Survey of climate policies for investment treaties

Note describing responses to the survey

January 2024

Context

This OECD Secretariat note describes the responses to the first-ever survey of climate policies for investment treaties.

It was originally prepared for discussion at a meeting in October 2023 open to invited governments, stakeholders and experts. It has been circulated to participants for comments, in particular by government participants.

This final version reflects comments received.

A separate document, also available on the Conference webpage, reproduces the survey questions.

Table of contents

Tables

Figures

1. Introduction

The OECD-hosted work programme on the “Future of Investment Treaties” was launched at the 6th Annual Conference on Investment Treaties on 29 and 30 March 2021. The work is advancing on two tracks.

In Track 1, governments and non-government participants at the OECD have initiated the first sustained multilateral work on climate policies for investment treaties, responding to growing demands to take action on the climate impacts of the investment treaty regime. The work has focused on the alignment of investment treaties with the Paris Agreement and net zero goals.[1]

Investment treaties can be seen as having multiple climate impacts: first on investment choices that have long-term climate effects; second in affecting government climate and investment policy approaches, incentives and costs; and third on the perceived credibility and coherence of government climate commitments and action. All of these impacts are becoming of greater public interest and concern. Investment treaties have been described as a “blind spot” in policy discussions of sustainable finance and investment, but there is increasing attention from climate, finance and energy policy makers.

The 2022 work program for Track 1 called for the first-ever survey on Climate policies for investment treaties. The survey built on an initial body of work and meetings on investment treaties and climate change including a January-March 2022 public consultation, a Track 1 meeting in April 2022 and a Conference in May 2022.

Along with other Track 1 work, the survey has contributed to placing climate change at the core of investment treaty policy discussions for the first time. The issues may have been overdue for attention, as the Chair of the Investment Committee has suggested. The survey has also contributed to joining up climate and investment communities within governments and generating new conversations and exchanges, as governments have recognised in meetings and in their responses.

The survey contains a range of sections that are widely seen as important for climate reporting and one goal of the survey was to inform investment treaty policy makers of the nature of modern climate reporting. While attention to the full survey is thus important, some key findings can be noted. The survey reflects the high level of importance that governments attach to the alignment of investment treaties both with the Paris Agreement as a whole and with its art. 2.1c goal of making finance flows consistent with a low-carbon pathway. Alignment with the Paris Agreement is seen as very important (65%) or somewhat important (22%) by 87% of respondents. Alignment of investment treaties with art. 2.1c is seen as very important by 78% of respondents. A little over half of respondents have a mandate for their investment treaty unit to pursue climate change initiatives, but only 13% have analysed the climate impacts of their investment treaties.

The difficulty of knowing what to do to address the climate in existing investment treaties and policies was the most frequently-cited obstacle to aligning existing investment treaties

[1] A second track considers whether it would be better if specific substantive provisions of older investment treaties were more similar to those now more consistently used in newer treaties, and if so, how interested jurisdictions could align earlier generation treaties with more recent designs in an efficient manner.

and policies with the Paris Agreement. Difficulties in changing existing practices was another frequently cite obstacle.

A majority disagree with the proposition that interpretations of investment treaties in Investor-State Dispute Settlement (ISDS) provide clear parameters on policy space for government climate measures. Only three respondents agree or somewhat agree with it.

The survey included both new and more familiar questions for investment and climate policy makers. Participation was significant but still only partial among economies invited to Track 1. Some governments rejected the premises of various aspects of the survey or expressed discomfort with certain approaches. Some responding jurisdictions answered only a small number of questions. Together with the information generated by responses, these reactions and views can be explored further and discussed in future work.

The balance of this note first provides general information about the survey. This includes information about how it was conducted and an overview of its content, statistical information about respondents, and a description of a gradual approach to climate reporting. It then reviews the responses to the survey.

1.1. Conduct of the survey

The survey was commenced in October 2022 with a background note and the survey questions.[2] Governments were initially invited to respond to the survey by 14 December 2022. The time for responding to the survey was subsequently extended to 31 January 2023. A number of governments submitted responses after that date including up until just prior to the April 2023 Conference.

The survey was initially presented using a online survey software used for a range of OECD surveys. However, input from governments indicated that a Word version would facilitate preparation of responses. The survey was circulated to Track 1 governments in Word format in conjunction with the extension of time to respond. The questions in both formats were the same. Most responses were received in Word format.

To address differences in government situations, two versions of the survey were developed. The full survey was prepared primarily for economies with prior participation in OECD work on the Future of investment treaties, large economies or extensive investment treaty networks. A shorter version of the survey, with most questions requiring textual answers removed, was sent to other invited economies.

At the time the survey was initiated, 84 economies were invited to Track 1 and Track 2 OECD work on the Future of investment treaties. During the course of the survey, additional economies were invited to participate in the work. The shorter form of the survey was provided to these economies.

The background note included suggestions with regard to responding to the survey for jurisdictions with investment treaties that are also members of a Regional Economic Integration Organisation (REIO) that has concluded investment treaties as a Contracting Party. Those jurisdictions were invited to respond primarily with regard to their existing national treaties where the REIO is not a Party rather than providing overlapping responses about treaties where both the respondent and the REIO treaties. It was suggested that information about investment treaties where both the REIO and some or all of its member states are Parties could be supplied by the REIO, reflecting its individual member

[2] DAF/INV/TR1/WD(2022)3. The survey questions have been reproduced in DAF/INV/TR1/WD(2023)2/ADD1 circulated together with this note.

specificities as appropriate, or through complementary information. It was suggested that this would allow the broad range of existing investment treaties to be addressed. While some jurisdictions in this position focused on their own investment treaties, others focused primarily on REIO policies in REIO treaties.[3]

The introductory Secretariat note and survey questions were made available on the OECD Future of investment treaties webpage as part of a commitment to stakeholder and public information about work on investment treaties, and to allow for input on them from experts and others. The Secretariat also provided them to (i) the National Focal Points for each jurisdiction under the UNFCCC; and (ii) the Secretariat of the Network for Greening the Financial System (NGFS) to allow for distribution to central banks and supervisors that are members or observers of the NGFS. The survey has also been posted to the TCFD Knowledge Hub (TCFDhub), which provides a hub for resources needed to understand and implement the Recommendations of the Task Force on Climate-related Financial Disclosures (TCFD).

1.2. Overview of the survey and comparable surveys

Reflecting the multiple climate aspects of investment treaties noted above, the survey includes climate policy questions inspired by a number of sources. First, it includes climate policy questions similar to those increasingly asked of major suppliers of financial services like asset owners, banks or insurance underwriters, whether they are private or public. These surveys and reports are high-profile processes benefitting from increasing government support and attention, such as the Task Force on Climate Financial Disclosures (TCFD).

Actors that provide financial services are widely recognised as having climate responsibilities for their portfolios and their financed or facilitated emissions. Responsibilities to disclose climate impacts are going global. The responsibilities can also arise from the capacity to influence the activities of operating companies and to redirect business incentives away from fossil fuels and other high-emission activities toward climate-friendly ones, particularly if climate commitments are made.

Recognition of these evolving responsibilities generates questions in climate surveys about whether commitments have been made to achieve Net Zero, whether climate criteria are applied for beneficiaries of services or contracts, and whether action is being taken in the short-term. High-level commitment and governance of climate policies, gathering data and public reporting are also essential components of climate action; those topics are routinely reflected in climate reports.

Second, the survey includes questions about the impacts of investment treaties on climate policy space. These generally do not arise for private sector suppliers of financial services to operating companies. A loan from a bank to a private oil company has little or no effect on policy space. Questions in this area are not included in the climate surveys and reports referred to above. In contrast, questions about policy space impacts have been the overriding centre of attention for investment policy makers in recent years.

Third, the survey includes questions about market access for climate-friendly investment, the degree of consideration of inclusion of additional incentives for climate-friendly investment, and a general question about provisions reflecting agreement to make changes to domestic law to advance climate goals. At the time the survey was prepared, intensive

[3] In survey responses, this was principally at issue with regard to the investment treaties of the European Union and those of its Member States.

investment facilitation negotiations were ongoing at the WTO; interests in avoiding redundancy or interference with negotiations suggested limited attention to that sphere was appropriate. In the intervening period, negotiations on a text have concluded at the WTO. Moreover, as discussed in Track 1 work, governments have begun considering whether additional investment treaty attention to facilitation would be valuable. The inclusion of questions in that area would appear to be a useful addition in future surveys.

Fourth, the survey also reflects commitments by major economies to integrate climate action across their foreign, security and trade policies in a range of unilateral and joint declarations and working groups. Governments have begun to take visible climate action in policy areas related to investment treaties, such as export finance. Climate action on investment treaties remains limited and the application of some recent climate commitments to investment treaties remains unclear, giving rise to an additional source of questions in the survey.

The survey included a range of new and more familiar questions for investment and climate policy makers. For governments that have made climate commitments including across the whole government, it may be seen as appropriate to answer questions that are of interest to others even if relevance is contested or uncertain. The evolving nature and extension of climate responsibilities, and the broad scope of the Paris art. 2.1c finance flows provision, may be factors to consider in this context. Alternatively, or in conjunction with answering the questions, disclosure of the rationale for challenging or rejecting the relevance of questions can help clarify issues of general interest.

As Track 1 and other climate and investment work advances, additional areas for questions are likely to emerge and appear appropriate for inclusion in future surveys. At the same time, while action on the climate is a priority, government officials working on investment treaty policies or on climate policies frequently face multiple demands with limited resources. The efforts of governments and government officials to respond to and comment on the first-ever survey have provided important inputs into consideration of climate policies for investment treaties. Those efforts are appreciated.

1.3. Overview of respondents

Twenty-three economies submitted responses to the survey. All responses received were to the full version of the survey; however, some economies answered only some questions. No short form responses were received. In total, responding economies are Party to approximately 1000 investment treaties, an average of approximately 44 per survey respondent.

Survey respondents include both countries that have primarily functioned in ISDS as home states as well as countries that have primarily been ISDS respondents. The total number of cases in both categories for all survey respondents is approximately 900 and overall survey respondents have been home states about twice as often as they have been host states. A small number of survey respondents have significant numbers of cases in both categories although balance is rare, reflecting the general status in ISDS.[4]

Twenty of the respondents are classified as high income jurisdictions by the World Bank; two are classified as upper middle income and one as lower middle income.

A majority of the survey respondent jurisdictions are in Europe. There are several survey respondents from the Americas and from the Asia-Pacific region. There were no responses

4 UNCTAD statistics were used in this area.

from the Middle East or Africa. Twenty of the respondent jurisdictions are Members of the OECD.

Five of eight G7 economies responded to the survey. One answered a small number of questions on behalf of one Ministry; another responded mainly to the first part of the survey. Six G20 economies responded to the survey.[5]

Some governments, including major economies, indicated that they are no longer negotiating new investment treaties or treaties with ISDS. Some accordingly framed their responses as a look at their historical experience, referring to approaches used in the past. While these approaches may or may not be dated, it is important to take into account that they continue to produce climate impacts in the present and going into the future. Accordingly, the efforts to respond to the survey by these governments are appreciated.

A number of countries indicated that they engaged seriously with the survey, but were unable to complete and file responses. One country provided a brief written explanation of its decision, citing in part temporarily applicable circumstances associated with a change of government. Other countries explained some of the challenges they faced during discussions in meetings on the survey, but did not further elaborate in writing. Governments have uniformly expressed support for the work program on investment treaties and climate change notwithstanding difficulties with the survey.

