

# LAW AND CLIMATE CHANGE: BALANCING INVESTORS' LEGITIMATE EXPECTATIONS AND STATES' CLIMATE COMMITMENTS

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## Challenges of Aligning Investment Protection Treaties with Climate Change Goals

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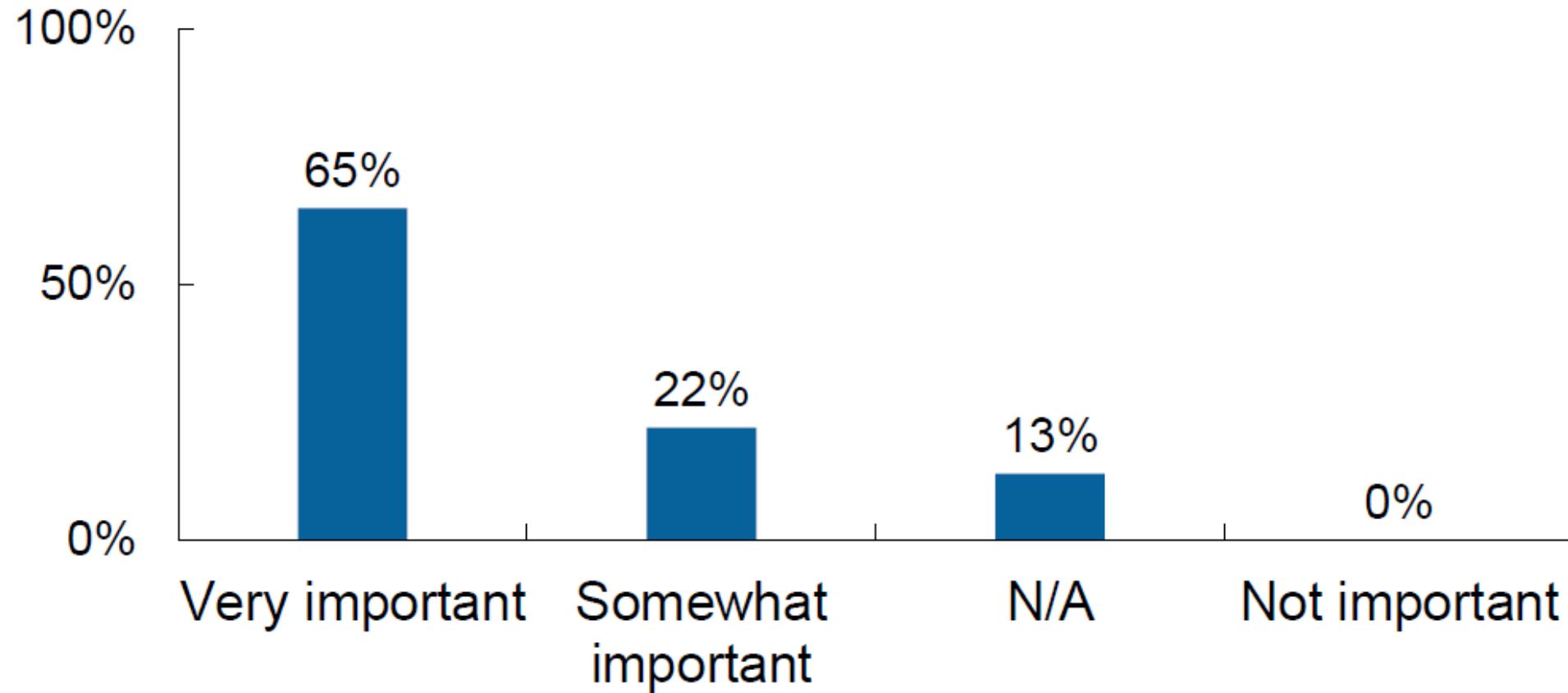
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*The Paris Agreement goal of holding temperature rise to 1.5°C requires annual renewable investments to triple by 2030 and no new investments in coal, gas, or oil.*

