affected foreign investment increased by approximately 42 per cent compared with the number in 2019. The number of measures introducing regulations or restrictions, mainly adopted by developed economies, more than doubled, as several countries adopted or reinforced screening regimes for foreign investment, including in reaction to the pandemic. Conversely, the total number of measures that liberalized, promoted or facilitated investment, most of which were adopted in developing economies, remained relatively stable. Accordingly, the proportion of more restrictive or more regulatory new policy measures was the highest since 2003 (section A).

At the international level, several notable developments related to international investment agreements (IIAs) took place in 2020 and 2021 that continued to rationalize the IIA regime by consolidating bilateral investment policymaking and accelerating regional rulemaking. These developments include the emergence of new megaregional IIAs, as well as continued efforts to reform old IIAs to minimize the risk of investor–State dispute settlement (ISDS) proceedings, especially in light of policy responses taken in the context of the pandemic.

The pandemic also prompted several countries to reassess the policies put in place at both national and international levels to regulate and promote investment in the health sector, and to reconsider what needs to be done for post-pandemic recovery and resilience. As discussed in section C, which focuses on investment in health, in reaction to the pandemic several countries have increased the oversight of health-sector investment and renewed efforts to encourage new investment, including through national policies and international investment commitments. Despite these efforts, the limited productive capacities in many low- and lower-middle-income countries (LLMICs) hamper their ability to host medical industries with adequate portfolios of medicines or vaccines, health infrastructure or services. The action plan for building productive capacities in health proposed at the end of this chapter presents 10 main action areas to address 5 major challenges facing investment in health and to support the financing of SDGs discussed in chapter V.

A. NATIONAL INVESTMENT POLICIES

1. Overall trends

The number of investment policy measures adopted in 2020 (152) increased by more than 40 per cent compared with 2019. The ratio of restrictive or regulatory measures over measures aimed at liberalization or facilitation of investment reached 41 per cent, the highest on record.

In 2020, 67 economies introduced an aggregate 152 policy measures affecting foreign investment – an increase of approximately 42 per cent compared with 2019. The number of measures introducing regulations or restrictions, mainly adopted by developed economies, more than doubled to 50, as several countries adopted or reinforced screening regimes for foreign investment, including in reaction to the COVID-19 pandemic. Conversely, the total number of measures that liberalized, promoted or facilitated investment, most of which were adopted in developing economies, remained relatively stable (72). The remaining 30 measures were of a neutral or indeterminate nature (table III.1). Accordingly, the proportion of more restrictive or more regulatory new policy measures was the highest since 2003 (figure III.1).

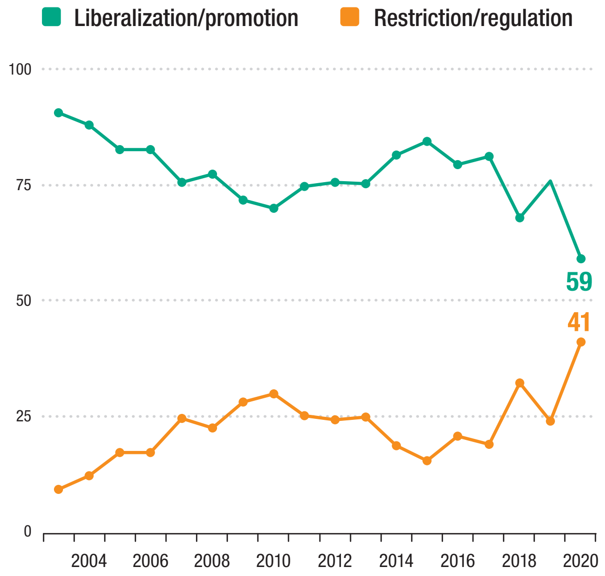
As forecast in *WIR 2020*, the trend towards more regulatory or restrictive policy measures accelerated in the wake of the pandemic. These measures amounted to 41 percent of all the new investment policy measures reported for 2020 (not considering measures of neutral or indeterminate nature) – compared with only 24 per cent in 2019 and 28 per cent in 2009, during the global financial crisis. Although developed economies adopted the vast majority of these measures, several developing countries and emerging economies also began to strengthen their FDI review mechanisms. This surge in regulatory or restrictive investment policy measures is not only a response to an extraordinary crisis but also a continuation of a policy trend in the era since the global financial crisis.

Table III.1. Changes in national investment policies, 2005–2020 (Number of measures)

Item	2003–2007 (pre-crisis average)	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Number of countries that introduced changes	67	40	46	54	51	57	60	41	49	59	65	55	54	67
Number of regulatory changes	**128**	**68**	**89**	**116**	**86**	**92**	**87**	**74**	**100**	**125**	**144**	**112**	**107**	**152**
Liberalization/promotion	107	51	61	77	62	65	63	52	75	84	98	65	66	72
Restriction/regulation	20	15	24	33	21	21	21	12	14	22	23	31	21	50
Neutral/Indeterminate[a]	1	2	4	6	3	6	3	10	11	19	23	16	20	30

Source: UNCTAD, Investment Policy Hub.
[a] "Restriction" means a policy measure that introduces limitations on the establishment of foreign investment; "regulation" means a policy measure that introduces obligations for established investment, be it domestically controlled or foreign controlled.

Figure III.1. **Changes in national investment policies, 2003–2020** (Per cent)

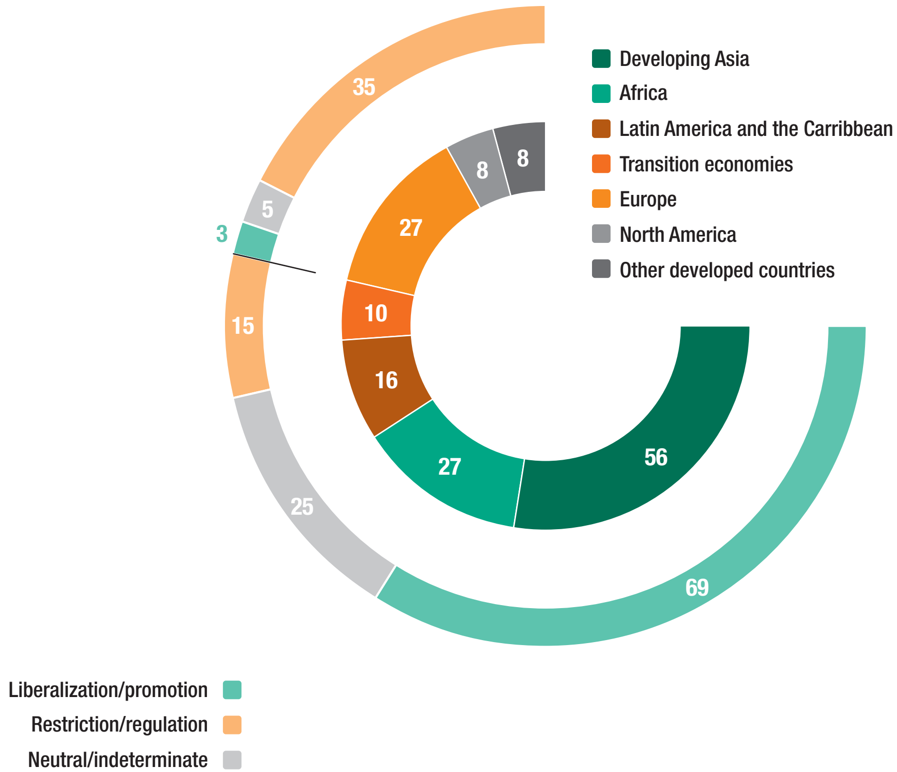


Source: UNCTAD, Investment Policy Hub.

Although policies to liberalize, promote or facilitate foreign investment continued to account for the majority of all measures adopted in 2020 (59 per cent, not considering measures of neutral or indeterminate nature), they reached the lowest share ever recorded. Steps towards liberalization were taken in various industries, including agriculture, manufacturing, mining, defence, financial services, transportation, digital media and pharmaceuticals. In addition, many countries simplified or streamlined administrative procedures, and some others expanded their investment incentive regimes to attract more foreign investment.

In regional terms, developing countries in Asia continued to lead in the adoption of new investment policy measures and became even more active than in 2019, followed by African countries (figure III.2). Developed countries, including those in Europe, North America and other regions, adopted almost three times more investment policy measures than in 2019 (43 measures compared with 15 in 2019).

Figure III.2. **Regional distribution of national investment policy measures in 2020** (Number of measures)



Source: UNCTAD.

The nature of the new measures, however, differed significantly among regions. Sixty-nine of the measures adopted in developing economies, including in developing Asia, Africa, and Latin America and the Caribbean, and in transition economies were meant to liberalize, promote or facilitate investment (63 per cent), while only 15 imposed new regulations or restrictions (14 per cent). In sharp contrast, the vast majority (35 of 43, or 81 per cent) of the measures introduced in developed countries, including in Europe, North America and other developed regions, introduced new or reinforced existing regulations. All of them relate directly or indirectly to national security concerns about foreign ownership of critical infrastructure, core technologies or other sensitive domestic assets. Often, these measures were motivated by the desire to protect sensitive domestic businesses against foreign takeovers in the midst of the pandemic (section 2).

During the period from January to April 2021, 21 economies introduced 35 policy measures affecting foreign investment. Among these measures, 9 adopted new regulations or restrictions, while 19 liberalized, promoted or facilitated investment. The remaining 7 were of neutral or indeterminate nature.

a. National security concerns and the pandemic underpin rising FDI scrutiny

The trend towards more investment regulations and restrictions related to national security intensified in 2020 and in the first quarter of 2021, including in reaction to the pandemic. Currently concentrated in developed countries and emerging economies, it is likely to have a growing impact on FDI inflows in coming years.

Twenty-five countries and the European Union (EU), nearly all of them developed economies, adopted or reinforced screening regimes for foreign investment, bringing the total number of countries conducting FDI screening for national security to 34. Together, these countries account for 50 per cent of world FDI flows and 69 per cent of the world stock of FDI. More than half of the recent changes were made in reaction to the pandemic.

For example,

- After having temporarily lowered to zero the monetary threshold that triggers screening for all inward foreign investments in March 2020, *Australia* made this change permanent for foreign investment in national security businesses and national security land by reforming the Foreign Acquisitions and Takeovers Act of 1975 in December 2020. In addition, the time frame for screening procedures was extended from 30 days to up to 90 days.
- *Austria* enacted the Investment Control Act to replace the previously applicable FDI regime under the Foreign Trade Act. This considerably expanded the prior approval requirements for FDI.
- *Canada* adopted "enhanced scrutiny" of any FDI in businesses considered critical to the pandemic response, which will be applied until the economy recovers from the pandemic. Furthermore, the Government extended the initial review period under the National Security Review of Investments Regulations for any investment notified between 31 July 2020 and 31 December 2020. The time given to the Minister to take action for investments that are subject to the Investment Canada Act but do not require a filing was also extended. In addition, in January 2021, the thresholds above which foreign investors in Canadian businesses must obtain federal government approval under the Investment Canada Act were lowered. These thresholds, which are adjusted annually on the basis of GDP growth forecasts, have been declining because of the pandemic's impact on the economy. In March 2021, Canada further intensified

the level of scrutiny on foreign investment in four areas where it sees a heightened risk: (i) sensitive personal data, (ii) specified sensitive technology areas, (iii) critical minerals and (iv) investments by "state-owned or state-influenced" foreign investors.

- *China's* new Regulation on the Unreliable Entity List establishes a framework of restrictions or penalties on foreign entities deemed to endanger China's national sovereignty, security or development interests. Furthermore, the country strengthened its national security review of foreign investment by mandating pre-closing filings and authorizing the Government to review foreign investments in various sectors, including military, agriculture, energy, transportation and information technology.
- *Finland* amended its Act on the Screening of Foreign Corporate Acquisitions of 2012 to make the Finnish investment review mechanism compatible with the EU Regulation on FDI screening of March 2019, which introduced common standards for such mechanisms.
- *France* added biotechnology to the list of sectors subject to screening. It further lowered the control threshold that requires prior governmental review of a foreign acquisition from 25 per cent of the shares to 10 per cent. The temporary alteration of the French FDI screening regime (initially supposed to apply until 31 December 2020) has been prolonged until the end of 2021.
- *Germany* amended its Foreign Trade and Payments Ordinance to impose prior governmental authorization on foreign acquisitions of 10 per cent stock in German companies developing, manufacturing or producing vaccines, medicines, protective medical equipment and other medical goods for the treatment of highly infectious diseases. Furthermore, Germany expanded the scope of the foreign acquisition review to a "probable impairment" of public order or security, replacing the previous "actual risk" test, in implementation of the EU Regulation on FDI screening of March 2019. In May 2021, Germany added 16 activities to the list of sectors and activities covered by the FDI review mechanism and lowered the thresholds that trigger investment screening for different types of acquisitions, depending on the sector.
- *Hungary* introduced a temporary screening mechanism applicable to foreign investments from both inside and outside the EU, which is effective until 30 June 2021.
- *India* introduced a requirement that all investment originating from countries that share land borders with India must obtain prior governmental approval, to curb opportunistic takeovers or acquisitions of Indian companies during the pandemic.
- *Italy* expanded the special power regime that requires prior approval for any foreign investment in strategic sectors, by lowering the approval threshold to acquisitions exceeding 10 percent of the share capital and widening the scope of the review to acquisitions originating from the EU. This temporary measure, first adopted in April 2020, was extended until the end of June 2021. Finally, in January 2021, the scope of the investment screening was again expanded to cover, among others, the sectors and activities listed in the EU Regulation on FDI screening of March 2019.
- *Japan* expanded foreign investment screening by adding businesses subject to the review or expanding the scope for those already listed. In addition, it lowered from 10 per cent to 1 per cent the threshold requiring prior government approval for acquisitions in Japanese firms considered relevant to national security (the Ministry of Finance listed 518 such companies in 12 industries). Manufacturing of pharmaceuticals and medical devices was also added to the list of industries that require prior investment approval.
- *Lithuania* reinforced the national security review mechanism to align it with the EU Regulation on FDI screening of March 2019. Among other changes, it expanded the list of businesses and entities considered relevant for national security by including radioactive waste companies, 5G service providers and infrastructure developers,

secure public data transmission networks, public security and emergency services, digital mobile radio communication network operators and selected power generation companies.

- *Malta* established the National Office for Foreign Direct Investment Screening, in charge of implementing the EU Regulation on FDI screening of March 2019.
- The *Netherlands* amended the Act on Undesirable Control in the Telecommunication Sector to introduce a screening mechanism for acquisitions of telecommunication providers. Any investor intending to acquire control of telecommunication providers shall notify the relevant minister eight weeks in advance.
- *New Zealand* introduced a temporary emergency notification requirement in its FDI screening mechanism to be able to review all overseas investments resulting in more than 25 per cent ownership of a New Zealand business, or an increase in an existing holding up to or beyond set thresholds (50, 75 or 100 per cent).
- *Poland* required foreign investors from countries outside the European Economic Area (EEA) to receive prior clearance from the president of the Polish Competition Authority for domestic acquisitions under certain conditions.
- The *Republic of Korea* tightened its review mechanism for foreign investment likely to result in the cross-border transfer of core national technologies.
- *Romania* introduced a legislative amendment allowing authorities to refuse to grant concessions for the exploration, development and exploitation of an oil field to a non-EU entity, on grounds of national security.
- The *Russian Federation* now subjects temporary foreign acquisitions of voting stakes in strategic companies to FDI screening procedures.
- *Slovenia* introduced a temporary screening mechanism to cover foreign investment in specific sectors or activities.
- *Spain* suspended the FDI liberalization regime, as the pandemic is seen to threaten both listed and unlisted Spanish companies, including some in strategic sectors. Governmental authorization is now required for a foreign acquisition of 10 per cent or more of stock in certain sectors, including critical infrastructure, critical technologies, media and food security.
- The *United Kingdom* amended the legal grounds on which the Government may intervene in certain mergers under the Enterprise Act 2002. The changes lowered the jurisdictional thresholds for merger controls in three specific sectors: artificial intelligence, cryptographic authentication technology and advanced materials. Earlier, the "need to maintain in the [United Kingdom] the capability to combat and mitigate the effects of public health emergencies" was added as one of the considerations in the screening process. In April 2021, the National Security and Investment Bill received Royal Assent. The new law introduced a separate investment screening regime for businesses aiming to gain control over a company or an asset in sensitive sectors identified by the Government.
- The *United States* promulgated an implementing regulation concerning foreign acquisitions subject to reviews for reasons of national security. Besides making the review process more effective and efficient, the regulation widened the jurisdiction of the Committee on Foreign Investment in the United States. The country also established the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector to assist the Federal Communications Commission in its sectoral screening efforts. Furthermore, the United States now requires publicly listed companies to declare that they are not owned or controlled by any foreign government. A new measure also prohibits citizens from investing

in Chinese firms that the administration considers to be owned or controlled by the Chinese military. In January 2021, the Commerce Secretary was granted broad discretion to block or mitigate transactions with designated foreign adversaries in information and communication technology (ICT) and services that would constitute an unacceptable risk in terms of national security, economic security, public health and safety concerns.

- At the regional level, in March 2020 the *European Commission* issued a Guidance to Member States addressing the possibility of "an increased risk of attempts from non-EU investors to acquire healthcare capacities (for example for the production of medical or protective equipment) or related industries such as research establishments (for instance developing vaccines) via foreign direct investment" during the pandemic. The Commission recommended full use of national FDI screening regimes and urged Member States that do not have screening regimes to set them up.
- In January 2021, *Czechia* introduced a new FDI screening mechanism in line with the EU Guidance on FDI screening. According to the new law, any non-EU investor must obtain a permit prior to acquiring effective control of a company in Czechia.
- In March 2021, *Slovakia* established an investment screening mechanism according to which any acquisition of more than 10 per cent of shares or voting rights in an operation of critical infrastructure may be subject to review in light of possible disruption of public order or national security. The governmental power to block acquisitions applies to a list of sectors that includes transport, ICT, energy, mining, postal services, pharmaceuticals and chemicals, metallurgy, health care, water, finance and agriculture.

