



Survey on Developing Country Investment Treaty Negotiations

IISD REPORT





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Results – February 2019

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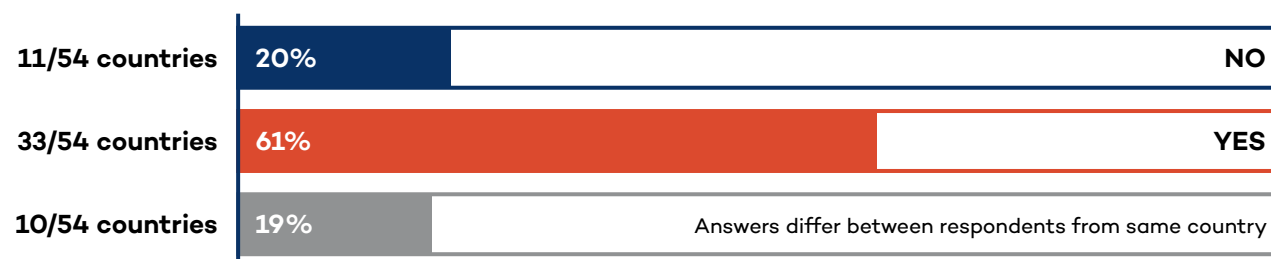
Methodology

This survey was produced at the suggestion of participants at the 11th Annual Forum of Developing Country Investment Negotiators. It was conducted online in English, French and Spanish between March and May 2018.

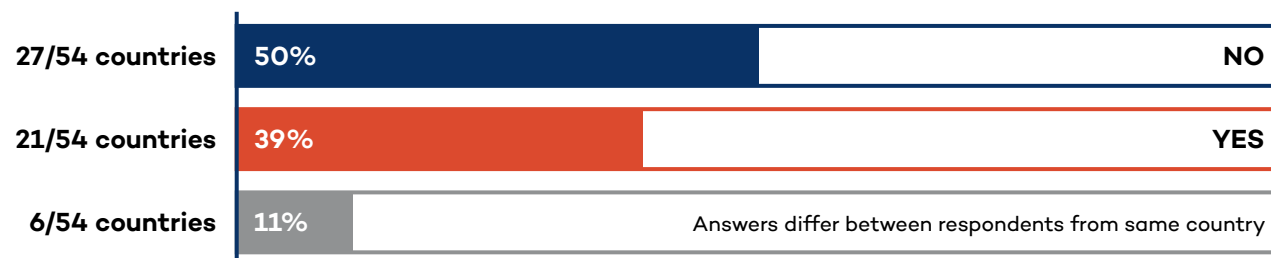
A total of 72 respondents from 54 countries participated. The invitation was shared with members of the Investment Policy Network (IPN), a closed group with the aim of facilitating discussion among officials from developing country governments and regional organizations involved in investment policy development and treaty disputes. Lawyers and industry representatives are not permitted to join.

Respondents were informed that results may be aggregated, published anonymously and shared with forum participants and members of IPN. Please note that some of the responses have been lightly edited or condensed for clarity.

Is your country negotiating new investment treaties?



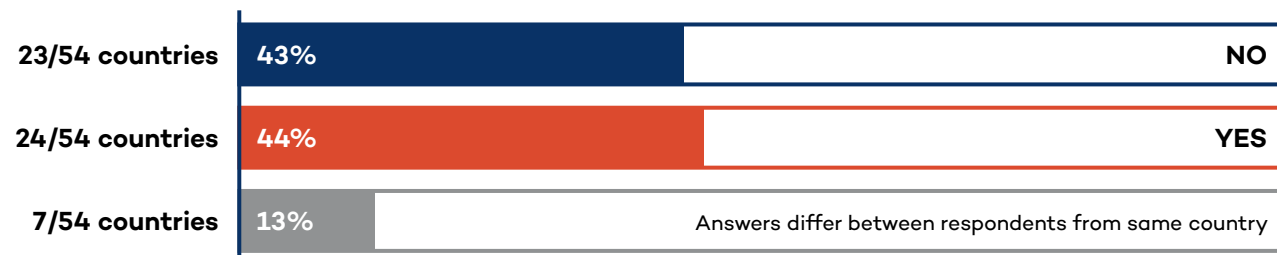
Is your country renegotiating or terminating any existing investment treaties, or planning to do so? Please explain why or why not.



Some respondents described plans to develop a “model investment treaty,” which could serve as a basis for renegotiating other agreements if needed. Others said that their existing bilateral investment treaties (BITs) had too many loopholes that could put their country at risk of litigation or are outdated relative to current needs and newer models. Some respondents raised issues of imbalance within existing treaties, such as those that ultimately put investors in a better legal position than host states or are designed in a way makes the treaties difficult to implement.



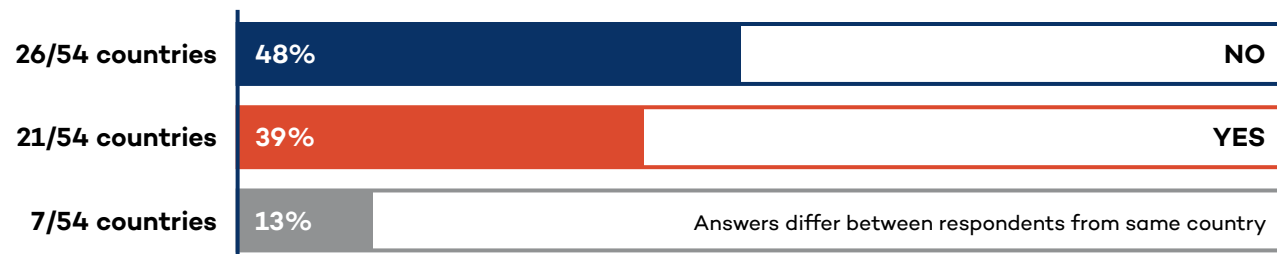
Has your country been subject to a treaty-based investment dispute?



Has the dispute affected your government’s approach to investment treaties? If so, how?

Respondents described a range of outcomes: no change; greater caution by the government in signing treaties; a temporary “freeze” on negotiating and ratifying BITs; and the review, denunciation or termination of some or all existing BITs. One referred to the adoption of constitutional language preventing the country from concluding agreements that would put it under the jurisdiction of extra-regional arbitration tribunals. Some respondents noted that the approach varied depending on the ministry, while others described efforts to craft a “comprehensive treaty template” for future negotiations and a move to incorporate lessons learned into future government actions.

To your knowledge, has your government ever been threatened with arbitration by a foreign investor in relation to a government measure, such as a new regulation or a permit refusal?