1.4. A step-by step approach

Climate surveys and reports generally identify respondents. This is seen as providing for greater accountability. Reports by businesses are graded. Climate performance is ranked. In this first-ever survey of climate policies and one that raised new issues of Paris alignment, a more gradual approach has been taken. The responses to this survey are confidential. This can foster greater disclosure particularly in uncertain areas.

Among respondents, some governments appeared to reject the premise of certain groups of questions or particular questions. Some governments have taken high-profile climate action on investment treaties in areas covered by some of these questions. It may be important to explore the reasons both for the actions and for the hesitations in order to satisfy the strong public interest in understanding and evaluating climate policies.

Regular reports have become the new normal for climate including in the public sector where governments are committed to climate policies and Paris alignment. Participants may wish to consult the report on the responses to the second Survey of climate-related and sustainability-related policies and practices provided by Members of the OECD Working Party on Export Credits and Credit Guarantees as of December 2022.[6]

ECG Members have agreed that the survey should be conducted on an annual basis. Responses in the second annual survey reflected progress on climate policies. For example, the number of Export Credit Agencies/countries[7] with a climate change statement doubled and the number of statements linked to the Paris Agreement increased by 60%. Five additional agencies/countries received a mandate to address climate change.

---

5 The African Union became a full member of the G20 at the Delhi Summit of the G20 in September 2023. This was shortly before the survey was circulated and it was not sent to the African Union.

6 TAD/ECG(2023)2/FINAL.

7 Some countries have more than one Export Credit Agency.

Recognising the exploratory nature of an initial survey and the presence of new questions, this note also does not identify governments that did not respond to the survey or that responded only to a small number of questions. It is proposed instead to use the initial survey, responses and hesitations along with recent climate action as a basis for continued dialogue about climate responsibilities in the investment treaty field and about future surveys. Further Track 1 work and follow-up discussions can explore the reasons for responses as well as for discomfort with the survey or some types of questions. A gradual approach may help investment treaty policy makers to become accustomed to climate surveys.

The note is principally dedicated to describing the responses to the survey. While a few potential conclusions or possible inferences are noted, the note is primarily descriptive. Conclusions for Track 1 and more generally may be more usefully drawn after Track 1 participants and others have had the opportunity to review and comment on the results in meetings or in writing. As noted in Track 1 discussions, the survey and Track 1 as a whole is a learning process.

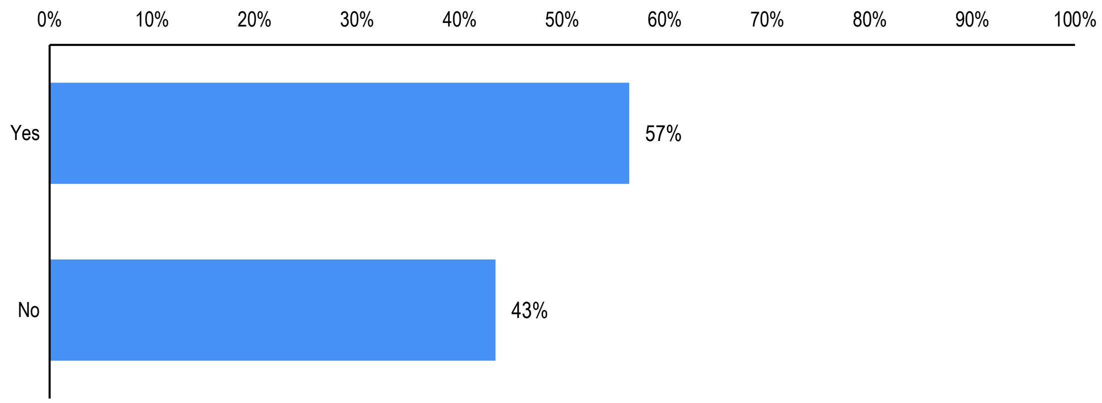
2. Overview of responses

2.1. Climate governance and risk management

Questions about climate governance are an important part of climate surveys. About half of the responding countries reported participation of environment ministries as well as investment experts in their responses. Ministries of finance, trade, foreign affairs were also involved in some cases in addition to investment officials.

More broadly, 57% of respondents indicated that their investment treaty unit has a mandate to pursue initiatives based on climate change issues while 43% have not received this mandate (Q7). About four-fifths (78%) of investment treaty units do not have any senior officials with competence on climate-related issues, while 17% do (Q9).

Figure 2.1. Mandate to pursue climate change initiatives

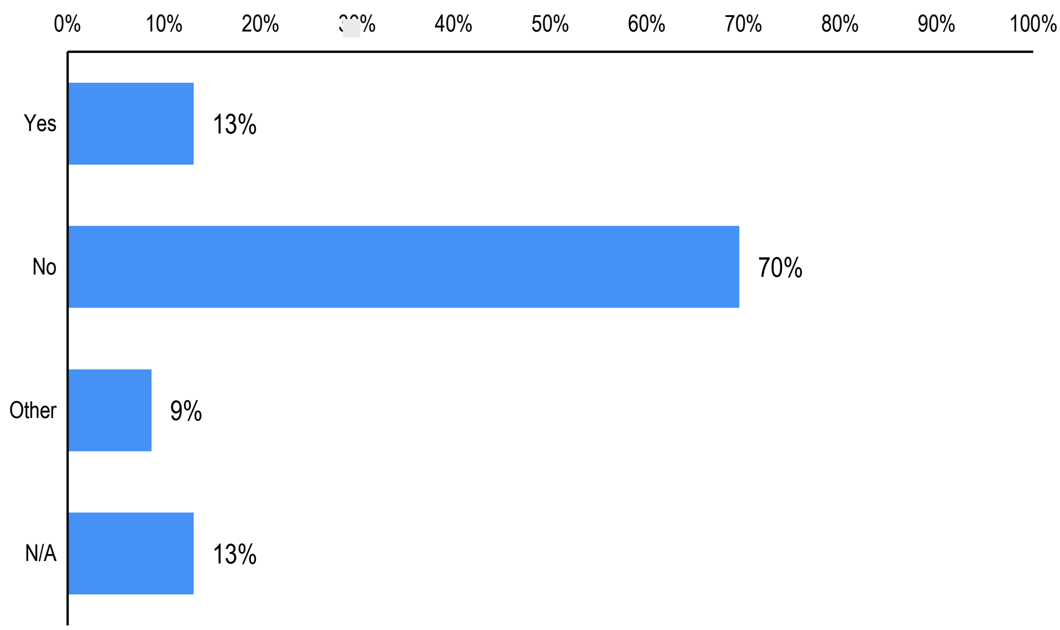


Question 7: Has your investment treaty unit been given a mandate by an oversight minister or body to pursue initiatives based on climate change issues?

In response to a question about whether the climate impacts of investment treaties have been analysed (Q11), 13% responded that they have analysed the climate impacts of their existing investment treaties while 70% have not done so.

Comments relating to one jurisdiction noted that it conducts four types of formal, published policy analyses during the life cycle (i.e., negotiation and implementation) of trade and investment agreements. Three of these are "integrated" assessments: that is to say, they aim to identify and analyse all the significant potential impacts of a proposed agreement (i.e. whether economic, social, human rights, environmental or climate), or all the significant actual impacts in the case of an agreement that is actually in force. A fourth is strictly economic. Another comment noted light climate analysis of a recent FTA, but limited to goods markets outcomes. One comment questioned whether Question 11 and some others were unduly closed in suggesting an answer; it stated that its government carries out climate impact analysis for trade agreements but not for bilateral investment treaties due to their limited scope and impact.

Figure 2.2. Analysis of climate impacts of existing investment treaties



Question 11: Has your government analysed the climate impact of your existing investment treaties?

Questioned about the extent to which their government's existing investment treaties take account of certain specificities of climate policies and impacts (Q13), governments provided a range of answers.

- With regard to taking account of the global impact of GHG emissions anywhere, promoted by any investment treaty, 27% report not having taken it into account while 18% have partially taken it into consideration. The premise of the question was rejected by 45% of respondents.[8]

[8] This answer was offered as an explicit option due to the framing of the question. Comments on the underlying reasoning for rejection of the premise were not requested.

- With regard to taking account of the recognised need for profound and rapid regulatory changes to address the climate crisis, 36% of countries reported having partially taken it into account while 27% had not taken this into consideration. The premise of the question was rejected by 13% of respondents.
- With regard to taking account of the particularly challenging political economy for adoption of climate measures due to long-term nature of many climate threats, resistance from lobbies or other factors, 23% reported not having taken them into account while 23% reported having taken this partially into account. 45% of respondents rejected The premise of the question was rejected by 45% of respondents.

Comments in this area on action taken in light of the specificities (Q14) generally focused on chapters or preamble references to sustainable development, or policy space for host government action (general right to regulate clauses, etc.). One comment noted the lack of attention to climate in earlier investment treaties but stated that this does not mean they are obstacles to climate action. Action on a fossil fuel carve-out was mentioned as was ongoing reflection on both the right to regulate and the scope of sectoral application of investment treaties.

On attention to human rights impacts (Q15), 13% report having done so and a further 22% are considering carrying out this analysis; half responded that they have not analysed these impacts. There were few comments here but comments about one jurisdiction pointed to evaluation tools used for both environmental and human rights impacts.

For 55% of respondents, UN Sustainable Development Goal 13 is very important for existing investment treaties and policies (Q17). This reported as somewhat important by 27% of countries while 4% consider this not important.

The survey noted that the Network for Greening the Financial System and other bodies are increasingly requesting or requiring financial and other actors with climate impacts to identify their expected policies under different climate scenarios. This helps identify or encourage work on how policies would adjust to different climate conditions such as 1.5 or 3 degree worlds.[9] No government reported using climate scenarios its investment treaty policies (Q18).