- International Energy Agency, 2023

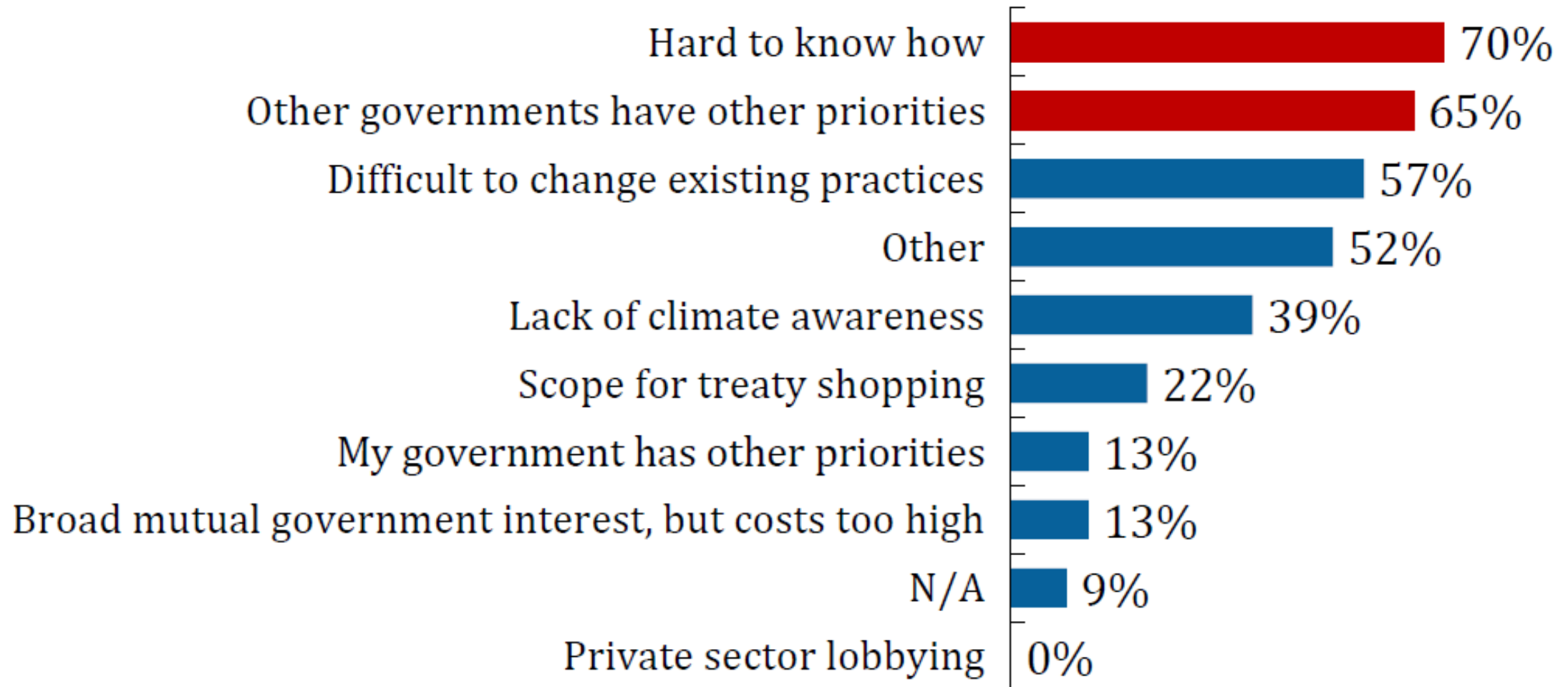
**How can investment protection treaties be aligned to achieve these goals?**