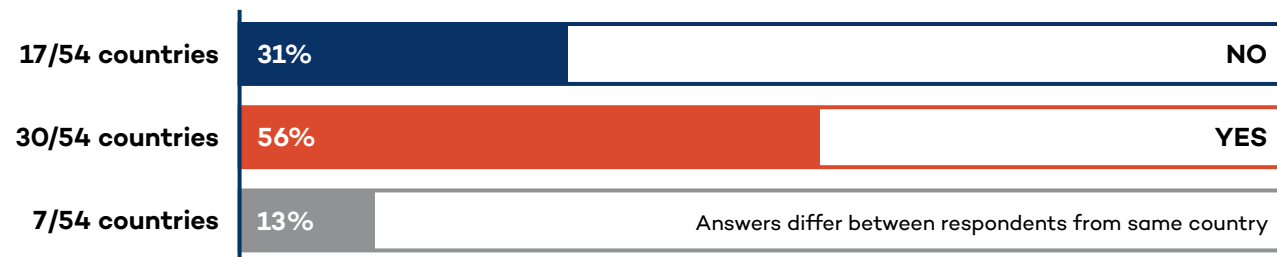


If so, what was the consequence of the threat?

Respondents described various consequences resulting from arbitration threats, such as states unilaterally suspending or terminating contracts, states attempting to amend a treaty to avoid future threats or states “backtracking” on their plans for a particular measure. Some cases were settled out of court, while others moved up to an international arbitral tribunal or a review by the relevant government ministries. One example described an arbitration threat that an investor dropped after it was clear that both sides would bear hefty costs.

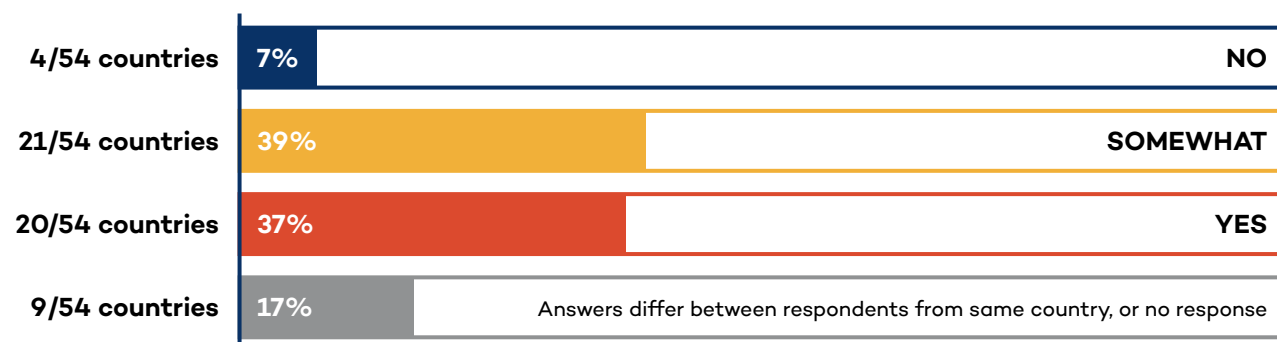


Do you have a formal coordination mechanism in your country on the negotiation of investment treaties or chapters? If yes, please describe.

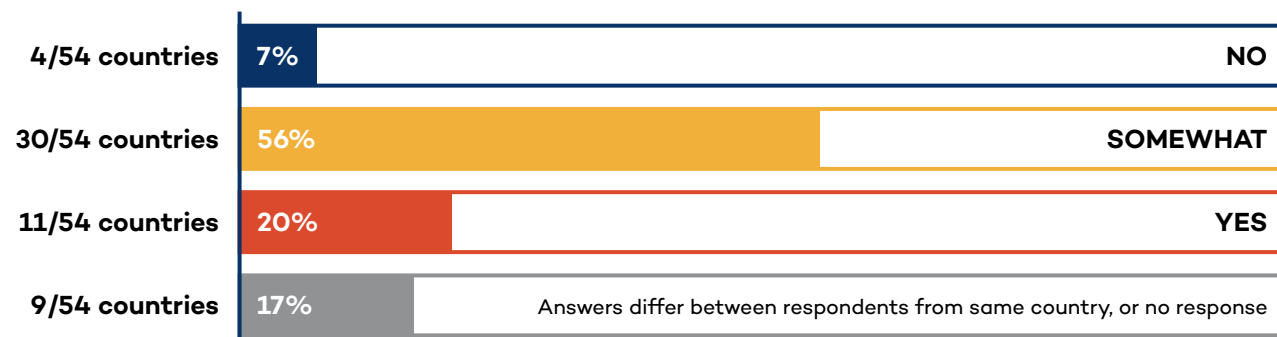


The bulk of the responses referred to at least one ministry, usually the ministry of finance or foreign affairs, taking the lead in the negotiating process. This would often be in coordination with other relevant ministries, such as trade, justice, treasury and industry. Some examples referred to inter-ministry coordination, including technical teams with representatives from different government ministries or agencies, without delineating a clear hierarchy. Other responses referred generally to a consultative process or the use of a committee to coordinate country positions ahead of each negotiating round.

Are political leaders (president, prime minister, ministers, permanent secretaries, etc.) aware of or involved in the process for treaty negotiations?

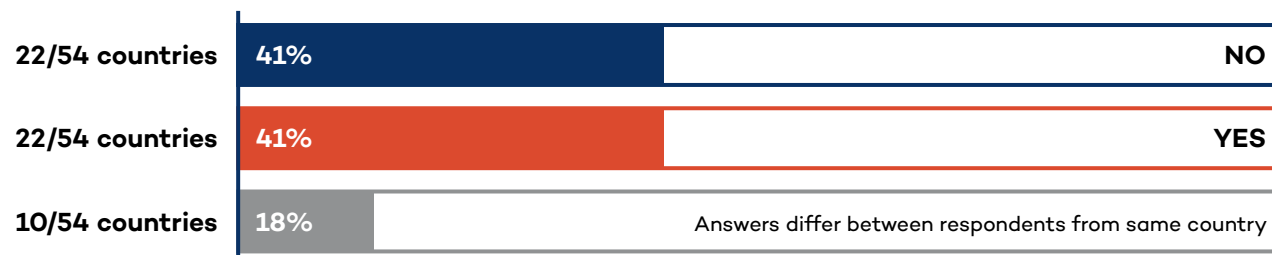


Are these political leaders aware of the potential implications of investment treaties and chapters in free trade agreements (FTAs)?





Does your country have a model investment treaty?



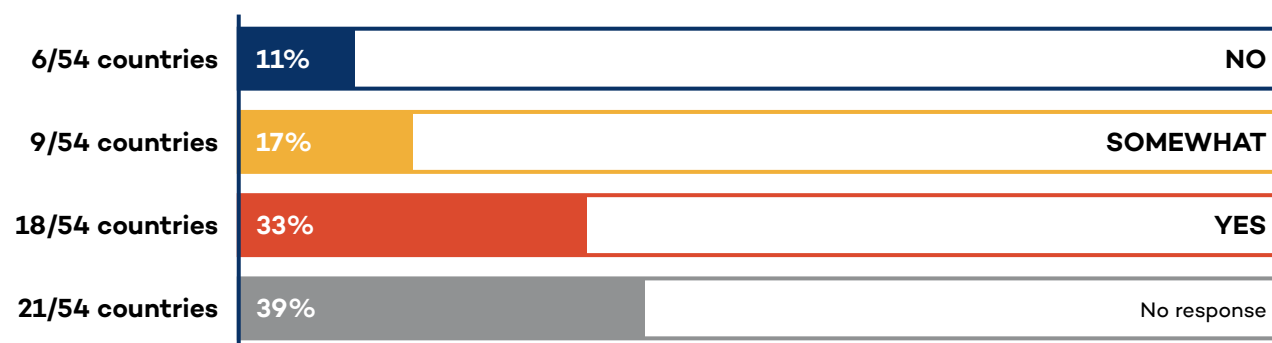
If yes, when was it adopted or last revised?