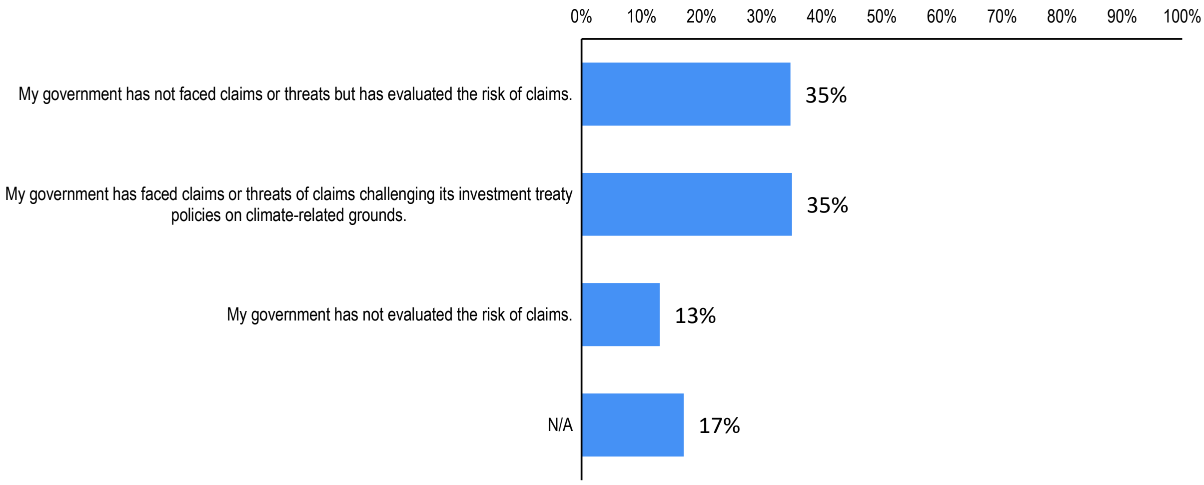
About a quarter of respondents (23%) report having included binding provisions to strengthen domestic law climate policies in their existing investment treaties; an additional 41% have this under consideration while 32% have not included such provisions (Q19). Comments in this area noted trade and investment agreement provisions on the environment and sustainable development. In recent treaties, these can state government interests in a high level of environmental protection, effective enforcement and call for inter-government cooperation. Some require continuous and sustained efforts towards the effective implementation of multilateral environmental agreements that each Party has ratified. The expected future addition of State-to-state dispute settlement in some treaties in this area is also noted. A comment noted government action in current work on modernisation of a model favouring the introduction of a binding provision on the Parties'

9 See, e.g., Network for Greening the Financial System, Scenarios Portal (identifying three broad climate scenarios for use in climate policies: (i) Orderly scenarios assume climate policies are introduced early and become gradually more stringent; (ii) Disorderly scenarios explore higher transition risk due to policies being delayed or divergent across countries and sectors; and (iii) hot house world scenarios assume that current policies are maintained or that some climate policies are implemented in some jurisdictions, but global efforts are insufficient to halt significant global warming.); Bank of England, Results of the 2021 Climate Biennial Exploratory Scenario (CBES).

obligations under the UNFCCC and the Paris Agreement, including their commitments with regard to their NDCs. Clauses recognising that it is inappropriate to weaken environmental protection to encourage investment are also noted. The impact of general provisions on investment treaty compensation obligations is generally not addressed.

Track 1 discussions have explored the growth of climate litigation. In response to a question about climate-based challenges in litigation to their investment treaties (Q21), 13% reported having already faced climate-related claims or threats of claims, and about one-third (36%) have evaluated risks of litigation of this type despite not having faced claims or threats of claims. Another third (32%) have not evaluated the risk of litigation of this type.

Figure 2.3. Climate-related litigation challenges to investment treaties



Question 21: Please describe your government's experience with risks of litigation challenging your existing investment treaties, proposed new treaties or investment treaty policies based on climate-related considerations. [three proposed answers]

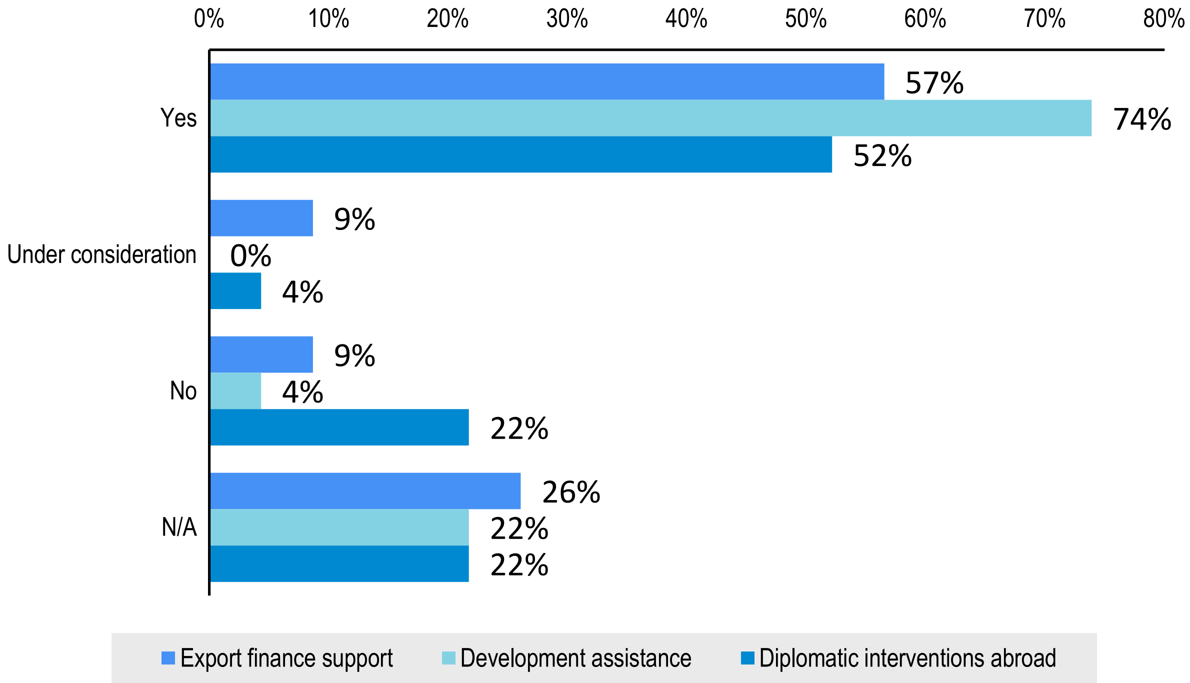
Track 1 discussions have also compared the development of climate policies in related fields with investment treaty policies. The survey asked whether climate considerations play a role in three related policy areas (Q23).

For export finance support, 55% report that climate considerations play a role in their policies, while for 9% this is under consideration. 9% report no role for climate considerations in this area.

For development assistance, 73% report that climate considerations play a role in government policy while for 4% they do not.

For diplomatic interventions in support of national investors abroad, half provide services in a climate-aware framework and 4% have this policy under consideration. 21% do not include climate considerations in their diplomatic interventions in support of national investors abroad.

Figure 2.4. Climate considerations in policies on foreign investment



Question 23: Do climate considerations play a role in policies of your government with regard to foreign investment in the following areas? (Export finance support, development assistance, diplomatic interventions abroad)

2.2. Investment treaties and alignment with the Paris Agreement

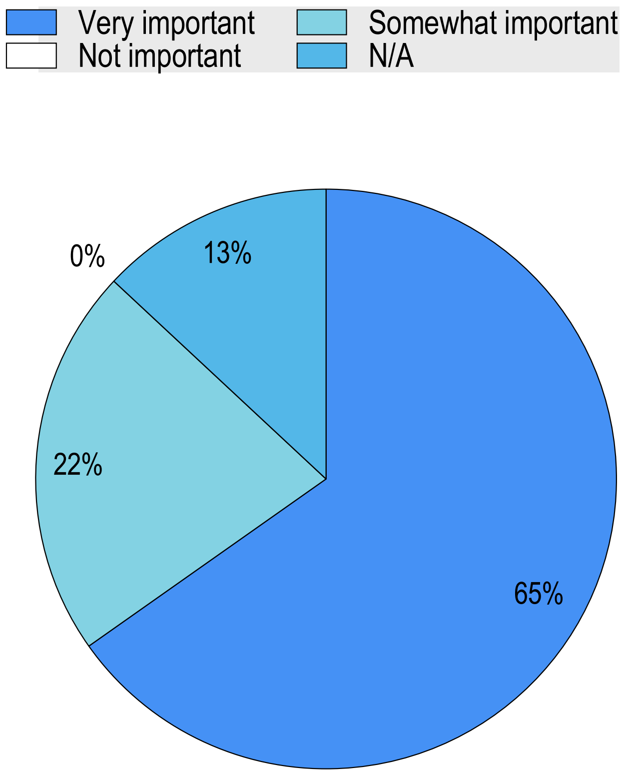
Governments have placed alignment of investment treaties with the Paris Agreement and net zero at the core of Track 1 work. As noted, the survey reflects strong recognition of the importance of Paris alignment of existing investment treaties and treaty policies, with 62% stating that it is very important and a further 22% finding is somewhat important. One respondent reports it as not important.

In comments, a number of economies refer to Paris alignment of investment treaties and a range of factors contributing to such alignment. These include provisions referring to the right to regulate. Action to exclude coverage of inward fossil fuel investment is addressed by some respondents; alignment of outward investment is not addressed. Trade and investment agreement provisions on trade and environment, or on sustainable development, are noted and can require in general terms efforts towards effective implementation of ratified environmental treaties including the Paris Agreement.

One jurisdiction states that its investment treaties are aligned with the Paris Agreement. Several governments report ongoing work on Paris alignment. Another government recognised that its existing investment treaties do not align with the Paris Agreement and underlined the burden of renegotiating all existing treaties. Another noted it was renegotiating existing treaties with a focus on policy space. Some governments report general statements in recent model investment treaties referring to the Paris Agreement without addressing their expected effects. One government notes also including references to additional environmental agreements or declarations.

One government noted that alignment of investment treaties with the Paris Agreement is very important even though it is not explicitly stated because government policy makes clear that alignment is very important in all areas. Another noted that it is required by a law to include environmental objectives in economic agreements including investment treaties.

Figure 2.5. Paris Agreement alignment for existing investment treaties and treaty policies



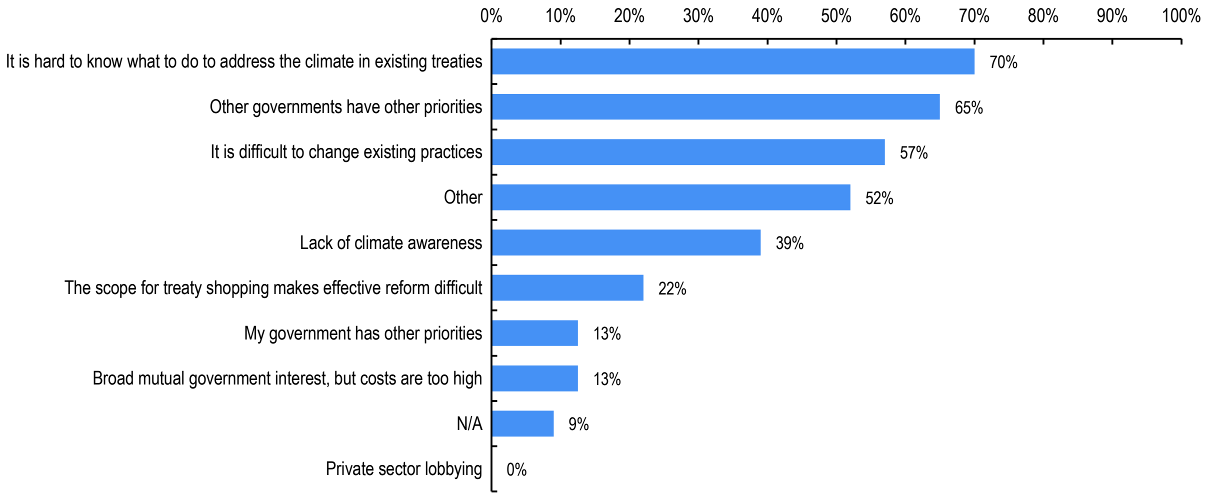
Question 25: What is your government's view about the importance of aligning your existing investment treaties and treaty policies with the Paris Agreement?

Governments were asked to identify the principal obstacles to the Paris Agreement alignment of existing investment treaties and treaty policies (Q26). About two-thirds (65%) of respondents report that it is hard to know what to do to address the climate in existing investment treaties. Half (52%) also report that it is difficult to change existing practices.