# Is it important to align investment treaties with the Paris Agreement?



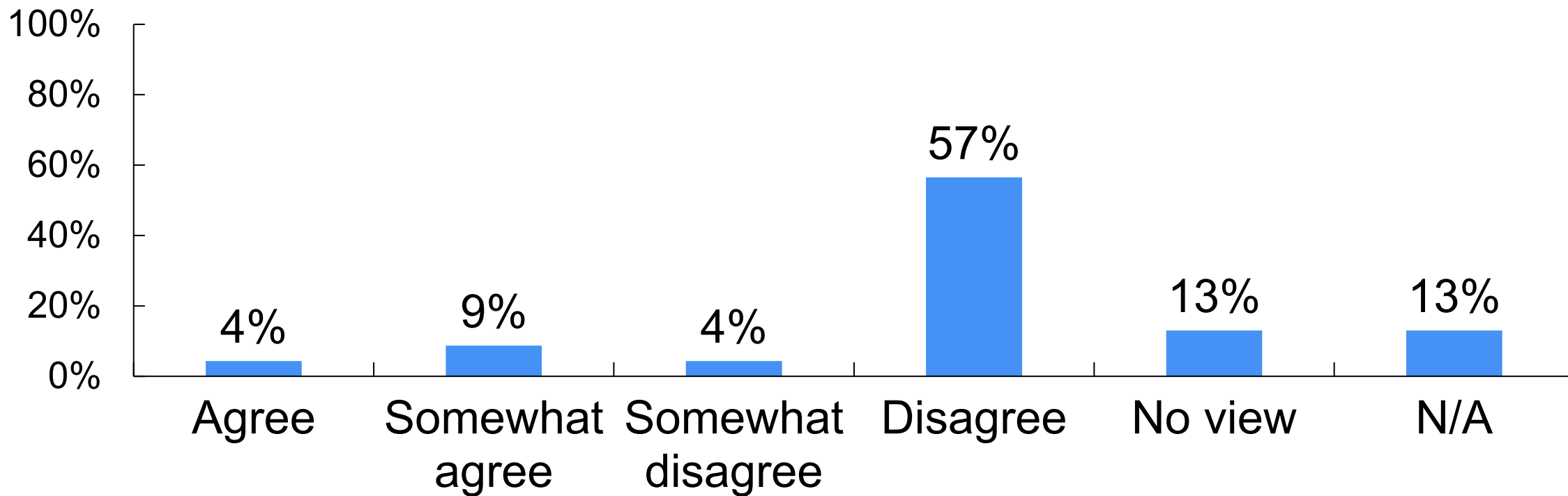
Source: OECD, "Future of Investment Treaties Track 1 - Investment Treaties and Climate Change, Note on Survey of climate policies for investment treaties" (October 2023).

# Principal obstacles to aligning IIAs with Paris Agreement?



Source: OECD, “Future of Investment Treaties Track 1 - Investment Treaties and Climate Change, Note on Survey of climate policies for investment treaties” (October 2023).

# Do ISDS interpretations provide clear parameters on policy space for climate measures?



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

Source: OECD, “Future of Investment Treaties Track 1 - Investment Treaties and Climate Change, Note on Survey of climate policies for investment treaties” (October 2023).

# “Right to Regulate” Provisions

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“The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection, privacy and data protection, and the promotion and protection of cultural diversity.”

- European Union- Singapore IPA (2018), Art. 2.2(1)

# “Shall Not Prevent” Provisions

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## INVESTMENT AND ENVIRONMENTAL, HEALTH AND OTHER REGULATORY OBJECTIVES

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

- CPTPP (2018), Art. 9.16

# Clarification of Particular Protections

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## Indirect Expropriation

“Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.”

- Canada-Peru FTA, Annex 812.1(c)



# General Exceptions Clauses: Canada-Peru FTA, Art. 2201

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3. *For the purposes of Chapter Eight (Investment)*, subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

- a) to protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life or health;
- b) to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or
- c) for the conservation of living or non-living exhaustible natural resources.

# *Bear Creek Mining v Peru (2017)*

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Bear Creek lost its rights to develop a mine due to an executive decree made after unrest and violent protests by the local community.

Treaty contained an annex on expropriation and general exceptions clause.

Held: Peru indirectly expropriated the company's mining rights

- Customary 'police powers' doctrine did not apply to determination of indirect expropriation because of the general exceptions clause.
- General exceptions clause did not provide a defense to compensation:
  - Decree was not linked to a purpose protected by the general exceptions;
  - General exceptions could not excuse procedural failings (e.g. lack of due process);
  - Even if the general exception applied, it would not have removed the obligation to pay compensation for an expropriation.

# *Eco Oro Minerals Corp. v Colombia (2021)*

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Eco Oro challenged a series of measures taken by Colombia to protect the Santurbán Páramo ecosystem.

- Even if a measure fell within the scope of the general exceptions clause, that this would not remove obligation to pay compensation for the FET breach.
  - Based upon wording in the exception that “Nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary...”

Note that both parties to the treaty made submissions to the tribunal agreeing that if the general exceptions clause applied there should be no obligation to pay compensation.

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## Other Options?

