An Empirical Study on the Effectiveness of Non-Disputing State Party Submissions in Investor-State Disputes

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SUPERVISORS

Nicolas Jansen Calamita	**Ayelet Berman**	**Charalampos Giannakopoulos**	**Alvin Yap**
Research Associate Professor	*Adjunct Assistant Professor*	*Postdoctoral Fellow*	*Of Counsel*
Centre for International Law, National University of Singapore	Centre for International Law, National University of Singapore	Centre for International Law, National University of Singapore	Eversheds Harry Elias LLP
n.j.calamita@nus.edu.sg	*cilayel@nus.edu.sg*	*cilcg@nus.edu.sg*	*alvinyap@eversheds-harryelias.com*

AUTHORS

Daniel Ang Wei En	**Goh Qi Qing**	**Vamika Puri**	**Wee Jin-wen**
LL.B. (Hons.) Candidate	*LL.B. (Hons.) Candidate*	*LL.M. (IADR) Candidate*	*LL.B. (Hons.) Candidate*
National University of Singapore, Faculty of Law	National University of Singapore, Faculty of Law	National University of Singapore, Faculty of Law	National University of Singapore, Faculty of Law
E0176583@u.nus.edu	*E0036774@u.nus.edu*	*E0441587@u.nus.edu*	*E0036308@u.nus.edu*

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BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement
CIETAC	China International Economic and Trade Arbitration Commission
CJEU	Court of Justice of the European Union
EPA	Economic Partnership Agreement
FET	Fair and equitable treatment
FTA	Free Trade Agreement
IA Reporter	Investment Arbitration Reporter
IIA	International Investment Agreement
ICJ	International Court of Justice
ILC	International Law Commission
ISDS	Investor-State Dispute Settlement
ISLG	Investor-State Law Guide
MIT	Multilateral Investment Treaty
MST	Minimum standard of treatment
NDSP	Non-Disputing State Party
PCA	Permanent Court of Arbitration

SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
TPA	Trade Promotion Agreement
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USMCA	Agreement between the United States of America, the United Mexican States, and Canada
VCLT	Vienna Convention on the Law of Treaties

EXECUTIVE SUMMARY

1. This Memorandum analyses from an empirical perspective the prevalence of submissions made by Non-Disputing State Parties ("NDSPs") and their influence on arbitral awards in Investor-State arbitration under investment treaties. The submissions studied for the purposes of this Memorandum are limited to those made by NDSPs, and not by other third parties. A summary of our key findings is set out below.

2. **Part I – NDSP Submission Provisions**: Treaty provisions providing for NDSPs to make submissions ("NDSP submission provisions") to an arbitral tribunal can be found in 78 International Investment Agreements ("IIAs"), out of a total of 2577 IIAs surveyed. Such provisions are also found in four sets of arbitration rules (i.e. the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014, the SIAC Investment Arbitration Rules 2017, the SCC Arbitration Rules 2017, and the CIETAC International Investment Arbitration Rules 2017). Notably, whilst NDSP submission provisions in IIAs and arbitration rules both allow for submissions on questions of treaty interpretation, the arbitration rules provide the tribunal with discretion to allow submissions on other issues related to the dispute.

3. **Part II – NDSP Submissions in Investor-State Arbitration**: As of the time of writing (i.e. 22 April 2020), and based on publicly available information, there have been 141 NDSP submissions made pursuant to 9 NDSP submission provisions, all of which have been under IIAs. The United States made the most NDSP submissions, followed by Mexico and then Canada. No State outside the Americas has made an NDSP submission. In this connection, NDSP submissions are most prevalent in NAFTA Chapter Eleven arbitrations, followed by CAFTA-DR Chapter Ten arbitrations, and then other Investor-State arbitrations commenced under various BITs to which either the United States or Canada is a party.

4. In addition, we observe that the content of most NDSP submissions directly corresponds to the stage of arbitration proceedings at which these submissions are made. What is more, States have generally been consistent in the positions they adopt both as NDSPs and as litigants in Investor-State disputes. Furthermore, consistency in the positions taken among

treaty parties in their submissions appears to have resulted in the emergence of agreed interpretations of particular treaty provisions.

5. **Part III – Weight accorded to NDSP submissions by arbitral tribunals**: NDSP submissions are a means which treaty parties may use to demonstrate "subsequent agreement" or "subsequent practice", which must be "taken into account" by arbitral tribunals in interpreting the relevant IIA pursuant to Article 31(3)(a) and Article 31(3)(b) of the Vienna Convention on the Law of Treaties ("VCLT") respectively.[1] While arbitral tribunals are not always explicit in how they decide the weight they accord to the various interpretive tools that they consider, our survey reveals that they generally consider and accept the interpretations advanced in NDSP submissions, especially where all treaty parties espoused similar positions.

6. In this regard, we have also identified three factors that may affect the weight accorded to interpretations advanced in NDSP submissions, namely: (i) the consistency among treaty parties' positions in a particular Investor-State dispute; (ii) whether the positions advanced by treaty parties are consistent over time; and (iii) whether the tribunal has specifically invited NDSPs to make submissions on certain issues.[2] The first two factors demonstrate a common view that amounts to a subsequent agreement or practice, thus increasing the likelihood that tribunals will place greater weight on the NDSP submissions. As for the third factor, we note that tribunals tend to be more explicit in their considerations of submissions from NDSPs that they have invited, thus hinting that tribunals may place greater weight on it as well.

7. **Part IV– Recommendations for improving the effectiveness of NDSP submissions**: Finally, we offer four recommendations on how NDSP submission provisions may be improved, either in existing or future treaties, to enhance the mechanisms for making NDSP submissions. There are four key recommendations in this regard: (i) first, express the NDSPs' right to make submissions in unambiguous terms; (ii) second, include procedural guidelines

[1] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, 8 ILM 679.

[2] See Part III.C.

for NDSPs to make submissions; (iii) third, clarify the weight to be accorded to NDSP submissions and include a requirement for tribunals to give reasons where they fail to consider NDSP submissions; and (iv) fourth, explain the significance, if any, to be attributed to NDSPs' silence in a dispute in the treaty.

8. In addition, we offer three suggestions that NDSPs may consider in order to improve and enhance increase the effectiveness of their submissions in influencing tribunals' interpretation of the their treaties, namely: (i) first, clearly express a common position amongst treaty parties; (ii) second, clearly express a long-standing, consistent position; and (iii) third, be targeted in drafting NDSP submissions.

INTRODUCTION

A. Background

9. Investor-State arbitration is a dispute settlement procedure that resolves claims filed by an investor against a host State for alleged breaches of an IIA entered into between the host State and the investor's home State. In principle, third parties to the arbitration, including the investor's home State, do not participate in this process. However, certain IIAs and arbitration rules modify this by including provisions which expressly permit the NDSP to the treaty to make oral and/or written submissions to the arbitral tribunal ("NDSP submission provisions").

10. In recent years, NDSP submission provisions have gained attention in the on-going ISDS reform process. In particular, it has been proposed that there should be more NDSP submission provisions included in IIAs,[3] as that would allow States to reassert control over the interpretation of their IIAs,[4] by guiding,[5] or in some cases, even restricting the interpretive discretion of arbitral tribunals.[6]

[3] At UNCITRAL's Working Group III, some States have proposed at the inclusion of NDSP submission provisions in new IIAs. For instance, see e.g. the submissions from Costa Rica (Costa Rica, 'Submission from the Government of Costa Rica' (UNCITRAL Working Group III, 37th Session, 22 March 2019) UN Doc A/CN.9/WG.III/WP.164, Annex I); Chile, Israel and Japan (Chile, Israel and Japan, 'Submission from the Governments of Chile, Israel and Japan' (UNCITRAL Working Group III, 37th Session, 15 March 2019) UN Doc A/CN.9/WG.III/WP.163, Annex I); and the EU and its Member States (European Union, 'Submission from the European Union and its Member States' (UNCITRAL Working Group III, 37th Session, 24 January 2019) UN Doc A/CN.9/WG.III/WP.159/Add.1, para 27).

[4] See Martins Paparinskis, 'Masters and Guardians of International Investment Law: How to Play the Game of Reassertion' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016), p 48; Nikos Lavranos, 'How the European Commission and the EU Member States Are Reasserting Their Control over Their Investment Treaties and ISDS Rules' in A Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016), p 318.

[5] This proposal has been made by States. For instance, see Chile, Israel, Japan, Mexico and Peru, 'Submission from the Governments of Chile, Israel, Japan, Mexico and Peru' (UNCITRAL Working Group III, 39th Session, 2 October 2019), p 3: "[NDSP submissions] provide a practical mechanism to seek to ensure that the interpretation of their IIAs by ISDS tribunals reflects correctly the intention of the party when negotiating the IIA".

[6] See e.g. UNCITRAL Working Group III, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 34th Session: Part II' (27 November–1 December 2017) UN Doc A/CN.9/930/Add.1/Rev.1, para 23; UNCITRAL Secretariat, 'Possible reform of investor-State dispute settlement (ISDS): Note by Secretariat' (36th Session of Working Group III: 29 October–2 November 2018) UN Doc A/CN.9/WG.III/WP.149, para 30.

11. Currently, only a limited number of IIAs contain NDSP submission provisions – 78 IIAs out of the 2577 IIAs that have been surveyed. To date, States have made 141 NDSP submissions under the NDSP submissions provisions of only 9 IIAs.[7]

12. This Memorandum sets out the results of our empirical study of the various IIAs which contain NDSP submissions provisions and the cases in which NDSP submissions have been made. Our aim is three-fold: (i) to assist in the understanding of the NDSP submission provision mechanism; (ii) to provide an analysis of NDSP submissions that have been made, and of their effectiveness in influencing tribunals' decision-making; and (iii) to offer recommendations to States in making more effective NDSP submissions

B. Scope

13. As defined above, the term "NDSP submission provision" refers to a provision found in an IIA or in arbitration rules, which allows NDSPs to make written submissions to arbitral tribunals in the context of an Investor-State arbitration arising under that IIA ("NDSP submissions"). Accordingly, provisions which allow general third parties to make submissions (hereinafter called "Third Party provisions") are excluded from the scope of this Memorandum.[8] Notwithstanding, for completeness, we will briefly mention cases in which these provisions were invoked by States in Part I.C below.

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[7] These IIAs being: NAFTA (1992); CAFTA-DR (2004); Canada-Peru FTA (2008); Canada-Colombia FTA (2008); United States-Uruguay BIT (2005); United States-Panama TPA (2007); Korea-United States FTA (2007); Oman-United States FTA (2006); and United States-Peru TPA (2006).