About three-fifths (61%) cite other governments having other priorities while 13% cite their own government having other priorities. About a third (35%) identify lack of climate awareness. The scope for treaty shopping is seen as a principal obstacle to effective reform by 22% of respondents. For 13%, there is broad mutual government interest, but the costs to address the climate impacts of many treaties are too high. No respondents report private sector lobbying being an obstacle to alignment with the Paris Agreement. 50% of governments note other reasons.

Comments in this area noted that the ECT negotiations over the exclusion of fossil fuels illustrate the different levels of ambition with regard to Paris alignment and different views on how to achieve it, as well technical and legal challenges. In explaining their inclusion of "other" among their responses, several comments pointed out that the investment policy community is not always in sync with the climate community. It was also suggested that a lack of climate awareness with regards to the direct relationship between investment treaties and climate action constitutes an additional obstacle. One comment stated that Paris alignment through the exclusion of coverage for certain sectors could result in more Paris aligned investment opportunities but a loss of attractiveness for unaligned investment. The complexities associated with treaty development and approval were also noted.

Figure 2.6. Principal obstacles to aligning existing investment treaties and treaty policies with the Paris Agreement



Question 26: What are the principal obstacles to the Paris Agreement alignment of existing investment treaties and treaty policies in your government's view? (various proposed answers including Other)
:

The survey addressed the numbers of ISDS claims by high-carbon investors. Track 1 and recent UNCTAD statistics on the numbers of cases show substantial use of ISDS by fossil fuel investors including many of the largest claims and awards. Governments were asked about usage by investors of their treaties for inward and outward fossil fuel investment (Q27).

For inward fossil fuel claims, a majority (59%) reports having had no inward fossil fuel claims; 27% report one claim and 14% report having had more than one. No survey respondent reports having had more than five claims filed against it.

For outward fossil fuel claims, a majority of countries (64%) reports not having had any claims filed against other countries under their treaties, 9% report one claim and 5% report two to five claims. 9% report more than five claims filed against other jurisdictions.

Q30 asked governments about their views on the impact of existing investment treaties and treaty policies on the one hand, and commitments by governments to ambitious National Determined Contributions (NDCs) to address climate change under art. 2.1(b) of the Paris Agreement on the other hand. 45% of countries believe that current investment treaties have no impact on the ambition of government NDC's, 27% believe that current treaties encourage ambitious government NDCs and 18% believe current treaties discourage ambitious NDCs.

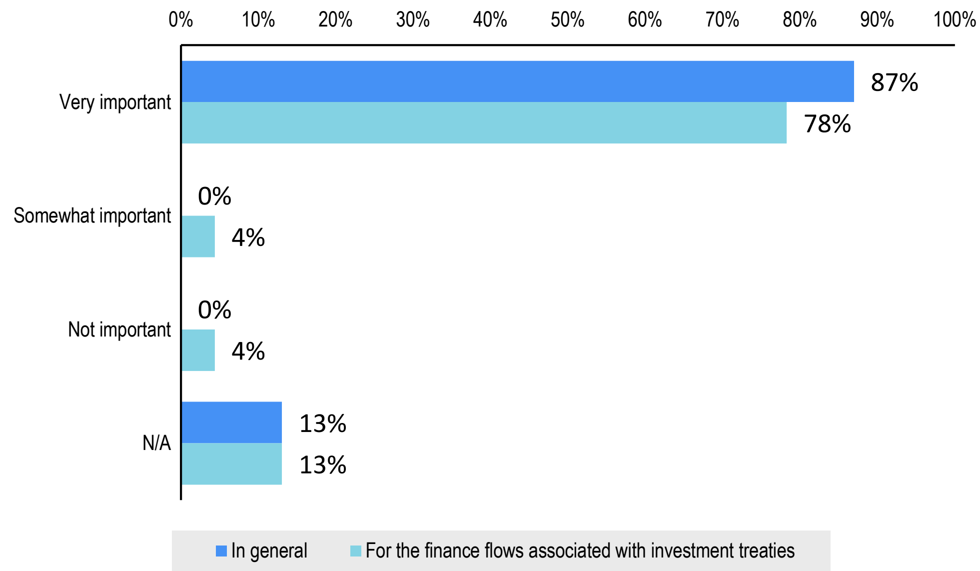
Governments were also asked in Q30 about the desirable impact of investment treaties on NDCs. Half of respondents believe that investment treaty policies should encourage ambitious NDCs, while 5% think that they should be neutral.

In comments, one government expressed views on the proper interpretation of investment treaties, noting that properly interpreted they should not interfere with NDCs; however, existing precision might not be sufficient which could give rise to claims contrary to NDCs. It suggested that market access and the additional legal certainty provided by investment protection can generate more investment in renewable energies and thus enhance the climate transition. A comment noted a recent treaty that requires the Treaty Parties to effectively implement the UNFCCC and the Paris Agreement, including commitments with regard to NDCs.

Track 1 work has focused on investment treaties and art. 2.1c of the Paris Agreement. The provision sets out the goal of making finance flows consistent with a low-carbon pathway and climate-resilient development. Questions 31-33 addressed this area. A large majority of respondents (87%) consider it very important to make finance flows in general consistent with a low-carbon pathway, as set out in Article 2.1 of the Paris Agreement (Q31).

A large majority (78%) also consider it very important to make the finance flows associated with investment treaties consistent with a low-carbon pathway as set out in Article 2.1. One respondent considers it somewhat important and one states it is not important (Q31).

Figure 2.7. Paris Agreement art. 2.1c: Importance of making finance flows consistent with a low-carbon pathway



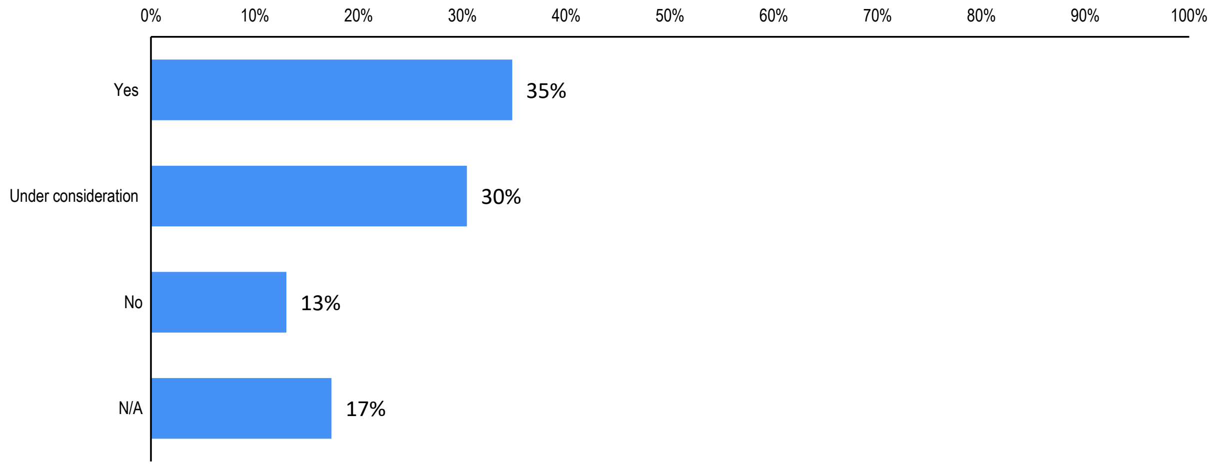
Question 31:What is your government's view about the importance of making finance flows consistent with a low-carbon pathway as set out in Article 2.1 of the Paris Agreement? [In general] [For the finance flows associated with investment treaties]

Q32 asked whether governments have taken or are considering action with regard to the finance flows associated with their existing investment treaties and art. 2.1(c) of the Paris Agreement. A third (35%) of respondents report having taken action on the finance flows associated with their existing investment treaties, 30% report considering action and 13% report not considering action.

Comments addressed action with regard to the alignment of finance flows associated with their existing investment treaties. Several comments pointed to the example of work on the ECT to exclude coverage of fossil fuel investment, the reaffirmed commitment by all ECT Contracting Parties to implement the Paris Agreement and the inclusion of new provisions on the "right to regulate" to achieve legitimate policy objectives such as the energy and climate transition. Another comment pointed to an broad ongoing review of both policy space and sectoral coverage elements of investment treaty policy. Other comments focused on policy space-related action or the general development of new model investment treaties. The exclusion of ISDS from intra-EU relations was also noted in this area as action facilitating the energy transition in Europe. A comment also referred to engagement in Track 1 work, noting its helpfulness in addressing environmental objectives.

Another comment stated that Article 2.1c is key to the implementation of the Paris Agreement as a whole and supports international climate finance in developing countries. A number of comments pointed to government action on art. 2.1c in a wide range of areas including mandatory climate-related financial disclosures, emissions trading schemes, green bonds and advocacy for the reform of fossil fuel and environmentally harmful subsidies.

Figure 2.8. Action on finance flows associated with investment treaties with regard to Paris art. 2.1c

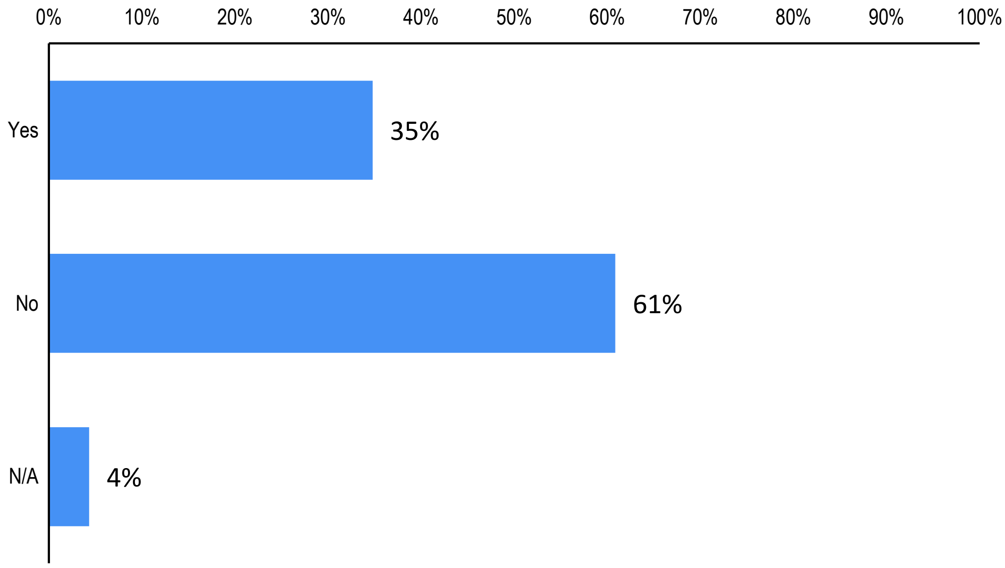


Question 32: Has action been taken by your government or is action under consideration with regard to the finance flows associated with your existing investment treaties and art. 2.1(c) of the Paris Agreement?

No respondent reported having a transition plan to align their investment treaty policies with net-zero emissions by 2050 (Q34). Roughly a quarter (23%) have this under consideration while 64% of countries report neither having nor considering such a plan. Comments in this area generally addressed compatibility rather than alignment with the Paris Agreement. Several commentators stated that their investment treaties are compatible with net zero objectives without further explanation. One comment referred to compatibility due to the preservation of policy space, adding that support for low-carbon investment is valuable. Some governments pointed to ongoing work on new models.