Respondents gave examples such as an adaptable “first-generation” model; a model that was developed with IISD’s help and recently updated, though is still pending final government approval; the Southern African Development Community (SADC) model; and other models that have been updated, reviewed or are pending implementation.

What was the process that led to the adoption of the model treaty?

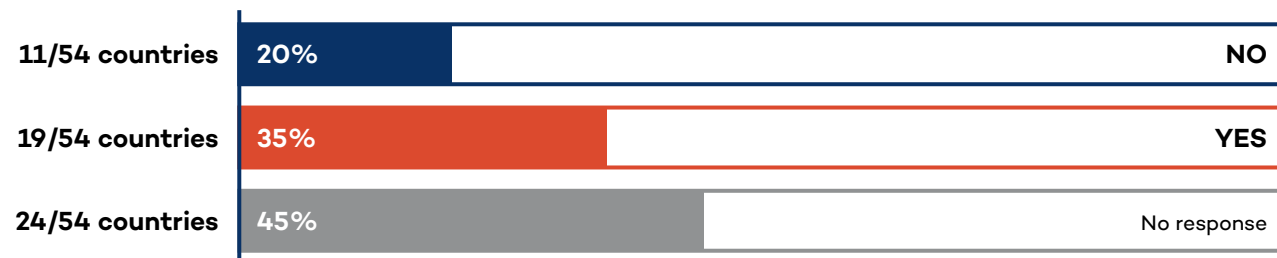
Respondents described a selection of different processes, such as training key stakeholders who would help in reviewing the treaty; bringing in SADC lawyers to endorse the model prior to the government’s adoption; regularly updating a model investment treaty based on changes in investment law; internal consultations between institutions, led by the foreign affairs ministry; and exchanging the proposed model treaty with the other country involved, using the SADC BIT model as a basis and then deriving a common text to serve as a basis for future negotiations.

Do you have flexibility with respect to the application of the model during the negotiation of investment treaties?

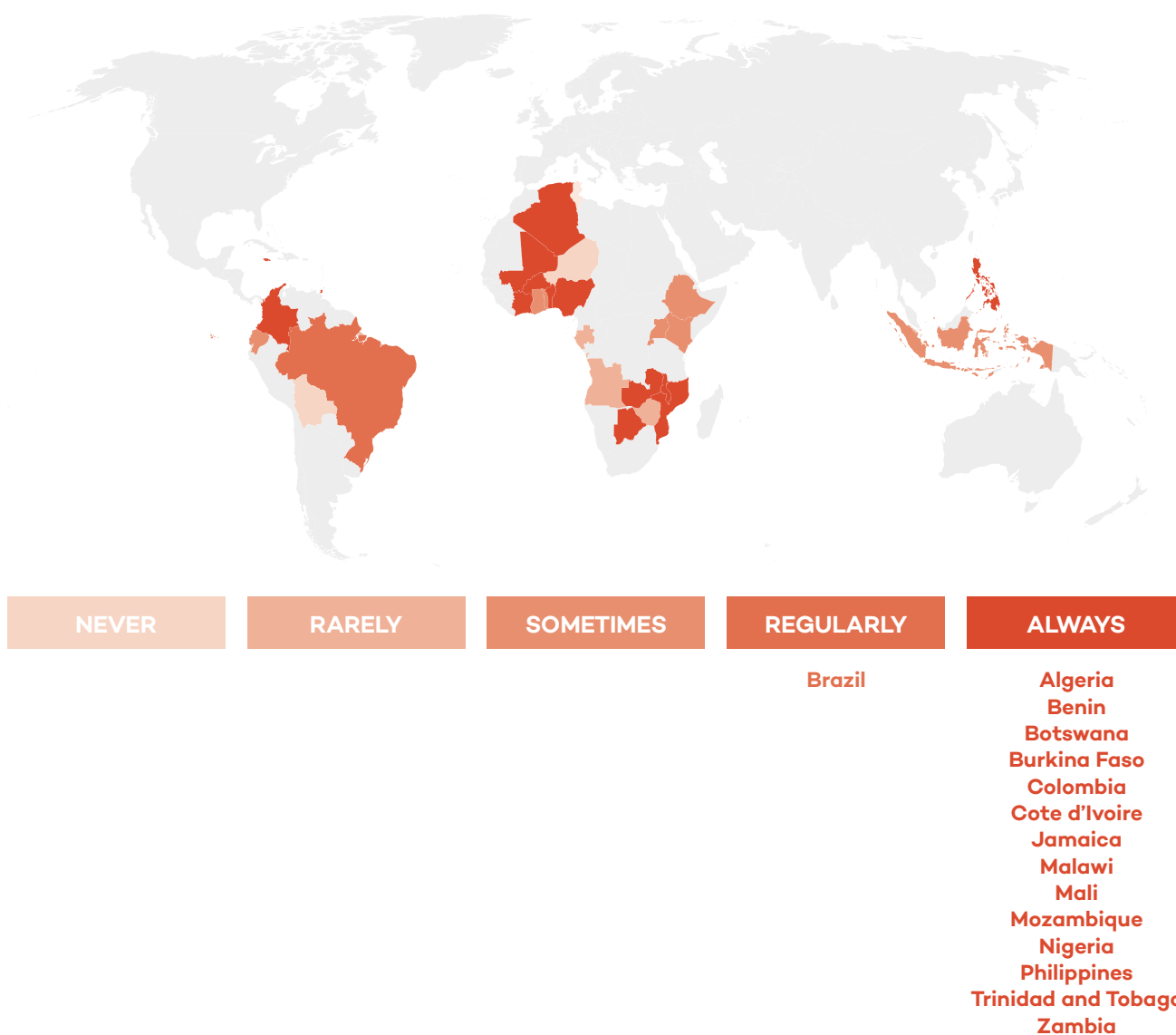




Do you have any predefined red lines in the model that are non-negotiable?