[8] *Amicus curiae* submissions have received considerable attention in academic literature. To that end, see M Paparinskis and J Howley 'Article 5. Submission by a Non-Disputing Party to the Treaty' in D Euler, M Gehring and M Scherer (eds), *Transparency in International Investment Arbitration* (CUP 2015), p 205; E Obadia, 'Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration' (2007) 22(2) ICSID Review 349; F Grisel and J Vinuales , 'L'amicus curiae dans l'arbitrage d'investissement' [2007] 22(2) ICSID Review 380; W C Lin, 'Safeguarding the Environment? The Effectiveness of Amicus Curiae Submissions in Investor-State Arbitration' (2017) 19(2-3) International Community Law Review 270.

We note that such a provision could read as follows: "[a] Tribunal has the authority to consider and accept written submissions from a person or entity that is not a disputing party but that nevertheless has a significant interest in the arbitration …" For BITs, see, for example, the Canada-Moldova BIT (2018), Article 31; Canada-Mongolia BIT (2016), Article 31; Cameroon-Canada BIT (2014), Article 31; Burkina Faso-Canada BIT (2015), Article 33. In arbitration rules, see ICSID Arbitration Rules (2006), Rule 37.

C. Methodology

14. Our survey is based on publicly available data as at 22 April 2020. The sources of this data are, the UNCTAD database,[9] IA Reporter, ISLG, italaw, the relevant government websites, and secondary literature.

15. In obtaining this data, we first relied on the UNCTAD database to identify IIAs, including BITs, MITs, FTAs, and TPAs that include NDSP submission provisions. We then canvassed secondary literature for any IIAs that might not have come up in our initial search. This search yielded a total of 78 IIAs. Once all 78 IIAs were identified, we used the UNCTAD database to find all ISDS cases that arose under those IIAs. We then went through each of those cases to ascertain if NDSP submissions were made. This search yielded a total of 54 ISDS cases, in which a total of 141 NDSP submissions have been made.

16. The Memorandum is structured as follows. Following this Introduction, **Part I** discusses the existing legal frameworks under which NDSP submissions can be made. Next, **Part II** sets out the results of our empirical study of ISDS cases in which NDSP submissions have been made. Thereafter, **Part III** evaluates the effectiveness of these NDSP submissions in influencing arbitral tribunals' decision-making. **Part IV** offers our recommendations on drafting future NDSP submissions provision and on how NDSPs may best utilise NDSP submissions to influence the interpretation of IIAs by tribunals. Our **Conclusion** then summarises our key findings.

[9] UNCTAD, 'Policy Tools' (*UNCTAD Investment Policy Hub*) <https://investmentpolicy.unctad.org> accessed 17 April 2020.

I. NDSP SUBMISSION PROVISIONS

17. NDSP submission provisions can be found in IIAs and arbitration rules. These provisions in IIAs provide NDSPs with the right to make submissions on issues of treaty interpretation only.[10] Arbitration rules similarly provide for such a right, but also provide the tribunal with the discretion to allow submissions to be made by the NDSP on matters other than treaty interpretation.

18. These legal bases for making NDSP submissions will be analysed below, beginning with arbitration rules.

A. NDSP Submission Provisions in Arbitration Rules

19. At present, there are four sets of arbitration rules that contain NDSP submission provisions:[11]

- the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014 (the "UNCITRAL Transparency Rules");[12]
- the SIAC Investment Arbitration Rules 2017 (the "SIAC IA Rules");[13]
- the SCC Arbitration Rules 2017 (the "SCC Rules");[14] and
- the CIETAC International Investment Arbitration Rules 2017 (the "CIETAC IIA Rules").[15]

[10] Rodrigo Polanco, *The Return of the Home State to Investor-State Disputes* (CUP 2019), p 169.

[11] There is a proposal to amend the ICSID Arbitration Rules to include an NDSP submission provision, in the proposed Rule 68: see ICSID, *Working Paper 4: Proposals for Amendment of the ICSID Rules* (ICSID, 2020), p 337.

[12] UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration 2014, Article 5.

[13] SIAC Investment Arbitration Rules 2017, Rule 29.1.

[14] SCC Arbitration Rules 2017, Appendix III, Articles 4(1)-(2).

[15] CIETAC International Investment Arbitration Rules 2017, Article 44.

(1) Use of arbitration rules

20. The above-mentioned arbitration rules may apply to arbitrations commenced under any IIA, provided that: (i) the IIA expressly refers to those rules; or (ii) the disputing parties expressly agree to the rules' application.[16]

21. Our research found that only the UNCITRAL Transparency Rules have been expressly referred to in IIAs.[17] An example of such express reference is Article 10(4) of the Greece-United Arab Emirates BIT (2014), which states:

> "The UNCITRAL rules on transparency, as adopted by the United Nations Commission on International Trade Law on 10 July 2013, shall apply to international arbitration proceedings initiated pursuant to this Article."

22. Out of all the IIAs we surveyed, the UNCITRAL Transparency Rules have been expressly referred to in six IIAs only, namely:

- Canada-EU CETA (2016), Article 8.36;
- Austria-Kyrgyzstan BIT (2016), Article 14(3);
- Canada-Hong Kong, China SAR BIT (2016), Article 27(1);
- Islamic Republic of Iran-Slovakia BIT (2016), Article 14(4);
- Georgia-Switzerland BIT (2014), Article 10(3); and
- Greece-United Arab Emirates BIT (2014), Article 10(4).

[16] For example, in *Iberdrola v. Bolivia,* the first case to apply the UNCITRAL Transparency Rules, the disputing parties expressly agreed to the application of the UNCITRAL Transparency Rules, even though the dispute was initiated under the 1976 UNCITRAL Arbitration Rules.

[17] This was based on a search of IIAs signed from 2014, being the year the UNCITRAL Transparency Rules came into force. The remaining three arbitration rules were enacted in 2017. See UNCTAD, 'Mapping of IIA Content' (*UNCTAD International Investment Agreements Navigator*) <(https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping> accessed 17 April 2020.

23. Of these six IIAs, the Iran-Slovakia BIT (2016) is particularly notable, because it provides that the UNCITRAL Transparency Rules apply asymmetrically to the treaty parties, in that they *only* apply to arbitration proceedings against Slovakia but *not* those against Iran.[18] The other five IIAs provide that the UNCITRAL Transparency Rules apply to Investor-State arbitration proceedings against both States parties.

24. Two of these six IIAs, namely the CETA (2016) and the Canada-Hong Kong, China SAR BIT (2016),[19] also contain NDSP submission provisions.[20] Thus, an issue may arise as to how the NDSP submission provisions in these IIAs should be read with the NDSP submission provisions in the UNCITRAL Transparency Rules. As there have been no cases under either IIA, this issue has not been addressed by an arbitral tribunal. In our view, one possible interpretation is that the two types of NDSP submission provisions may coexist. The IIAs' NDSP submission provisions would only apply to NDSP submissions addressing questions of treaty interpretation, whereas the UNCITRAL Transparency Rules would apply to NDSP submissions addressing questions other than treaty interpretation.[21] Another possible interpretation is that, due to a stricter application of the *lex specialis* principle, *only* the IIAs' NDSP submission provisions apply. Thus, the NDSP submission provisions in the UNCITRAL Transparency Rules would be excluded in their entirety, including the provisions regarding the discretion of the tribunal to allow submissions on matters beyond treaty interpretation.

[18] Islamic Republic of Iran-Slovakia BIT (2016), Article 14(4): "[t]he UNCITRAL rules on transparency in treaty-based Investor-State arbitration shall apply to any international arbitration proceedings initiated against the Slovak Republic pursuant to this Agreement. The Islamic Republic of Iran shall duly consider the application of the UNCITRAL rules on transparency in treaty-based Investor-State arbitration to any international arbitration proceedings initiated against the Islamic Republic of Iran pursuant to this Agreement."

[19] CETA (2016), Article 8.38(2); Canada-Hong Kong, China SAR BIT (2016), Article 27(3).

[20] In addition, the Cameroon-Canada BIT (2014) incorporates the UNCITRAL Transparency Rules by virtue of the Mauritius Convention (see para 26 below). The Cameroon-Canada BIT (2014) also contains an NDSP submission provision: Article 28(2).

[21] Both of these IIAs and the UNCITRAL Transparency Rules provide for conflicts clauses that give priority to the provisions of the IIA. For the UNCITRAL Transparency Rules, see Article 1(7). For the IIAs, see Canada-Hong Kong, China SAR BIT (2016), Article 27(1), which states: "[t]he UNCITRAL Transparency Rules shall apply with respect to the participation of the non-respondent Party [...] except as modified by this Agreement"; and CETA (2016), Article 8.36(1), which states: "[t]he UNCITRAL Transparency Rules, as modified by this Chapter, shall apply in connection with proceedings under this Section."

25. Other than express reference in IIAs, the UNCITRAL Transparency Rules can be incorporated through two additional mechanisms:

- For IIAs concluded *before* 1 April 2014: by one or more of the IIA's treaty parties ratifying the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration[22] (the "Mauritius Convention"); or

- For IIAs concluded *after* 1 April 2014: by express reference to the UNCITRAL Arbitration Rules.[23]

26. With respect to the former mechanism, the Mauritius Convention is an instrument by which States that are parties to IIAs concluded before 1 April 2014 can express their consent to apply the UNCITRAL Transparency Rules in future disputes. There are currently five States that have ratified the Mauritius Convention: Cameroon, Canada, the Gambia, Mauritius and Switzerland.

27. Under the Mauritius Convention, the UNCITRAL Transparency Rules will apply to disputes under IIAs where all its treaty parties have ratified the Mauritius Convention.[24] There are four such IIAs: Gambia-Switzerland BIT (1994); Mauritius-Switzerland BIT (1998); Cameroon-Canada BIT (2014); and Mauritius-Cameroon BIT (2001).[25] In addition, the UNCITRAL Transparency Rules may apply to IIAs where one State has ratified the Mauritius Convention, subject to the investor also agreeing to their application.[26] There are approximately 300 such IIAs.[27]

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[22] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2014, entered into force 18 October 2017) Registration No. 54749 ("**Mauritius Convention**").

[23] UNCITRAL Transparency Rules, Article 1(1).

[24] Mauritius Convention, Article 2(1).

[25] The Mauritius-Cameroon BIT (2001) has not entered into force yet. The Cameroon-Canada BIT (2014) was signed on 3 March 2014 (i.e. before 1 April 2014). The Mauritius Convention does not apply to the Cameroon-Switzerland BIT (1964). This is because the IIA does not provide for ISDS, as required by Article 1(2) of the Mauritius Convention.