In the next two years, 36% of respondents plan to implement new climate policies in their investment treaties whereas 59% do not (Q36). Comments reflected a significant range of work on new models, including for jurisdictions not having decided to implement new policies. There is also ongoing reflection and participation in work on investment treaties and climate change. Some also refer to more informal new approaches in negotiations.

Figure 2.9. Plans to implement new climate policies in investment treaties in the next two years



Question 36: Does your government have any plans to implement new climate policies in your investment treaties in the next two years?

2.3. Alignment of investment-treaty-covered investment and investors: financed emissions

This section addressed whether and how governments consider climate issues with regard to the concept of financed emissions and the overall portfolios of treaty-covered investments and covered investors. Governments were provided with references to brief background information on the notion of financed emissions and initial Track 1 analytical work.[10] The section addressed both investment and investors, and inward and outward investment.

Investment treaty coverage of investment: Q38 asked about whether governments have established, or are considering establishing, general criteria for coverage of investment in their investment treaties based on the potential impacts of the investment on climate change

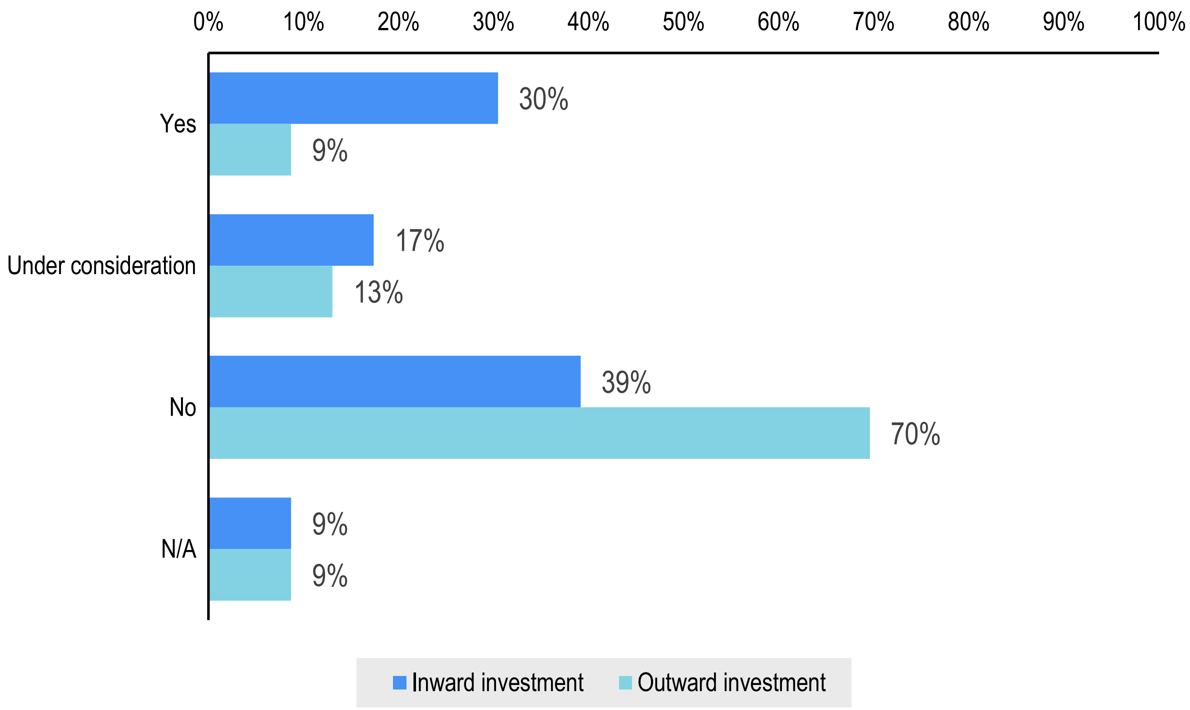
[10] PWC, Financial institutions are pledging to lower carbon footprints. Here's what you need to know about financed emissions; Sudeep Doshi et al, Aligning portfolios with climate goals: A new approach for financial institutions (McKinsey & Co 2021); Background paper for the OECD 2022 Conference on Investment treaties and climate change, and session 3/4 of the Conference (video).

(e.g., climate-friendly, climate-neutral, climate-unfriendly). The question addresses such criteria for inward and outward investment under investment treaties.

For inward investment, 33% reported having established climate-based criteria and 14% are considering doing so. 43% report not considering and not having plans to consider the potential climate impacts of inward investment.

For outward investment, 9% of countries have introduced criteria based on potential impacts for outward investment on climate change, while another 9% have this under consideration. 73% reported no plans to establish these criteria.

Figure 2.10. Investment coverage criteria based on potential climate impacts



Question 38: Investment treaty coverage of investment: Have you established, or are you considering establishing, criteria based on the potential impacts of the investment on climate change (e.g., climate-friendly, climate-neutral, climate-unfriendly) for: [Inward investment?] [Outward investment?]

The survey did not solicit general comments in this area but asked governments about potential specific criteria. No countries currently take into account project GHG emissions, project carbon neutrality, mitigation measures to limit GHG emissions, or adaptation measures in their investment treaty coverage of investment. Two respondents are considering each of these measures.

In Q42, government were asked to consider the actual or potential application of the types of criteria in green or climate taxonomies or metrics for their government's existing investment treaties. They were asked to consider certain specific taxonomies or metrics, or other similar ones.[11] Few governments responded to the question.

[11] The taxonomies and metrics cited for reference were the EU Taxonomy, EU Do No Significant Harm principles, Chinese Green Bond Endorsed Projects Catalogue (2021 Edition,

One commentator noted that its government uses voluntary climate scores rather than taxonomies to assess alignment of financial products, and makes assessments of alignment of portfolios of banks, insurance companies and other asset owners and managers available to market participants. It notes that whether and how these approaches could be used in the context of investment treaties will need to be further assessed. Another comment notes ongoing development of a green taxonomy and notes their usefulness in several areas including in negotiations over the Agreement on Climate Change, Trade and Sustainability (ACCTS). Another respondent notes a lack of current involvement but ongoing reflection on engagement on the issue due to its importance.

Investment treaty coverage of investors: Policies can also address the quality of investors that obtain coverage (Q40). With regard to investment treaty coverage of investors and inward investment, most countries (64%) have not integrated nor are they considering integrating climate policies in policies on the scope of covered investors. 23% have this under consideration, while 5% report that climate policies have been implemented in this context.

For coverage of outward investors, 68% have not integrated nor are they considering integrating climate policies with regard to the scope of covered investors, 5% report having integrated climate policies on this issue and 18% are considering this measure.

Governments were also asked about potential specific criteria in this area. No respondent has included whether investors have a credible climate transition plan or whether they engage in climate disclosure in accordance with TCFD Recommendations among the criteria for investor coverage. Investor CAPEX (capital expenditure) in net zero assets is similarly not currently taken into consideration (Q41).

2.4. Exclusions – coal-related projects

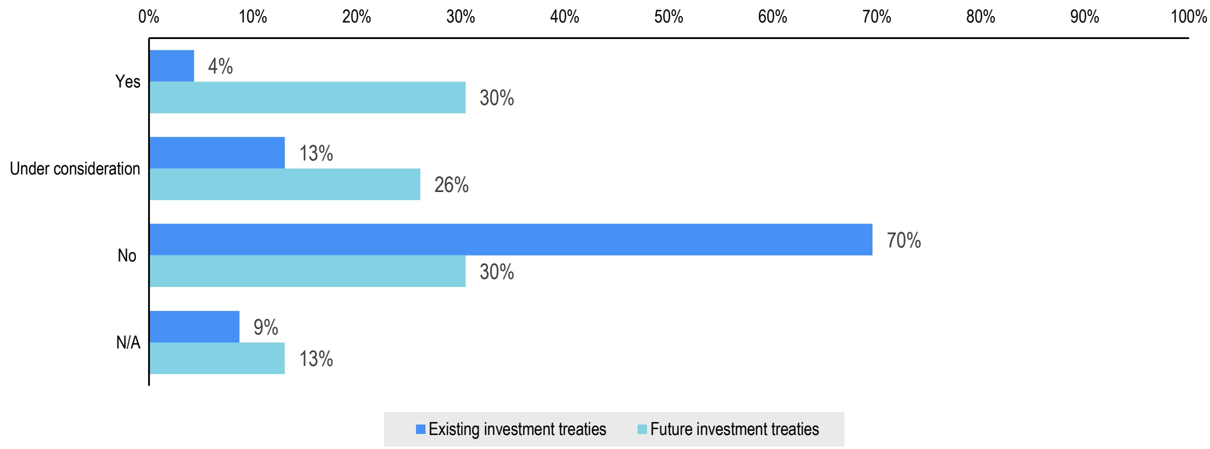
This section and the following three sections addressed whether governments have adopted policies to exclude coverage for fossil fuel-related projects from their investment treaties. In this area, survey questions were closely modelled on the questions in the OECD climate-related surveys for export credit agencies. Policies for existing treaties and for future treaties were distinguished for the general approach; additional specific questions were asked about existing investment treaties.

For existing investment treaties, 4% reported having implemented policies to exclude support for coal-related projects in their government's existing investment treaties and a further 13% are considering doing so. 70% are not considering this measure.

For future investment treaties, 30% of respondents have implemented policies to exclude support for coal-related projects; another 26% have this measure under consideration, while 30% do not plan on introducing this exclusion.

English), IFC Definitions and Metrics for Climate-Related Activities (2017), International Platform on Sustainable Finance, etc. For work comparing certain taxonomies and exploring certain possible common green taxonomies, see International Platform on Sustainable Finance (IPSF), Common Ground Taxonomy - Climate Change Mitigation (instruction report by IPSF Taxonomy Working Group) (3 June 2022) (in-depth comparison exercise that puts forward areas of commonality between the EU and China taxonomies, using the amended 2021 Chinese Green Bond Endorsed Projects Catalogue as the Chinese equivalent of the EU Taxonomy for purposes of the report).

Figure 2.11. Exclusion of support for projects involving substantial coal-related content



Question 43: Have you implemented, or are you considering implementing, policies to exclude support for projects involving substantial coal-related content: [In your government's existing investment treaties?] [In your government's future treaties?]

Q44 asked about specific types of action with regard to coal for existing investment treaties. For those treaties:

13% of respondents report having excluded new coal-fired power plants (another 13% have it under consideration)

17% report having excluded expansion of existing plants (under consideration for another 17%)

22% report having excluded exploration and extraction of coal for energy generation (under consideration for another 17%)

17% report having excluded transportation and related infrastructure projects (under consideration for another 9%).

In order to have preliminary information about the scope of action in this area, governments were asked about their breadth of action of this type across their investment treaty network. Questions asked about the number of treaties for which governments had requested exclusions, requested and obtained exclusions and requested and not obtained exclusions. Most respondents reported not having requested coal-related exclusions for any investment treaties. About a quarter (22%) reported having requested exclusions for one of their investment treaties. One government reported requesting and obtaining exclusions for more then one treaty.

About a quarter of respondents (26%) report having implemented exceptions to coal-related exclusions while 17% are considering doing so. (The question noted that these could relate to, for example, relating to improving energy or emissions efficiency, health & safety issues, decommissioning, use of carbon capture and storage (CCS) or transition plans in line with the Paris Agreement.) On the other hand, 17% have not implemented nor are they considering implementing exceptions to coal exclusions.