The increase in the adoption of FDI screening mechanisms is likely to have a growing impact on FDI inflows in coming years. Data on the proportion of foreign investment subject to screening and the degree to which such screening blocks proposed investments are scarce. In the few countries for which data are available, they suggest that the overall project rejection rate is generally low but that the number of projects undergoing screening is increasing steadily, and so is their share in total projects (box III.1). Available data, however, may not necessarily reflect the full impact of the enhanced scrutiny on investment flows. Indeed, the adoption or reinforcement of FDI screening mechanisms may have a chilling effect on investment flows to the sectors potentially subject to screening, as foreign companies may decide to abandon their investment plans before reaching the screening phase or to not undertake business opportunities in those industries subject to scrutiny.

Other recent policy developments which, owing to their nature, may not be captured in the investment policy data presented in this report may also have a deterrent effect on investment flows in the years to come. Examples include the policy statements and initiatives by several country leaders to promote reshoring.

Box III.1. FDI screening – summary of available data

A small number of countries have started reporting official data on FDI screening. With no common framework for data reporting, however, the type of information, reporting periods and metrics used vary from country to country. Whereas some countries share the total number of investment projects screened for national security purposes in a given period, for example, others report the value of such transactions. Also, some countries indicate how many projects were rejected, whereas others do not.

A summary of key available data identified by UNCTAD indicates that in the Russian Federation over 17 per cent of screened transactions have been rejected, while in all other countries for which data exist, fewer than 1 per cent of screened transactions have been rejected (box table III.1.1).

For France, the data confirm intensifying scrutiny in recent years, with the proportion of projects that undergo screening more than doubling between 2017 and 2020 to almost a quarter of all projects (box table III.1.2). Lack of data prevents calculation of the rejection rate.

Data on the value of screened and rejected transactions are available only for Australia and New Zealand. In Australia, rejected transactions accounted for 7 per cent of the entire value of screened transactions from April 2018 to March 2019. In New Zealand, no proposed foreign investment was declined in 2020.

Box table III.1.1. Screening of FDI projects, selected countries

Country	Period	Screened projects (number)	Rejected projects (number)	Rejection rate (%)
Australia	4/2018–3/2019	689	1	0.15
Canada	4/2018–3/2019	962	2	0.21
Germany	2020	163	1	0.61
Italy	2019	83	0	0
New Zealand	2020	25	0	0
Russian Federation	2019	29	5	17.24
United States	2019	231	1	0.43

Box table III.1.2. France: screening of FDI projects, 2017–2020

Item	2017	2018	2019	2020
Total FDI projects (number)	1 298	1 323	1 469	1 215
Screened FDI projects (number)	137	184	216	275
Screening rate (%)	11	14	15	23

Source: UNCTAD, on the basis of available information:
Australia: FIRB 2018–19 Annual Report, https://firb.gov.au/sites/firb.gov.au/files/2020-05/FIRB-AR-2018-19.pdf.
Canada: Investment Canada Act, Annual Report 2018–19, https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk81126.html.
France: Le contrôle des IEF en chiffres, https://www.tresor.economie.gouv.fr/services-aux-entreprises/investissements-etrangers-en-france.
Germany: Data provided by the Federal Ministry for Economic Affairs and Energy.
Italy: Relazione concernente l'attività svolta sulla base dei poteri speciali sugli assetti societari nei settori della difesa e della sicurezza nazionale, nonché per le attività di rilevanza strategica nei settori dell'energia, dei trasporti e delle comunicazioni, relativa all'anno 2019, http://www.senato.it/service/PDF/PDFServer/BGT/1161802.pdf.
New Zealand: Data provided directly by the Overseas Investment Office.
Russian Federation: СФОРМИРОВАН НОВЫЙ СОСТАВ ПРАВИТЕЛЬСТВЕННОЙ КОМИССИИ ПО ИНОСТРАННЫМ ИНВЕСТИЦИЯМ, https://fas.gov.ru/news/29559.
United States: Information Regarding Notices and Presidential Decisions for Covered Transactions 2008–2019, https://home.treasury.gov/system/files/206/CFIUS-Summary-Data-2008-2019.pdf.

b. Several investment regulations or restrictions unrelated to the pandemic were adopted

Other types of investment regulations or restrictions were introduced in several countries, mostly developing countries, and many focused on increasing local content.

For example:

- *Angola* extended the scope of local content regulations to include all companies providing goods and services to the oil sector.
- *Indonesia* introduced new requirements for e-commerce businesses to support government programmes by prioritizing locally produced goods and services and providing opportunities to promote them online. In December 2020, Indonesia introduced new local ownership requirements in the non-bank payment services sector.
- *Kenya* introduced local participation requirements in various industries, including insurance, telecommunication and ICT services.
- *Namibia* abolished some tax incentives granted to manufacturers, export processing zone companies and management companies, in view of the planned introduction of special economic zones. In April 2021, Namibia required all applications for mining licences to reserve a 15 per cent stake for local owners.
- *Oman* published a list of activities that are prohibited for foreign investors, in order to promote local products and domestic entrepreneurship.
- In January 2021, *Nepal* introduced new requirements for foreign investment. Foreign investors are now supposed to bring in 70 per cent of their proposed investment before beginning operations and the remaining 30 per cent in the following two years. They are also required to transfer the capital they have pledged within a year of their project being approved.

c. Developing countries and transition economies continue to embrace policies to promote or facilitate investment

The drastic decrease in global FDI flows caused by the COVID-19 pandemic triggered a rise in the number of promotion and facilitation measures in numerous developing countries in 2020. At least 27 countries introduced such new policy measures.

(i) New investment promotion measures

Numerous countries have adopted new policy measures to promote inward investment. For example,

- *China* adopted detailed implementing regulations for the Foreign Investment Law enacted in 2019. Among other things, the regulations emphasize the intention to provide equal treatment for domestic and foreign enterprises. China also published a set of trial measures to promote foreign investment in the Yangtze River Delta area. Furthermore, China expanded by 10 per cent the list of industries in which foreign investment is encouraged.
- *North Macedonia* adopted the Law on Strategic Investment to create more favourable conditions for selected investments in the following sectors: energy, transport, telecommunication, tourism, manufacturing, agriculture and food, forestry and water economy, health, industrial and technological parks, wastewater and waste management, sport, science and education.
- *Pakistan* now allows companies to remit disinvestment proceeds to their foreign shareholders without prior approval from the State Bank.

- The *Russian Federation* introduced agreements on the protection and promotion of investment as a new investment policy instrument. These agreements, to be concluded between public entities and private investors, are to provide stabilization clauses relating to import customs duties, measures of State support and rules regulating land use, as well as ecological and utilization fees and taxes.
- *Sri Lanka* established a pharmaceuticals manufacturing zone on the southern coast of Hambantota to attract global pharmaceutical companies.
- *Uzbekistan* introduced a multi-tiered mechanism for ISDS and adopted a law on special economic zones to promote FDI.
- *Viet Nam* now allows certain disputes between foreign investors and the State to be taken to international arbitration.
- In January 2021, *Kazakhstan* introduced reimbursement by the State of up to 20 per cent of the costs of construction and installation works of investment projects, as well as purchase of equipment. It also simplified public procurement procedures with entities having concluded investment agreements.
- In April 2021, *Panama* established the legal basis for creating a new Export and Investment Promotion Agency, which will have autonomous legal personality under public law, with its own assets and independence in the exercise of its functions.

(ii) New investment incentives

At least 18 countries introduced new incentives for investors, most of a fiscal nature. For instance:

- *Angola* adopted a law to support the creation of free trade zones offering incentives and benefits.
- *Azerbaijan* expanded tax incentives for industrial and high-tech parks.
- *Colombia* introduced a special tax regime for investments exceeding a certain tax value.
- *Kuwait* temporarily granted fiscal exemptions to investors that apply for investment licences until 31 December 2020. Furthermore, Kuwait halved all fees for services provided by the Kuwait Direct Investment Promotion Authority until 31 December 2020.
- *Mauritius* provided additional investment allowances for capital expenditure on the acquisition of new plants and machinery for companies affected by the pandemic.
- *Oman* introduced new incentives for foreign investors, including exemption from certain fees and operational requirements for investment projects in the country's less-developed regions.
- *Panama* amended its tax incentive regime to promote investment in the tourism industry. The country also introduced new tax incentives for multinational companies providing manufacturing services.
- The *Republic of the Congo* introduced various tax incentives for non-resident taxpayers carrying out activities in the country without a permanent establishment.
- The *Republic of Korea* revised its Foreign Investment Promotion Act to recognize foreign reinvested earnings as foreign direct investment. It also expanded the list of sectors and technologies that are eligible for investment incentives.
- *Romania* extended its state aid scheme to support investments that promote regional development through job creation until 2028.
- *Rwanda* revised its investment incentive scheme to support key priority sectors and reduce operational costs for firms. New incentives were also introduced to support talent attraction, innovation and economic diversification. In February 2021, Rwanda also revised the Investment Code to introduce new priority sectors and activities and adopt several new tax incentives for philanthropic investors, angel investors or strategic investment projects.

- *Saudi Arabia* revised its mining law to facilitate investor access to financing and to support exploration and geological survey activities.
- *Ukraine* began to provide fiscal incentives such as tax exemptions, import duty exemptions, preferential land access and construction of necessary infrastructure for large investment projects.
- *Uruguay* increased tax benefits granted to eligible investment projects.
- *Viet Nam* expanded the list of business lines eligible for investment incentives. It also published a detailed list of conditions that apply for businesses to be considered as high-tech enterprises eligible for tax incentives.

(iii) Streamlined administrative procedures for FDI

Several countries streamlined or simplified administrative procedures for inward investment in 2020. For example:

- *Angola* created a single contact mechanism for investors to obtain all necessary authorizations.
- *Australia* introduced a licensing regime for foreign financial services providers to Australian wholesale clients. It also established licensing relief for providers of financial fund management services to attract certain types of professional investors.
- *Bolivia, Panama* and *Uzbekistan* established new government agencies to attract more investment.
- *Cambodia*, *Cuba*, *Iraq*, and *Pakistan* launched online platforms to help investors establish companies more efficiently.
- *China* introduced new mechanisms to strengthen the procedure for handling complaints from foreign-invested enterprises by broadening the scope of possible grievances.
- *India* amended its FDI policy on civil aviation, permitting non-resident Indian nationals to own up to 100 per cent (up from previously 49 per cent) of Air India under the automatic route.
- *Indonesia* enacted the Omnibus Law to facilitate doing business by, among other things, simplifying licensing processes, providing incentives, amending Labour Law regulations, relaxing immigration rules and harmonizing various sector-specific laws and regulations.
- *Mexico* simplified the criteria for foreign companies to conduct commercial activities by expanding the list of countries whose companies do not need to obtain an authorization from the Ministry of Economy. Moreover, Mexican companies with a total asset value below $990 million and with foreign ownership of less than 49 per cent are no longer required to obtain authorization from the National Foreign Investment Commission in order to invest.
- *Uzbekistan* created a one-stop shop mechanism to facilitate investment.

d. FDI liberalization

About 15 per cent of the policy measures introduced in 2020 (22 measures) concerned partial or full liberalization of investment in a variety of industries.

FDI liberalization measures concerned a range of industries, including agriculture, manufacturing, mining, defence, financial services, transportation, digital media and the pharmaceutical industry. As in previous years, developing economies in Asia were the most active in liberalizing foreign investment.

- *Algeria* removed the 49 per cent foreign ownership ceiling so that foreign investors may now own 100 per cent of local companies, except in certain industries.

- *China* amended its national negative list and its negative list for free trade zones, lifting several restrictions on FDI in industries such as financial services, manufacturing, agriculture, radioactive mineral smelting and the pharmaceutical industry. Furthermore, China released the Special Administrative Measures for the Access of Foreign Investment in the Hainan Free Trade Port, enumerating industries and sectors that are restricted or prohibited for foreign investment in Hainan. The list is shorter than the national negative list and the negative list for free trade zones. In March 2021, China abolished the restrictions on foreign shareholding in joint-venture life insurance companies.
- In April 2021, *Costa Rica* authorized vessels under foreign flag to operate in the domestic market for maritime cabotage transportation and related tourism services.
- *Ethiopia* opened up all industries to foreign investment of at least $200,000 for a single project. It also allowed foreign investment in certain transport services.
- *India* opened investment in the coal mining industry to non-coal companies, which are now allowed to bid for coal mines. The country also liberalized the digital news media industry and the defence sector: foreign ownership is now allowed up to 26 per cent through the government approval route in the former industry and up to 74 per cent under the automatic route in the latter. In March 2021, India increased the FDI ceiling on insurance companies from 49 per cent to up to 74 per cent.
- *Indonesia* opened several sectors to FDI by presidential decree. A new investment list was adopted, which indicates the activities that are open to 100 per cent foreign ownership (245 business lines), those that are subject to specific entry conditions (97) and those that are reserved for local businesses (112). In February 2021, Indonesia allowed foreigners to own strata title right of ownership of apartment units that are built in specific economic zones, free trade and free port zones, industrial zones or other economic zones.
- The *Lao People's Democratic Republic* for the first time permitted foreign investors to own apartments in condominiums and carry out condominium construction.
- The *Philippines* now allows 100 per cent foreign ownership in large-scale geothermal projects.
- After adopting the "Positive List of Activities", which identified 13 industries eligible for up to 100 per cent foreign ownership, in 2019, the *United Arab Emirates* officially issued a detailed list of 122 economic activities in those industries. The country no longer requires commercial companies to have a major Emirati shareholder or agent, and therefore allows 100 per cent foreign ownership.
- *Viet Nam* for the first time introduced a negative list on market access, affording foreign investors national treatment (NT) except in the sectors included in that list. The country also raised the cap on foreign ownership in domestic airlines.
- In January 2021, *Nepal* amended its negative list to allow foreign investment in agriculture.

2. M&A controls affecting foreign investors

In 2020, at least 15 cross-border merger and acquisition (M&A) deals, valued at over $50 million each, failed for regulatory or political reasons, including 5 that were withdrawn by the parties while waiting for regulatory approval.

The aggregate value of the 15 M&A deals terminated in 2020 for regulatory or political reasons was roughly $12.4 billion, down from a corresponding $87.3 billion in 2019. They involved a variety of industries (e.g. food, energy, health, telecommunication and electricity).

Three deals were formally prohibited by the host country for national security reasons. Four deals in different industries (pharmaceuticals, cement manufacturing and telecommunication) were discontinued because of concerns from competition authorities.

Another three were withdrawn for various regulatory reasons, and five were terminated because of delays in receiving approval from the host-country authorities (table III.2).

Compared with 2019, the number of M&As that were discontinued because of regulatory or political reasons increased (15 in 2020 versus 13 in 2019), but the total value diminished by approximately 86 per cent. This reflects both the smaller number of megadeals in the list of withdrawn deals, as well as the overall reduction in FDI over the course of 2020.

The fact that only three M&As were formally blocked in 2020 for national security concerns contrasts with the accelerating trend towards more regulations on screening foreign investment (section 1). As discussed earlier, one explanation could be that foreign investors have become more hesitant to engage in transactions that might raise national security concerns in host countries. Another reason could be that host-country authorities express their concerns and become engaged early in the negotiation phase of M&A deals, thereby sometimes stopping the transaction before the national security test. For example, the M&A deal between Carrefour and Couche-Tard was aborted during early negotiations after the Minister of Economy stated that he was not in favour in the name of French food security.[1] The acquisition of Iveco by China FAW Group was also terminated during the negotiation stage after the Italian Government signalled that it would oppose the deal.[2] Another M&A deal in which a Chinese company planned to acquire an Italian semiconductor company was blocked by the Italian Government.[3] Finally, the investment screening regulations newly adopted in 2020 may not have been applicable to the M&A deals withdrawn in the same year.

Table III.2. Foreign acquisitions withdrawn for regulatory or political reasons in 2020
(Illustrative list)

For national security reasons	
China Mengniu Dairy Co Ltd–Lion Dairy & Drinks Pty Ltd[a]	On 25 August 2020, China Mengniu Dairy (China) walked away from its proposed $600 million acquisition of Lion Dairy & Drinks (Australia) after the Treasurer of the Australian Government stated that the Chinese investment would be “contrary to the national interest”.
Shandong Gold Mining Co, Ltd–TMAC Resources Inc[b]	On 27 November 2020, the Canadian Government exercised its authority under the national security review mechanism to block the $207 million M&A acquisition of Canadian gold producer TMAC Resources Inc by Shandong Gold Mining Co, Ltd, a Chinese State-owned enterprise.
EMST GmbH–IMST GmbH[c]	On 4 December 2020, the Federal Ministry of Economics and Technology of Germany prohibited the planned acquisition deal of radar specialist IMST GmbH by EMST GmbH, which is indirectly held by Chinese enterprise Addsino, due to the possible threat to public order or security. The total value of the deal is not identifiable from the publicly available sources.
For competition reasons	
Prosafe SE–Floatel International Ltd[d]	On 13 February 2020, Prosafe (Norway) and Floatel (United States) mutually agreed to terminate their proposed $199 million merger after the competition authorities in the United Kingdom and Norway raised serious concerns.
Ethicon Inc–Takeda Pharmaceutical Co Ltd (TachoSil business)[e]	On 10 April 2020, Johnson & Johnson (United States) announced that subsidiary Ethicon (United States) and Takeda (Japan) mutually decided to terminate Ethicon’s proposed $400 million acquisition of Takeda’s TachoSil business after EU antitrust regulators and the United States Federal Trade Commission expressed significant concerns about potential anticompetitive effects.
West China Cement Ltd–SCHWENK Namibia (Pty) Ltd[f]	On 5 August 2020, the Namibian Competition Commission blocked the $870 million sale of Schwenk Namibia’s stake in Ohorongo Cement (Namibia) to West China Cement (China) on the grounds that it would substantially reduce competition in the cement market.
América Móvil SAB de CV–Telefónica Moviles El Salvador SA de CV[g]	On 3 September 2020, América Móvil (Mexico) cancelled its $315 million plan to acquire Telefónica Moviles (El Salvador) after assessing the regulatory conditions imposed to obtain final authorization from the Competition Superintendent.