[26] Mauritius Convention, Article 2(2).

[27] See the UNCTAD, 'International Investment Agreements Navigator' (*UNCTAD Investment Policy Hub*) <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 17 April 2020.

28. As for the latter mechanism, reference to the UNCITRAL Arbitration Rules in IIAs concluded on or after 1 April 2014 directly incorporates the UNCITRAL Transparency Rules, unless the IIA's treaty parties agree otherwise.[28] If there is no such agreement, the UNCITRAL Transparency Rules apply irrespective of the version of UNCITRAL Arbitration Rules referenced in the IIA.[29]

29. In total, there are 55 IIAs signed on or after 1 April 2014 that refer to the UNCITRAL Arbitration Rules.[30] Of these 55 IIAs, it is noteworthy that the Republic of Korea-Vietnam FTA (2015) expressly *excludes* the application of the UNCITRAL Transparency Rules.[31] Furthermore, NDSP submission provisions are found in 27 of these 55 IIAs.[32] Interestingly, in the Chile-Hong Kong BIT (2016), where the tribunal has been constituted, only the UNCITRAL Arbitration Rules (and therefore the NDSP submission provision of the UNCITRAL Transparency Rules) will apply.[33]

30. As discussed above, there are two possible interpretations in arbitration proceedings commenced under those 27 IIAs that have NDSP submission provisions and apply the UNCITRAL Arbitration Rules. First, either the NDSP submission provisions apply complementarily; or second, the IIA's NDSP submission provision excludes the application of any other NDSP submission provision entirely .

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[28] UNCITRAL Transparency Rules, Article 1(1).

[29] M Paparinskis and J Howley (n 8), para 45. Article 1(2) of the UNCITRAL Transparency Rules provides that the Transparency Rules would apply to an arbitration rules initiated under the "UNCITRAL Arbitration Rules", without restricting it to any particular version.

[30] See Annex A.

[31] Republic of Korea-Vietnam FTA (2015), footnote 25 to Article 9.28: "For greater certainty, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall not be applied in this Chapter".

[32] See Annex B.

[33] Pursuant to the Chile-Hong Kong BIT (2016), the NDSP submission provision only applies where the tribunal has not been constituted. Article 22.5(b), read with Article 22.3(c): where there is no arbitral tribunal established for the purposes of determining the validity of defences raised by the Respondent State under Articles 18.2, 18.3, 18.4. or 18.5 of this IIA, NDSPs may make oral and written submissions to the tribunal regarding the issue of whether and to what extent those Articles provide a valid defence to the claim. The NDSP submission provision only applies to situations where the Respondent State has invoked certain defences to the investor's claim (see Articles 18.2-18.4), and the State parties cannot agree, or set up a tribunal to decide whether the defences are valid.

The UNCITRAL Arbitration Rules apply in the Chile-Hong Kong BIT (2016) pursuant to Article 21.4(a) read with Article 21.1.

31. As of the time of writing, our survey has found a total of seven cases in which the UNCITRAL Transparency Rules apply.[34] NDSP submissions were made in two of these seven cases, namely, *Ballantine v. Dominican Republic*[35] and *Gramercy v. Peru*.[36] However, none of the NDSP submissions in these cases were made pursuant to the UNCITRAL Transparency Rules. Rather, the NDSP submissions were made pursuant to the NDSP submission provisions found in the relevant IIAs.

(2) Comparison between arbitration rules

32. The first point of comparison is how the four sets of arbitration rules regulate NDSP submissions on issues of treaty interpretation. The UNCITRAL Transparency Rules and the SCC Rules state that a tribunal "shall" allow such NDSP submissions.[37] The SCC Rules contain the further requirement that the NDSP submission must be "material to the outcome of the case".[38] In contrast, both the SIAC IA Rules and CIETAC IIA Rules provide that the NDSP "may" make submissions on matters of treaty interpretation,[39] but the submissions must be "relevant to the dispute".[40] None of the four sets of rules stipulate the considerations that tribunals must have in deciding whether to accept or reject NDSP submissions on issues of treaty interpretation. Thus, under any of the four sets of arbitration rules, tribunals cannot reject NDSP submissions on treaty interpretation, notwithstanding the difference in the rules' language between "may" or "shall".

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[34] See UNCITRAL, 'Transparency Registry' (*United Nations Commission on Internal Trade Law*) <https://www.uncitral.org/transparency-registry/registry/search.jspx> accessed 17 April 2020. Bolivia was Respondent in 2 cases, Colombia, the Dominican Republic, Guinea, Mauritius and Peru in 1 case each: see Herbert Smith Freehills LLP, 'UNCITRAL Transparency Rules Applied for the First Time in Investor-State Arbitration' (2015) Public International Law Notes.

<https://hsfnotes.com/publicinternationallaw/2015/10/26/uncitral-transparency-rules-applied-for-the-first-time-in-Investor-State-arbitration/> accessed 17 April 2020.

[35] *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, UNCITRAL, PCA Case No. 2016-17.

[36] *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC. v. Republic of Peru*, ICSID Case No. UNCT/18/2.

[37] UNCITRAL Transparency Rules, Article 5(1); SCC Rules, Appendix III, Article 4(1).

[38] SCC Rules, Appendix III, Article 4(1).

[39] SIAC IA Rules, Article 29.1; CIETAC IIA Rules, Article 44.1.

[40] *Ibid*.

33. The second point of comparison is whether and how the tribunal can invite submissions from an NDSP on matters outside of treaty interpretation but within the scope of the dispute. Tribunals can do so under all four sets of arbitration rules after consulting with the disputing parties (but not subject to their approval).[41] In deciding whether to do so, these tribunals must consider whether: (i) the NDSP has a significant interest in the proceedings; and (ii) the submission would help determine a factual or legal issue in the dispute. On top of these requirements, the UNCITRAL Transparency Rules and the SCC Rules also require tribunals to take into account whether the NDSP submission would be tantamount to diplomatic protection.[42] As for the CIETAC IIA Rules and the SIAC IA Rules, the tribunal must take into account whether the NDSP submission would violate the disputing parties' right to confidentiality.[43] With the exception of the SCC Rules, the three other sets of arbitration rules also require tribunals to consider whether the NDSP submission will unduly burden or unfairly prejudice any of the disputing parties.[44]

34. The SIAC IA Rules and CIETAC IIA Rules also provide that the tribunal "may" hold hearings to allow the NDSP to orally elaborate on views it previously expressed in its written submissions.[45] These sets of arbitration rules also enable the tribunal to order that documents relating to the proceedings be made available to the NDSP where necessary.[46] No such provisions are found in the UNCITRAL Transparency Rules or the SCC Rules.

[41] UNCITRAL Transparency Rules, Article 5(2); SCC Rules, Appendix III, Article 4(2); SIAC IA Rules, Article 29.2; CIETAC IIA Rules, Article 44.2.

[42] UNCITRAL Transparency Rules, Article 5(2); SCC Rules, Appendix III, Article 4(2)(ii).

[43] SIAC IA Rules, Article 29.3(d); CIETAC IIA Rules, Article 44.4.

[44] UNCITRAL Transparency Rules, Article 5(4); SIAC IA Rules, Article 29.9; CIETAC IIA Rules, Article 44.11.

[45] SIAC IA Rules, Article 29.7 and CIETAC IIA Rules, Article 44.8.

[46] SIAC IA Rules, Article 29.8 and CIETAC IIA Rules, Article 44.10.

B. NDSP Submission Provisions in IIAs

35. Moving to NDSP submission provisions included in IIAs, we observe there are relatively few IIAs which contain such provisions. Only 3.0% of the IIAs surveyed (78 of 2577 IIAs),[47] including those not yet in force, contain NDSP submission provisions.

(1) Wording of NDSP Submission Provisions

36. The first known NDSP submission provision is Article 1128 of the NAFTA, which was signed in 1992. The provision provides:

> "On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement."[48]

37. Out of the 78 IIAs, 13 provide for NDSP submission provisions that are worded similarly to NAFTA Article 1128.[49] In particular, the NAFTA Article 1128 wording has been followed in subsequent IIAs involving the NAFTA parties.[50] Such wording would also seem likely to be included in future US and Canada IIAs, given that this wording is found in their current model BITs.[51] Beyond the treaty practice of the NAFTA parties, the language of NAFTA

[47] Total number of treaties that have been mapped by the UNCTAD database: see UNCTAD, 'Mapping of IIA Content' (*UNCTAD International Investment Agreements Navigator*) <(https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping> accessed 22 February 2020.

[48] NAFTA (1992), Article 1128. By virtue of Article 101 of the NAFTA, the word "Party" in Article 1128 refers to a party to the Agreement i.e. one of the treaty parties. As such, it is clear that third parties, other than the NDSP, are not allowed to make submissions to the tribunal under NAFTA Article 1128.

[49] These IIAs are: Canada-Chile FTA (1996), Article G-29; Canada-Peru BIT (2006), Article 35(1); Canada-Peru FTA (2008), Article 837(3); Canada-Jordan BIT (2009), Article 35(1); Canada-Romania BIT (2009), Annex C, Article II(3); Canada-Latvia BIT (2009), Annex C, Article II(3); Canada-Slovakia BIT (2010), Annex B, Article II(3); Canada-Korea FTA (2014), Article 8.31; Japan-Mexico EPA (2004), Article 86; Mexico-Peru FTA (2011), Article 11.25; Mexico-Chile FTA (1998), Article 9-29; Japan-Lao People's Democratic Republic BIT (2008), Article 17(16); India-Japan EPA (2011), Article 96(16).

[50] For example, for Canada: Canada-Chile FTA (1996), Article G-29; Canada-Peru FTA, Article 837(3); for Mexico: Mexico-Czechoslovakia BIT, Article 16(2); Mexico-Iceland BIT, Article 16(2); Mexico-Republic of Korea BIT, Article 14(2); Mexico-Chile FTA (1999), Article 9-29. See also Polanco (n 10), p 168.

[51] See US Model BIT 2012, Article 28(2); and Canada Model BIT 2004, Article 35(1).

Article 1128 in NDSP submission provisions has also been adopted by IIAs involving State parties in Asia, particularly Japan.[52]

38. A variation of the NAFTA Article 1128 wording, without the requirement that the NDSP must first give "written notice", has been used in several other IIAs.[53] Such provisions include NDSP submission provisions in IIAs that the United States entered into after the NAFTA was signed.[54] A typical NDSP submission provision found in US IIAs is as follows:

> "The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement."[55]

In this variation of the NAFTA Article 1128 wording, the NDSP submission provision does not expressly provide for specific procedural requirements or guidelines.