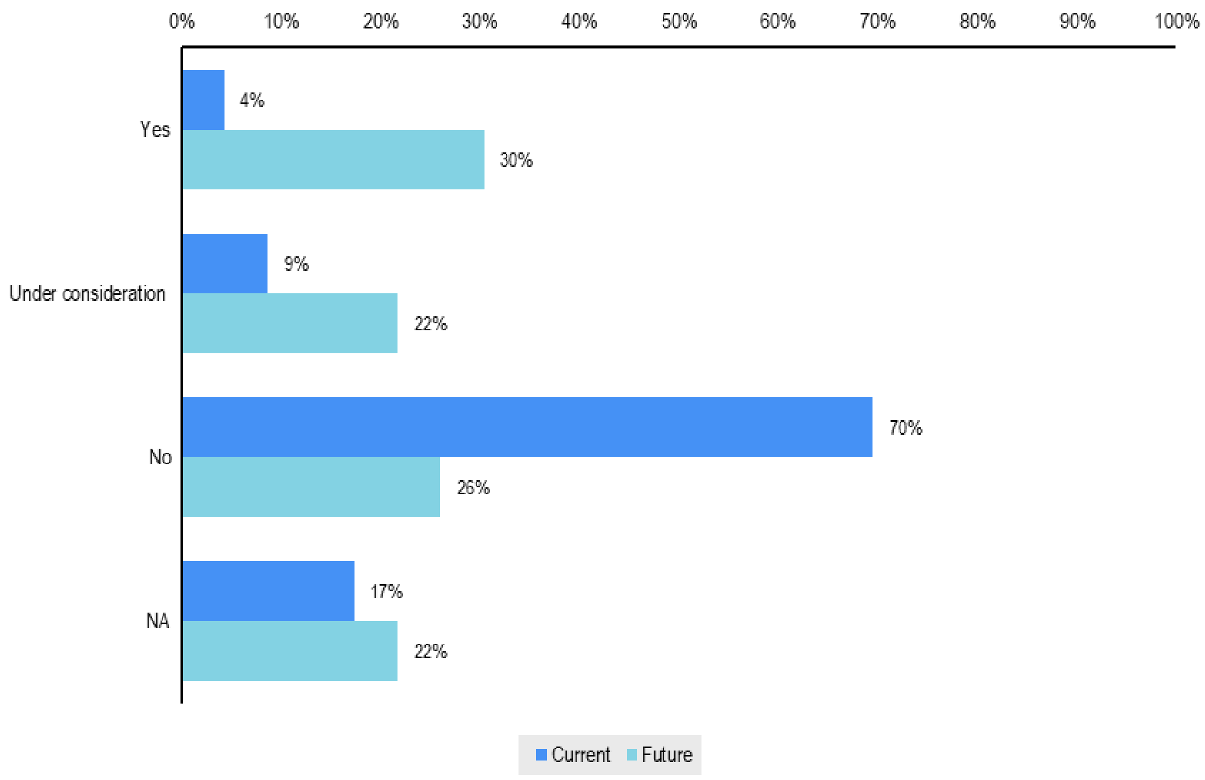
2.5. Exclusions – oil-related projects

Questions 48-52 addressed policies for excluding investment treaty protection support for projects involving oil. Policies for existing treaties and for future treaties were distinguished with regard to the general approach; additional specific questions were asked about existing investment treaties.

For existing investment treaties, one government reported having implemented policies to exclude support for projects involving substantial oil-related content and one is considering doing so; 70% report not considering this measure (Q48).

For future investment treaties, 26% of respondents have implemented policies to exclude support for projects involving substantial oil-related content; another 22% have this measure under consideration, while 26% do not plan on introducing this exclusion (Q48).

Figure 2.12. Exclusion of support for projects involving substantial oil-related content



Question 48: Have you implemented, or are you considering implementing, policies to exclude support for projects involving substantial oil-related content: [In your government's existing investment treaties?] [In your government's future treaties?]

Q49 asked about specific types of action taken or under consideration with regard to oil for existing investment treaties. For those treaties:

13% of respondents report having excluded new oil-fired power plants (another 13% have it under consideration);

17% report having excluded expansion of existing plants (under consideration for another 13%),

17% report having excluded projects related to existing oil-fired power plants without expanding capacity (under consideration for another 13%), 22% report having excluded exploration and extraction of oil (under consideration for another 13%);

22% report having excluded exploration and non-conventional extraction methods such as fracking and oil sands (under consideration for another 13%)

17% report having excluded transportation of oil and related infrastructure, including pipelines (under consideration for another 13%).

22 % report having excluded downstream activities, such as oil refineries, petrochemicals, etc. (under consideration for another 9%).

In order to have preliminary information about the scope of action in this area, governments were asked about their breadth of action of this type across their investment treaty network (Q50). Questions asked about the number of treaties for which governments had requested exclusions, requested and obtained exclusions and requested and not obtained exclusions. 57% of countries have requested oil-related exclusions for none of their investment treaties, while 22% have requested exclusions for one of their treaties. No countries have requested exclusions for several or most of their treaties.

With regard to exceptions to oil-related exclusions, 13% of respondents report considering implementing exceptions while 57% report they are not considering them (Q51).

2.6. Exclusions – gas-related projects

Questions 53-57 addressed policies for excluding investment treaty protection support for projects involving gas. Policies for existing treaties and for future treaties were distinguished for the general approach; additional specific questions were asked about existing investment treaties.

For existing treaties, one respondent reported having implemented policies to exclude support for projects with substantial gas-related content; 9% have this option under consideration. The majority (68%) do not (Q53).

For future investment treaties, 23% of respondents have implemented policies to exclude support for gas-related projects in their future investment treaties while 32% this under consideration. A quarter (27%) do not (Q53).

Q54 asked about specific types of action taken or under consideration with regard to gas for existing investment treaties. For those treaties:

17% of respondents report having excluded new gas-fired power plants (another 9% have it under consideration);

17% report having excluded expansion of existing plants (under consideration for another 9%),

17% report having excluded projects related to existing gas-fired power plants without expanding capacity (under consideration for another 9%),

22% report having excluded exploration and extraction of gas (under consideration for another 9%);

22% report having excluded exploration and non-conventional extraction methods such as fracking (under consideration for another 9%)

17% report having excluded transportation of gas and related infrastructure, including pipelines (under consideration for another 9%).

17% report having excluded downstream activities, such as gas processing, LNG plants, petrochemicals, etc. (under consideration for another 9%).

Half of respondents have not requested gas-related exclusions for any of their investment treaties. A quarter (23%) have requested these exclusions for one of their investment treaties, while none have requested them for several or most of their treaties (Q55).

A third of respondents (32%) report that they are considering implementing exceptions to gas-related exclusions, while 18% have this option under consideration. 14% do not plan on implementing exceptions (Q56).[12]

2.7. Policy space for climate policies

This section addresses an area of long-standing government attention including in work at the OECD, in contrast to Paris Agreement alignment and coverage issues.

Q63 addressed views on the appropriate regime for disclosure of government requests for greater climate policy space under investment treaties, and their outcomes. Governments were asked if they agreed or disagreed with a range of statements.

Most governments (52%) agreed or somewhat agreed (4%) that the disclosure of government requests for greater climate policy space under investment treaties would advance the goals of the Paris Agreement and should be made. Over half agreed (48%) or somewhat agreed (8%) that the disclosure of government requests for greater climate policy space under investment treaties would improve inter-governmental cooperation in the setting and achievement of ambitious NDCs under the Paris Agreement. (52%) Most governments (56%) did not agree with the statement that such disclosures would interfere with investment treaty negotiations. A majority of respondents agree (52%) or somewhat agree (9%) that each government should decide on the scope of disclosure of the existence and outcomes of requests for greater climate policy space under investment treaties. Asked whether they agree that only the final outcomes of negotiations should be disclosed, 36% of countries disagreed; 20% agreed and 4 % somewhat agreed.

No respondent agreed with the statement that governmental disclosures regarding requests for greater climate policy space under investment treaties should be made in the context of broader work on the climate such as in the UNFCCC process. 44% disagreed and 4% somewhat disagreed.

Comments in this area refer to policies to disclose negotiating starting positions and information about negotiations as they advance (through reports from the negotiating rounds, press releases, etc). Another noted that it consults with representatives of civil society, businesses, trade unions, youth organisations and academia, on major developments in its bilateral investment protection policy. One jurisdiction noted that in its view treaty negotiation requires a careful balance between disclosure and the confidentiality of information. This balance builds trust in the process and each other and makes it easier to adopt decisions.

[12] Questions 58-62 addressed policies for excluding investment treaty protection support for industrial operations requiring dedicated fossil-fired energy supply to achieve high temperatures: for example, cement, glass, pulp & paper, steel, etc. No respondents have implemented such policies in existing investment treaties or for future treaties; two governments have it under consideration for future treaties.

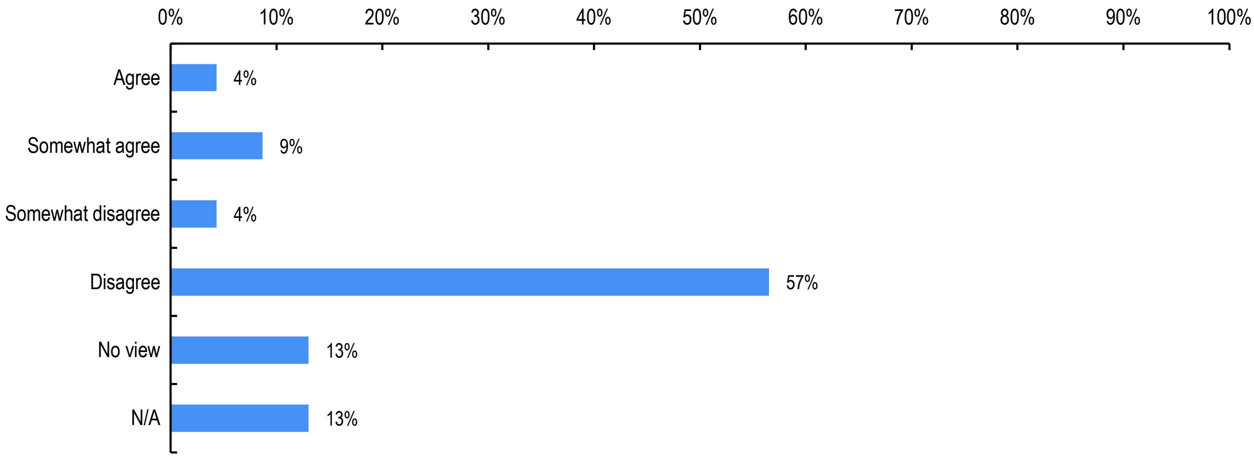
Governments were asked about their experience with ISDS claims or threats of claims directed at their climate or environmental policies, as well as whether they have considered the potential for such claims (Q65). Over half of respondents (58%) have never faced ISDS claims with respect to their climate or environmental policies; 13% of respondents have faced ISDS claims in these areas more than once and 8% were subjected to such claims once.

Over half of respondents (54%) have never faced threats of ISDS claims with respect to their climate or environmental policies. A fifth (22%) have faced threats of ISDS claims more than once and 4% have faced such threats once. Half of governments have not considered the potential of ISDS claims with regard to their climate or environmental policies. 9% have considered the issue once and 22% have considered the issue more than once.

Most countries agree that governments should be encouraged to request more policy space applicable to climate policies (63%). One respondent disagrees.