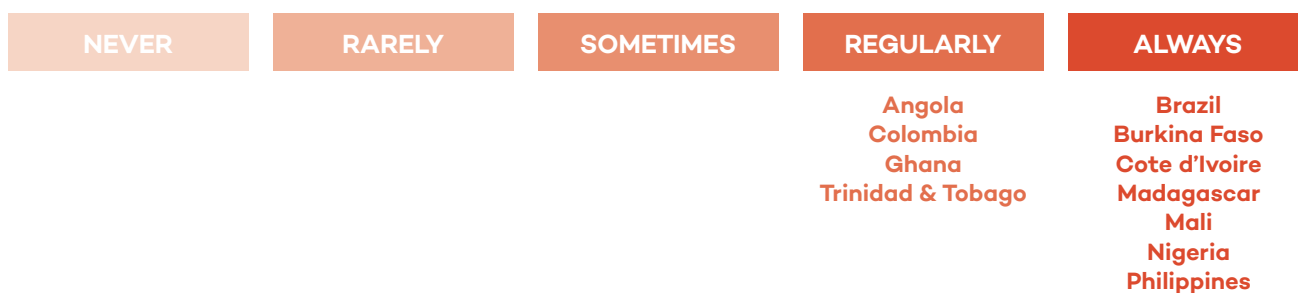
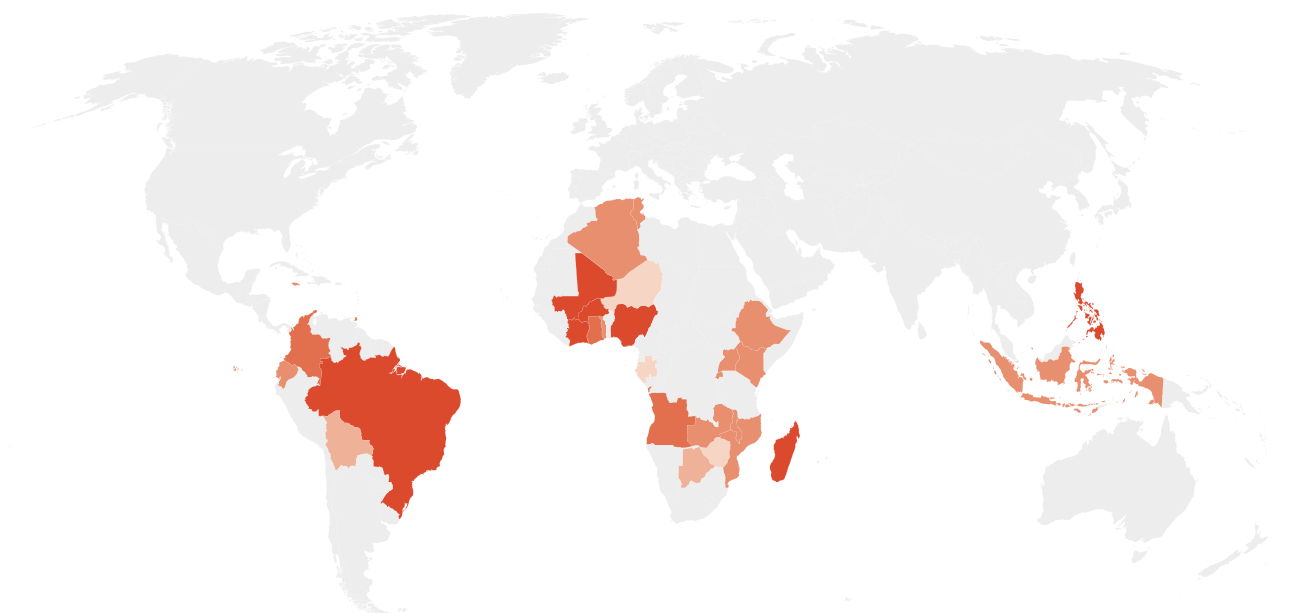


How often is your model treaty being used in the treaty negotiations?

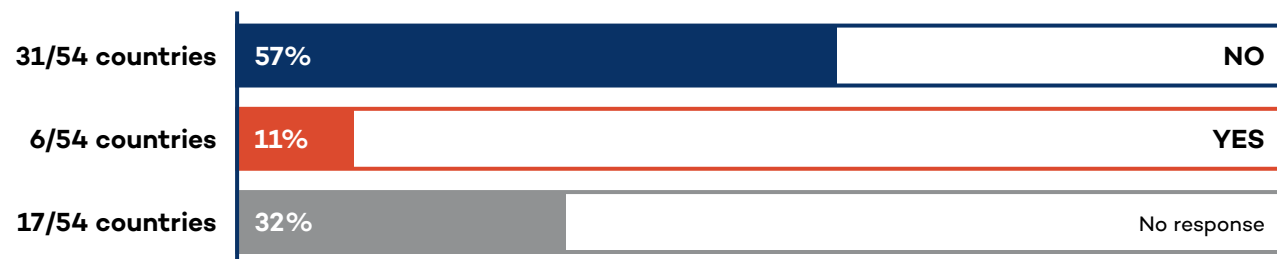




How successful have you been in integrating the most important elements of your model in concluded treaties or chapters?



In your country, is/was your Parliament involved in any way in the elaboration of your model investment treaty? If so, how?



Several respondents described the Parliament’s role as one involving adoption or ratification of the model treaty. Some referred to Parliamentary feedback on past BITs, which helped inform negotiators working on new model treaties. One respondent noted that, while their Parliament does play a role in ratification, the legislative body lacks the confidence of the public and does not necessarily act in the national interest, nor in the interest of “genuine investors.”



In your country, do investment treaties go through a ratification process? If yes, please describe the ratification process.¹

Country	Ratification Process
Algeria	After the Minister of Finance, in consultation with their colleague from Foreign Affairs, agrees on the advisability of starting negotiations, the same minister chairs an inter-agency working group that runs the negotiations. Once these negotiations conclude, the text is then initialled and circulated to various ministries for review and possible changes. It is then submitted for approval to the Government Council, chaired by the Prime Minister. The project may then be signed by an authorized government representative. Finally, the President of the Republic signs a decree ratifying the agreement.
Angola	After signature, the government must send the text to Parliament for ratification.
Argentina	After being negotiated by the Executive Branch, international treaties are approved by the National Congress and finally ratified.
Bangladesh	The treaty, signed by both parties, is placed before the cabinet for ratification. Upon approval, the Ministry of Industries informs the Ministry of Foreign Affairs and asks them to issue the instrument of ratification. The Ministry of Foreign Affairs issues that instrument, signed by the Foreign Minister, and transmits it to the other treaty party.
Benin	The treaty is submitted to parliamentarians, who then vote on whether to authorize its ratification. The treaty is then ratified by the President of the Republic, though the Constitutional Court must first issue its opinion.
Bolivia	The treaty is ratified by the Legislative Assembly.
Brazil	The President must forward the agreement to the Congress for approval. The President must then publish a Decree that internalizes the agreement's provisions.
Burkina Faso	The government submits to the National Assembly a bill for ratifying a signed agreement. Following parliamentary sessions, the law is adopted by a majority of the deputies voting. The President of the country then issues a decree promulgating the ratification law.
Burundi	The treaty is ratified by presidential decree.
Cambodia	The ministry negotiating the treaty submits a request to the Council of Ministers, asking for them to review and approve the final version. The adopted treaty is then forwarded to the Parliament for ratification (both by National Assembly and Senate) before it is promulgated (declared to be in use) by the King, who serves as the Head of State.
Cameroon	The treaty is prepared by the government and sent to the Parliament (National Assembly and Senate) for examination before ratification by the Head of State.
Chad	Once signed, investment treaties are ratified by the National Assembly.