# Reframing the Right to Regulate

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## Right to Regulate

1. In accordance with customary international law and other general principles of international law, each State Party has the right to regulate, including to take measures to ensure that investment in its territory is consistent with the goals and principles of sustainable development, and with other national environmental, health, climate action, social and economic policy objectives and essential security interests.
2. For greater certainty, measures taken by a State Party to comply with its international obligations under other relevant treaties shall not constitute a breach of this Protocol.
3. For avoidance of doubt, the exercise of the right to regulate under Paragraphs 1 and 2 cannot give rise to any claim by an investor for compensation.
  - African Continental Free Trade Agreement Investment Protocol, Art. 24.

# Exceptions for Particular Kinds of Government Measures

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“A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a **tobacco control measure**<sup>12</sup> of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. . . .”

- CPTPP (2018), Art. 29.5 (Tobacco Control Measures)

## Financial Services Investments

E.g., Fair and Equitable Treatment Exception

- Japan-Mexico EPA (2004), Art. 111
- Singapore-US FTA, Ch. 10
- North American Free Trade Agreement (1994), Ch. 14

# Reforming Procedures for Climate Change Related Disputes

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## Example from Taxation

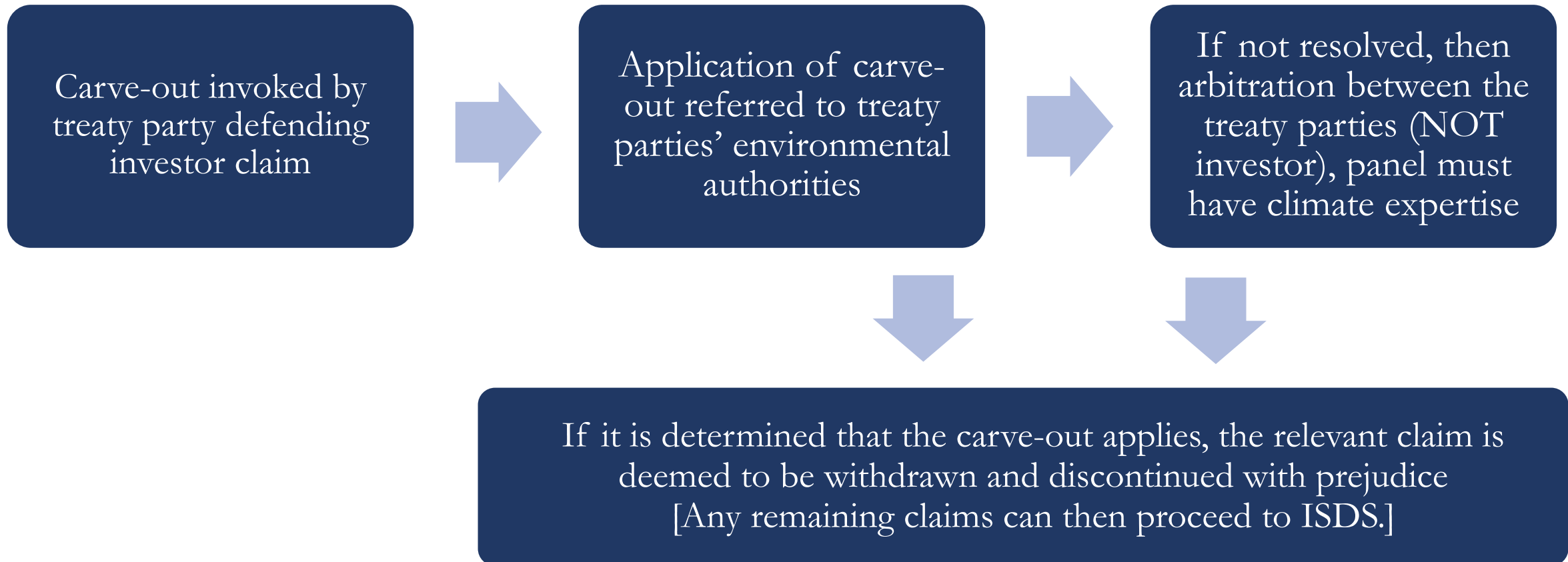
2. Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if:

- a) the claimant has first referred to the competent tax authorities of both Parties in writing the issue of whether that taxation measure involves an expropriation; and
- b) within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation.

- US Model BIT (2012), Art. 21.



# Procedural mechanism



*Source:* Elizabeth Sheargold, based on ideas developed in Joshua Paine and Elizabeth Sheargold, 'A Climate Change Carve-Out for Investment Treaties' (2023) [26\(2\) Journal of International Economic Law 285–304](#)