Governments were also asked about their attitudes to a series of statements about policy space for climate measures (Q66). Asked whether investment treaties as interpreted in ISDS provide clear parameters on policy space for climate measures, 57% disagree. One respondent agrees and two somewhat agree while 13% have no view on the matter.

Figure 2.13. Whether ISDS interpretations provide clear parameters on policy space for climate measures



Question 66.4: Please state whether you agree or disagree with the following statement[]: [Investment treaties as interpreted in ISDS provide clear parameters on policy space for climate measures.]

Over half of respondents disagree or somewhat disagree with the statement that governments fear requesting more policy space applicable to climate policy under existing investment treaties because of the perceived impact such policies would have on their country's attractiveness for investment. Two respondents (9%) agree while two more somewhat agree (9%).

With regard to the statement that risks to climate policy are best averted through avoiding investment treaties with ISDS with states which significantly invest in their jurisdiction, almost half (46%) somewhat agree and 4% agree while 4% disagree and 13% somewhat disagree.

Governments were asked to evaluate some possible techniques for improving policy space for non-discriminatory climate action. Attention was drawn to substantive standards (Q67) and to dispute settlement (Q68).

On substantive standards, 9% of respondents consider the omission of high-claim-frequency substantive provisions, such as fair and equitable treatment (FET) or indirect expropriation, would be a highly effective technique to address policy space for non-discriminatory climate action; 13% think this method moderately effective. About 17% of countries think the effectiveness of this method is uncertain. Most countries did not answer.

Changing the language of high-claim-frequency substantive provisions is seen as a highly effective technique to address policy space for non-discriminatory climate action by 52% of respondents; 4% think its effectiveness is moderate while 9% think its effectiveness is uncertain.

With regard to joint government interpretations of high-claim-frequency substantive provisions, 44% think they would have uncertain effectiveness; 9% consider them highly effective and 13% think they are moderately effective.

On dispute settlement, 9% considered actions and submissions as a respondent in ISDS cases to be highly effective and 48% considered them to be moderately effective. 13% consider the effectiveness of this policy uncertain. One country considers that this policy is ineffective.

Non-disputing Treaty Party submissions on interpretation issues for protection of climate policy space are seen as highly effective by 4% of countries and moderately effective by 48%. 13% consider the effectiveness of this policy uncertain. One respondent considers that this policy is ineffective.

The impact of transparency of ISDS proceedings for protection of climate policy space is considered highly effective by 13%, moderately effective by 56% and uncertain by 9%. Access for amicus curiae and interveners is considered highly effective by 9% and moderately effective by 60% of respondents; 4% consider the effectiveness of this policy uncertain.

Over half of respondents (58%) consider that reforming ISDS would be a highly effective solution to protect climate policy space, while 13% think it would be moderately effective and 4% deem effectiveness uncertain. With regard to the use of State-to-State dispute settlement (SSDS) rather than ISDS for investment protection claims generally to protect climate policy space, 63% answered that the effectiveness would be uncertain, 4% consider it highly effective and 4% think it would be moderately effective. With regard to the use of SSDS for high-claim-frequency substantive provisions currently treated in ISDS to protect climate policy space, 63% of countries think its effectiveness is uncertain, 8% of countries consider it moderately effective and 4% deem this solution ineffective.

Governments were asked about their views about policy space for climate measures under their own investment treaties and also under other governments' investment treaties (Q69). Results show significant variance in this area depending on the investment treaties at issue. Under other governments' investment treaties, 54% are concerned that climate action will be delayed, postponed or avoided because of concerns about possible ISDS liability (54%); 17% are not concerned in this area. In contrast, 54% are not concerned about this occurring under their own government's treaties while 17% are concerned in this context. 5.

Comments in this area stated views that policy space is protected under recent investment treaties or models and cited recent provisions adopted in that area. One comment noted that some governments have been subject to claims based on climate policies and that damages liability could generate a chilling effect. Another questioned the meaning and interest of the question.

In order to address action on the ground on reform, governments were asked about requests for modifications to existing investment treaties to provide greater or more certain policy space applicable to climate measures than under currently applicable treaties as interpreted in ISDS. Governments were asked about four types of requests. They were asked separately about their own requests (Q71) and also those received from other governments (Q73).

In terms of requests made to other governments (Q71), 36% of respondents have made requests to other governments to remove certain sectors like fossil fuels from the scope of investment coverage; 20% have made requests for joint government interpretations; 17% have made requests to change dispute settlement provisions; and 13% have made requests to modify treaty language including the removal of substantive provisions. One comment noted that renegotiation requests received have not been specifically directed at taking account of climate policy concerns. Another comment noted that it has included more precise language in recent treaties, but not in response to specific requests for greater or more certain policy space applicable to climate measures.

With regard to the receipt of such requests from other governments (Q73), approximately three-quarters of respondents report not having received any requests from other governments in the same four areas. Comments about requests to other governments noted proposed changes to the ECT including a joint renegotiation proposal for fossil fuel carve outs, re-affirmation of commitments to implement the Paris Agreement and new provisions on the right to regulate. Comments also cited recent efforts to add further interpretive guidance on climate for the CETA. A government cited proposals it made on policy space and ISDS procedures which were accepted in one negotiation. Another government noted it had proposed renegotiations and had not received responses, but the tenor of the proposed changes was not identified.

Governments were asked about the dissuasive effects of possible ISDS liability on climate action (Q75). In response, 68% of respondents report that they have not delayed, considered delaying or postponed climate action due in part to risks of ISDS liability. The remainder did not answer.

In response to a question about concerns over budget impacts (Q77), 72% affirm that they have not considered the impact of actual and potential ISDS liability on their budgets for the energy transition or other climate policies such as additional mitigation or adaptation. The remainder did not answer.

2.8. Market access

Only a small number of countries answered questions about the relative importance of market access vs. post-establishment protection in their investment treaties as a whole, in recent treaties (last 5 years) or for future treaties (Q78). Opinions were generally balanced, with a slight preponderance for investment protection.

In terms of frequency of binding market access provisions in investment treaties (Q79), one country has them in all treaties; a fifth have them in most of their investment treaties, one has them in some and two have them in a few of their investment treaties. A third (32%) of respondents have no such provisions in any of their investment treaties.

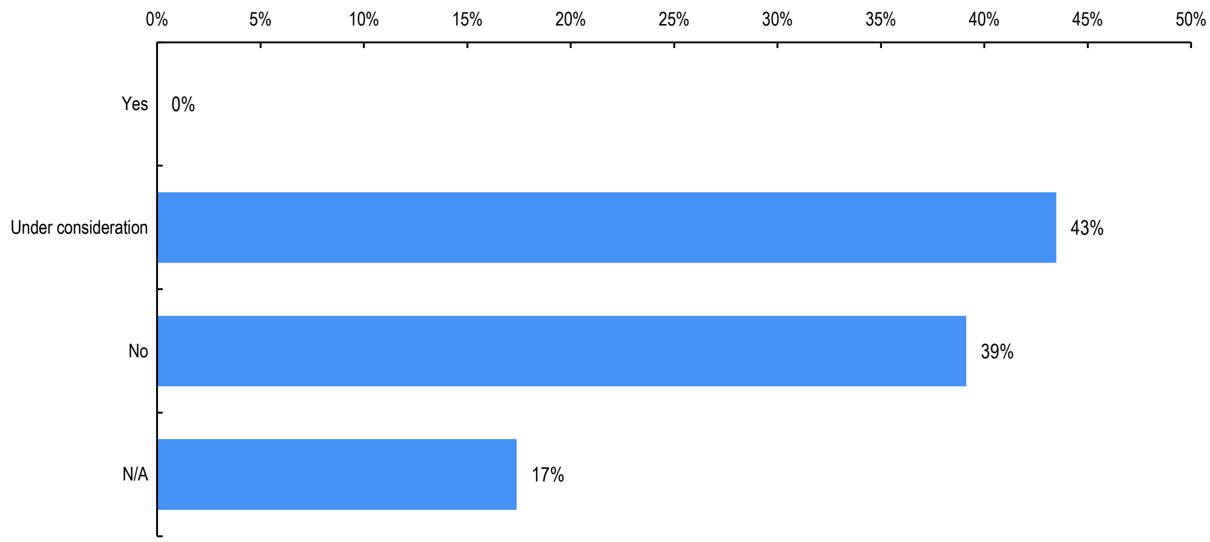
Comments on answers referred to some ambitious REIO trade and investment agreement provisions in relation to market access and climate, in particular in the area of environmental services. For example, as part of a revamped approach, a new broader environmental good and services list is included in a recently-concluded treaty. The parties to the treaty also recognise the importance of facilitating trade and investment in climate-friendly goods and services. A number of comments referred to the narrow scope of traditional investment treaties limited to post-establishment protections.

Suggestions in response to a question about potential market access and investment facilitation topics for Track 1 discussions included more discussion among governments about how investment facilitation could be more conducive to climate-friendly investment; comparisons between the levels of unilateral vs. treaty-based liberalisation of climate-friendly investment and the reasons for discrepancies; and further discussions on investment incentives and investment guarantees in home and host States. Another comment emphasised the importance of improving market access and the complementarity of trade and investment.

2.9. Additional incentives

No respondent reports having established additional incentives in investment treaties to foster climate-friendly transactions; the measure is under consideration in 43% of countries while 39% of countries are not considering implementing this policy (Q83).

Figure 2.14. Establishment of additional incentives to promote climate-friendly transactions



Question 83: Have you established, or are you considering establishing, any additional incentives in your investment treaties to promote transactions considered climate-friendly?

Comments pointed to recently concluded negotiations on a first-ever Sustainable Investment Facilitation Agreement between the EU and Angola. It includes provisions on development assistance and the Parties also recognise the importance of technical assistance and capacity-building. Comments also referred to recent development assistance policies and suggested that a clearer link between investment facilitation and such policies could be further explored.

2.10. Implementation

With a focus on climate change, this section addressed dispute settlement mechanisms, remedies for breach of investment treaties, provisions applicable to claims by investors, and the regime for enforcement of awards.

Q85 asked about the use of alternatives to ISDS for investment disputes involving climate policies. About 36% of countries report that some of their existing investment treaties provide only for options other than ISDS for the resolution of investment protection disputes involving climate policy, such as binding state-to-state dispute settlement or diplomatic negotiations while 32% of countries do not have such investment treaties.

Comments about alternatives to ISDS cited an investment court system, State-to-State dispute settlement (SSDS) and mediation in recent treaties; it was noted that these rules could supersede existing ISDS rules upon revisions to existing treaties. Another comment cited use of SSDS without ISDS in a recent regional treaty. A commentator cited a range of its existing investment treaties that do not provide for ISDS, but noted the exclusion of ISDS is general and not specific to climate. Two comments cited a regular use of ISDS with few exceptions.

About three-quarters (76%) of governments report that none of their existing investment treaties provide only for non-binding mechanisms to resolve disputes of certain types, such as using expert reports (Q89).

No responding government reported having investment treaties that provide for government power over remedies in investment protection disputes involving climate policies (such as requirements that remedies taking the form of financial payments are to be agreed by governments) (Q87).

Q91 asked about existing investment treaties that provide for obligations for covered investors relating to the environment. One government responded in the affirmative while 72% responded that they do have not such provisions. Comments cited investment treaty provisions requiring investment to be made in accordance with host state law. Provisions on responsible business conduct were also cited including the OECD Guidelines for Multinational Enterprises and the OECD Due Diligence Guidance for Responsible Business Conduct.