¹ Three countries (Botswana, Malawi and Togo) responded “no.”



Country	Ratification Process
Chile	The agreement is presented as an international treaty for approval by both houses of Congress, without any changes to the text.
Colombia	Ratification is the same for all treaties. These must be incorporated into a domestic law by Congress, which the Constitutional Court reviews automatically.
Côte d'Ivoire	After the parties sign the treaty, the technical ministry concerned sends an explanatory memorandum to the Ministry of Foreign Affairs for National Assembly ratification.
Djibouti	The treaty is sent to the Council of Ministers and Parliament for adoption.
Dominica	The line ministry ratifies, then the Cabinet of Ministers does the final ratification.
Dominican Republic	All international treaties signed by the Dominican Republic must pass the "constitutionality test" according to the legal system in force at the time. The signed document is reviewed by the Dominican Constitutional Court, which initiates a preventive control to see whether the agreement is in accordance with the constitution and laws in force. After this control, the treaty passes to the Legislative Branch for ratification. Finally, upon approval by the National Congress, it passes to the Executive Branch for promulgation and entry into force.
Ecuador	The Congress must adopt the treaty after the Executive's report.
Ethiopia	<p>Parliament enacted a new law in July 2017 providing for International Agreements Making and Ratification Procedure Proclamation No. 1024/2017. Under this procedure, any government organ that begins negotiating an international agreement must consult the Ministry of Foreign Affairs (MoFA) and submit the draft agreement to the Council of Ministers/Cabinet for approval with an explanatory note on the treaty's benefits and obligations. The MoFA will send the approved draft to the other contracting party. Once the negotiation is done, the MoFA (after making sure that the treaty will promote the country's interest) makes the final draft ready for signature. The Prime Minister and the Minister of Foreign Affairs have the power to negotiate and sign treaties, though this power may also be delegated to other government department officials. The government organ that negotiated the treaty submits a copy of the signed treaty together with an explanatory note in Amharic (the official language), including comments from relevant stakeholders and a draft ratification proclamation, to the Council of Ministers. The treaty is then sent for ratification to the House of Representatives (Parliament) together with explanatory notes, and a ratification proclamation is issued after approval.</p> <p><i>Note: there is no guarantee that this proclamation will be implemented in practice.</i></p>
Gambia	After the treaty has been agreed by both parties, it is submitted to Parliament for approval or rejection. Once accepted by Parliament, the instruments of ratification are exchanged and it enters into force as per the start date.
Ghana	Treaties involve Cabinet approval, Attorney-General review and then Parliament ratification.

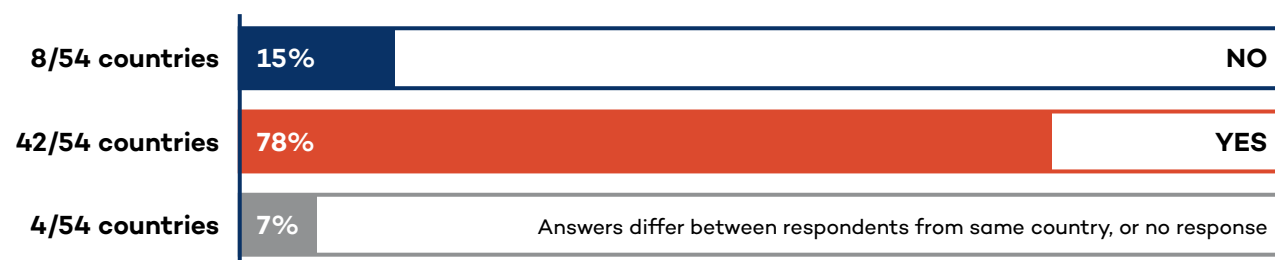


Country	Ratification Process
Indonesia	BITs that only include an element of protection would have to be ratified by a Presidential Decree, while BITs or FTAs with an investment chapter that also includes an element of market access (in addition to protection) would have to be ratified by a law issued by the Parliament.
Jamaica	The treaty is tabled in Parliament for ratification.
Kenya	Ratification involves an elaborate process outlined in the Treaties Making Act. The ultimate actions include approval by Cabinet, then gazette.
Laos	The investment promotion agency (IPA) submits a treaty report to government Cabinet. The treaty is then sent to the National Assembly for ratification.
Liberia	The treaty must become law and must be ratified by both Houses of Parliament.
Madagascar	Ratification is put on the agenda of the National Assembly
Mali	Ratification takes place at the level of the National Assembly. There are parliamentary groups in the Chamber dealing with different issues.
Montserrat	The treaty is presented to Cabinet in the format of a "Cabinet paper." This text sets out the effective parts of the treaty and highlights the legal and financial implications.
Mozambique	The agreed text must be translated into Portuguese and then submitted to the Minister of Finance, who submits to the Minister of Foreign Affairs. The text is then transmitted to the Cabinet (Council of Ministers) for ratification, after which it must be officially published.
Myanmar	The ministry sends the agreement to the Parliament via the Cabinet.
Namibia	Ratification involves parliamentary discussion and approval of the signed agreement, with the subsequent drafting of the instrument of ratification (done by the Foreign Ministry) and the exchange/notification of instrument of ratification to the treaty partner before entry into force.
Niger	Draft treaties are sent to the relevant ministries for comment before ratification.
Nigeria	The treaty is ratified by the Federal Executive Council, which is the Council of Ministers, after necessary scrubbing by the Federal Ministry of Justice. Depending on the text of the Treaty, it may require domestication by the Parliament thereafter.
Peru	In the case of treaties not related to human rights, national defence, sovereignty, state control or financial obligations, the creation or modification of taxes or the adoption or modification of regulations with the status of laws, the procedure involves direct internal ratification by the President of the Republic. Congress conducts a treaty monitoring procedure to verify that the procedure is carried out in line with the Constitution.
Philippines	The process involves executive ratification, where government agencies concur, and the President then ratifies the treaty for it to enter into force.



Country	Ratification Process
Rwanda	Ratification takes place through Parliament.
Sao Tome and Principe	After approval by the Parliament, the President of the Republic ratifies it.
Sudan	The draft agreement shall be submitted by Sudan or the other party. There is then a technical study from both sides, after which the proposal goes to the Ministry of Justice. The draft agreement shall be sent after the other party's approval. The agreement is then signed by the other party, then sent to the Cabinet and subsequently to the National Council. In the absence of the latter, the President of the Republic will sign.
Trinidad and Tobago	The treaty is negotiated by the Cabinet-approved committee. The provisional agreement is vetted by the Ministry of the Attorney General. It is considered and approved by Cabinet prior to signature of the designated Authority.
Tunisia	The treaty is ratified by Parliament and then by the President.
Uganda	After Cabinet approval, the Ministry of Foreign Affairs presents the treaty to Parliament for ratification.
Uruguay	Once the agreements have been signed, they require the approval of the Legislative Branch for their ratification.
Venezuela	Once signed, treaties are approved by the National Assembly (legislative body) and then must be endorsed by the President of the Republic.
Zambia	Treaty ratification involves the submission of a Cabinet Memorandum to the Cabinet, for their approval.
Zimbabwe	The treaty is adopted by the Parliament, after which the President must give their approval.