39. While the NDSP submission provisions in the 78 IIAs are largely similar, some have unique features. For instance, the NDSP submission provision in the Colombia-Panama FTA (2013) allows NDSPs to make submissions "[u]pon agreement between the disputing parties".[56] Also, the Republic of Korea-Vietnam FTA (2015) provides that the NDSP submission may be made "[u]pon request of the Tribunal".[57]

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[52] For example, Japan-Lao People's Democratic Republic BIT (2008), Article 17(16); India-Japan EPA (2011), Article 96(16). See also Polanco (n 10), p 169.

[53] For the avoidance of doubt, in practice, the absence of the "written notice" language does not make a difference to the operative effect of the NDSP submission provision as the NDSP submissions are in any event made available to the disputing parties.

[54] See, for example, United States-Singapore FTA (2003), Article 15.19(2); United States-Chile FTA (2003), Article 10.19(2); United States-Morocco FTA (2004), Article 10.19(2); United States-Uruguay BIT (2005), Article 28(2); United States-Rwanda BIT (2008), Article 28(2).

[55] Singapore-United States FTA (2003), Article 15.19(2). This is the earliest iteration of the NDSP submission provisions found in IIAs in which the US is a party.

[56] Article 14.62(2); authors' translation. In the original, the provision provides: "Previo acuerdo entre las partes contendientes, la otra Parte podrá hacer presentaciones orales o escritas a un Tribunal sobre un asunto relativo a la interpretación del presente Acuerdo."

[57] Article 9.23(1).

(2) IIA Provisions on Transparency

40. In a given dispute, access to the case file is important when an NDSP wishes to make a submission on a point of law. It may be difficult for NDSPs to make submissions without access to pleadings and submissions because these documents help NDSPs better understand the issues at play in the dispute and to thus make targeted contributions.

41. In this regard, approximately 64% of IIAs with NDSP submission provisions (50 out of 78 IIAs) contain provisions that make it mandatory for the respondent to make such documents available to the general public, unless the disputing parties agree otherwise.[58] Such provisions are found in all of the United States' IIAs with NDSP submission provisions, and in all but two of such IIAs signed by Canada.[59]

42. In contrast, 33% of the IIAs with NDSP submission provisions (26 out of 78 IIAs) instead require the respondent to deliver such documents directly to the NDSP only (not the general public).[60] These provisions are found in all of the IIAs with NDSP submission provisions to which neither Canada, Mexico nor the United States is a party.

43. The remaining two IIAs do not contain any provision granting NDSPs access to these dispute documents: the Republic of Korea-Turkey Investment Agreement (2015); and the Republic of Korea-Vietnam FTA (2015).

[58] Canada-Moldova BIT (2018), Article 30.1: "A Tribunal award under this Section shall be publicly available, subject to the redaction of confidential information. All other documents submitted to, or issued by, the Tribunal shall be publicly available unless the disputing parties otherwise agree, subject to the redaction of confidential information."

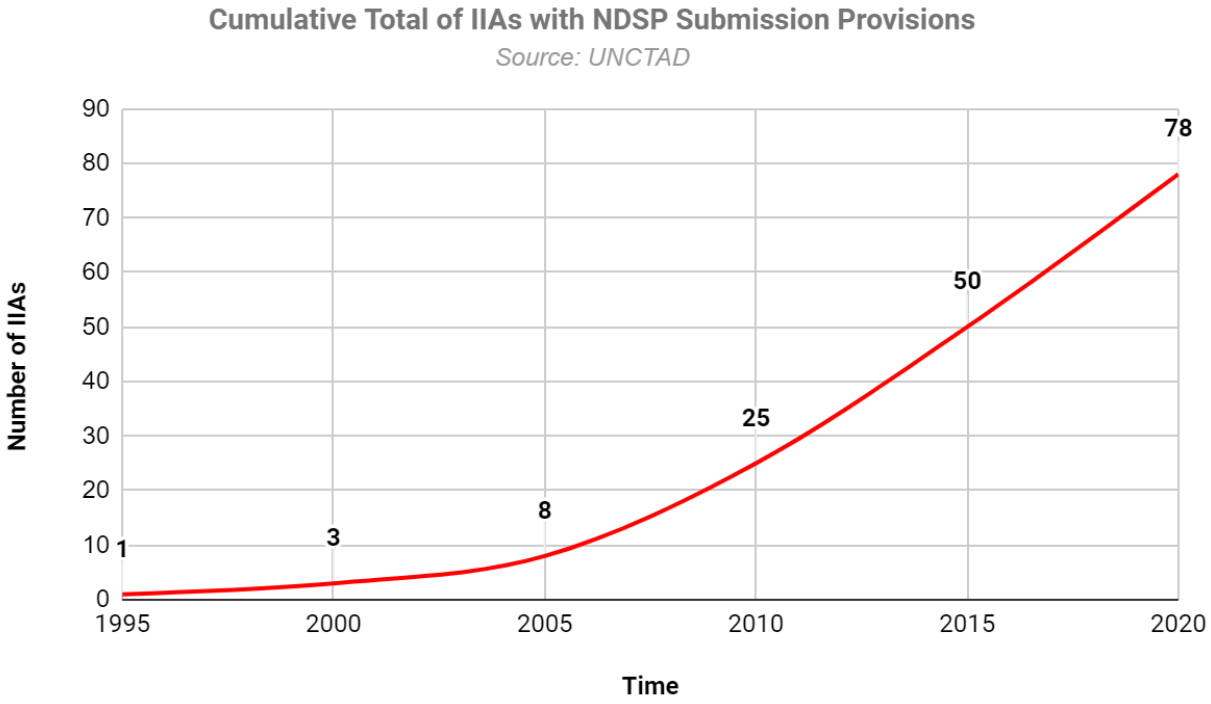
[59] The two IIAs are: Canada-Chile FTA (1996); and Canada-China BIT (2012). Instead, they contain provisions require the respondent State to deliver such documents directly to the NDSP only (not the general public): see Canada-Chile FTA (1996), Articles G-28, G-30(1); and Canada-China BIT (2012), Article 27.1. Furthermore, in Article 28.1 of the Canada-China BIT (2012), document disclosure to the public is optional.

[60] See e.g. the Cambodia-Japan BIT (2007), Article 17.15: "The disputing Party shall deliver to the other Contracting Party: (a) written notice of the claim submitted to the arbitration no later than 30 days after the date on which the claim was submitted; and (b) copies of all pleadings filed in the arbitration".

(3) Increased uptake of NDSP Submission Provisions in IIAs across time

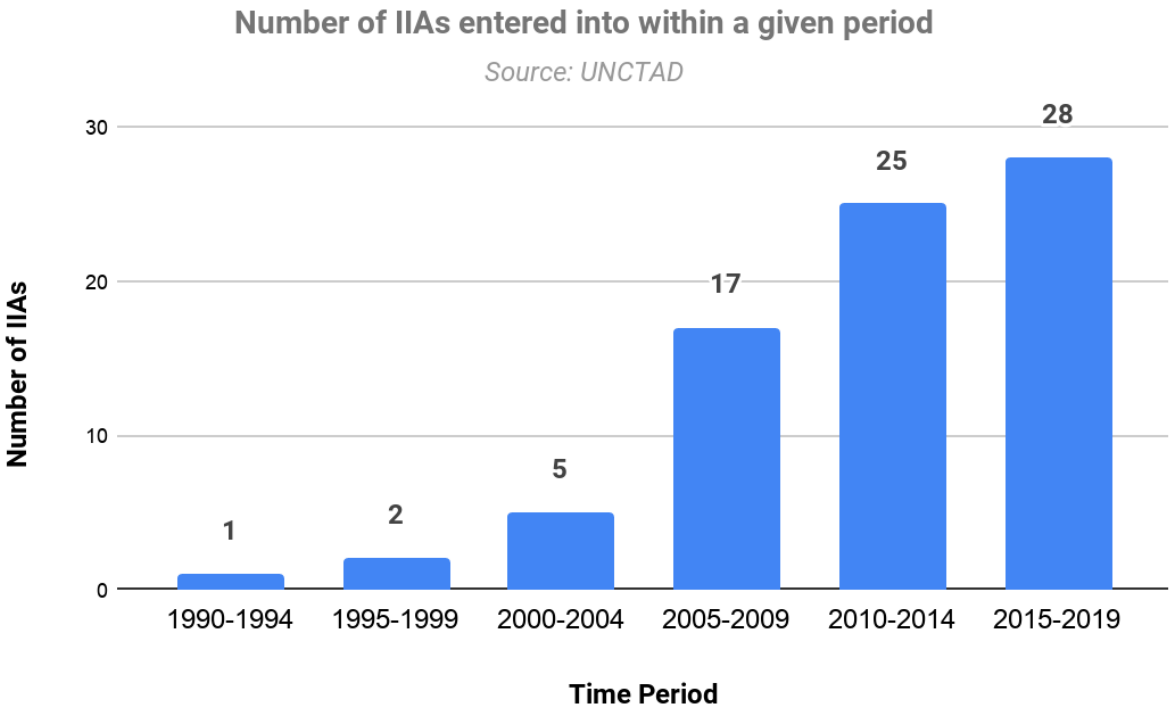
44. The cumulative total number of IIAs containing NDSP submission provisions has been increasing steadily since the 1990s. As seen in Figure 1 below, the presence of NDSP submission provisions in IIAs is a relatively recent phenomenon. In 1992, the first IIA to contain such provisions, the NAFTA, was signed. Post-NAFTA, the number of IIAs containing NDSP submission provisions has gradually increased over time, to the present cumulative total of 78.