/…

Table III.2.	Foreign acquisitions withdrawn for regulatory or political reasons in 2020 (Illustrative list) (Concluded)
For other regulatory reasons	
Hillhouse Capital Management Pte Ltd and Temasek Fullerton Alpha Pte Ltd–Shanghai Kinetic Medical Co Ltd[h]	On 23 November 2020, Temasek Fullerton Alpha (Singapore) and Hillhouse Capital Management (China) terminated a $155 million investment plan to acquire Kinetic Medical (China). This decision is suspected of being related to the Chinese Government's inclusion of medical devices in its centralized procurement programme for the first time this year.
Total SA–Anadarko Petroleum Cor[i]	On 18 May 2020, Total (France) announced the cancellation of the previously reported $4.9 billion deal to acquire Anadarko (Algeria) from Occidental Petroleum Corp. Occidental had informed Total that, as part of an understanding with the Algerian authorities on the transfer of Anadarko's interests to Occidental, Occidental would not be in a position to sell its interests in Anadarko to Total.
Teledyne Technologies Inc–Photonis Technologies SAS[j]	On 28 September 2020, Teledyne (United States) withdrew its proposed $550 million acquisition of Photonis (France) after France's Minister of the Economy and Finance decided the deal could only proceed if a French sovereign investment fund, Banque Publique d'Investissement, was allowed to hold a minority stake in Photonis.
While waiting for host-country approval	
Aurobindo Pharma USA Inc–Sandoz Inc[k]	On 2 April 2020, Aurobindo (United States; subsidiary of Aurobindo Pharma Ltd (India)) announced it had agreed with Sandoz (United States; subsidiary of Novartis AG (Switzerland)) to terminate its $1 billion plan to buy Sandoz's United States generic oral solids and dermatology businesses because approval for the transaction from the United States Federal Trade Commission was not obtained within anticipated timelines.
Carlisle Companies Inc–Draka Fileca SAS[l]	On 19 June 2020, Carlisle Companies (United States) announced the termination of the $81.85 million plan to acquire Draka Fileca (France) because regulatory approval was not received for the transaction prior to the expiration of the parties' agreed time period to satisfy closing conditions.
Millicom International Cellular AS–Telefónica de Costa Rica TC SA[m]	On 2 May 2020, Millicom International Cellular (Luxemburg) withdrew its $570 million plan to acquire the entire share capital of Telefonica de Costa Rica (Costa Rica) from Telefónica SA (Spain), stating that the pending regulatory approvals for the transaction had not been issued by 1 May 2020.
Shanghai Electric Power Co Ltd–K-Electric Ltd[n]	On 27 June 2020, Shanghai Electric Power (China) withdrew its proposed $1.7 billion acquisition of a majority stake in K-Electric (Pakistan). The timeline for concluding the deal, which had been pending for almost four years, expired on 26 June 2020, by which date the Securities and Exchange Commission of Pakistan had failed to grant approval for the transaction.
QT Vascular Ltd–Tengri Coal And Energy Pte Ltd[o]	On 22 November 2020, QT Vascular (Singapore) announced that the $818 million conditional sale and purchase agreement of Tengri Coal (British Virgin Islands) had ceased because the parties failed to obtain the Singapore Exchange's approval within three months from the date of the agreement.

Source: UNCTAD.
[a] https://www.afr.com/companies/manufacturing/china-mengniu-takeover-of-lion-dairy-collapses-20200825-p55p0w.
[b] https://www.dwpv.com/en/Insights/Publications/2021/Government-Blocks-Foreign-Acquisition-of-Gold-Miner.
[c] http://mwe.com/insights/radar-specialist-german-government-prohibits-takeover-by-chinese-investor/.
[d] https://www.gov.uk/cma-cases/prosafe-se-floatel-international-limited-merger-inquiry;
https://www.wired-gov.net/wg/news.nsf/articles/Offshore+accommodation+merger+abandoned+14022020091500?open.
[e] https://www.reuters.com/article/us-tachosil-m-a-johnson-johnson/johnson-johnson-abandons-deal-for-takedas-tachosil-surgical-patch-idUSKCN21S1XG.
[f] https://www.globalcement.com/news/item/11180-namibian-competition-commission-blocks-sale-of-ohorongo-cement-to-west-china-cement; https://m.marketscreener.com/quote/stock/WEST-CHINA-CEMENT-LIMITED-6727622/news/West-China-Cement-nbsp-Namibia-competition-watchdog-blocks-West-China-Cement-s-Schwenk-deal-31060294/.
[g] https://www.reuters.com/article/us-america-movil-telefonica-el-salvador-idUSKBN25U31J.
[h] https://www.yicaiglobal.com/news/china-kinetic-medical-plummets-to-near-nine-month-low-as-temasek-hillhouse-pull-out.
[i] https://www.ogj.com/general-interest/article/14176155/total-cancels-deal-to-acquire-ghana-assets-from-occidental.
[j] https://news.futunn.com/en/post/7429186?report_type=stock&report_id=14631998&seo_redirect=1&level=2&data_ticket= 1617788864321632.
[k] https://www.pharmalive.com/after-failing-to-gain-ftc-approval-sandoz-and-aurobindo-call-off-1-billion-deal.
[l] https://www.businesswire.com/news/home/20200619005451/en/Carlisle-Companies-Announces-the-Termination-of-its-Acquisition-of-Draka-Fileca.
[m] https://nextvnews.com/telefonica-to-sue-millicom-for-not-acquiring-its-operations-in-costa-rica/;
https://ml-eu.globenewswire.com/Resource/Download/0ea9769e-ccf7-45c6-8324-685eb4cd5154.
[n] https://www.thenews.com.pk/print/678263-china-pulls-out-of-ke-s-buyout-deal.
[o] https://www.businesstimes.com.sg/companies-markets/qt-vascular-scraps-s1b-rto-plan-shares-fall-amid-heavy-volume.

B. INTERNATIONAL INVESTMENT POLICIES

1. Trends in IIAs: bilateral consolidation and acceleration of regional rulemaking

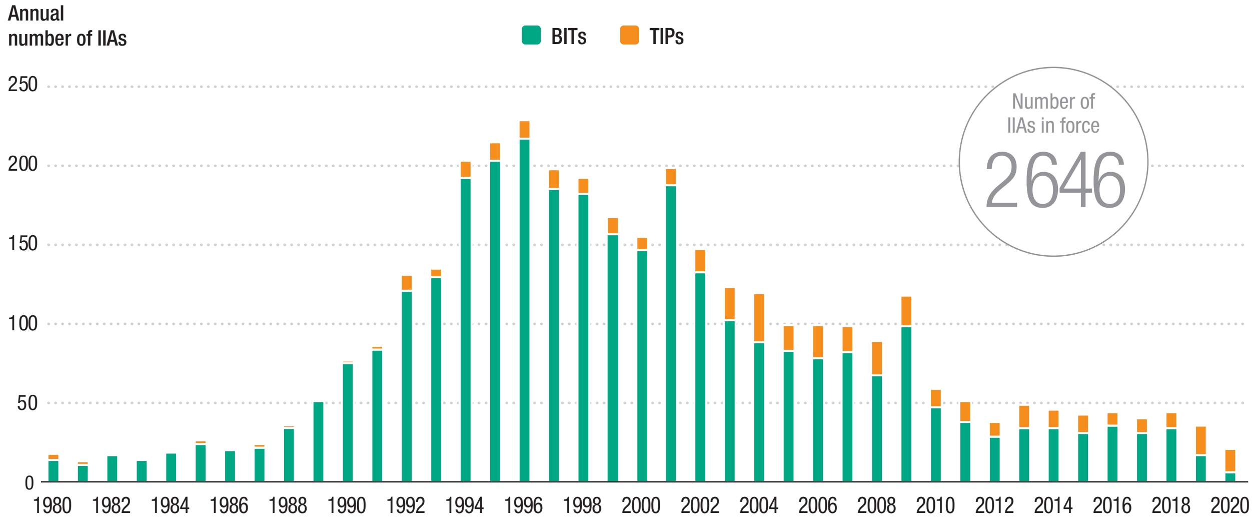
Several notable developments took place in 2020 and 2021 that continued to rationalize the international investment agreement (IIA) regime, by consolidating bilateral investment policymaking and accelerating regional rulemaking. These developments include the entry into force of the EU agreement to terminate all intra-EU bilateral investment treaties (BITs) and the emergence of new megaregional IIAs, as well as other developments that continue to influence international investment rules such as multilateral discussions for the reform of the ISDS system.

a. Developments in the conclusion and termination of IIAs

In 2020, countries concluded 21 IIAs, over half of which were rollover agreements concluded by the United Kingdom. As in 2019, the number of effective treaty terminations in 2020 exceeded that of new IIAs, with 42 terminations.

In 2020, countries concluded at least 21 new IIAs: 6 BITs and 15 treaties with investment provisions (TIPs). Of these 21 IIAs, 12 were rollover agreements concluded by the United Kingdom to maintain existing trade and investment relationships with third countries following its withdrawal from the EU. In addition, at least 18 IIAs that had already been concluded entered into force in 2020, bringing the total to at least 2,646 IIAs in force by the end of the year (figure III.3).

Figure III.3. **Number of IIAs signed, 1980–2020**



Source: UNCTAD, IIA Navigator.
Note: This includes treaties (i) unilaterally denounced, (ii) terminated by consent, (iii) replaced by a new treaty and (iv) expired automatically.

At the same time, the number of terminations exceeded the number of newly concluded IIAs: at least 42 IIA terminations entered into effect in 2020 ("effective terminations"), of which 10 were unilateral terminations, 7 were replacements (through the entry into force of a newer treaty), 24 IIAs were terminated by mutual consent, and 1 expired. Of the 42 terminations, 20 were the consequence of the entry into force of the agreement to terminate all intra-EU BITs on 29 August 2020 (section c). Moreover, as in 2019, India was particularly active in terminating treaties, with six BITs terminated, followed by Australia with three, and Italy and Poland with two each. By the end of the year, the total number of effective IIA terminations reached at least 393, bringing the IIA universe to 3,360 (2,943 BITs and 417 TIPs).[4]

The 15 TIPs concluded in 2020 for which texts are available can be grouped into three categories.

1. Three agreements with obligations commonly found in BITs, such as substantive standards of investment protection:
   - Canada–United Kingdom Trade Continuity Agreement
   - Regional Comprehensive Economic Partnership (RCEP)[5]
   - Republic of Korea–Indonesia Comprehensive Economic Partnership Agreement (CEPA)
2. Eight agreements with limited investment provisions (e.g. national treatment (NT) and most-favoured-nation (MFN) treatment with regard to commercial presence or the right of establishment of companies) or provisions on the free movement of capital relating to direct investments:
   - EU–United Kingdom Trade and Cooperation Agreement (TCA)
   - United Kingdom–Viet Nam Free Trade Agreement (FTA)
   - Moldova–United Kingdom Strategic Partnership, Trade and Cooperation Agreement
   - Singapore–United Kingdom FTA
   - Egypt–United Kingdom Association Agreement
   - North Macedonia–United Kingdom Partnership, Trade and Cooperation Agreement
   - Japan–United Kingdom Comprehensive Economic Partnership Agreement (CEPA)
   - Ukraine–United Kingdom Political, Free Trade and Strategic Partnership Agreement
3. Four agreements that establish a process for negotiation or an institutional framework to promote and cooperate on investment but do not contain substantive investment protection provisions:
   - Turkey–United Kingdom FTA
   - Fiji–United States Trade and Investment Framework Agreement
   - Kenya–United Kingdom Economic Partnership Agreement
   - Côte d'Ivoire–United Kingdom Stepping Stone Economic Partnership Agreement

b. Developments related to megaregional IIAs

Megaregional IIAs have been proliferating in recent years, with possible significant implications for future international investment rulemaking.

Megaregional agreements are broad economic agreements among a group of countries that together carry significant economic weight and in which investment is only one of several subjects addressed. A review of selected recent megaregional IIAs – the Sustainable Investment Protocol of the African Continental Free Trade Area (AfCFTA); the EU–United Kingdom TCA; the China–EU Comprehensive Agreement on Investment (CAI); the RCEP;

the United States–Mexico–Canada Agreement (USMCA); and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) – reveals variations in the way they approach investment obligations. At the same time, all converge towards including reform-oriented provisions aimed at ensuring a balance between investment protection and the right of States to regulate (table III.3).

They regulate investment protection and liberalization in different ways because of variations in how the parties approach investment provisions. Most importantly, recently concluded megaregional IIAs include many of the IIA reform approaches identified in UNCTAD's Investment Policy Framework for Sustainable Development (UNCTAD, 2015)

Table III.3. Selected recent megaregional IIAs at a glance

		Economic significance			
Megaregional IIA	**IIA reformed provisions**	**Population** (Number)	**GDP** (Trillions of dollars)	**Total FDI stock covered** (Billions of dollars)	**Bilateral investment relationships created**
China–EU CAI	• NT and MFN pre- and post-establishment with "in like situation" comparator • MFN exception excluding ISDS • Specific section on investment and sustainable development • No ISDS	1.9 billion	30	188	27
EU–UK TCA	• NT and MFN pre- and post-establishment with "in like circumstances" comparator • No FET clause • No expropriation clause • No ISDS • Commitment to enhance the contribution of investment to sustainable development	513.5 million	18.4	1 684	27
RCEP	• Refined definition of investment • NT and MFN pre- and post-establishment with "in like circumstances" comparator • Qualified FET • Indirect expropriation defined • Transfer-of-funds exceptions • Security exception • Investment promotion and facilitation provisions • No ISDS	2.3 billion	26.3	2 690	105
USMCA	• Refined definition of investment • NT and MFN pre- and post-establishment with "in like circumstances" comparator • Qualified FET • Indirect expropriation defined • Transfer-of-funds exceptions • Reference to environment, health and CSR • Limited ISDS scope • Tailored ISDS arrangements (only between the United States and Mexico)	500 million	24.3	2 181	3
CPTPP	• Refined definition of investment • NT and MFN pre- and post-establishment with "in like circumstances" comparator • MFN exception excluding ISDS • Qualified FET • Indirect expropriation defined • Transfer of funds exceptions • Reference to environment, health and CSR • Limited ISDS scope • Tailored ISDS arrangements	499 million	10.6	1 230	55

Source: UNCTAD, calculations based on publicly available data.
Note: The AfCFTA Protocol on sustainable investment is not included as negotiations are ongoing and no text has been adopted yet.

and UNCTAD's Reform Package for the International Investment Regime (UNCTAD, 2018), which continue to shape investment policymaking. Regarding ISDS, there is an increasingly cautious approach, with some megaregional IIAs excluding ISDS altogether (the RCEP, the CAI and the EU–United Kingdom TCA)[6] while others preserve ISDS with certain exceptions or tailored arrangements (the USMCA and the CPTPP).

The trend toward megaregional IIAs is resulting in a smaller number of IIAs but with multiple parties, significantly expanding the investment treaty network as each of them creates multiple bilateral IIA relationships (see table III.3). These megaregionals merit attention because of their sheer size, among other reasons (*WIR14*). The following paragraphs summarize the key developments for these agreements:

Negotiations of the "Sustainable Investment Protocol" under the African Continental Free Trade Area: Trading under the AfCFTA officially started on 1 January 2021, after being postponed from 1 July 2020 because of the pandemic. The AfCFTA Agreement was signed on 21 March 2018 and entered into force on 30 May 2019; as of February 2021, 36 countries had ratified it. Negotiations of the Protocol on Sustainable Investment started on 31 March 2021. The negotiations were initially expected to be completed in December 2020, but the deadline could not be met on account of the pandemic. The new deadline for the conclusion of the negotiations is December 2021.[7] The Negotiating Principles for the AfCFTA Protocol on Sustainable Investment refer to UNCTAD's work on IIA reform and mention the Investment Policy Framework for Sustainable Development (UNCTAD, 2015) and the IIA Reform Accelerator (UNCTAD, 2020e). The substantive content of the Protocol is likely to be inspired by the Pan-African Investment Code as well as other African and international investment agreements and instruments.[8] UNCTAD is providing technical assistance and capacity-building support to the African Union in the process leading to the conclusion of the Protocol.

Agreement in principle for the China–EU Comprehensive Agreement on Investment[9] was reached on 30 December 2020. The agreement contains a section dedicated to investment liberalization, providing for NT and MFN treatment for investors and covered enterprises in like situations with respect to their establishment and operation. Exceptions to the MFN provision exclude the importation of substantive provisions and dispute settlement procedures from other IIAs. The CAI does not include all investment protection standards commonly found in BITs or an investment dispute settlement mechanism. Instead, it provides for a State–State mechanism for avoiding and settling disputes between the parties using a two-step approach consisting of consultations and recourse to an arbitration panel. The parties agree to continue the negotiations with a view to negotiate an agreement on investment protection and investment dispute settlement within two years of the signature of the CAI. The agreement includes a specific section on sustainable development which includes commitments on labour and environmental protection, as well as provisions on a separate and dedicated mechanism to address differences.

EU–United Kingdom Trade and Cooperation Agreement: The EU and the United Kingdom concluded a TCA to govern their future relationship on 30 December 2020. The agreement consists of three main pillars: (i) an FTA covering, among other things, trade in goods and services, investment liberalization, competition, State aid, fisheries, energy and sustainability; (ii) a new partnership on citizens' security establishing a framework for law enforcement and judicial cooperation in criminal and civil law matters; and (iii) an overarching governance framework providing for binding enforcement and dispute settlement.[10] The chapter on investment liberalization includes NT and MFN treatment of investors and covered enterprises with respect to their establishment and operation.

It does not include investment protection provisions such as fair and equitable treatment (FET) or expropriation and does not provide for ISDS. Also of direct relevance to investment regulation, the agreement contains a level playing field and rebalancing mechanism which includes a non-regression clause in the chapters dealing with labour and social standards as well as environment and climate, ensuring that the current levels of protection will continue to be upheld.

Regional Comprehensive Economic Partnership: The RCEP Agreement was signed on 15 November 2020. The negotiations were initiated in 2012, originally including India, which opted out in 2019. The agreement contains a chapter on investment that features reform-oriented provisions such as the inclusion of a refined definition of investment, specifying in a non-exhaustive manner the characteristics that a covered investment should have (such as commitment of capital or other resources, expectation of gain or profit, and the assumption of risk) and the forms that an investment may take. Provisions on investment promotion and facilitation are included, such as simplifying procedures for investment approvals and establishing one-stop investment centres to provide assistance and advisory services. The chapter does not provide for ISDS; the parties are to enter into discussions on ISDS no later than two years after the date of entry into force of the agreement and conclude them within three years of the commencement of the discussions. In addition to specific provisions on investment, RCEP coverage of non-investment issues will also have an impact on international investment. This includes for example the RCEP's rules-of-origin regulations and their impact on regional value chains.