In your country, do FTAs (with investment chapters) go through a ratification process?



If your country does not go through a ratification process, please describe the process applicable from treaty signature to entry into force. If yes, please describe the ratification process.

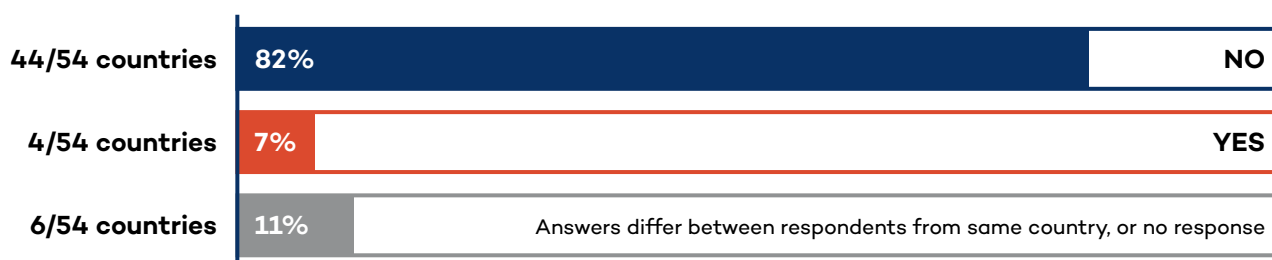
Respondents outlined various different processes. For example, the FTA could face review by a Council of Ministers, followed by parliamentary approval and head of state signature, in consultation with the relevant judicial branches; approval in the national congress; approval by Council of Ministers; or other variations of this formulation. Some of these variations also involved “constitutionality tests” to make sure that the FTAs are in



line with the national constitution and other laws in effect. Some respondents noted that these FTAs undergo virtually the same process as investment agreements, with a few minor variations, such as whether a different minister serves as chief negotiator.

A few respondents described consultations between ministries or within a country’s Cabinet, which may then involve parliamentary approval. One respondent noted that the recipient of the final ratification instrument could either be the FTA counterpart or the secretariat of a wider regional group, depending on who is involved in the FTA—giving the example of the Association of Southeast Asian Nations (ASEAN).

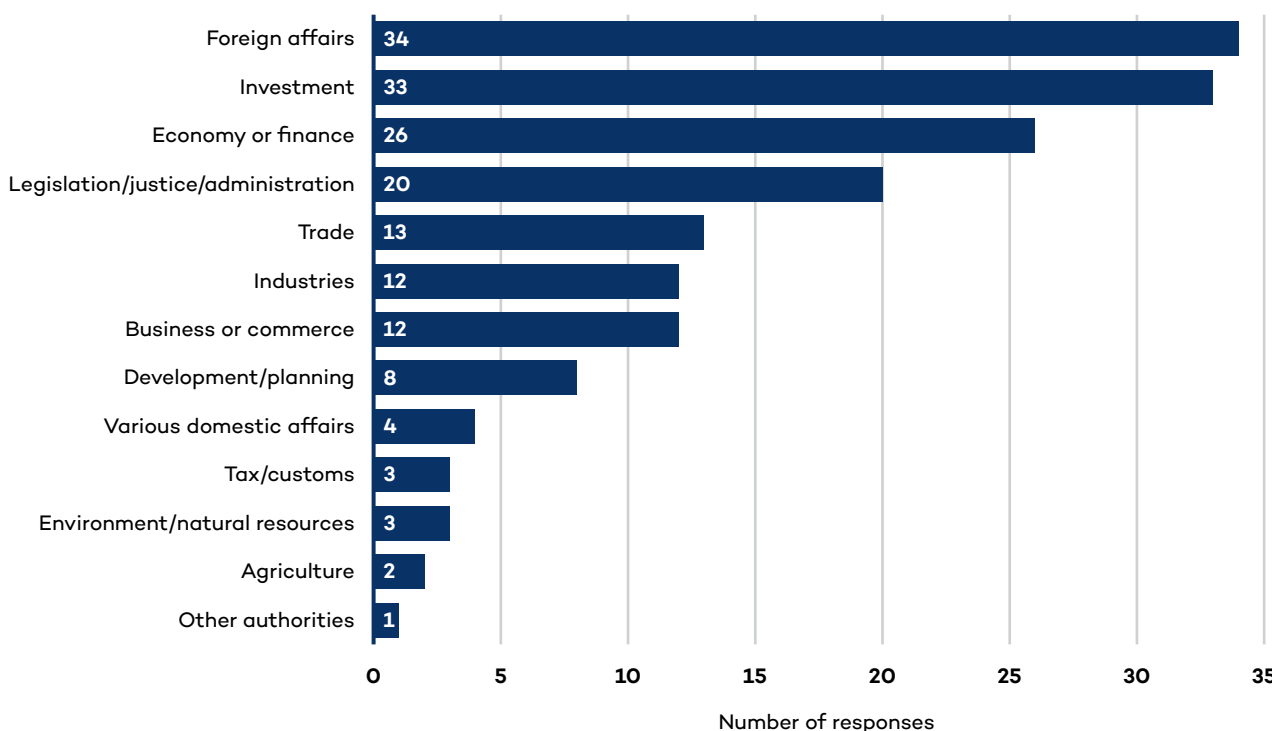
Does your Parliament provide guidance for ongoing or future investment negotiations? If so, how?



Examples of parliamentary guidance included internal consultations; legislation on the sector receiving the investment; political statements, meetings and hearings; dissemination of information to the relevant bodies; engagement with treaty negotiators; and steps to ensure treaty conformity with government-approved models.