Figure 1: Cumulative Total of IIAs with NDSP Submission Provisions



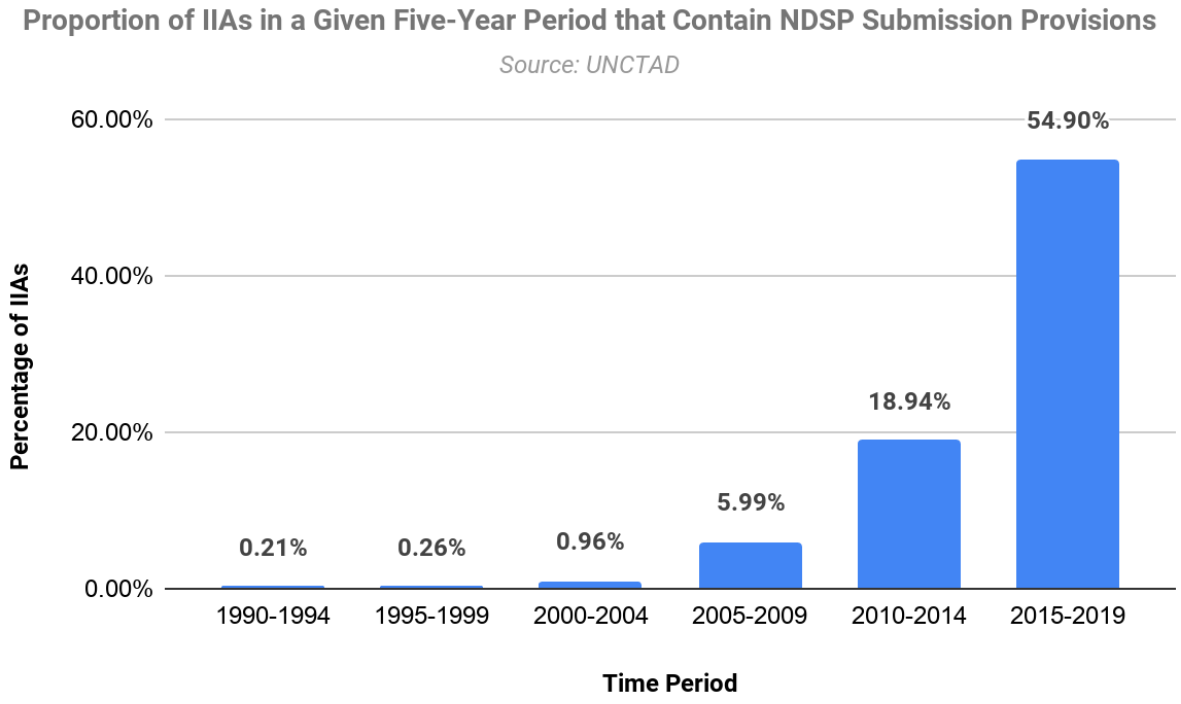
45. In particular, the number of IIAs containing NDSP submission provisions entered into during any given five-year period has steadily increased over time, as seen from Figure 2 below. In the 1980s, IIAs entered into did not contain any NDSP submission provisions. The only treaty containing an NDSP submission provision between 1990 and 1994 was the NAFTA. Thereafter, more IIAs with NDSP submission provisions were entered into within each subsequent time period. Notably, most of the IIAs with NDSP submission provisions were entered into between 2010 and 2014 (35.9%, or 28 out of 78 IIAs).

Figure 2: Number of IIAs with NDSP Submission Provisions entered into within a given period



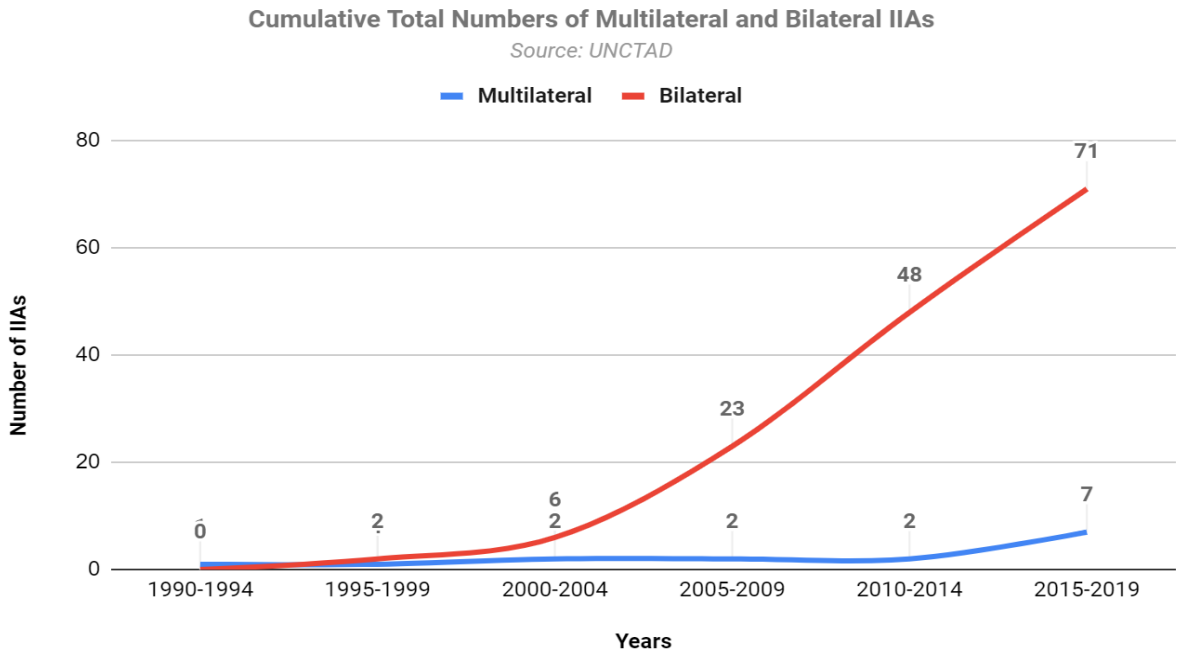
46. The proportion of total IIAs entered into within a given five-year period that contain NDSP submission provisions has increased significantly. From Figure 3 below, we can see that in 1990-1994 and 1995-1999, a negligible percentage of IIAs entered into within each time period contained NDSP submission provisions (i.e. in 1990-1994, only 1 out of 484 IIAs, or 0.2%; in 1995-1999, only 2 out of 777 IIAs, or 0.2%). Thereafter, the percentage of IIAs with NDSP submission provisions entered into increased. For instance, more than half of the IIAs entered into during 2015-2019 contained NDSP submission provisions (i.e. 28 out of 51 IIAs, or 54.9%).

Figure 3: Proportion of IIAs in a Given Five-Year Period that Contain NDSP Submission Provisions



47. Although the number of bilateral and multilateral IIAs containing NDSP submission provisions have increased over time, the former has increased more sharply than the latter. Most multilateral IIAs with NDSP submission provisions were entered into recently, during the period of 2015-2019 (see Figure 4 below).

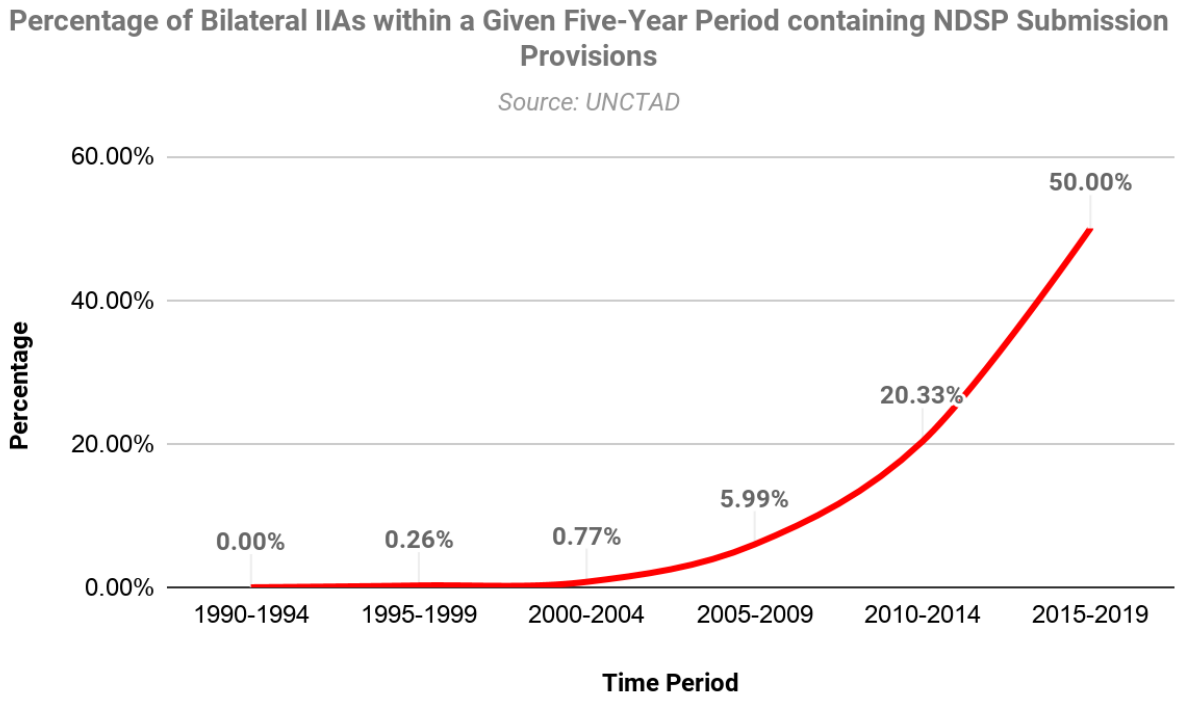
Figure 4: Cumulative Total Numbers of Multilateral and Bilateral IIAs with NDSP Submission Provisions



48. Further, the percentage of *multilateral* IIAs with NDSP submission provisions entered into during any given five-year period varies greatly across time. From 1990 to 2009, only two multilateral IIAs were signed: the NAFTA (1992) and the CAFTA-DR (2004). Both contain NDSP submission provisions.[61] From 2010 to 2014, only one out of nine multilateral IIAs (11.1%) entered into contained NDSP submission provisions. However, from 2015 to 2019, the percentage increased considerably: half of the multilateral IIAs entered into during that period contained NDSP submission provisions (7 out of 14 IIAs).

49. As for *bilateral* IIAs, the percentage of them containing NDSP submission provisions entered into during any given five-year period has increased sharply since 2005, i.e. much earlier than for multilateral IIAs (see Figure 5 below).