Entry into force of the United States–Mexico–Canada Agreement: On 1 July 2020 the USMCA entered into force following its ratification by the United States on 29 January 2020, Mexico on 19 June 2019 and Canada on 13 March 2020. The USMCA replaces the North American Free Trade Agreement (NAFTA), which was signed in 1992. The agreement features reform-oriented language, including its preamble, which recognizes the States' right to regulate in areas such as health, safety and the environment. It limits the definition of investment to assets with the characteristics of an investment and provides explicit exclusions. The parties reaffirm in the treaty the importance of corporate social responsibility (CSR) guidelines. Among the major changes brought about by the new agreement are the revised ISDS provisions, which limit the application of ISDS exclusively to disputes between the United States and Mexico and narrow the claims that investors can bring under the provision. In addition to investment provisions, other clauses on rules of origin and labour costs may have an impact on Mexico's attractiveness as an investment location for North American manufacturing value chains.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership: The CPTPP, which entered into effect on 30 December 2018, is a treaty concluded between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Viet Nam. In February 2021, the United Kingdom formally requested the commencement of negotiations on its accession to the CPTPP.[11] With respect to investment (chapter 9 of the agreement), the traditional ISDS model remains in force. However, the parties agreed to suspend the application of the provisions relating to "investment agreement" (investor–State contract) and "investment authorization", including for the submission of ISDS claims (i.e. limiting the submission of claims to the breach of a treaty obligation). There is therefore narrower scope for challenging government measures, as claims by private companies in relation to investment contracts and approvals are now excluded. Multiple side letters were signed on a bilateral basis between participating countries, to terminate existing BITs, to exclude the application of ISDS provisions or to provide for tailored ISDS arrangements, among other matters. The agreement also includes specific measures to assist small and medium-sized enterprises in taking full advantage of the opportunities it creates.

c. Other developments related to investment rulemaking

Other notable developments were either a continuation of the trends towards the reform of the international investment regime observed in recent years or directly related to the COVID-19 pandemic.

Modernization of the Energy Charter Treaty: The first three rounds of negotiations on the modernization of the Energy Charter Treaty (ECT) took place on 6–9 July, 8–11 September and 3–6 November 2020, respectively. Pursuant to the agreed list of topics for modernization, the first round of negotiations saw discussions on, among others, the definition of investment and investor, clarification of most constant protection and security, compensation for losses, definition of FET and the right to regulate. The topics addressed in the second round of negotiations included dispute settlement (e.g. frivolous claims, valuation of damages and third-party funding) as well as sustainable development and CSR, and the discussions of the third round centred on pre-investment, regional economic integration organizations and obsolete provisions. In relation to the modernization of ISDS provisions in the ECT, a group of nearly 100 representatives from the European Parliament as well as national parliaments signed and issued a declaration calling on "EU negotiators to ensure that the provisions in the ECT that protect foreign investment in fossil fuels are deleted and thus removed from the ECT" and for "ISDS provisions (…) to be scrapped or fundamentally reformed or limited."[12] Five rounds of negotiations are scheduled for 2021.[13]

Entry into force of the EU agreement for the termination of intra-EU BITs: On 29 August 2020, the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the EU entered into force following receipt by the Depositary of the second instrument of ratification. Twelve more countries have since ratified the agreement, and Spain is provisionally applying it.[14] The agreement, which had been signed by 23 EU Member States on 5 May 2020,[15] implements the March 2018 judgment of the Court of Justice of the EU in the *Achmea* case, which found that investor–State arbitration clauses in intra-EU BITs are incompatible with EU law. Annex A of the agreement contains a list of 124 intra-EU BITs that will be terminated, i.e. removed from the EU legal order, upon entry into force of the agreement for the relevant Member States, and clarifies that their sunset clauses will also be terminated. Annex B lists already terminated intra-EU BITs whose sunset clauses will also cease to produce legal effect upon entry into force of the agreement for the relevant Member States.[16] The agreement does not cover intra-EU proceedings on the basis of Article 26 of the ECT. It indicates that the EU as a group and its Member States will address this matter at a later stage.

Investment Facilitation for Development negotiations at the World Trade Organization: On 25 September 2020, participants in the structured discussions on investment facilitation for development at the World Trade Organization (WTO) began formal negotiations. The objective of the negotiations is to draft concrete proposals for specific provisions based on an "informal consolidated text". Within the context of these negotiations, investment facilitation is understood as the creation of a more transparent, efficient and investment-friendly business environment by making it easier for domestic and foreign investors to invest, conduct day-to-day business and expand their existing investments.[17] The objective is to achieve a concrete outcome by the 12th WTO Ministerial Conference scheduled for the week of 29 November 2021, to be held in Geneva, Switzerland.

Western Balkans regionally accepted standards for negotiating IIAs: On 10 November 2020, six economies of the Western Balkan region, with the support of the Regional Cooperation Council, endorsed the Regionally Accepted Standards for Negotiating International Investment Agreements, which set a common baseline for the negotiation of future investment agreements involving Albania, Bosnia and Herzegovina, Kosovo (United Nations Administrative Region, Security Council resolution 1244 (1999)),[18] Montenegro, North Macedonia and Serbia. The standards were developed in line with the Regional Investment Reform Agenda, whose goal is to achieve greater alignment of the investment policies in the six economies with EU standards and international best practices, as well as with latest trends in investment policymaking.[19] Some of the key provisions in the standards include qualified MFN treatment only in "like situations" and the exclusion of ISDS procedures in other IIAs from the scope of the MFN obligation; a qualified FET standard with a closed list of actions constituting FET violations; protection against expropriation (direct and indirect), with a carve-out for legitimate public policy measures; transfer of funds with accompanying exceptions; provisions on the protection of the right to regulate; sustainable development-related provisions such as clauses on "not lowering of standards" and CSR; and dispute settlement, with a limited scope for ISDS and improvements to the arbitral process (e.g. transparency, no-U-turn clause and disclosure of third-party funding).

African Union declaration on the risks of investor–State arbitration for COVID-19-related measures: During the 14th meeting of African Union Ministers for Trade, held on 24 November 2020, the ministers adopted the Declaration on the Risk of Investor–State Dispute Settlement with Respect to COVID-19 Pandemic Related Measures.[20] It highlights the "potential for disputes arising between investors and states under investment treaties in relation to the measures taken by African governments to respond to the COVID-19 pandemic, as highlighted by a number of organizations including UNCTAD and the African Development Bank (AfDB)". It also expresses concern over the high costs associated with ISDS and the need to ensure that public budgets are directed towards responding to the pandemic. On this basis, the declaration, among other things, invites African Union Member States to explore all available options under international law to mitigate the risks of ISDS claims, including through a mutual temporary suspension of ISDS provisions in investment treaties with respect to COVID-19-related measures. It requests Member States to consider renegotiating their investment treaties by integrating provisions better suited to exceptional situations in accordance with new trends at the regional and international levels. It also requests the African Union Commission to provide support to Member States in the ongoing negotiations within different organizations that are working towards the development of legal instruments to address the risks of ISDS for COVID-19-related measures.

UNCITRAL Working Group III on ISDS reform: The United Nations Commission on International Trade Law (UNCITRAL) Working Group III resumed its 38th session in Vienna, Austria on 20–24 January 2020. In this session, the deliberations addressed three possible reform options: a stand-alone review or appellate mechanism, a standing multilateral investment court and selection of arbitrators. The 39th session, on ISDS reform, convened in a hybrid format (in person and virtually) in Vienna on 5–9 October 2020. The Working Group considered reform options for dispute prevention and mitigation as well as other means of alternative dispute resolution; reflective loss and shareholder claims; multiple proceedings, including counterclaims; security for costs and means to address frivolous claims; treaty interpretation by States parties; and a multilateral instrument on ISDS reform. In 2021, the Working Group held its 40th session in Vienna virtually on 8–12 February 2021 and resumed on 4–5 May 2021. The core of the discussions revolved around establishing a workplan for the next five to six years.

The ICSID's Fourth Working Paper on Rule Amendments: In February 2020, the International Centre for Settlement of Investor Disputes (ICSID) released its latest working paper with proposed amendments to its procedural rules for resolving international investment disputes, reflecting input received on the previous working paper, published in August 2019. Once in effect, the updated rules will, among other things, reduce the time and costs of ICSID proceedings, expand the range of dispute settlement mechanisms available to parties through new mediation rules and updated conciliation and fact-finding rules, enhance transparency and broaden access to the Additional Facility Arbitration and Conciliation Rules.[21]

2. Trends in ISDS: new cases and outcomes

The total ISDS case count had reached over 1,100 by the end of 2020, with at least 68 new arbitrations initiated in 2020. Most investment arbitrations were brought under IIAs signed in the 1990s or earlier.

a. New cases initiated in 2020

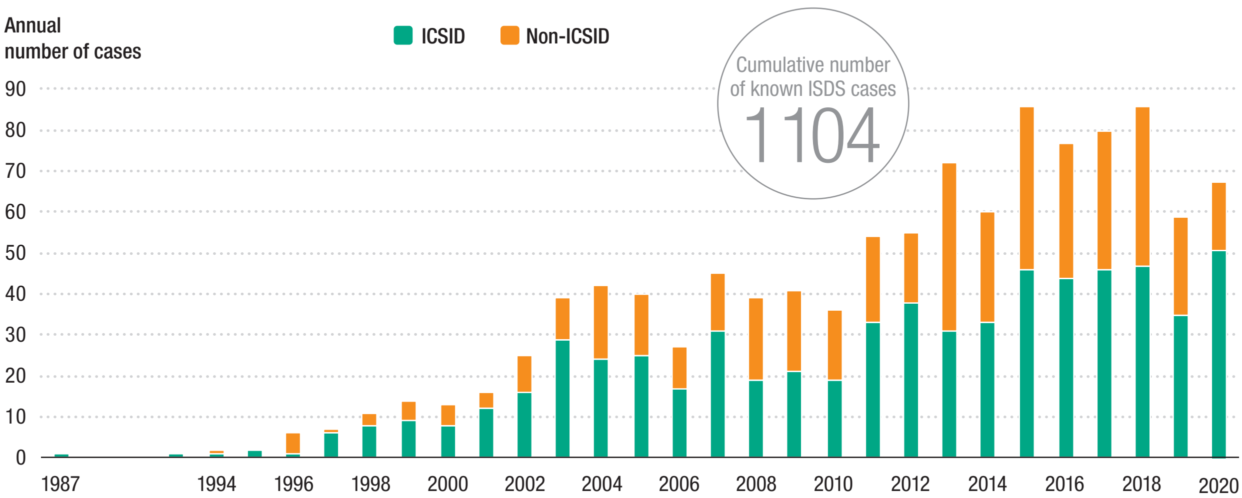
The number of new ISDS cases remained high. In 2020, at least 68 new treaty-based ISDS cases were initiated.

In 2020, investors initiated 68 publicly known ISDS cases pursuant to IIAs (figure III.4). As of 1 January 2021, the total number of publicly known ISDS claims had reached 1,104. As some arbitrations can be kept confidential, the actual number of disputes filed in 2020 and previous years is likely to be higher. To date, 124 countries and one economic grouping are known to have been respondents to one or more ISDS claims.

(i) Respondent States

The new ISDS cases in 2020 were initiated against 43 countries. Peru and Croatia were the most frequent respondents, with six and four known cases respectively. Four economies – Denmark, Norway, Papua New Guinea and Switzerland – faced their first known ISDS claims. As in previous years, the majority of new cases (about 75 per cent) were brought against developing countries and transition economies.

Figure III.4. Trends in known treaty-based ISDS cases, 1987–2020



Source: UNCTAD, ISDS Navigator.
Note: Information has been compiled from public sources, including specialized reporting services. UNCTAD's statistics do not cover investor–State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signaled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continually adjusted as a result of verification processes and may not match exactly case numbers reported in previous years.

(ii) Claimant home States

Developed-country investors brought most – about 70 per cent – of the 68 known cases in 2020. The highest numbers of cases were brought by investors from the United States (10 cases), the Netherlands (7 cases) and the United Kingdom (5 cases).

(iii) Intra-EU disputes

About 15 per cent of the 68 known cases filed in 2020 were intra-EU disputes (nine cases). Five of these nine disputes were brought on the basis of intra-EU BITs; the remaining four cases invoked the ECT. The EU-level developments to foreclose intra-EU disputes based on BITs between EU Member States and the ECT have so far not stopped new ISDS cases from arising.

(iv) Applicable investment treaties

About 65 per cent of investment arbitrations in 2020 were brought under BITs and TIPs signed in the 1990s or earlier. All but two remaining cases were based on treaties signed between 2000 and 2011. The ECT (1994) was the IIA invoked most frequently in 2020, with seven cases, followed by the Arab Investment Agreement (1980) and the Organization of the Islamic Conference (OIC) Investment Agreement (1981) with four cases each. Looking at the trend in the past five years (2016–2020), about 20 per cent of the 370 known ISDS cases initiated in this period have invoked the ECT (41 cases), NAFTA (14 cases) or the OIC Investment Agreement (13 cases).

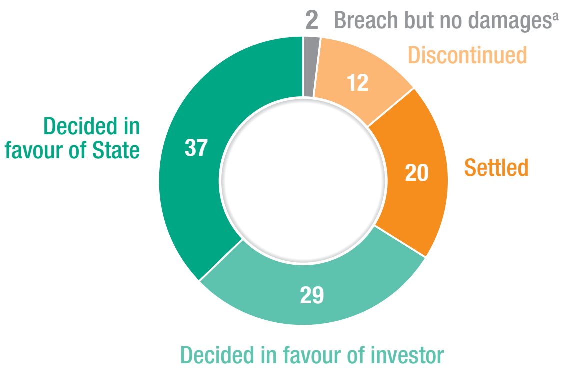
b. ISDS outcomes

(i) Decisions and outcomes in 2020

In 2020, ISDS tribunals rendered at least 52 substantive decisions in investor–State disputes, 31 of which were in the public domain at the time of writing. Eleven of the public decisions principally addressed jurisdictional issues (including preliminary objections), with eight upholding the tribunal's jurisdiction and three declining jurisdiction. The remaining 20 public decisions were rendered on the merits, with 6 holding the State liable for IIA breaches and 14 dismissing all investor claims.

In addition, four publicly known decisions were rendered in annulment proceedings at the ICSID. Ad hoc committees of the ICSID rejected the applications for annulment in three cases; in one case, the award at issue was annulled in its entirety.

Figure III.5. **Results of concluded cases, 1987–2020** (Per cent)



Source: UNCTAD, ISDS Navigator.
[a] Decided in favour of neither party (liability found but no damages awarded).

(ii) Overall outcomes

By the end of 2020, at least 740 ISDS proceedings had been concluded. The relative share of case outcomes changed only slightly from that in previous years (figure III.5).

3. Taking stock of IIA reform

Reform-oriented clauses continue to significantly permeate IIAs concluded in 2020.

All IIAs concluded in 2020 contain reform-oriented provisions aimed at preserving regulatory space and promoting sustainable investment. In particular, all 9 reviewed IIAs (table III.4) contain at least 8 reform features, one IIA contains 10 reform features, and 2 IIAs meet all 11 reform features. Four of the five action areas identified by UNCTAD continued to be the subject of heightened reform with a nearly equal level of focus: i.e. preservation of regulatory space; investment dispute settlement reform; responsible investment through, among other things, more sustainable development-oriented provisions; and investment promotion and facilitation.

Table III.4. Reform-oriented provisions in IIAs concluded in 2020

	1	2	3	4	5	6	7	8	9	10	11
Brazil–India BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Canada–United Kingdom Trade Continuity Agreement	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Hungary–Kyrgyzstan BIT	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Japan–Morocco BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
RCEP	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Japan–Côte d'Ivoire BIT	Yes	No	Yes	No	Yes	Yes	Yes	Yes	No	Yes	Yes
Mexico–Hong Kong, China SAR BIT	No	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Israel–UAE BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Korea–Indonesia Comprehensive Economic Partnership Agreement	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No	Yes

Yes No

Selected aspects of IIAs

The scope and depth of commitments in each provision varies across IIAs.

1 References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble

2 Refined definition of investment (e.g. reference to characteristics of investment; exclusion of portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts)

3 Circumscribed FET (in accordance with customary international law, equated to the minimum standard of treatment of aliens under customary international law or clarified with a list of State obligations), or FET omitted

4 Clarification of what does and does not constitute an indirect expropriation, or indirect expropriation omitted

5 Detailed exceptions from the free-transfer-of-funds obligation, including for balance-of-payments difficulties and/or enforcement of national laws

6 Omission of the so-called "umbrella" clause

7 General exceptions, e.g. for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources

8 Explicit recognition in the treaty text that parties should not relax health, safety or environmental standards to attract investment

9 Promotion of corporate social responsibility standards by incorporating a separate provision into the IIA or as a general reference in the treaty preamble

10 Limiting access to ISDS (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, limiting time period to submit claims, omitting the ISDS mechanism)

11 Specific proactive provisions on investment promotion and/or facilitation (e.g. facilitating the entry and sojourn of personnel, furthering transparency of relevant laws and regulations, enhancing exchange of information on investment opportunities)

Source: UNCTAD.
Note: Based on nine IIAs concluded in 2020 for which texts are available, not including "framework agreements" that lack substantive investment provisions or agreements with limited investment-related provisions.

Preservation of regulatory space. Safeguarding States' policy space continued to be remained a driving concern behind the reform features contained in the IIAs concluded in 2020. All nine reviewed IIAs include limitations to the FET obligation, clarify or omit indirect expropriation, provide for detailed exceptions to the free-transfer-of-funds obligation, contain general exceptions (e.g. to protect human health or to conserve exhaustible natural resources) and omit umbrella clauses. Moreover, seven of the nine IIAs circumscribe the treaty scope by, for example, excluding certain types of assets from the definition of investment.

Responsible investment. In IIAs concluded in 2020, the commitment of States to ensure that investment is responsible translated into the systematic incorporation of provisions that promote responsible development. Eight of the nine IIAs reviewed make reference to the protection of health and safety, labour rights, and environment or sustainable development and provide for general exceptions as well. Six of the nine IIAs explicitly recognize that parties should not relax health, safety or environmental standards to attract investment, while five include provisions for the promotion of CSR.