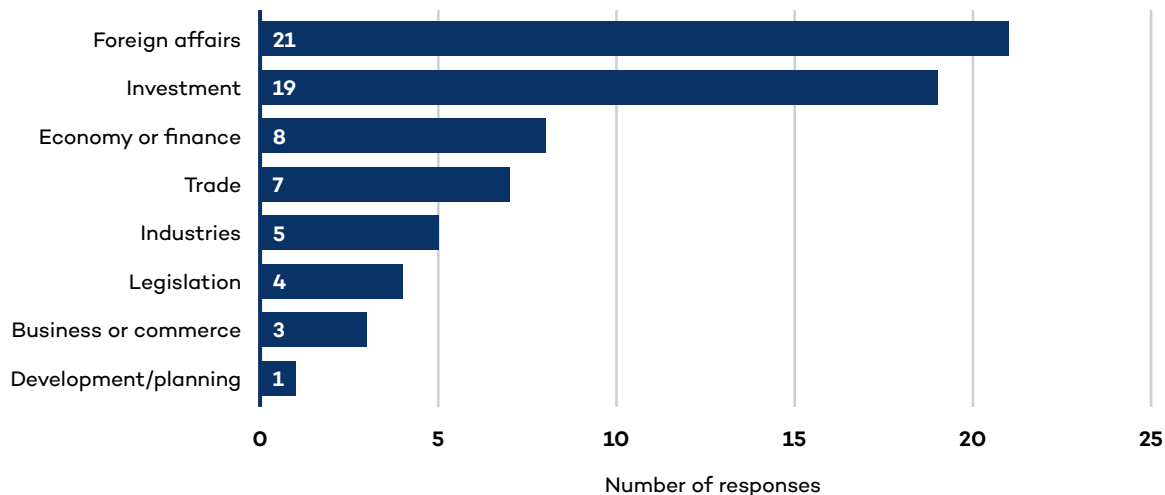
In your country, which agencies are involved in the negotiation of investment treaties?

Given that various agencies with similar mandates but different names are involved in negotiating investment treaties and chapters, our analysis groups them into 14 categories according to their functions.





Which agency has the lead in these investment treaty negotiations?



What are the roles of each agency in the negotiations of investment treaties?

Agency	Roles
Business or commerce	<ul style="list-style-type: none"> Provides data and information. Gives input for the negotiation. Leads the negotiation. Reviews the compatibility of the investment promotion and protection provisions of the treaty with trade promotion. Plays a preponderant role over the investments that they intend to attract through the treaty.
Development or planning	<ul style="list-style-type: none"> Offers inputs. Undertakes taxation-related issues.
Economy or finance	<ul style="list-style-type: none"> Provides specific inputs in matters such as public credit and regulation regarding transfer of funds. Central bank: makes the transfer clauses; observes, checks and verifies the transfer of investment, repatriation, balance of payments, interest rates. Forms part of the inter-ministerial team. Defines the negotiating policy and participates in the rounds of negotiations.
Environment/natural resources	<ul style="list-style-type: none"> Advises the team finalizing the treaty on public health, environment and climate change considerations, particularly for the investment in infrastructure development.



Agency	Roles
Foreign affairs	<ul style="list-style-type: none"> • Undertakes diplomatic issues. • Makes policies. • Serves as the focal point for diplomatic relations. • Initiates/leads/coordinates/gives inputs for the negotiation. • Gives comments to the draft agreements. • Negotiates and signs the treaties. • Finalizes the treaty, with due consideration to the geopolitical, economic and diplomatic dynamics.
Industries	<ul style="list-style-type: none"> • Involved in the investment. • Takes part in the negotiation. • Makes observation of the negotiation. • A specific division contributes to the finalization process of the treaty by suggesting texts based on the practical experience with the investors. • Undertakes overall responsibility of performing a BIT.
Investment	<ul style="list-style-type: none"> • Undertakes overarching responsibilities on investment-related issues, including but not limited to market access policies and investment code issues. • Prepares the investment schedule/chapter. • Leads the negotiation. • Analyzes the benefits and implications of the investment treaty. • Analyzes whether the investment treaty is aligned with the sectoral laws and regulations. • Gives technical opinion in the interest of the state. • Signs the treaties after they have been approved. • Negotiates and coordinates with line ministries.
Legislation/justice/administration	<ul style="list-style-type: none"> • Attorney General's roles: reviews the legal conformity with domestic laws and regulations and contributes own experience derived from the knowledge of the decisions of the arbitration processes; gives advice and makes decisions. • Solicitor General Department under the Attorney General is responsible for vetting and harmonization with legal requirements. • Gives inputs for the negotiation. • Observes, checks and verifies the definitions of investment and investors as per the regulations of the host state. Looks into the facilities given to the investors to promote investment. • Vets the treaty on the basis of prevailing rules and regulations of the country and the legal procedures.
Trade	<ul style="list-style-type: none"> • Negotiates the treaties.
Tax/customs	<ul style="list-style-type: none"> • Clarifies the provisions of the treaties from the perspective of the tax regime of the country. • Makes sure tax issues are properly addressed.



Overarching observation regarding investment treaty negotiations

- The Ministry of Foreign Affairs (34) and investment authorities (33) are the most frequent agencies that are involved in the negotiation of investment treaties, and normally take the lead.
- Finance/economic authorities (including the central bank, ministries of economy and finance, etc.) are also frequent participants in the negotiation, primarily involved in issues such as transfer of funds, interest rates, etc.
- At least 17 countries set up specific investment promotion agencies/boards to facilitate the investment process, for example, IPA, APIEX, etc.
- Some respondents indicated that each agency represents its sector interests, and the roles depend on the issues in question or the field it regulates, so no specific role descriptions are provided by them.

What are the roles of each agency in the negotiations of investment chapters in treaties?