Figure 5: Percentage of Bilateral IIAs within a Given Five-Year Period containing NDSP Submission Provisions

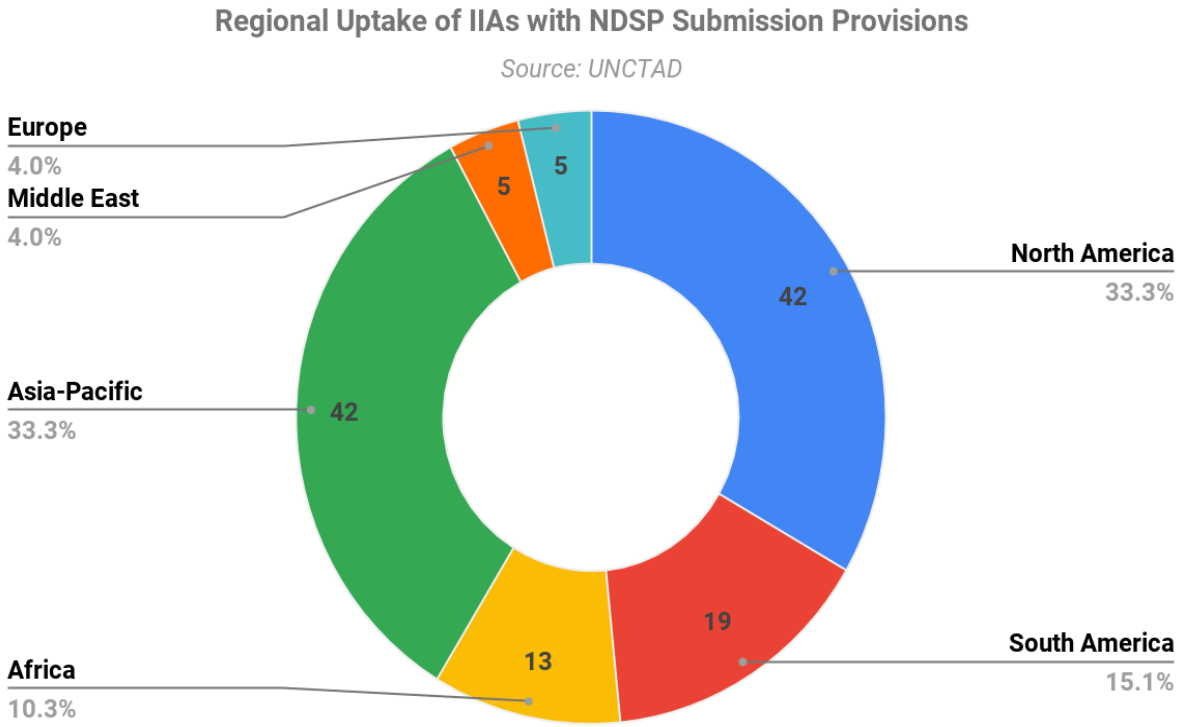


[61] For the NAFTA (1992): Article 1128; as for the CAFTA-DR (2004): Article 10.20.2.

(4) Distribution of IIAs with NDSP Submission Provisions by Region

50. The regional distribution of IIAs is shown in Figure 6 below. North America and the Asia-Pacific have the highest number of States that are parties to at least one IIA with an NDSP submission provision. North American States are party to 33.3% of all IIAs with NDSP submission provisions. As for IIAs with NDSP submission provisions that do not include any NAFTA parties, nearly all have at least one Asia-Pacific State as a party.[62] Much fewer European and Middle Eastern States have IIAs that contain NDSP submission provisions (4.0% each).

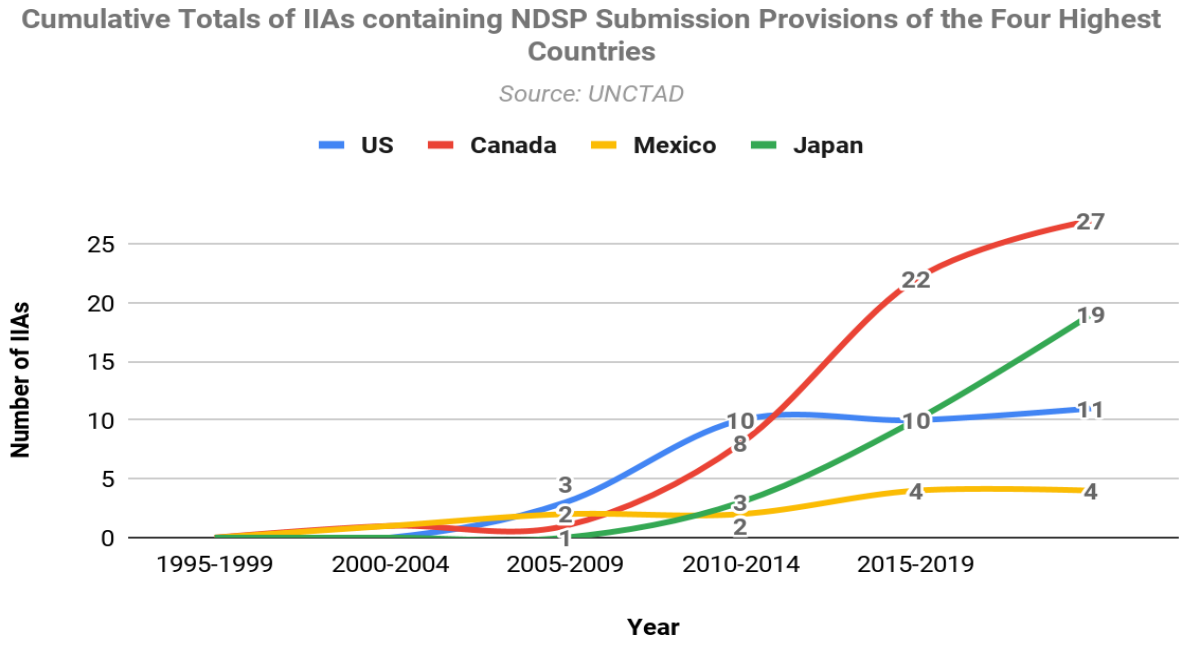
Figure 6: Regional Uptake of IIAs with NDSP Submission Provisions



[62] See Annex C.

51. The States which are party to the highest number of IIAs containing NDSP submission provisions are Canada, Japan, the United States, and Mexico (see Figure 7 below). We briefly examine each countries' treaty trends below.

Figure 7: Cumulative Totals of IIAs containing NDSP Submission Provisions of the Four Highest Countries



(a) Japan

52. As observed from Figure 7 above, Japan is party to an increasing number of IIAs with NDSP submission provisions. Of a total of 16 IIAs with NDSP submission provisions entered into since 2010, Japan's IIAs account for 11 of them (68.75%).[63]

53. This is a relatively recent development in Japan's treaty-making practice. Japan's NDSP submission provisions were first introduced in the Cambodia-Japan BIT (2007).[64] Since then,

[63] These IIAs are: India-Japan EPA (2011); Japan-Papua New Guinea BIT (2011); Japan-Kuwait BIT (2012); Iraq-Japan BIT (2012); Japan-Myanmar BIT (2013); Japan-Mozambique BIT (2013); Japan-Kazakhstan BIT (2014); Japan-Mongolia EPA (2015); Japan-Uruguay BIT (2015); Japan-Oman BIT (2015); Japan-Kenya BIT (2016).

[64] Article 17(16).

NDSP submission provisions have consistently been included in IIAs entered into by Japan every subsequent year up to 2016. Such IIAs were entered into with counterparties from around the globe, ranging from South American states,[65] to Central Asian states,[66] and African states.[67] Most of these counterparties do not typically have NDSP submission provisions in their IIAs. This suggests that Japan is the party proposing to include NDSP submission provisions in these IIAs.

54. Japan's treaty-making practice above may be explained by its increased interest in the role NDSP submissions play in ensuring that tribunals' interpretation of IIAs correctly reflect the intentions of the treaty parties.[68] In this regard, Japan has made submissions before the UNCITRAL Working Group III's 37th and 39th sessions, proposing NDSP submissions as a means to address concerns regarding consistency, coherence, predictability, and correctness of arbitral decisions by tribunals in ISDS.[69] In particular, Japan described NDSP submissions as one of the "starting point[s] for … specific reform solutions"[70] that should be "explored as a way forward in the reform process."[71]

[65] These are: Japan-Uruguay BIT (2015); Japan-Peru BIT (2008).

[66] See, for example, the Japan-Kazakhstan BIT (2014).

[67] These are: Japan-Mozambique BIT (2013); Japan-Kenya BIT (2016).

[68] Chile, Israel, Japan, Mexico and Peru, '39th Session Submissions' (n 5), p 3.

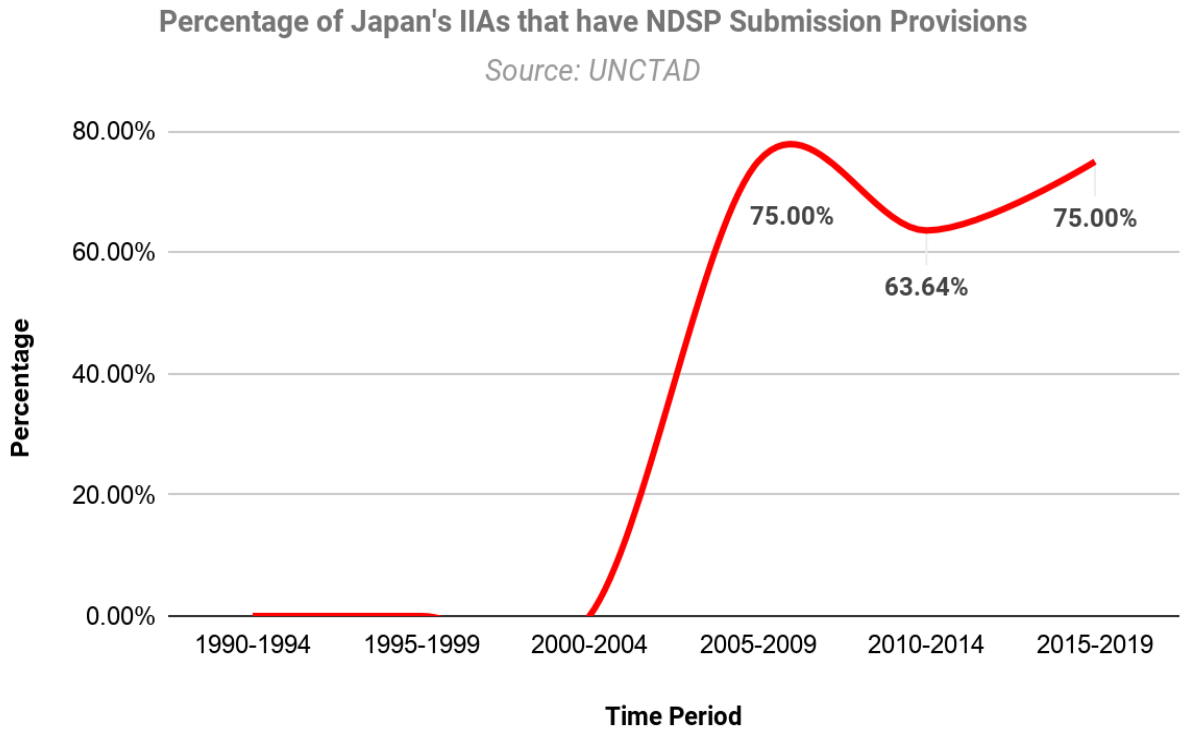
[69] For the 37th session: Chile, Israel and Peru (n 3), p 8. For the 39th session: Chile, Israel, Japan, Mexico and Peru, '39th Session Submissions' (n 68), p 8.