Investment dispute settlement reform. Reforming ISDS remained a priority in IIAs concluded in 2020. Eight of the nine IIAs reviewed contain at least one type of limitation to that omit ISDS altogether.[22] Other types of limitations commonly observed in IIAs concluded in 2020 involve time periods to submit claims and fork-in-the-road provisions.

Investment promotion and facilitation. In keeping with recent trends, IIAs concluded in 2020 continued to largely include specific proactive provisions on investment promotion and/or facilitation. Eight of the nine IIAs reviewed feature such provisions, which range from facilitating the entry, sojourn and residence of investors and enhancing exchange of information on investment opportunities, to providing for the establishment of an ombudsperson or facilitator.

Gender equality and women's empowerment. Provisions aimed at ensuring gender equality in IIAs remain rare. United Nations Sustainable Development Goal (SDG) 5 aims to "achieve gender equality and empower all women and girls".[23] Since foreign investment is recognized as an important way to achieve the SDGs (*WIR14*), IIA reform should take into account gender equality and women's empowerment (UNCTAD, 2014). A gender-inclusive IIA could, for instance, encourage the contracting parties to promote investments that contribute to gender equality and women's empowerment, whether in its preamble or as part of its investment promotion provision. Investment could be protected against gender-based discrimination in the context of NT, MFN or FET clauses. Investors could be encouraged, as part of CSR provisions, to ensure gender equality and inclusiveness in their activities. In addition, ISDS clauses could establish requirements to ensure gender diversity in the appointment of arbitrators.

To support and accelerate ongoing IIA reform efforts, UNCTAD launched the *IIA Reform Accelerator* on 12 November 2020 (UNCTAD, 2020e). The Accelerator is a tool to assist States in modernizing the existing stock of old-generation investment treaties. It operationalizes the idea of gradual innovation by focusing on the reform of the substantive provisions of IIAs in selected key areas. The Accelerator focuses on eight IIA provisions that are most in need of reform in line with the SDGs and the State's right to regulate: (i) definition of investment, (ii) definition of investor, (iii) NT, (iv) MFN treatment, (v) FET, (vi) full protection and security, (vii) indirect expropriation and (viii) public policy exceptions. For each provision, the IIA Reform Accelerator identifies sustainable development-oriented policy options, building on UNCTAD's Investment Policy Framework for Sustainable Development (UNCTAD, 2015), and proposes ready-to-use model language that reflects these options. The Accelerator further illustrates how these options have been used in recent IIAs and model BITs. Explanations accompany the model formulations to highlight their objective, provide background and explain how various reform options can be combined.

The reform-oriented formulations can be used directly at the national, bilateral, regional and multilateral levels to interpret, amend or replace old-generation treaties.

In addition, UNCTAD organized in November 2020 its Annual IIA Conference, focusing on "IIA Reform in Times of COVID-19", gathering more than 300 participants from government, the private sector, civil society and academia. They recognized that the pandemic and the ensuing economic crisis posed great challenges but also provided a new impetus for reform of the IIA regime. The Virtual IIA Conference 2020 echoed the need to ensure that the IIA regime promotes and facilitates investment for sustainable development and that it safeguards the right of States to regulate to protect public health in the post-pandemic era.

* * *

Parallel to the ongoing IIAs reform is the new round of global tax reform, which may exert a far-reaching impact on global investment patterns and investment policies. Some implications are highlighted in box III.2. A key emerging issue that merits major efforts for research and policy analysis is the ever-growing interaction between industrial policy and investment and tax policy regimes. The recent worldwide proliferation of industrial policy (UNCTAD, 2018) has intensified such interactions. This has triggered extensive realignments of trade, investment and tax policies (Owens and Zhan, 2018). It poses challenges and opportunities for the effort towards a coherent international approach to trade, investment and tax policies, as well as the opportunity for synergies for sustainable development. The new holistic policy approach to investment in the health sector (section C) is a case in point.

Box III.2. Ongoing tax reforms: implications for investment and investment policy

The global tax landscape is in transition, with significant implications not only for tax revenues in home and host countries of international investment, but also for global investment patterns, investment promotion strategies and SDG financing. As the initiatives under discussion will affect both national and international investment policies, they need to be fully understood by policymakers, particularly in developing countries.

Among the key reform proposals, tax policymakers are negotiating the adoption of a *minimum tax for the largest MNEs*. The global minimum tax proposal of at least 15 per cent adopted by the G7 on 5 June 2021 will be presented to the G20 and the OECD Inclusive Framework on Base Erosion and Profit Shifting. The G7 also committed to reform the allocation of taxing rights, with countries awarded taxing rights on at least 20 per cent of profit exceeding a 10 per cent margin for the largest and most profitable MNEs. Among the key implications, an international minimum tax is expected to (i) discourage MNEs from shifting profits and tax revenues to low-tax countries and also lead to less conduit investment through tax havens; (ii): reduce tax competition and the race to the bottom that has lowered tax revenues in many countries over the past three decades, particularly in developing and transition economies; and (iii) necessitate reviews of tax incentive regimes adopted by countries to attract investment.

In addition, corporate tax transparency obligations are likely to increase with a new EU provisional political agreement that will require public country-by-country reporting (disclosure of income tax information by certain undertakings and branches) by MNEs with activities in member States and in selected third countries. Although the proposal is still under consideration and will require political endorsement, MNEs with a presence in the EU will now be subject to a higher level of tax transparency. The proposal should be viewed as part of the general trend to improve tax transparency around the world. Other tax developments with significant investment policy implications include negotiations on proposals to tax the digital economy, which could introduce new complexities for remote investors.

These developments may create friction with the IIA framework, as State obligations under IIAs can interact with tax regulatory action intended to raise revenue, eliminate double taxation or limit opportunities to engage in tax avoidance or evasion. They can hence expose States to tax-related claims brought under their ISDS mechanisms (for how to handle this interaction, see UNCTAD's "A guide for tax policymakers: IIAs and their implications for tax measures").

These issues are relevant for all countries, but developing and emerging economies are particularly exposed, as tax measures are an important part of the industrial policy and investment promotion toolkit. Keeping abreast of reforms and assessing potential impacts on the local economy will be key to enable these economies to participate effectively in the process of tax reform. Greater coordination and cooperation between tax and investment policymakers will also be crucial to ensure investment policy responses that optimize the impact of tax reforms on national investment climates.

Source: UNCTAD.

C. INVESTMENT IN THE HEALTH SECTOR

1. Investment policy response to the COVID-19 pandemic: an overview

The outbreak of the pandemic has triggered a significant increase in investment policy measures in the health sector, including increased screening, but also new investment incentives. It has also highlighted the need to safeguard sufficient regulatory space in IIAs and to support LLMICs in building productive capabilities in health.

The ongoing pandemic has created enormous challenges for national health systems and policies. It has tested the resilience of global value chains for medical goods, revealed the weaknesses and fragility of many national health systems, and highlighted the urgent need to invest more in health (see chapter V).

The outbreak of the pandemic has also prompted a significant increase in foreign investment policy measures in the health sector. On the basis of a survey of 70 economies carried out by UNCTAD, which covered developed (24), developing (41) and transition (5) economies in all regions of the world,[24] no country has introduced new *FDI entry restrictions* in the health sector or lifted existing ones since the beginning of the pandemic. However, almost one third of these economies have introduced new or reinforced existing *screening procedures* for foreign investment in the sector.

Most of the health-related investment screening identified in the UNCTAD survey resulted from policy measures introduced in developed countries in 2020 (72 per cent of all screening measures) or in the first quarter of 2021 (50 per cent). At least 18 countries – *Australia, Austria, Canada, Czechia, France, Germany, Hungary, India, Italy, Japan, Malta, New Zealand, Poland,* the *Russian Federation, Slovakia, Slovenia, Spain,* and the *United Kingdom* – as well as the *EU* have in place some type of investment screening mechanism that allows them to block foreign acquisitions *specifically in the health and life science sectors.*

On the promotion side, at least six countries in the UNCTAD survey have introduced *new investment incentives* in the health sector in response to the pandemic. These include incentives to foster digital medical technologies, especially telemedicine and e-health applications, and also incentives for the manufacturing of medical equipment and supplies (e.g. protective gear), as well as grants and loans for medical and pharmaceutical research related to the pandemic (box III.6).

Adapting to the new reality, in the first phase of the pandemic, IPAs have not only digitalized their services and outreach modalities,[25] but also actively supported companies in shifting resources to the health sector and retooling production lines towards health equipment and materials, such as ventilators and masks. The support includes assistance in building supply chains, and facilitation of work permits and certification for companies producing essential goods and services (UNCTAD 2020g). Over the course of 2020, IPA activities progressively shifted from crisis management relating to the pandemic towards active investment promotion as a key component of recovery strategies (UNCTAD, forthcoming c).

At the international level, IIAs can help by promoting, facilitating and protecting investment in health, but they may also come into play in relation to policy responses taken by governments to address the economic impact of the pandemic. Some of these policy measures could potentially create friction with IIA obligations. This highlights the need to safeguard sufficient regulatory space in IIAs to protect public health and to minimize the risk of ISDS proceedings.

The pandemic has also highlighted vulnerabilities in global supply chains and in productive capabilities in health, which has prompted governments to consider what needs to be done for post-pandemic recovery and resilience. In this regard, the UNCTAD survey found that, although the range of tools employed varies significantly depending on the region and level of development, most countries actively try to encourage investment in health and that restrictions to entry are rare (section C.2). An open investment policy regime alone, however, will not suffice to attract the levels of investment required to ensure health and well-being for all by 2030. A more holistic approach is needed, particularly in LLMICs.

LLMICs face five major challenges that limit their capacity to host medical industries with adequate portfolios of medicines or vaccines, health infrastructure or services. These challenges are (i) lack of capital, technology and skills; (ii) low regulatory capacity and weak health-care systems; (iii) weak policy coherence and enabling policy frameworks; (iv) small markets and unstable demand; and (v) poor infrastructure and related services. In this context, UNCTAD's action plan for building productive capacity in health proposes 10 main action areas for establishing an adequate ecosystem at the national, regional, and international levels and mobilizing the amount of investment needed to achieve SDG 3 (section C.3).

2. Investment policies and the health sector

In response to the pandemic, countries have been reassessing their overall national and international policies affecting investment in the health sector.

This section provides an overview of national and international policies concerning foreign investment in the health sector. In this section, the term "health sector" covers (i) the manufacturing component (e.g. the production of medical goods, such as medical devices, medical equipment and pharmaceuticals), (ii) the infrastructure component (e.g. the construction of medical facilities such as hospitals and health centres) and (iii) the services component (e.g. research and development (R&D), the provision and export of medical services or medical tourism).[26] Table III.5 summarizes key policies affecting investment in the health sector at the national and international levels, which are presented in more detail in the following subsections.

a. National policy

Among the 70 economies with specific investment policies in the health sector surveyed by UNCTAD, outright entry restrictions are relatively rare, but FDI screening has recently proliferated. On the promotion side, most countries encourage both domestic and foreign investment in all segments of the health sector, but the tools used vary by region and level of development.

Entry restrictions to foreign investment in the health sector are primarily found in Asia and affect mostly health infrastructure. The pandemic, however, has resulted in additional scrutiny of FDI in the health sector, especially in developed economies, often motivated by national security considerations. Measures to encourage investment in health, in contrast,

Table III.5.	Key investment policies in the health sector			
Industry	**Entry and admission**	**Investment promotion and facilitation**	**Investment incentives**	**International policies**
Manufacturing	• FDI ceilings[a] • Conditional entry[a] • FDI screening[b]	• Investor targeting • SEZs • Health clusters[b] • Enhanced facilitation	• Health-sector specific (e.g., grants, subsidies and tax exemptions) • As part of general manufacturing regimes	• Protection of IP rights (TRIPS) • Investment protection (IIAs) • Access to ISDS (IIAs)
Health infrastructure	• FDI ceilings[a] • Conditional entry[a] • Approval procedures[a] • FDI screening[b]	• Investor targeting	• Health-sector specific (e.g., land incentives) • As part of strategic investment regimes	• Investment protection (IIAs) • Access to ISDS (IIAs)
Health services	• FDI bans[a] • FDI ceilings[a] • Conditional entry[a] • FDI screening[b]	• Enhanced facilitation • Medical fairs • SEZs • Health clusters[b]	• Health-sector specific (grants, subsidies, and tax exemptions) • As part of general innovation support regimes	• Market access and national treatment (some IIAs; GATS) • Investment protection (IIAs) • Access to ISDS (IIAs)

Source: UNCTAD.
Note: GATS = General Agreement on Trade in Services, IIA = international investment agreement, SEZ = special economic zone, TRIPS = Agreement on Trade-Related Aspects of Intellectual Property Rights.
[a] Applies primarily in developing countries.
[b] Applies primarily in developed countries.

are widespread and target primarily the manufacturing of pharmaceuticals and medical devices. Incentives are a common instrument in all regions to promote investment in all health-sector segments. Other investment promotion tools such as investor targeting, sector-specific facilitation or dedicated special economic zones (SEZs), however, are typically deployed primarily to target manufacturing and the provision of health services; these promotion tools are also less frequently used in Africa and transition economies.

(i) Entry and admission

Control over FDI entry in the health sector falls within two main categories: outright restrictions and screening.

Entry restrictions: Of the 70 countries reviewed by UNCTAD, 18 impose FDI entry restrictions in at least one of the three health segments analysed. All the FDI entry restrictions identified were in developing countries. Most of these restrictions are in Asia and the Pacific (11 countries), followed by Africa (4 countries), and Latin America and the Caribbean (3 countries) (table III.6).

Health-care facilities and medical services stand out as the most restricted subsector (15 countries), as entry restriction measures typically aim to avoid crowding out small local hospitals and clinics. Entry restrictions in pharmaceuticals production and biotechnology (13 countries) mostly seek to ensure the participation of local investors. Nine countries have adopted FDI entry restrictions in the production of medical equipment.

Entry bans: Only one country has legally banned FDI in the entire health sector (*Cuba*, although the Council of Ministers can approve FDI in specific health sector projects). The other bans, adopted in six countries, apply to FDI in health-care facilities and medical services in specific subsectors, activities or regions. For instance, these prohibitions concern foreign investment in small hospitals *(Indonesia,* the *Lao People's Democratic Republic, Malaysia)* or basic health services or nursing homes *(Ethiopia, Indonesia, Myanmar)*, or apply in certain regions or areas of the country *(Egypt,* the *Lao People's Democratic Republic)*.

FDI ceilings: Eleven countries maintain foreign ownership ceilings or joint venture requirements in one or more segments of the health sector. Of these, the production of pharmaceuticals is the most frequently affected, with eight countries imposing foreign

Table III.6. FDI entry restrictions in the health sector

Country	Manufacturing of medical equipment	Manufacturing of pharmaceuticals and biotech (and related R&D)	Health-care facilities and medical services
Algeria		FDI ceilings	
Barbados		FDI ceilings	
China			FDI ceilings
Côte d'Ivoire	FDI ceilings	FDI ceilings	FDI ceilings
Cuba[a]	FDI ban	FDI ban	FDI ban
Egypt			FDI ban (regional)
Ethiopia			FDI ban (basic health services)
India		FDI ceilings[b]	
Indonesia	FDI ceilings (testing institutions)	FDI ban (traditional medicines) FDI ceilings (pharmaceuticals)	FDI ban (small hospitals, basic health services, nursing homes) FDI ceilings (others)
Lao People's Democratic Republic		FDI ceilings	FDI ban (small hospitals, rural areas)
Malaysia			FDI ban (small hospitals) FDI ceilings (others)
Mongolia	Conditional entry (minimum capital requirement)	Conditional entry (minimum capital requirement)	Conditional entry (minimum capital requirement)
Myanmar	FDI ceilings (brownfield FDI)	FDI ceilings (brownfield FDI)	FDI ban (nursing homes, domestic labs) FDI ceilings (others)
Philippines	Conditional entry (export requirement)	Conditional entry (export requirement)	FDI ceilings
Thailand[c]	FDI ceilings	FDI ceilings	FDI ceilings
United Arab Emirates	Conditional entry (minimum capital requirement)	Conditional entry (minimum capital requirement)	Conditional entry (minimum capital requirement)
Venezuela, Bolivarian Rep. of	Conditional entry (minimum capital requirement)	Conditional entry (minimum capital requirement)	Conditional entry (minimum capital requirement)
Viet Nam			Conditional entry (minimum capital requirement)

Source: UNCTAD.
[a] Despite the ban, the Council of Ministers can approve foreign investment opportunities in specific projects in the health sector and several of them are highlighted in the "Cuba Portfolio of Opportunities for Foreign Investment 2020–2021.
[b] Brownfield FDI in pharmaceuticals above 74 per cent of ownership must receive prior government approval.
[c] Foreign majority ownership in hospitals, specialized centres, distribution and marketing of pharmaceutical products, medical equipment, and medical R&D must receive prior government approval.

investment caps *(Algeria, Barbados, Côte d'Ivoire, India, Indonesia,* the *Lao People's Democratic Republic, Myanmar, Thailand)*. Whereas in some countries foreign equity restrictions apply to the entire pharmaceutical sector (e.g. *Algeria,* the *Lao People's Democratic Republic*), in others they apply only to specific segments (e.g. in *India*, where they are limited to patent medicines) or activities (e.g. in *Barbados*, where the cap affects only the medical cannabis industry).

FDI caps also apply to medical infrastructure and the provision of medical services, either as general joint venture requirements (e.g. *China, Côte d'Ivoire*) or, particularly in Asian countries, in the form of specific equity caps (e.g. *Indonesia*,[27] *Malaysia*,[28] *Myanmar*[29]).

Foreign ownership caps in the production of medical equipment are applied in only four countries (*Côte d'Ivoire*, *Indonesia*, *Myanmar* and *Thailand*).