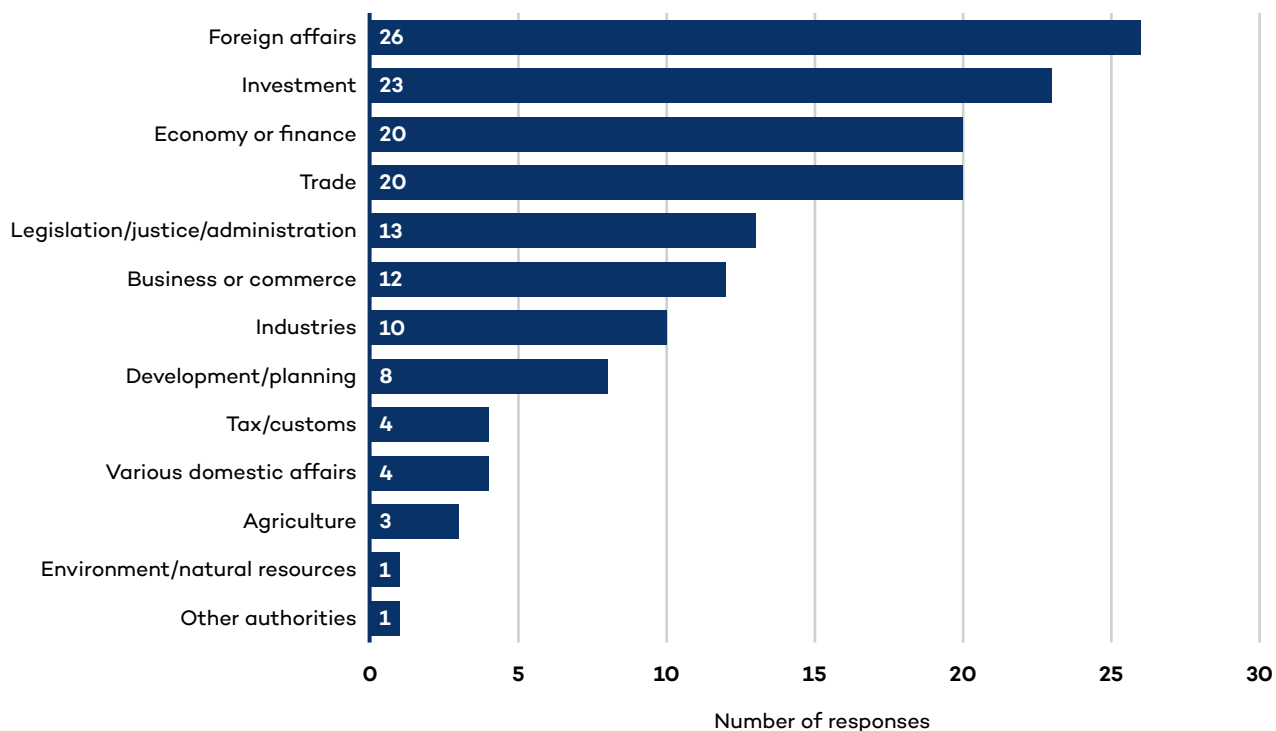
Agency	Roles
Business or commerce	<ul style="list-style-type: none"> • Provides data and information. • Gives input for the negotiation. • Leads the negotiation. • Reviews the compatibility of the investment promotion and protection provisions of the treaty with trade promotion. • Plays a preponderant role over the investments that they intend to attract through the treaty.
Development or planning	<ul style="list-style-type: none"> • Offers inputs. • Undertakes taxation-related issues.
Economy or finance	<ul style="list-style-type: none"> • Provides specific inputs in matters such as public credit and regulation regarding transfer of funds. • Central bank: makes the transfer clauses; observes, checks and verifies the transfer of investments, repatriation, balance of payments, interest rates. • Forms part of the inter-ministerial team. • Defines the negotiating policy and participates in the negotiating rounds. • Initiates the negotiation. • Reviews and decides on investment chapters in accordance with the interests of the country. • Provides economic forecasts. • Deals with financial and fiscal issues.
Environment/natural resources	<ul style="list-style-type: none"> • Advises the team finalizing the treaty on public health, environment and climate change considerations, particularly for the investment in infrastructure development.



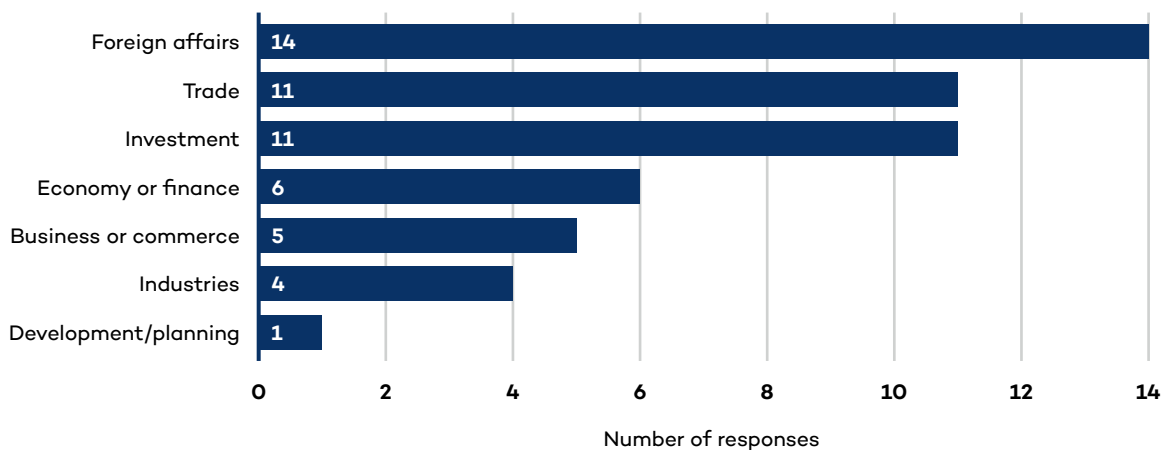
Agency	Roles
Foreign affairs	<ul style="list-style-type: none"> • Undertakes diplomatic issues. • Makes policies. • Serves as the focal point for diplomatic relations. • Initiates/leads/coordinates/gives inputs for the negotiation. • Gives comments to the draft agreements. • Negotiates and signs the treaties. • Finalizes the treaty with due consideration of the geopolitical, economic and diplomatic dynamics.
Industries	<ul style="list-style-type: none"> • Involved in the investment. • Takes part in the negotiation. • Makes observation of the negotiation. • A specific division contributes to finalizing the treaty by suggesting texts based on the practical experience with the investors. • Undertakes overall responsibility of performing a BIT.
Investment	<ul style="list-style-type: none"> • Undertakes overarching responsibilities on investment-related issues, including but not limited to market access policies, investment code issues. • Prepares the investment schedule/chapter. • Leads the negotiation. • Analyzes the benefits and implications of the investment treaty. • Analyzes whether the investment treaty is aligned with the sectoral laws and regulations. • Gives technical opinion in the interest of the state. • Signs the treaties after they have been approved. • Negotiates and coordinates with line ministries.
Legislation/justice/administration	<ul style="list-style-type: none"> • Attorney General's roles: reviews the legal conformity with domestic laws and regulations and contributes own experience derived from the knowledge of the decisions of the arbitration processes; gives advice and makes decisions. • Solicitor General Department under the Attorney General is responsible for vetting and harmonization with legal requirements. • Gives inputs for the negotiation. • Observes, checks and verifies the definitions of investment and investors as per the regulations of the host state. Looks into the facilities given to the investors to promote investment. • Vets the treaty on the basis of prevailing rules and regulations of the country and the legal procedures.
Trade	<ul style="list-style-type: none"> • Negotiates the treaties. • Leads investment chapter negotiations.
Tax/customs	<ul style="list-style-type: none"> • Clarifies the provisions of the treaties from the perspective of the tax regime of the country. • Makes sure tax issues are properly addressed.



In your country, if you negotiate investment chapters in broader trade agreements, which agencies are involved?



Which agency has the lead in the negotiations of these investment chapters?





Overarching observations regarding the negotiations of the investment chapters:

- The Ministry of Foreign Affairs (26), investment authorities (23), trade authorities (2) as well as the authorities of economy/finance (2) are the most frequent participants in the negotiation of investment chapters, and normally take the lead. Compared with the investment treaty negotiations, ministries of trade are more involved in negotiations of investment chapters.
- Many respondents indicated that negotiations of investment chapters in trade agreements are carried out by the same agencies that are involved in investment treaty negotiations.
- Respondents from nine countries indicated that such questions are not applicable, either because there is no such trade agreement, or because they are not sure about the negotiation arrangement.
- Some respondents indicated that each agency represents the interests of a sector and the roles depend on the issues in question or the field it regulates, so no specific role descriptions are provided.
- The roles of each agency here are similar to the investment treaty part, except for the agencies of the economy/finance and trade.

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