[70] Chile, Israel, Japan, Mexico and Peru, '39th Session Submissions' (n 5), p 3.

[71] Chile, Israel, Japan, Mexico and Peru, '39th Session Submissions' (n 5), p 5.

55. However, upon a closer examination of Japan's portfolio of IIAs containing NDSP submission provisions, we observe that the trend has been fluctuating – dropping from 75.0% in 2005-2009 to 63.6% in 2015-2019, and then rising again to 75.0% in 2015-2019 (see Figure 8 below). It is therefore unclear whether this trend will continue, given that the last five IIAs signed by Japan contain NDSP submission provisions.[72]

Figure 8: Percentage of Japan's IIAs that have NDSP Submission Provisions



(b) United States

56. The only IIA that the United States has signed since 2013 is the USMCA (signed in 2018), which contains an NDSP submission provision in Article 14.D.7.2.[73] This explains the low

[72] The IIAs are: (i) Japan-Morocco BIT (2020), Article 16.9; (ii) Argentina-Japan BIT (2018), Article 25.13; (iii) Japan-Jordan BIT (2018), Article 23.13; (iv) Japan-United Arab Emirates BIT (2018), Article 17.17; (v) Armenia-Japan BIT (2018), Article 24.13.

[73] The USMCA (2018) has been signed, but has not yet entered into force as of the time of writing.

number of NDSP submission provisions found in US IIAs over the last seven years. That being said, NDSP submission provisions have been a part of US Model BITs since 2004.[74]

(c) Canada

57. Since 2010, there has been a sharp increase in the number of Canada's IIAs with NDSP submission provisions. Given that the Canadian Model BIT (2004) contains an NDSP submission provision,[75] it is possible that the number will continue to increase in future.

58. Most of Canada's IIAs with African States have NDSP submission provisions (9 out of 11 IIAs) and were signed between 2013 and 2015.[76] In contrast, Canada's other two IIAs with African States do not contain NDSP submission provisions, and were concluded almost 20 years prior.[77] Given that the 2013-2015 IIAs are highly consistent with each other and with the Canada Model BIT (2004), the prevalence of NDSP submission provisions may be due to those IIAs largely adopting the Model BIT.[78]

(d) Mexico

59. Mexico has entered into IIAs with NDSP submission provisions rather sporadically, with about one IIA every four to seven years.[79] Outside of the NAFTA and USMCA, all of Mexico's IIAs with NDSP submission provisions have been concluded with South American countries and Japan.[80]

[74] Starting from the US Model BIT 2004, Article 28(2).

[75] Article 35(1).

[76] The IIAs are: Canada-United Republic of Tanzania BIT (2013); Benin-Canada BIT (2013); Canada-Côte d'Ivoire BIT (2014); Canada-Mali BIT (2014); Canada-Senegal BIT (2014); Canada-Nigeria BIT (2014); Cameroon-Canada BIT (2014); Canada-Guinea BIT (2015); and Burkina Faso-Canada BIT (2015).

[77] The two IIAs are: Canada-Egypt BIT (1996); and Canada-South Africa BIT (1995).

[78] J. Anthony VanDuzer, 'Canadian Investment Treaties with African Countries: What Do They Tell Us About Investment Treaty Making in Africa?' (2017) 18(3) Journal of World Investment & Trade 556, pp 569-571.

[79] The longest interval between the conclusion of successive IIAs with NDSP submissions provisions was seven years, between Japan-Mexico EPA (2004), Article 86 and Mexico-Peru FTA (2011), Article 11.25.

[80] In reverse chronological order: Mexico-Panama FTA (2014), Art. 10.21(2); Mexico-Peru FTA (2011), Art. 11.25; Japan-Mexico EPA (2004), Article 86; Mexico-Chile FTA (1998), Art. 9-29.

C. Coda

60. At this stage, we note that apart from making submissions pursuant to NDSP submissions provisions, NDSPs can make submissions in three additional ways:

- Pursuant to Third Party provisions in IIAs;
- Pursuant to Third Party provisions in the applicable arbitration rules; or
- By requesting the tribunal to exercise its inherent discretion to allow an NDSP to make a submission.

These methods will be explored below *seriatim*.

(1) Third Party provisions in IIAs

61. Our survey indicates that there are 41 IIAs which include Third Party provisions.[81] Of these 41 IIAs, nine contain Third Party provisions but not NDSP submission provisions.[82] As of writing, five ISDS cases were filed under IIAs with NDSP provisions other than the NAFTA and CAFTA-DR.[83] No submissions were made by States under Third Party provisions in these cases.

[81] See Annex D. An example of such a provision can be found in Article 9.16.3 of the Australia-China FTA (2015): "[w]ith the written agreement of the disputing parties, the tribunal may allow a party or entity that is not a disputing party to file a written *amicus curiae* submission with the tribunal regarding a matter within the scope of the dispute."

[82] The IIAs are: Austria-Kyrgyzstan BIT (2016); Chile-Uruguay BIT (2010); Colombia-Costa Rica FTA (2013); Colombia-France BIT (2014); Colombia-Peru BIT (2013); Georgia-Switzerland BIT (2014); Hungary-Paraguay BIT (1993); Islamic Republic of Iran-Slovakia BIT (2016); and New Zealand-Taiwan (2013).

[83] These cases arose from the following IIAs: the Canada-Serbia BIT (2014); Canada-Slovakia BIT (2010); Rwanda-United States of America BIT (2008); United States of America-Uruguay BIT (2005); and Canada-Czech Republic BIT (1990).

(2) Third Party provisions in arbitration rules

62. There are six sets of arbitration rules that contain Third Party provisions.[84] With the exception of the ICSID Arbitration Rules, no State has made any submission pursuant to these Third Party provisions.

63. Under the ICSID Arbitration Rules, Rule 37(2) allows non-disputing parties *in general* to make submissions to the tribunal on matters within the scope of the dispute. For example, in the annulment phase of *Siemens v. Argentina*, the United States made a submission as *amicus curiae* in order to clarify its position[85] in response to Argentina's suggestion that the United States shared its view on the interpretation of Articles 53 and 54 of the ICSID Convention.[86] Another example is seen in *Infinito Gold v Costa Rica*, where Canada made an NDSP submission expressing its views on the interpretation of the Canada-Costa Rica BIT (1998).[87]

(3) The tribunal's inherent power

64. Absent Third Party provisions or NDSP submission provisions, NDSPs might be able to make submissions upon permission by tribunals exercising their inherent power.[88] Although there is limited information in the public domain, it appears that this was the case for the

[84] The arbitration rules are: the ICSID Rules of Procedure for Arbitration Proceedings 2006 (the "**ICSID Arbitration Rules**"); the ICSID Additional Facility Rules 2006; the SIAC Investment Arbitration Rules 2017; the CIETAC International Investment Arbitration Rules 2017; the SCC Arbitration Rules 2017; and the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration 2014.

[85] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/08, Annulment Proceedings, Submission of the United States.

[86] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ICSID Convention, Regulations and Rules 7, ICSID/15, April 2006.

[87] *Infinito Gold Ltd v. Republic of Costa Rica*, ICSID Case No. ARB/14/5 ("***Infinito Gold v. Costa Rica***"), Non-Disputing Party Submission of Canada, para 2.

[88] The dispute documents of those cases are not publicly available. As such, we are unable to conclusively determine whether the NDSPs pursued this method in order to make submissions, but observe that it is the most likely method.

submissions[89] made by Canada in *WWM v. Kazakhstan*[90] and *Gold Pool v. Kazakhstan*,[91] and by Ukraine in *Aeroport v. Russia*[92] and *PJSC v. Russia*.[93] In all four cases, none of the applicable IIAs nor arbitration rules contained NDSP submission provisions or Third Party provisions.[94] Thus, the remaining possible basis for granting such submissions is the tribunal's inherent power to do so.

65. *WWM v. Kazakhstan* and *Gold Pool v. Kazakhstan* were brought under the Canada-Soviet Union BIT (1989).[95] *Aeroport v. Russia* and *PJSC v. Russia* were brought under the Ukraine-Russia BIT (1998). Interestingly, in these two cases, the disputing State did not participate in the proceedings, but the NDSP still made submissions.[96] Notably, the tribunals in those two cases permitted Ukraine to make *written* but not *oral* submissions.[97]

(4) Submissions by the European Commission

66. In addition, we observe that the European Commission (the "EC") has been particularly active in participating in ISDS cases filed against EU Member States as *amicus curiae*. The

[89] The NDSP submissions in these cases are not publicly available, but we have been able to verify that such submissions have been made, as evidenced by reports from other sources.

[90] *World Wide Minerals v. Republic of Kazakhstan*, UNCITRAL (Case 2) ("***WWM v. Kazakhstan***"). Reported in see Luke Peterson, 'In a Dramatic Holding, UNCITRAL Tribunal Finds that Kazakhstan is Bound by Terms of Former USSR BIT with Canada' (*Investment Arbitration Reporter*, 28 January 2016) <https://www.iareporter.com/articles/in-a-dramatic-holding-uncitral-tribunal-finds-that-kazakhstan-is-bound-by-terms-of-former-ussr-bit-with-canada/> accessed 22 April 2020.

[91] *Gold Pool v. Kazakhstan*, PCA Case No. 2016-23. Reported in Yelena Burova, 'Recent Investment Arbitration Disputes involving CIS States' (CIS Arbitration Forum, 17 October 2016) <http://www.cisarbitration.com/2016/10/17/recent-investment-arbitration-disputes-involving-cis-states/> accessed 22 April 2020.

[92] *Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. The Russian Federation*, PCA Case No. 2015-07. Reported in Burova (n 91).

[93] *PJSC CB PrivatBank v. The Russian Federation*, PCA Case No. 2015-21. Reported in Burova (n 91).

[94] The 1976 UNCITRAL Arbitration Rules applied in all four cases.