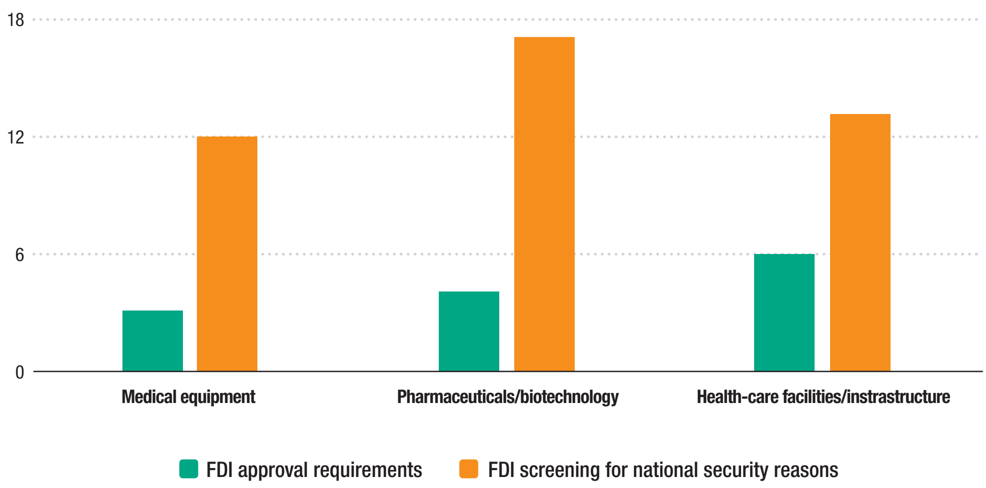
Conditional entry: A few countries set minimum capital requirements or other conditions for foreign investment in the health sector. Minimum capital requirements are the most common entry condition and apply either to foreign investment beyond health (e.g. *Mongolia,* the Bolivarian Republic of Venezuela*) or to FDI in specific segments of the health sector (e.g. the *United Arab Emirates, Viet Nam*). An export performance requirement is imposed on foreign ownership in the health sector in *the Philippines*.[30]

FDI screening: Outright FDI prohibitions in the health sector remain relatively rare; however, national security considerations have resulted in a proliferation of foreign investment screening mechanisms recently (see section 1 and box III.3), largely in developed countries and emerging economies (UNCTAD, 2021b). While FDI screening affects all health subsectors, it is most prominent in the manufacturing of pharmaceuticals and in biotechnologies (figure III.6). In health-care facilities and infrastructure, many review regimes cover not only the facilities where medical services are offered – e.g. hospitals, clinics, care centres, laboratories — but also the critical IT infrastructure needed to run these facilities, process personal and medical data, or enable the remote provision of services.

General approval procedures for foreign investment are less common than screening for national security purposes (see figure III.6). At least six countries review all inbound investment – all in developing economies (two in Africa and four in Asia). These procedures are not limited to national security considerations, but are often designed to confirm that investors meet certain performance obligations or minimal capital requirements. In practice, these procedures apply mostly to the foreign construction and management of health-care facilities.

Screening mechanisms fall under four categories. First, some screening mechanisms specific to investments in the health sector were introduced as a response to the pandemic and are intended to be temporary (e.g. *Hungary, Italy, Poland, Slovenia, Spain*). Second, some pre-existing screening regimes were broadened during the recent epidemic to include health considerations. In addition, some countries' existing mechanisms already screen FDI for national security purposes across all sectors, not specifically health and life science projects (e.g. *China,* the *United States*). Finally, certain investment legislation includes general safeguards restricting foreign investment that threatens public health, often along with national security, public order and environmental protection. UNCTAD's Investment Laws Navigator lists at least 16 jurisdictions with such limitations (e.g. the *Central African Republic, Nicaragua,* and the *Lao People's Democratic Republic*).

Figure III.6. **Specific investment screening and approval procedures in health and life science sectors** (Number of countries)



Source: UNCTAD.

Box III.3. **Examples of specific investment screening and approval procedures in health and life sciences**

In May 2020, *Slovenia* introduced a temporary screening mechanism that applies to, among other things, critical infrastructure in health, critical technologies and dual-use items – including biotechnology; health, medical and pharmaceutical technology; and supply of critical resources, which also includes medical and protective equipment.

In July 2020, a newly adopted Investment Control Act entered into force in *Austria*. The law introduces review of foreign investment in business activities including R&D of pharmaceuticals, vaccines, medical devices and personal protective equipment; critical infrastructure in health; supply of pharmaceuticals and vaccines, medical devices and personal protective equipment (including R&D in these areas); and biotechnology.

In the *United Kingdom*, the Enterprise Act 2002 was amended in 2020 to provide that foreign acquisitions meeting certain ownership thresholds are to be screened against "the need to maintain […] the capability to combat, and to mitigate the effects of, public health emergencies".

In *Myanmar*, since the adoption of the Myanmar Investment Law of 2016, foreign investment in "medical, bio or similar technologies" is considered strategic and subject to approval by the Myanmar Investment Commission.

In *Tunisia*, investment in manufacturing of pharmaceuticals and in constructing and managing health institutions and blood centres are subject to approval (Decree 417 of 11 May 2018).

Source: UNCTAD.

(ii) Investment promotion and facilitation

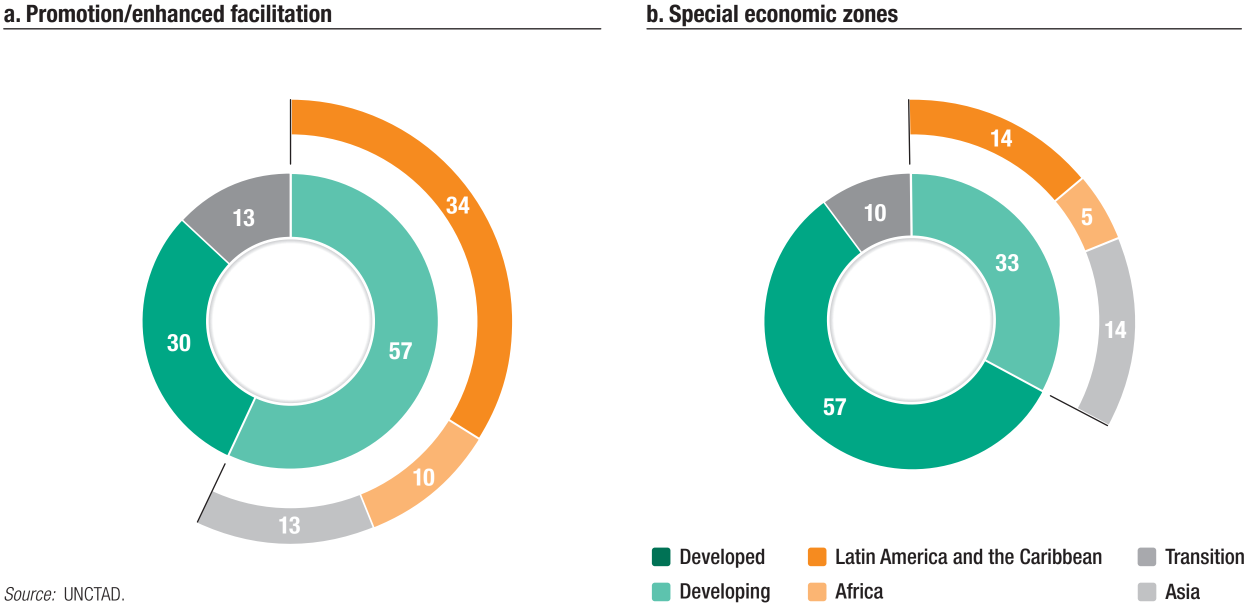
Most countries consider the development and provision of health care a core policy objective. It includes improving and facilitating affordable access to health services, as well as producing medical products and pharmaceuticals. Therefore, countries typically encourage both domestic and foreign investment in all segments of the health sector, including manufacturing, health infrastructure and health services (including R&D and the provision of medical services). In this regard, a recent monitoring of the online activities of 188 national IPAs by UNCTAD found that 73 per cent of IPAs based in developed countries, 42 per cent of those based in developing countries and 32 per cent of those in the least developed countries (LDCs) featured health care as a key area of investment. It also found that IPAs are promoting investment opportunities across a broad range of subsectors, with a particular focus on the manufacturing of medical devices, pharmaceuticals and vaccines as well as digital health and the production of personal protection equipment (PPE) (UNCTAD, forthcoming c).

In the UNCTAD survey, at least 58 of the 70 countries promote, facilitate or incentivize investment in the health sector through specific or cross-sectoral policies. Three different types of policy instruments encourage such FDI: (i) proactive investment promotion and enhanced facilitation measures, such as actions by IPAs or other government institutions to attract or facilitate foreign investment specifically in the health sector; (ii) SEZs and clusters dedicated to investment in the health sector and (iii) financial, fiscal and regulatory incentives for investors in the health sector.

Investment promotion and enhanced facilitation: Proactive investment promotion activities and enhanced investment facilitation are widely used in developed as well as developing countries, particularly in Latin America and the Caribbean, and in transition economies. Conversely, health-sector SEZs or clusters are mostly found in developed countries and are notably scarce in Africa (figure III.7). There are notable exceptions, such as Ethiopia.

At least 30 countries in the UNCTAD survey encourage FDI in the health sector through targeted promotion and enhanced facilitation. The measures include IPAs targeting the medical industry and life sciences as priorities to attract FDI; organizing campaigns to promote medical tourism and the export of medical services, as well as medical fairs

Figure III.7. **Investment promotion measures in the health sector: distribution by country group** (Per cent)



Source: UNCTAD.

and sector-targeted events; facilitating partnerships with local companies; and offering dedicated permitting and support to establish specific projects in the sector (box III.4). IPA activities involve reaching out to a wide spectrum of investors, including private companies, followed by institutional investors and impact investors, as well as diaspora (UNCTAD, forthcoming c).

Countries in Latin America and the Caribbean, North America and Asia rely broadly on targeted FDI promotion and enhanced facilitation measures, but these measures are less frequently used in Africa. At least eight countries in the survey recognize medical tourism as a key sector to be promoted, facilitating visas and extending other benefits to patients and health-care facilities. Medical fairs targeting foreign investors are periodically organized in Brazil, Chile, Germany, Malaysia, Mexico and Singapore.

Box III.4. **Examples of targeted promotion/enhanced facilitation measures for investment in the health sector**

Canada's IPA, Invest in Canada, lists life sciences, pharmaceuticals, R&D, medical devices and medical laboratories, among the priority sectors for investment promotion.

Costa Rica's IPA, CINDE, includes the life sciences sector (including medical devices, biotechnology and pharmaceuticals) among the six priority sectors for FDI attraction. The country produces and exports medical devices and is home to major medical device companies.

Jamaica's IPA, JAMPRO, actively targets FDI in medical devices, pharmaceuticals and the production, processing and distribution of medical products derived from cannabis. The country's strategy also includes promoting medical tourism and positioning Jamaica as one of the global health and wellness tourism centres.

China included pharmaceuticals and medical devices in the Catalogue of Encouraged Industries for foreign investment in 2019.

Thailand included the health-care industry as a priority sector for investment in its Thailand 4.0 policy. The Board of Investment actively promotes health-sector investment to position Thailand as the medical hub of Asia.

Finland's Smart Life programme (2019–2022) offers innovation funding and network opportunities, as well as internationalization and export services for the digital transformation of the health and well-being sectors.

Mauritius Economic Development Board promotes the country's attractiveness as a medical hub and targets FDI in investment opportunities in life sciences, medical tourism and medical education.

Source: UNCTAD.

Investment incentives: Forty-seven countries in the UNCTAD survey offer incentives that directly or indirectly benefit domestic and foreign investment in the health sector. Of these, 39 have adopted incentives targeting specific segments, such as the medical and pharmaceutical industries or health services for the local or export markets. Incentives include tax benefits, import duty exemptions and grants for medical research or medical device production (box III.5). Many incentive programmes aim at facilitating the positive spillovers of foreign investment to strengthen local health-care systems and economies through skill development, technology transfer and cooperation with local partners (UNCTAD, forthcoming c).

At least 22 countries in the UNCTAD survey provide incentives for the *manufacturing of medical goods, including pharmaceuticals and medical devices.* These incentives take the form of grants, subsidies and tax exemptions. In addition, companies operating in the health sector may also benefit from general incentive schemes promoting manufacturing industries, particularly in developing countries.

In addition, eight countries provide incentives for investment in *health-care infrastructure,* covering not only the construction but also the operation and management of hospitals, clinics and health centres by the private sector or through public-private partnerships. Nine countries incentivize *R&D in the health sector* as part of general schemes to promote technology-intensive industries or through specific incentives such as grants for medical research.

In addition, as mentioned above, at least six countries in the UNCTAD survey have introduced new investment incentives in the health sector in response to the pandemic (box III.6).

Box III.5. Examples of targeted promotion/enhanced facilitation measures for investment in the health sector

Australia offers R&D grants to companies established in the health sector, consisting of payments of 30 cents per dollar spent on eligible R&D activities, above a base level.

The *United States* provides incentives at both federal and state levels. Federal government programmes include R&D support for small businesses in the health sector and grants to promote U.S. innovation and industrial competitiveness by advancing measurement science, standards and technology.

France has several public funds dedicated to supporting medical technology and research. Biothérapies Innovantes et Maladies Rares is a public fund for companies working on innovative therapies targeting rare diseases. The fund Accélération Biotech Santé supports companies, mainly at the seed stage, that develop therapeutic products and medical devices in the field of human health, as well as small and medium-size enterprises, technology platforms, and scientific or technological service providers. The fund InnoBio helps companies, technology platforms, and scientific or technological service providers that are directly or indirectly involved in developing innovative life science and health products, in the pre-clinical or clinical phase.

In *Kazakhstan*, the Government can conclude an investment priority contract with companies constructing, running and/or investing in a sanatorium or hospital, offering tax preferences, custom duties exemptions, government grants (up to 30 per cent of all costs) and investment subsidies.

Nigeria offers free capital repatriation and income tax exemptions to local and foreign companies with "pioneer status" involved in the manufacturing of pharmaceuticals and personal protective equipment, as well as medical and dental equipment.

The *Philippines'* Board of Investments offers a range of incentives to investors in health care and wellness services, including both fiscal incentives (e.g. a four-year income tax holiday on income derived from serving foreign patients and tax- and duty-free importation of medical equipment), as well as non-fiscal incentives (e.g. on the recruitment of foreign nationals and special residency visas for investors).

Source: UNCTAD.

Box III.6.	The COVID-19 pandemic has triggered a rise in investment incentives – examples

Czechia's COVID Technologies programme offers subsidies to firms that are willing to diversify their production through the acquisition of new technological devices and equipment. In addition, the Rise UP programme supports the introduction or expansion of capacities to manufacture health equipment such as ventilators and respirators.

Italy has allocated special funds within its Development Contract programme to support investment in biomedical and telemedicine activities, particularly those connected to the production of medical equipment and devices, as well as technologies and services to prevent health emergencies.

Ghana's Ministry of Finance and Central Bank have engaged with commercial banks to mitigate the impact of the pandemic. The agreed support includes a syndication facility of ₵3 billion to support various industries, including pharmaceuticals. The Government also announced an expansion of its domestic procurement of pharmaceuticals as well as a programme to support the domestic production of active pharmaceutical ingredients.

Thailand has announced new incentives to accelerate investment in the medical industry, including a 50 per cent reduction in corporate income tax for another three years (the existing law already provides a tax holiday of three to eight years for qualified investors). Moreover, starting in 2020, manufacturers of medical parts or devices could be exempted from import duties on machinery. Additional tax benefits are also offered to companies producing non-woven fabric used to manufacture medical masks or medical devices.

Source: UNCTAD.

Special economic zones: At least 22 countries have established health clusters or SEZs targeting specifically the health industry or offering special benefits to companies in this sector (box III.7). SEZs dedicated to the health sector are mainly located in Asia, whereas clusters are most common in Europe and North America. Such zones and clusters typically combine the provision of incentives, targeted promotion and enhanced facilitation within a dedicated industrial area to support interactions among investors, research centres and the educational system.

Clusters dedicated to biopharmaceuticals and biotechnology are increasingly common. Knowledge-based industries benefit from the development of clusters, as physical proximity facilitates linkages and reduces the cost of innovation through shared resources and information. Germany, for example, hosts more than 30 clusters for medical technology. Songdo International Business District in the Republic of Korea was designed to foster high-tech industries such as bioengineering.

Box III.7.	Examples of SEZs and clusters dedicated to the health sector

Brunei Darussalam has established a 174-hectare Bio-Innovation Corridor to support the development of pharmaceuticals and health supplements (halal).

Colombia has 14 health-care free trade zones and 8 health sector clusters across the country.

Germany is home to more than 30 specialized cluster networks focusing on medical technology. Dedicated cluster management teams help obtain funding for joint R&D projects, provide shared facilities and organize educational training programmes for their members.

Luxembourg's HealthTech Cluster aims at stimulating the development and commercialization of health technologies. In the spring of 2021, the Government announced the opening of a healthtech incubator within its House of Biohealth in Esch-Beval.

The *Republic of Korea's* Songdo region (part of the Incheon free economic zone) focuses on high-tech industries such as bioengineering and hosts a number of pharmaceutical companies.

Singapore has set up SEZs to promote FDI in health, with three zones prioritizing medical research. The Government also has established parks and hubs to support life sciences and R&D activities.

The *United States'* Small Business Association is investing in more than 50 regional innovation clusters throughout the country that span a variety of industries, from energy and manufacturing to health IT and biotech. The country hosts several biotech and biopharmaceutical clusters.

Source: UNCTAD.

b. International policies

International policies relevant to the health sector address market openness, intellectual property (IP) protection, and the promotion and protection of foreign investments. The main instruments are the General Agreement on Trade in Services (GATS), the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) and IIAs. The central challenge is to balance openness and investment protection with safeguarding of national policy space to pursue legitimate public health objectives.

(i) GATS

On the international level, a number of treaties include market opening commitments with respect to investments in the health sector. These commitments primarily provide market access and non-discrimination obligations for trade in health services. The GATS is the most prominent treaty that includes such obligations. These commitments are country-specific and inscribed in the services schedule of each WTO member.

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 III.8 details commitments relating to hospital services.