Q93 explored the relevance of climate factors under currently applicable law on the enforcement of arbitral awards under investment treaties. A conflict between an award and international public policy with regard to the climate was reported as irrelevant to enforcement in their jurisdiction by 36% of respondents. One respondent indicated that an award being contrary to international public policy with respect to climate would be relevant to award enforcement, and 13% indicated it would be somewhat relevant. Conflicts between an award and one's own government's public policies with regard to the climate received similar answers.

An award involving climate-unfriendly investment, an outcome that increases returns to such investment, an outcome that raises the costs of climate measures including non-discriminatory measures, or an outcome that increases the dissuasive effect of investment treaties on potential climate measures including non-discriminatory measures in the future, were also all reported as irrelevant to enforcement under current law by practically all respondents who answered the question. One government reported relevance of these factors in its jurisdiction.

Comments noted a public policy exception to enforcement of arbitration awards under its national law but that as interpreted to date it would be unlikely to apply to the climate factors at issue. Another noted a lack of cases on the issue and that further analysis would be needed.

With regard to suggestions for future Track 1 work in this area, comments suggested allowing for dialogue between countries on climate-friendly investment and considering how climate law experts could be further taken into account by investment tribunals. Other suggestions include examining dispute prevention strategies and best practices in communicating the benefits of the treaty to climate friendly investment. Another comment suggested consideration of climate issues with regard to right to regulate provisions (including general exceptions), with regard to their impact on the international liabilities of governments (including on the principles and methods of assessing damages); and with regard to the role of dialogue between parties to investment treaties (including through the use of joint interpretations).

2.11. Data gathering

In response to Q97, 36% of countries have implemented measures to improve their knowledge of the portfolio of covered investments in their jurisdiction and other jurisdictions under their existing investment treaties. A third (32%) of governments have focused on their portfolios in different regions. Comments pointed to the existence of general statistical data regarding outward and inward investment, in some cases both with regard to FDI and portfolio investments.

About a quarter of governments (24%) report having implemented measures to improve their knowledge of their portfolio of covered investments under their investment treaties in key economic sectors for climate policy, such as fossil fuels or renewables. One country has taken action to improve its knowledge of the portfolio of covered investments for which ISDS is made available.

Q98 asked governments about possible specific actions to gather data about their investment treaty impacts (e.g., requiring climate impact analysis by proposed covered entities about proposed projects as a condition for coverage, with or without screening or approval; requiring insured entities to report on claims under its treaties; analysing the climate impact of projects that are the subject of claims or threatened claims under its investment treaties; or evaluating the existence in other jurisdictions of major corporate producers of GHG emissions or affiliates thereof that could qualify for coverage in its jurisdiction under its investment treaties). One respondent reported that it requires ISDS claimants to report the claims. Otherwise, one country reports in each case that it has the actions at issue under consideration, but such actions are generally not under consideration for approximately 52% of respondents, with the rest not responding.

2.12. Reporting and transparency

Efforts to improve climate disclosures are underway in many jurisdictions and global progress has recently been achieved with the adoption of the ISSB baseline climate disclosure standards.[13] Q99 asked about views in this area.

Stronger public disclosure of climate impacts, risks, policies, targets or progress by businesses and financial services providers, including by reference to the standards inspired by the Task Force on Climate-Related Financial Disclosures (TCFD) Recommendations,

13 See IFRS, Ten things to know about the first ISSB Standards.

is reported to be supported by the governments of 48% of respondents. A fifth of respondents report that their government does not support stronger disclosure.

A fifth of respondents supports stronger climate disclosures of the same type by governments, both where governments are providing products or services similar to those in markets and more generally. A quarter do not support such stronger disclosure.

Q100 asks about implementation by investment treaty units of climate reporting measures including as inspired by the TCFD Recommendations. One respondent reports having implemented such climate reporting; it is under consideration by 12% and not envisaged in 52% of respondents.

Q101 asks about the frequency of requests for information about climate policies for investment treaties. About 32% of respondents have received requests for information about their climate policies with regard to investment treaties or their climate impacts from Parliaments. The same proportion of governments have received such requests from civil society. About 24% of governments have received climate-related requests for information regarding investment treaties from the press and 8% have from businesses. Only 8% of governments declare having received no such climate-related information requests.

Comments noted parliamentary and civil society attention as well as efforts to reach out to both. Press attention to investment treaties and climate change was also noted. Another commentator reported that its Environment Ministry regularly engages with civil society groups in other countries on climate issues.

2.13. Assessing government needs

More than half of governments (52%) think assistance with regard to improving the climate impacts of their investment treaties would be helpful and an additional 20% are considering whether such assistance would be helpful (Q102).

Asked about whether they have requested assistance with respect to improving the climate impacts of their investment treaties, one government indicated that it has asked for assistance. In contrast, 64% of countries have not requested assistance on this topic (Q103).

Asked about whether they would be interested in contributing to helping other governments address the climate impacts of investment treaties, 24% responded in the affirmative and an additional 12% are considering it (Q105). About 24% of countries would not be interested in doing so.

Governments were also asked about what types of assistance would be helpful (Q106). Two thirds of countries consider that analysis of policy issues in addressing the climate in investment treaties, and inter-governmental exchanges on policy goals and experiences, would be helpful. Input from experts on climate policies and outcomes in other fields than investment treaty policies is seen as helpful by 56% of governments while the analysis of existing investment treaty practice addressing the climate is seen as helpful by 36% of respondents. Draft model provisions and commentary on the scope of coverage of investments, and on climate policy space, are reported as helpful by 32% of respondents. Draft model provisions and commentary on alternatives to ISDS are seen as helpful by 20% of respondents.

2.14. Multilateral and plurilateral climate policy commitments, and investment treaties

While there are multiple inter-governmental institutions and groups addressing climate policies, sustainable finance or the climate effects of trade and investment, it is not always clear whether governments have included investment treaties and their finance flows in their commitments and work. This section sought to help to identify applicable commitments as well as possible gaps in existing climate commitments, in particular relating to climate and finance.

In Q107, governments were asked about the relevance of a range of institutions, groups and statements for their investment treaties. Question 110 asked (i) whether each government has raised the issue of the climate impact of investment treaties in the groups or institutions set out below; and (ii) whether it planned to do so in the next year. The answers to Q107 reflect recognition by a significant number of governments that a range of institutions, groups and statements addressing climate issues are relevant or may be relevant to investment treaties. However, survey responses reflect very few efforts to raise the issue of the climate impact of investment treaties in any of these institutions, groups and statements (Q110).

Only one respondent reports raising the issue of the climate impact of investment treaties in UNFCCC and in Paris Agreement committees or working groups. One other respondent has raised the issue of the climate impact of investment treaties in groups related to the Beyond Oil and Gas Alliance (BOGA). No other governments report raising the issue in any of the institutions, groups and statements. No respondent reported an intent to raise the issues in the next year.

Table 2.1. Climate commitments: Relevance for and attention to investment treaties

	The commitments are relevant for investment treaty policies	The commitments may be relevant for investment treaty policies	The commitments are not relevant for investment treaty policies	Not applicable (my government is not a party to the commitments)	No answer		My government has raised investment treaties in this context	Planning to raise investment treaties in the next year
UNFCCC (1992)	65%	21%	4%	0%	9%		4%	0%
Paris Agreement (2015)	70%	21	0%	0%	9%		4%	0%
G20 Sustainable Finance Roadmap (October 2021)	43%	17%	0%	22%	17%		0%	0%
G7 Leaders' Communiqué (June 2022)	35%	17%	0%	30%	17%		0%	0%
Powering Past Coal Alliance Declaration (2017)	35%	13%	4%	35%	17%		0%	0%
Joint statement: Agreement on Climate Change, Trade and Sustainability (ACCTS) Trade Ministers' meeting (October 2021)	9%	17%	0%	52%	22%		0%	0%
Statement on International Public Support for the Clean Energy Transition (Nov. 2021)	22%	9%	0%	30%	22%		0%	0%
International Platform on Sustainable Finance (2019)	26%	17%	0%	35%	22%		0%	0%
Beyond Oil and Gas Alliance (BOGA) Declaration (2021-2022)	13%	13%	4%	43%	26%		4%	0%
Export Finance for Future (E3F) Statement of Principles (April 2021)	13%	0%	4%	61%	22%		0%	0%
Global Methane Pledge (2021)	65%	13%	4%	0%	17%		0%	0%

Question 107: Please indicate whether you consider that the following commitments are relevant for your government's investment treaties. [four proposed answers]
Question 110: Please indicate (i) whether your government has raised the issue of the climate impact of investment treaties in the groups or institutions set out below; and (ii) whether it plans to do so in the next year. [four proposed answers]

In comments in this area, one commentator notes attention to climate and trade in the ACCTS and that resulting fossil fuel subsidy reform could affect the context for investment. Another commentator notes that its government has not raised the issue of climate impact of investment treaties in the cited multilateral or plurilateral groups because it has so far not identified them as the main key driver for emission-intensive and non-resilient investments. However, it notes that it considers investment treaties as an element of the framework conditions to attract investments which are ideally drafted in such a manner that they are conducive for a low-emission and climate resilient development.

Q112 asked governments about whether they or their relevant agencies have made unilateral climate commitments affecting outward international investment from their jurisdiction, such as commitments to cease or limit public support for coal-related projects.

In response, 45% of respondents affirm that their government or relevant agencies have made unilateral climate commitments affecting outward international investment from their jurisdiction. Several comments point to the European Investment Bank (EIB), which has ended financing fossil fuel energy projects from the end of 2021 (cf new Energy Lending Policy 2019). They note that the EIB is the first international finance institution to end financing for fossil fuel projects and to focus its support on projects that are fully aligned with the Paris Agreement.

Additional comments notes a range of action including limiting export finance and ending all direct financial support abroad for unabated fossil fuels. Action to cease public support for coal- and oil- related projects and gas-related up- and midstream projects through development assistance is also cited. The exclusion of public support for gas-fired power plants except under very restrictive criteria is cited by another jurisdiction.

With regard to additional international treaties of note beyond those cited, comments focused principally on the Convention on Biological Diversity. With regard to multilateral or plurilateral institutions for which the climate impacts of investment treaties would be relevant, commentators cited UNCTAD in particular.

The survey also asked governments to describe any other climate-related measures undertaken or under consideration with regard to their investment treaties. Additional information was not provided in this area.

3. Conclusion

Governments have supplied an abundance of information in response to the first-ever survey on climate policies for investment treaties. Their efforts in doing so are appreciated. The information supplied as well as other reactions to the survey will provide important inputs for Track 1 work.

Governments and others could give consideration to joint work to identify questions that are considered relevant by at least a significant part of the Track 1 community but also broader communities. Questions widely seen as irrelevant or poorly framed can be omitted or adjusted appropriately. Questions that are asked of other financial and economic actors with influence on economic activities would appear to be an important reference point, as they were for the initial survey, but specificities of the investment treaty regime are also relevant.

Such Track 1 discussions may help ensure that in future surveys, governments that consider that some questions are not relevant can refer to reasoned explanations rather than omitting responses or responding N/A without further detail. They may also help additional governments respond to the survey. Beyond impact on the survey, such survey-prompted discussions may assist governments and others in identifying, defining and taking action on their climate responsibilities, including as they may evolve, as well as those of others.