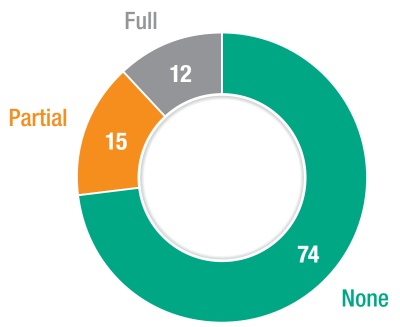
In addition to hospital services, 25 WTO members (15 per cent) have entered full or partial market access and NT commitments under mode 3 in the category of other human health services. A total of 46 WTO members (28 per cent) have scheduled mode 3 obligations for professional medical and dental services. 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.

(ii) TRIPS Agreement, public health and investment in the health sector

IP rights protection, as elaborated under the TRIPS Agreement, is one important policy domain in the production and supply of vaccines, pharmaceuticals and diagnostics. The TRIPS Agreement provides for an international minimum standard for the protection of IP rights that are applicable in all of the 164 WTO member countries. WTO members have adopted the Doha Ministerial Declaration in 2001, which affirmed the rights of countries to use flexibilities available within the TRIPS Agreement, including in health emergencies, such as the COVID-19 crisis.

The TRIPS Agreement provides various flexibilities applicable to all countries with important implications for the health sector. These flexibilities include leeway to define (i) the scope of inventions and eligibility criteria for patent protection, (ii) the level of

Figure III.8. **Country market access and national treatment commitments under GATS for hospital services (mode 3)** (Per cent)



Source: UNCTAD.

disclosure required in patent applications and (iii) limitations to the exclusive rights to allow, for example, parallel importation of ingredients or finished products, and use in regulatory approval processes for medicines (UNCTAD, 2011a). Patent laws of Argentina, India and the Philippines, for example, reduce the conditions under which new forms or new use of a known pharmaceutical substance can receive patent protection.[31] The approach is designed to encourage local industry to engage in incremental innovation and adaptation.

If a voluntary license to allow the generic manufacturing or importation of medicines cannot be secured, a compulsory license can be granted, on a case-by-case basis and against an adequate remuneration (see also box III.7). The use of the compulsory license must be primarily for domestic consumption and in certain cases for export to countries with limited or no pharmaceutical manufacturing capacity, in accordance with the strict procedures established for this purpose. These conditions for compulsory license are relaxed during a national emergency or to enforce competition law (UNCTAD, 2011a). A compulsory license against a product patent is not necessarily sufficient to overcome the challenges arising from other IP rights for the production of pharmaceuticals and vaccines. The protection of undisclosed information, including test data for pharmaceuticals and vaccines and process-related trade secrets, copyright and industrial designs, may also be important. Another option to address a national emergency is to use the provisions under the Agreement establishing the WTO that provide for the possibility of a temporary waiver from the obligations of the TRIPS Agreement, covering not only patents but also other IP rights and generally applicable principles.[32] Temporary waiver, however, requires negotiation to secure the agreement of all WTO member states, which may result in additional conditions on its use. A 2003 waiver to facilitate the export of pharmaceuticals produced under compulsory licenses, for example, is criticized for having adopted numerous conditions that limited its utilization.[33] Furthermore, countries may still have to resolve challenges arising from domestic law, such as the legality of suspending IP rights already granted in accordance with domestic law. Aside from the legal issues, countries must have a certain level of technological capacity to utilize the waiver. Since the suspension of the IP rights reduces the incentive for the IP right holders or their licensees to collaborate for transfer of technology and know-how, countries must identify the means to build the necessary capacity to utilize the waiver.

In the context of building a domestic pharmaceutical sector, LLMICs were allowed to delay the protection of pharmaceutical patents altogether until 2005. The success of the Indian pharmaceutical sector is credited to the use of this flexibility.[34] Currently, the transition period is available for the benefit of the least developed countries (LDCs) until 2033 (WTO, 2015). Among LDCs, Bangladesh demonstrated its ability to use this flexibility when one of its pharmaceutical companies, Beximco Pharma, launched in 2015 a generic version of a hepatitis C drug that had been developed by Gilead Sciences.[35] When it comes to COVID-19 vaccines, however, a vaccine producer in Bangladesh, Incepta Pharmaceuticals, preferred to cooperate with vaccine developers to manufacture the already-approved vaccines, rather than work on its own to develop manufacturing processes that meet the regulatory standard, which it perceived would be more challenging.[36]

The extent to which countries can benefit from this flexibility depends on various factors, including the capacity of the local pharmaceutical industry to manufacture pharmaceutical products and the capacity of IP offices to examine patents, as well as the ability of the judiciary and the competition authorities to apply substantive laws and global practices. In several countries, the standards for the protection of IP rights are upgraded under bilateral and regional FTAs, for example, to provide additional years of protection for pharmaceutical patents and exclusivity of test data for pharmaceuticals and vaccines. Yet countries still enjoy flexibility within these higher standards; they may, for example, determine what pharmaceutical products are eligible for extended periods of protection or which type of test data are eligible for exclusivity protection.[37]

UNCTAD has developed guidelines and a case law database on how countries can use the IP rights system to stimulate local production of pharmaceuticals and promote coherence between industrial and public health policies (UNCTAD, 2011a and 2020c). Countries need to strike an appropriate balance between implementing proactive IP policy to attract foreign technology and using TRIPS flexibilities. In doing so, they should strive to address current challenges for the manufacturing sector, advance coherent policies and implement actions necessary to boost domestic productive capacity, as discussed in section 3.

(iii) International investment agreements

Most IIAs do not take a sectoral approach to the promotion and protection of investments, instead broadly covering all kinds of assets. As a consequence, they do not specifically promote investments in the health sector. A number of recently concluded BITs and investment chapters of FTAs do, however, carve out regulatory space for domestic health-related measures.

More than 3,000 IIAs, representing more than 90 per cent of all IIAs, were signed between 1959 and 2011 (*WIR19*). The vast majority of these old-generation IIAs remain in force today, and few of them explicitly refer to public health at all. In stark contrast, 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 IIAs concluded since 2018 contain at least one explicit reference to health in the operative part of the treaty (figure III.9). Generally, these references to health seek to preserve domestic regulatory space by various means:

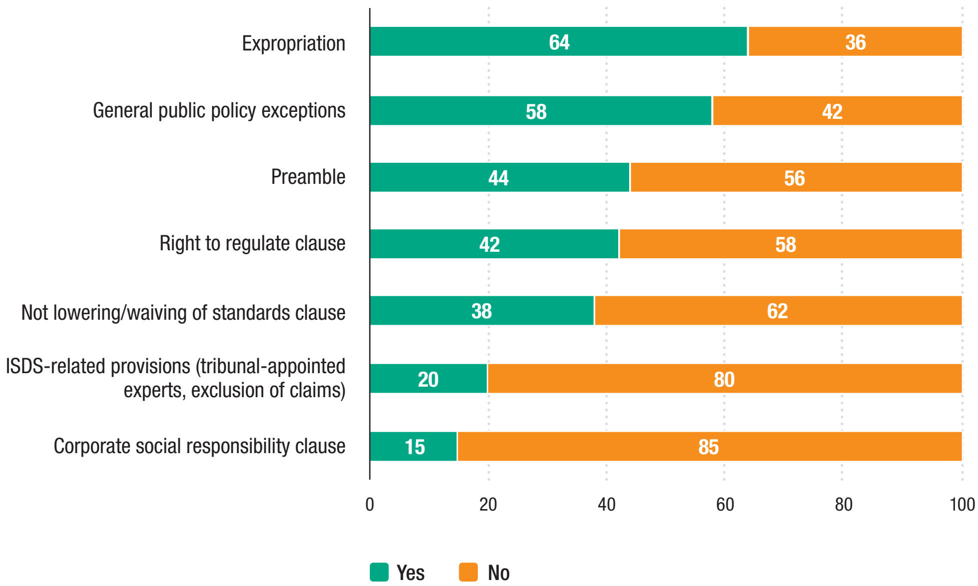
- Clarifying that measures adopted in the pursuit of public health do not constitute expropriation
- Including public policy exceptions for measures adopted in pursuit of public health
- Referring in preambles to the importance of regulatory space for protecting public health
- Including right-to-regulate clauses
- Including not-lowering-of-standards clauses prohibiting the relaxation of domestic health regulations to attract investment
- Specifying 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
- Including CSR clauses imposing a “best efforts” obligation on investors to refrain from seeking special exceptions from the host State’s regulatory framework relating to health

The IIA regime also touches on issues of compulsory licensing, as most investment treaties cover IP rights as protected investments. Compulsory licensing has recently received more attention, in the context of allowing generic manufacturing or importation of medicines in light of the pandemic (box III.8).

New-generation IIAs do not specifically promote health investments. Yet, by rebalancing the dual objectives of investment protection and regulatory freedom, they afford States the flexibility to promote and facilitate investments in health on the domestic level without the risk of violating their IIA commitments.

In addition to safeguarding regulatory space, some IIAs (modern FTAs) often include an investment chapter as well as a separate services chapter. Similar to the GATS, these services chapters generally take a different approach than the broad coverage of investment in BITs. Services chapters include commitments on a sectoral basis to allow access to foreign investors, including for health-related services. These chapters can thus be more specific in their approach to promoting investment in health.

Figure III.9. **Provisions referencing public health in IIAs concluded between 2018 and 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.

However, they do not include the same treatment standards as BITs or investment chapters and do not provide access to ISDS. Instead, services chapters include specific commitments related to market access (e.g. the prohibition to impose restrictions on the number of service suppliers) and NT of foreign service suppliers. Together, the different treaty obligations found in services chapters on the one hand, and in investment chapters and BITs on the other, complement each other to provide an effective framework for the promotion and protection of investment in health.

Either these commitments in services chapters are inscribed in the respective schedules of each party to an FTA (the positive list approach, similar to the GATS), or exceptions to market access and NT are set out in the annexes to the treaty (the negative list approach).

Box III.8. **Compulsory licensing and international investment agreements**

The conditions for granting compulsory licenses for product or process patents are internationally regulated under the TRIPS Agreement. The IIA regime also touches on issues of compulsory licensing, however, 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.

Box III.9. **Investor–State dispute settlement and health-related investments**

In total, at least 33 known ISDS cases directly related to public health have been initiated against developed countries (13) and developing ones (20). These cases cover a variety of issues. Their link to public health may arise from the nature of the investment itself (e.g. an investment in a water and sewerage infrastructure project or in pharmaceutical patents). In other cases, the regulatory action taken by the defendant established the link to health. For example, a regulatory measure may be implemented to protect public health either exclusively (e.g. measures that seek to curb the prevalence of smoking) or as one of several interrelated objectives (e.g. a prohibition on using certain pesticides for the protection of the environment and human health).

In 30 cases, investors relied on IIAs signed in the 1990s or earlier; the FET and indirect expropriation standards were most frequently invoked in these proceedings. National authorities were successful, either on jurisdictional grounds or on the merits, in 18 of 33 cases (55 per cent). Investors succeeded in 13 cases (39 per cent). In two cases, liability was found but no damages were awarded. Claims and outcomes in health-related cases thus do not significantly differ from outcomes in other ISDS proceedings.

Source: UNCTAD.

Data from UNCTAD's International Investment Agreements Navigator[38] show that 28 per cent of 417 TIPs extend coverage to the pre-establishment phase of the investment and therefore include liberalization commitments. The vast majority of these TIPs partially liberalize the mode 3 provision – that is, supply by a foreign service provider through a commercial presence – of one or multiple health-related services by at least one of their parties. Services that have a direct bearing on investment in health are hospital services, other human health services and health-related professional services (medical and dental services as well as services provided by midwives, nurses, physiotherapists and paramedical personnel). Other relevant services include, for example, R&D services in natural sciences, health insurance services and sanitation services.

Although IIAs can shape investment in health, they can also interact with measures taken by States to mitigate the impact of the pandemic. The enormous challenges facing national health systems and policies have highlighted possible tensions between measures taken to mitigate the impact of the pandemic and existing IIA obligations, which could result in investment disputes. In the past, ISDS cases directly related to public health have been initiated against both developed and developing countries (box III.9).

To ensure better synergies between IIAs and public health policies, future agreements could include provisions that proactively encourage and facilitate health-related FDI, while maintaining or strengthening existing safeguards that protect the host States' right to regulate to pursue public health objectives.

3. Action plan for building productive capacity in health[39]

Limited productive capacities in many LLMICs hinder their ability to attract investment in the health sector and host medical industries. A holistic action plan can address the major challenges facing investment in health in these economies.

The pandemic has revealed the vulnerability of global supply chains and highlighted the importance of a robust health manufacturing sector both for public health and for the national economy. Not all countries host pharmaceuticals and vaccine manufacturing industries with large product portfolios, or world-class health infrastructure and services. The challenge is not related to investment restrictions, as the policy framework is generally conducive to investment in health in most countries, despite restrictions put in place to safeguard legitimate concerns regarding public health and national security (section 2). Nor is it about population size: Israel, for example, hosts Teva Pharmaceutical Industries, the largest manufacturer of generics in the world and an important player in the production of active pharmaceutical ingredients. Neither is the level of economic development an insurmountable obstacle, since Bangladesh, though an LDC, satisfies most of its needs for medicines through local production. Rather, the challenges emanate from the development of the domestic and regional ecosystem for investment in the health sector. Since the 1980s, Bangladesh has been consistently implementing measures to support the development of the local pharmaceutical industry (UNCTAD, 2011b). Over time, the measures helped to improve the business environment, including the availability of skilled personnel and streamlining of trade and industrial regulations. This section discusses the five main challenges that LLMICs face to build productive capacity in the health sector, and 10 policy actions necessary to address these challenges.

a. Five main challenges

(i) Lack of capital, technology and skills

In the technology-intensive health sector, investment requires sufficient capital to acquire adequate technology and skills to meet applicable standards (such as the current pharmaceutical good manufacturing practice) for health facilities, laboratories, the distribution network and also health professionals. The capital, skills and know-how required are not readily available in many countries. Commercial banks are often hesitant to provide loans to projects in health, pharmaceuticals and vaccines production, all considered highly risky.

(ii) Low regulatory capacity and weak health-care system

In many LLMICs, national medicines regulatory authorities (NMRAs) lack the financial, human and technological resources to enforce adherence to the standards for health services, laboratories, distributors and manufacturers. In addition, a weak health system means poor diagnosis, poor adherence to treatment standards and inadequate reporting of adverse side effects. Low regulatory capacity and weakness in the health-care system discourage potential investment by standard-compliant investors, raising concerns about unfair competitive advantage from non-compliant firms that can produce or provide services at lower cost, or about improper handling and distribution of products.

(iii) Weak policy coherence and enabling framework

Investment into the health sector involves a complex network of investors, technology holders and input suppliers, all of which are subject to various standards. Encouraging investment requires coherence between public health and industrial development policies, including trade and tariff policies, competition regulation, investment policy and IP laws. As an example, although public health policy demands tariff-free importation of essential medicines, tariff and value added taxes on inputs or a sluggish customs-clearing process could affect the attractiveness of a country for foreign investment into the manufacturing sector.

(iv) Small markets and unstable demand

Many LLMICs have relatively small populations and weak purchasing power. In the absence of regulatory access to an export market or membership in an FTA, LLMICs with relatively small market sizes would struggle to develop a health industry dependent on scale and value. Lack of regional cooperation for pooled procurement, harmonization of medicines regulations and free movement of goods and services further fragment the markets of LLMICs, especially in pharmaceuticals and vaccines manufacturing, thus eliminating an opportunity to combine purchasing power and demand. As a result, local firms often do not use their full capacity.

(v) Poor infrastructure and related services

As in other sectors, poor infrastructure makes investment in the health sector challenging and costly. Such infrastructure includes constraints in energy supplies, digital technology, water supply and waste treatment, and transport and customs facilities for the handling of sensitive ingredients or finished products. More specific to the sector, weak health systems mean poor information, including supply and demand data for assessing investment viability, and weak testing and conformity assessment infrastructure for supporting manufacturing. Moreover, LLMICs may not have invested in the specific infrastructure necessary to support health science as well as pharmaceuticals and vaccines manufacturing, such as e-health systems, human genomic databases, big data and artificial intelligence, among others.

b. Ten actions

Addressing these five main challenges requires creating or improving an ecosystem of coherent policy, regulatory institutions and infrastructure, skills and technology that supports the development of the health, pharmaceutical and vaccines sector. Following are 10 actions that, when combined, would facilitate this development.

(i) Invest in skills development and technological capacity

Skills, including technological know-how, are crucial to the development of the health-care, pharmaceutical and vaccines sector. First, universities need to align academic training with industrial practices and regulatory standards. Chulalongkorn University in Thailand, for example, offers an advanced programme with a specialization in industrial pharmacy and comprehensive practical training.[40] Second, countries can facilitate the transfer of know-how from technology developers and foreign experts, the promotion of joint ventures and further liberalization of professional services. Invest Barbados promotes a training grant for personnel in medical transcription. Israel's IPA and its "Global enterprise programme" encourages partnerships between multinational enterprises and start-ups through financial support to promote international collaborative R&D partnerships between Israeli and foreign companies (UNCTAD, forthcoming c).

(ii) Share technologies to enable affordable mass production

Countries need to establish stronger linkages among domestic producers, foreign investors and domestic research institutions – among other ways, through voluntary IP licensing. Sharing of technologies is especially important for vaccines and other complex products, where process technology and know-how play significant roles in making products that meet regulatory standards. A recent example involves AstraZeneca, a British–Swedish pharmaceuticals company, that licensed Siam Bioscience, a public-private partnership based in Thailand, to produce its COVID-19 vaccines. The commitment of the Government of Thailand to procure locally, with a view that Thailand can emerge as a regional vaccine production hub, contributed to the feasibility of the IP licensing.[41] Various initiatives can contribute to creating linkages between foreign technology providers and domestic institutions, e.g. the Medicines Patent Pool, the Coalition of Epidemic Preparedness Innovations and philanthropy programmes in the R&D-based pharmaceutical industry.

(iii) Improve access to finance and tap into impact investment

Commercial banks and private investors may be reluctant to invest in the health sector in general because of the risks associated with the complex regulatory environment and the longer investment horizons or because they do not have the capacity to assess investment projects in the sector. Governments thus need to provide alternative means of financing health sector projects. For example, since 2017, the Ghanaian Export-Import Bank has offered long-term finance at concessionary rates to pharmaceuticals producers to help them build state-of-the-art factories and/or retool existing facilities to bring them up to good manufacturing practices.[42]

Impact investment (investment made with the objective of creating a positive social or environmental impact) has been expanding globally. At the end of 2019, the global value of impact investment was estimated at $715 billion (GIIN, 2020). Pro-active and targeted policies to access impact investment funds can help mobilize necessary financial resources. A Swedish asset investor recently contributed $319 million to a social bond issued by the International Finance Corporation to help LLMIC-based producers involved in the production of medical equipment and pharmaceuticals. Intergovernmental organizations, such as UNCTAD and its World Investment Forum can play a key role in mobilizing impact investors to facilitate investment in social bonds (see chapter V).

(iv) Build partnerships to initiate "lighthouse" projects

Successful short-term projects relying on simple technologies, especially in the production of test kits, personal protective equipment, medical supplies and mosquito nets, can provide stepping stones to attract subsequent investment in more ambitious projects, such as the production of treatments, diagnostics and, to the extent possible, vaccines. IPAs can partner with development banks, impact investors and social entrepreneurs to fund initial "lighthouse" projects in the health sector. South Africa's response to the pandemic involved the strengthening of productive capacity and collaboration in health care. In the past year, interventions by the country's IPA, Invest SA, included identifying companies to collaborate to repurpose their facilities and activities towards the manufacturing of products to fight the pandemic, as well as facilitating access to finance for existing domestic manufacturers to ramp up their production of key health products (UNCTAD, forthcoming c).

(v) Provide investment incentives to improve local firms' sustainability

Various financial and fiscal incentives have been designed to encourage investment in the health sector (box III.4). In addition, government procurement can be introduced to support local producers. In Ethiopia, for example, government procurement provides a 25 per cent price advantage to local pharmaceuticals manufacturers, compared with international suppliers. Uganda made an advance purchase commitment that supported the establishment and successful operation of a pharmaceutical company specializing in HIV/AIDs products (UNCTAD, 2011b). The approach can help kick-start the manufacturing of new products, such as COVID-19 vaccines, when the market is unpredictable and companies need guaranteed purchases.

(vi) Upgrade and streamline regulations and administration

The health and pharmaceutical sector attracts stringent regulations. In many countries, upgrading the capacity of NMRAs is a challenge. The Southern African Development Community (SADC) initiated the Collaborative Medicines Registration Procedure (ZaZiBona) to support NMRAs and harmonize varying levels of capacity and diverse regulatory standards. Through ZaZiBona, SADC member states are working towards ensuring that NMRAs meet minimum standards and towards nationally and regionally integrated information management systems.

Becoming members of a multilateral system also facilitates the upgrading of regulatory systems. Brazil, for example, joined the Pharmaceutical Inspection Co-operation Scheme (PIC/S) in 2019, together with Argentina, Mexico, Indonesia, the Islamic Republic of Iran, South Africa and Thailand. PIC/S ensures that all Members comply with its standards at all times. Participation in PIC/S drives the improvement of national systems that meet international standards .[43] Countries can also benefit from capacity-building programmes offered by international organizations such as the World Health Organization for regulatory institutions.[44] Digital technology tools can contribute to enhancing regulatory procedures.

(vii) Invest in infrastructure

One way of addressing infrastructure needs is through dedicated industrial parks or similar economic zones that provide centralized services, for example, central effluent treatment service; reliable electricity and water supply; and linkages with major road and railway networks. Box III.6 illustrates the use of SEZs dedicated to the health sector. India is promoting "bulk drug parks" and "medical device parks" to reduce the cost of local manufacturing in the country (UNCTAD, forthcoming c).

LLMICs also need to develop the specific infrastructure necessary to handle and distribute pharmaceuticals, vaccines and other health products. Incentives can mobilize private investment in such infrastructure. India, for example, nearly doubled its cold-storage capacity after the Government provided tax breaks and subsidies.[45]

The national digital infrastructure also supports the development of new technologies. In Rwanda, innovative approaches such as the use of drones to fly needed medicines to patients in remote areas illustrate how investing in digital connectivity benefits the development of the health sector. Digital technology can also be leveraged to improve regulatory compliance and health monitoring. Next-generation medical diagnosis and treatment, such as personalized treatments and digital therapeutics, as well as drug discovery and manufacturing processes, are expected to benefit from artificial intelligence and machine learning. IPAs, in particular from developed countries, are promoting their digital infrastructure and innovation ecosystems as key determinants for investment in the sector. Invest in Estonia, for example, promotes the country's digital platform and investment in data – including one of the biggest biobanks in Europe, with biological samples and personal health information volunteered by over 20 per cent of the country's population – to position itself in a range of e-health sectors, notably personalized medicine (UNCTAD, forthcoming c).

(viii) Emphasize a regional approach to reduce cost

Regional cooperation will make the measures suggested here more feasible and sustainable. Regional economic groups such as ASEAN and the SADC, and in particular the newly created AfCFTA, can establish regional value chains to enable small economies in the region to collectively build productive capability. Different countries have different comparative advantages, and together they can participate in value chains that generate the medical supplies and medicines they need. IIAs, including regional ones, can also help create a conducive framework for investment in health by including proactive investment promotion and facilitation provisions for investments in health, as well as by ensuring sufficient flexibility to protect public health objectives through regulation.

For a regional approach to meaningfully contribute to the development of the health sector, it must remove barriers related to trade, investment and IP for trade in health products and services. The regional approach can benefit from regional initiatives for investment promotion. The regional investment strategy of the South African Development Community has identified health care as one of its priority sectors. The East African Community has developed a 10-year "Regional Health Sector Investment Priority Framework". The strategy highlights the importance of domestic policy in member states, including facilitating better resource allocation in the health sector and ensuring financial risk protection and equity to successfully attract investment in health care in the region.

Private and public sector partnerships, as well as multisectoral collaboration have been identified as the necessary tools to achieve the ambitious investment goals (UNCTAD, forthcoming c).

Health is a highly regulated sector, and the most important contribution of a regional approach is harmonization of medicines and health regulations. Seeking marketing approval for pharmaceuticals, vaccines and other health products on a country-by-country basis affects companies' access to a regional market. To overcome this challenge, the African Medicines Registration Harmonization initiative, established by the African Union in 2009, adopted a model law that inspired harmonization of subregional regulations. Following the model law, the East African Community adopted a regional harmonization of medicines regulation in 2015. The African Union has also adopted the legal framework for the African Medicines Agency. ASEAN has also developed common standards and procedures applicable to the regulation of the pharmaceutical industry. Further integration can include mutual recognition of certifications and marketing authorization. Finally, a regional approach to procurement enables the pooling of purchasing powers, and regional drug regulation substantially eases the burden on producers, who otherwise must file and process multiple applications for the same pharmaceutical product in different countries.

(ix) Seek funding from official development assistance

National efforts to develop investment in the health sector are increasingly supported by regional coordination efforts. In 2020, for example, the Asian Development Bank extended a loan to Imexpharm Corporation (Viet Nam), to help the company sustain its production of generic medicines and overcome the global supply disruptions caused by the pandemic.[46]

National and regional efforts are also increasingly supported by expanding international cooperation. As one example, the Coalition for Epidemic Preparedness Innovations and the African Union Commission have announced a project to enhance vaccine R&D, clinical trials and manufacturing in Africa.[47] Ghana also secured financial assistance from the Government of the United Kingdom to support its pharmaceutical sector by building private sector capacity and creating new partnerships for vaccines production, addressing vulnerabilities in supply chains and improving manufacturing practices.[48]

(x) Ensure sustainability of efforts despite an unpredictable market

Ensuring the sustainability of an investment is a key concern in the health sector, especially where investors cannot know the scale and duration of the health problem, as in the case of COVID-19. As public health challenges continuously evolve, the health services, pharmaceuticals, diagnostics and vaccines needed in a given market also change. An international coalition of governments, development banks, impact investors and like-minded stakeholders is needed to address this market failure and to protect humankind from the next pandemic.

* * *

Building and expanding local productive capacity in the health sector cuts across multiple policy areas and requires concerted actions by all stakeholders to effectively address the five key bottlenecks. Because of the vast coverage of the sector, countries need to assess which segment to prioritize and how to build the necessary ecosystem through coherent policy, regulatory institutions and infrastructure, skills and technology. Further guidance is provided in UNCTAD's Tool Box for Policy Coherence (UNCTAD, 2017).

NOTES

[1] "France shields Carrefour from takeover in food security battle", Politico, 15 January 2021, https://www.politico.eu/article/france-carrefour-takeover-food-security-battle/.

[2] "Agnellis end Iveco talks with China FAW as Italy opposes", Bloomberg, 19 April 2021, https://www.bloomberg.com/news/articles/2021-04-19/agnellis-end-talks-on-iveco-with-china-faw-amid-italy-opposition.

[3] "Italy blocked Chinese semiconductor bid, Draghi says", Bloomberg, 9 April 2021, https: //www.bloombergquint.com/business/italy-s-draghi-seeks-broader-shield-from-chinese-corporate-bids.

[4] The total number of IIAs is revised in an ongoing manner as a result of retroactive adjustments to UNCTAD's IIA Navigator.

[5] The 15 signatory countries include Australia, Brunei Darussalam, Cambodia, China, Indonesia, Japan, the Lao People's Democratic Republic, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, Viet Nam, the Republic of Korea and Thailand.

[6] The RCEP states that the parties are to enter into discussions on ISDS no later than two years after its entry into force, and the CAI states that the parties agree to continue the negotiations with a view to negotiate an agreement on investment protection and investment dispute settlement within two years of the signature of the agreement.

[7] Assembly of the African Union, Thirteenth extraordinary session (on the AfCTA), 5 December 2020, Ext/Assembly/AU/ Decl.1(XIII) Johannesburg, South Africa, https://www.tralac.org/documents/resources/cfta/4247-au-assembly-thirteenth-extraordinary-session-on-the-afcfta-decision-and-declaration-5-december-2020/file.html.

[8] African Union, "Pan-African Investment Code", 31 December 2016, https://au.int/en/documents/20161231/pan-african-investment-code-paic.

[9] European Commission, "EU–China Comprehensive Agreement on Investment (CAI)", https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237.

[10] European Commission, "EU-UK Trade and Cooperation Agreement: protecting European interests, ensuring fair competition, and continued cooperation in areas of mutual interest", 24 December 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2531.

[11] Government of the United Kingdom, "Formal request to commence UK accession negotiations to CPTPP", 1 February 2021, https://www.gov.uk/government/news/formal-request-to-commence-uk-accession-negotiations-to-cptpp.

[12] "Statement on the modernisation of the Energy Charter Treaty", 8 September 2020, Euractiv, https://www.euractiv.com/wp-content/uploads/sites/2/2020/09/Statement-on-Energy-Charter-Treaty-ENG_080920.pdf.

[13] The 2021 rounds will take place on 2–5 March, 1–4 June, 6–9 July, 28–30 September, and 9–11 November (https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2020/CCDEC202017.pdf).

[14] For information on the status of contracting parties' ratification and acceptance of approval of the agreement, see https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en.

[15] The signatories are Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.

[16] Official Journal of the European Union, Vol. 63, 29 May 2020, https://eur-lex.europa.eu/legal-content/en/ALL/?uri=OJ%3AL%3A2020%3A169%3ATOC.

[17] World Trade Organization, "Structured discussions on investment facilitation for development move into negotiating mode", 25 September 2020, https://www.wto.org/english/news_e/news20_e/infac_25sep20_e.htm.

[18] Kosovo (United Nations Administrative Region, Security Council resolution 1244 (1999)).

[19] Regional Cooperation Council, "Regional investment reform agenda for the West Balkans 6", 11 May 2018, https://www.rcc.int/docs/410/regional-investment-reform-agenda-for-the-western-balkans-six.

[20] IISD, "IISD welcomes AU Ministerial declaration on the risks of investor–State arbitration for COVID-19 measures", 21 December 2020, https://www.iisd.org/articles/iisd-welcomes-au-ministerial-declaration-risks-investor-state-arbitration-covid-19.

[21] ICSID, "ICSID publishes fourth working paper on rule amendments", 28 February 2020, https://icsid.worldbank.org/news-and-events/news-releases/icsid-publishes-fourth-working-paper-rule-amendments.

[22] The Brazil–India BIT and the RCEP are two IIAs that omit ISDS; the RCEP states that the parties are to enter into discussions on ISDS no later than two years after its entry into force.

[23] UN Sustainable Development Goals, https://sdgs.un.org/goals/goal5.

[24] The UNCTAD survey covered Algeria, Argentina, Australia, Austria, Barbados, Botswana, Brazil, Brunei Darussalam, Bulgaria, Cambodia, Canada, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Czechia, the Dominican Republic, Egypt, Ethiopia, Finland, France, Germany, Ghana, Hungary, India, Indonesia, Italy, Jamaica, Japan, Kazakhstan, the Lao People's Democratic Republic, Liberia, Luxembourg, Malaysia, Malta, Mauritius, Mexico, Mongolia, Myanmar, the Netherlands, New Zealand, the Niger, Nigeria, North Macedonia, Norway, Peru, the Philippines, Poland, the Republic of Korea, the Russian Federation, Singapore, Slovakia, South Africa, Spain, Switzerland, Tanzania, Thailand, Tunisia, Ukraine, the United Arab Emirates, the United Kingdom, the United States, Uzbekistan, the Bolivarian Republic of Venezuela, Viet Nam, Zambia and the EU.

[25] IPA efforts to digitalize their services and outreach modalities include enhancing their online presence, offering specialized virtual webinars and conferences with private and public partners and conducting strategic social medial outreach (UNCTAD (forthcoming c).

[26] Insurance services are not included in the analysis. In some cases, the analysis covers different components jointly, to reflect the nature of the public policy concerned (e.g. in the case of entry restrictions, manufacturing of pharmaceuticals and biotech and related R&D are considered jointly, as are the construction of health infrastructure and the provision of health services).

[27] A 67 per cent cap applies for large hospitals, specialist medical clinics, nursing services and other hospital services.

[28] A 30 per cent ceiling applies for private hospitals (increased to 70 per cent for investors from ASEAN countries), and 49 percent for hospice, nursing home and community mental health centres.

[29] A 35 per cent cap applies for hospitals and clinics owned by domestic companies (increased to 70 per cent for investors from ASEAN countries).

[30] Up to 100 per cent foreign equity ownership is allowed in the manufacturing of medical devices, medical supplies and medicines, and in the establishment of health information management enterprises, provided an export requirement of at least 50 per cent of output is met. When located in FEZs ("ecozones"), 100 per cent foreign equity ownership is allowed provided that manufacturers export 100 per cent of production.

[31] Correa, Carlos (2013). "Is Section 3(d) consistent with TRIPS?" *Economic and Political Weekly,* 48(32), 49-52.

[32] In October 2020, India and South Africa proposed a temporary waiver from certain TRIPS obligations to discontinue the application and enforcement of IP rights to facilitate the development and production of all products necessary to the prevention, containment or treatment of COVID-19. The waiver is proposed to last for at least three years, subject to renewal. It attracted broad support from WTO members. The United States announced its support for waiving IP protections but narrowly focusing on IP rights for COVID-19 vaccines. See WTO (2020), Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of COVID-19 and USTR (2021), Statement from Ambassador Katherine Tai on the Covid-19 Trips Waiver, United States Trade Representative, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver.

[33] Tolulope, Anthony Adekola, "Has the Doha Paragraph 6 system reached its limits?", *Journal of Intellectual Property Law & Practice*, 15(7), 525–529.

[34] He, J. (2019). "Indian patent law and its impact on the pharmaceutical industry: What can China learn from India? In: Liu, K.C., Racherla, U. (eds.), *Innovation, Economic Development, and Intellectual Property in India and China*. ARCIALA Series on Intellectual Assets and Law in Asia.

[35] "Beximco Pharma launches generic version of breakthrough hepatitis C drug", Beximco Pharmaceuticals, Dhaka, 28 June 2015.

[36] Patnaik, Priti. *" Health Policy Watch*, 1 April 2021.

[37] Biadgleng, Ermias, and Jean-Christoph Maru (2011). "The influence of preferential trade agreements on the implementation of intellectual property rights in developing countries: A first look", IPRs and Sustainable Development Paper No. 33, New York and Geneva: United Nations and Geneva and ICTSD.

[38] UNCTAD, International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements.

[39] Adapted from Zhan and Spennemann (2020).

[40] Chulalongkorn University, Faculty of Pharmaceutical Sciences. "Bachelor of Pharmacy Program, Industrial Pharmacy", https://www.pharm.chula.ac.th/pharm/index.php?main_id=39&sub_id=296&parentid=293.

[41] Thepgumpanat, Panarat, and Chayut Setboonsarng, "Thai government feels heat from lawmakers over vaccine rollout", Reuters.com, 17 February 2021, https://www.reuters.com/article/health-coronavirus-thailand-idUSL1N2KN0JH.

[42] GEXIM, "Ghana export-import bank's collaboration with indigenous pharmaceutical manufacturing companies for exportable products – our story", https://www.eximbankghana.com/files/1/OCT-PHARMACEUTICAL%20SECTOR%20WRITE-UP.pdf.

[43] PIC/S, "Pharmaceutical Inspection Co-operation Scheme", https://picscheme.org/en/picscheme.

[44] WHO, "Medicines regulatory support", https://www.who.int/medicines/areas/quality_safety/regulation_legislation/en/.

[45] Kumar Jha, Dilip, "Cold storages: Nearly 50-fold rise in projects approved by govt incentives". *Business Standard*, 14 March 2018, https://www.business-standard.com/article/markets/cold-storages-nearly-50-fold-rise-in-projects-approved-by-govt-incentives-118031300784_1.html.

[46] ADB, "ADB, Imexpharm sign loan to support generic medicine production in Viet Nam", 15 December 2020, https://www.adb.org/news/adb-imexpharm-sign-loan-support-generic-medicine-production-viet-nam.

[47] African Union and Africa CDC, "CEPI and the African Union join forces to boost African vaccine R&D and manufacturing", 13 April 2021, https://africacdc.org/news-item/cepi-and-the-african-union-join-forces-to-boost-african-vaccine-rd-and-manufacturing/.

[48] British High Commission Accra, "UK-Government supports Ghana's pharmaceutical sector", 30 October 2020, https://www.gov.uk/government/news/uk-ghana-business-council-supports-ghanas-pharmaceutical-sector.