[95] Given that the Canada-Soviet Union BIT (1989) was signed by Canada and the then-USSR, not Kazakhstan, the treaty interpretation issue in *WWM v. Kazakhstan* was whether Kazakhstan succeeded to the treaty. Both the NDSP (Canada) and the disputing investor's submitted that Kazakhstan was bound, and the tribunal agreed. This was despite the fact that Canada and Kazakhstan were separately negotiating a BIT: see Peterson (n 900).

[96] See Burova (n 91).

[97] See Burova (n 91).

EC's active participation might be due to Council Regulation (EU) No 1219/2012,[98] which requires the respondent EU Member State and the EC to take all necessary measures to effectively defend against the disputing investor's claim. Doing so may include the EC's participation in the dispute.[99] The EC's submissions have mainly addressed the issue of whether intra-EU IIAs (including the Energy Charter Treaty) remain applicable following the Treaty of Lisbon[100] and, more recently, following the CJEU's decision regarding the *Achmea v The Slovak Republic* ISDS case.[101]

67. Generally, arbitral tribunals have taken a conservative approach to the EC's participation. Some tribunals have outright refused to allow the EC to make any submissions.[102] For example, in *RREEF v. Spain,* the tribunal stated that the "European Commission's application for leave to intervene was inadmissible."[103]

68. Even tribunals that have allowed the EC to make submissions as *amicus curiae* appear not to have involved the EC greatly in the proceedings. For example, although the tribunal in *Charanne v. Spain* allowed the EC to submit an *amicus curiae* brief, it denied the EC access to the case file and participation in the hearings.[104]

69. It is important to note that in a number of cases the EC has relied on Rule 37(2) of the ICSID Arbitration Rules to make their submissions as *amicus curiae*. These submissions were allowed to be admitted by tribunals in cases such as: *Electrabel v. Hungary*,[105] *AES Summit*

[98] Regulation (EU) No 1219/2012 of the European Parliament and European Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L 351/40.

[99] Article 13(b).

[100] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, [2007] C306/01.

[101] *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13.

[102] *Antin v. Spain*, ICSID Case No. ARB/13/31; and *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, para 98.

[103] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, para 20.

[104] *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Final Award 062/2012, para 49.

[105] *Electrabel SA v. Republic of Hungary AES Summit Generation Ltd*, ICSID Case No. ARB/07/19, Procedural Order No. 4.

and AES-Tisza Erömü v. Hungary,[106] *Micula v. Romania*,[107] *Vattenfall v. Germany*,[108] *Infrastructure Services Luxembourg v. Spain*,[109] *Eiser v. Spain*,[110] and *United Utilities v Estonia.*[111]

70. The tribunal's consideration of the positions advanced in the EC's submissions has been mixed. For example, in *Electrabel v. Hungary*, the tribunal held that "several of the Commissions' submissions cannot be taken into account in this arbitration, because they are based on a hierarchy of legal rules seen only from the perspective of an EU legal order applying within the EU."[112] Further, in *Micula v. Romania*, the tribunal stated that it was undesirable to predict what would happen after an award was rendered, and thus "inappropriate for the Tribunal to base its decisions in this case on matters of EU law that may come to apply after the Award has been rendered."[113] It accordingly did not address the arguments made in the EC's submission, which were largely based on the enforceability of the Award. On the other hand, in *AES Summit v. Hungary*, the tribunal stated that it "has duly considered the points developed in its [the EC] *amicus curiae* brief in its deliberations".[114] Further, in *Vattenfall v. Germany*, the tribunal took the arguments made in the EC's submissions into consideration when determining the issues.[115]

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[106] *AES Summit Generation Ltd. and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22.

[107] *Iona Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on the EC's Application to file a Written Submission.

[108] *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Procedural Order No. 13

[109] *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, para 64.

[110] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, para 64.

[111] *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Decision on the Application for Leave to Intervene as a Non-Disputing Party Submitted by the European Commission.

[112] *Electrabel SA v. Republic of Hungary AES Summit Generation Ltd*, ICSID Case No. ARB/07/19, Award, p IV-35, para 4.112.

[113] *Iona Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Final Award, p. 97, para 340

[114] *AES Summit Generation Ltd. and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, p 43, para 8.2

[115] *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, see for example p 43, para 134; p 46, para 144.

71. The EC's participation as *amicus curiae* can be distinguished from the participation of NDSPs as *amicus curiae*. While NDSPs are parties to the underlying IIA, this is not the case for the EC. Thus, tribunals may be more sceptical of the EC's assistance in interpreting the relevant treaty provisions as they were not a part of the drafting negotiations of the relevant IIA, and their submissions thus do not reflect the treaty parties' intent.

72. Moving forward, it remains to be seen whether other supranational bodies similar to the EC will use Third Party provisions to participate in future ISDS cases, and how effective such efforts will be. As of the time of writing, apart from the EC, no other supranational body has participated in ISDS cases as *amicus curiae* relying on the arbitration rules applicable to the proceedings to do so.

D. Conclusion

73. In summary, Part I has canvassed the NDSP submission provisions contained in IIAs and arbitration rules in existence as of writing. With respect to NDSP submission provisions found in arbitration rules, although these are included in four such sets of rules, only the UNCITRAL Transparency Rules have been incorporated into IIAs, and have actually been invoked in ISDS cases. As for NDSP submission provisions found in IIAs, these are becoming increasingly prevalent, constituting a higher proportion of IIAs entered into in recent times. While many of the IIAs with NDSP submission provisions are entered into by the NAFTA parties, we observe that Asian States, especially Japan, have also concluded an increasing number of such IIAs.

II. STATISTICS OF NDSP SUBMISSIONS IN ISDS CASES

74. As of the time of this Memorandum, out of a total of 983 publicly available Investor-State arbitration cases,[116] NDSP submissions have been made pursuant to an NDSP submission provision in only 54 cases (or approximately 5.5%). Of them, 36 cases were brought under the NAFTA, 8 cases under the CAFTA-DR, and 10 cases under various IIAs containing NDSP submission provisions. A total of 141 NDSP submissions were made in these cases.

75. This Part surveys both the Investor-State arbitration cases in which NDSP submissions have been made, and the content of the NDSP submissions, in order to derive meaningful conclusions regarding the:

(a) Volume and frequency of NDSP submissions;

(b) Identities of States that have been making NDSP submissions;

(c) Stage of the proceedings at which NDSP submissions were made;

(d) Content of the NDSP submissions; and

(e) Consistency of the NDSP submissions.

A. Volume and frequency

76. This section explores trends in the number of cases in which NDSP submissions have been made over time, as well as in the number of NDSP submissions that have been made within each case.

(1) Number of ISDS cases in which NDSP submissions have been made

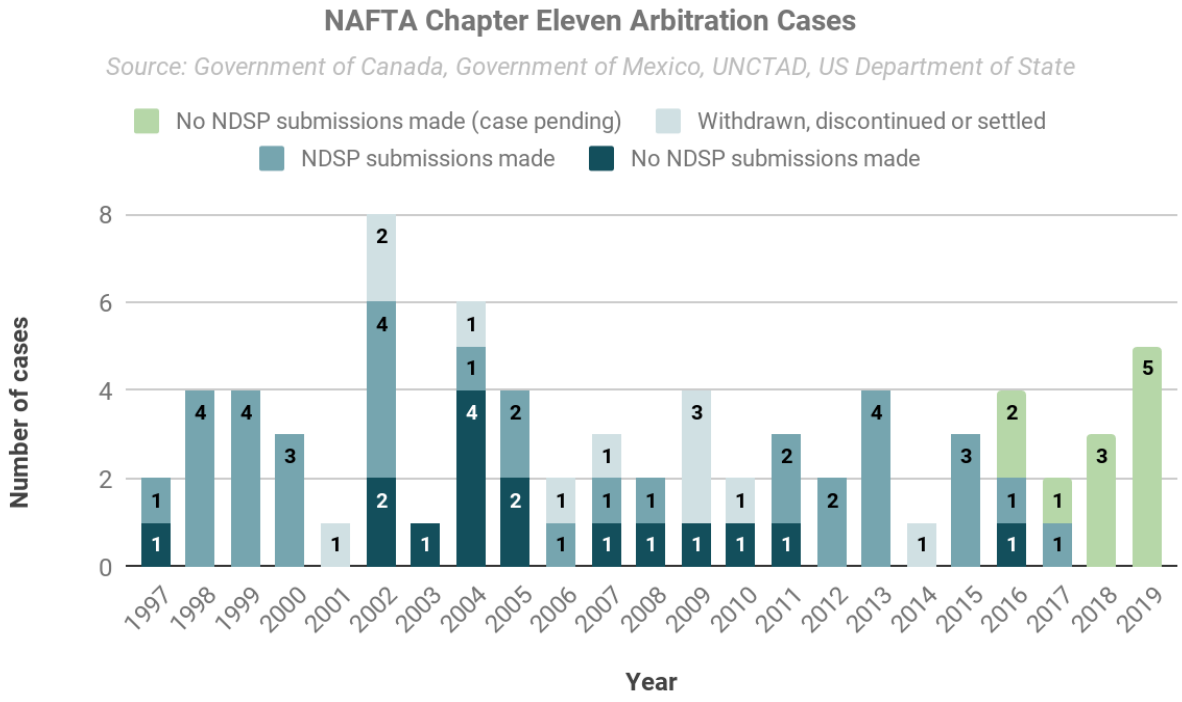
77. The first recorded NDSP submission (Mexico's 1998 submission in *Ethyl v. Canada*[117]) was made in a NAFTA Chapter Eleven arbitration. Since then, NDSP submissions have been made in at least half of the NAFTA Chapter Eleven arbitration cases commenced in any

[116] UNCTAD, 'Investment Dispute Settlement Navigator' (*UNCTAD International Investment Agreements Navigator*) <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 22 April 2020.

[117] *Ethyl v. Canada*, Non-Disputing State Party Submission of Mexico, 11 March 1998.

given year, with the exception of the years 2003, 2004, 2009 and 2010 (see Figure 9 below).[118] Since 2012, we can observe a clear trend toward NDSP submissions being made in *all* NAFTA Chapter Eleven arbitration cases.

Figure 9: Cases in which NDSP submissions were made (NAFTA)



78. In the context of CAFTA-DR Chapter Ten arbitration cases, the earliest *case* in which an NDSP submission was made was *RDC v. Guatemala*,[119] which commenced in 2007. In that case, El Salvador made a submission in 2010 in the later stages of the proceedings.[120] Since the *RDC* case, NDSP submissions have been made in seven out of 12 cases commenced pursuant to the CAFTA-DR (see Figure 10 below).

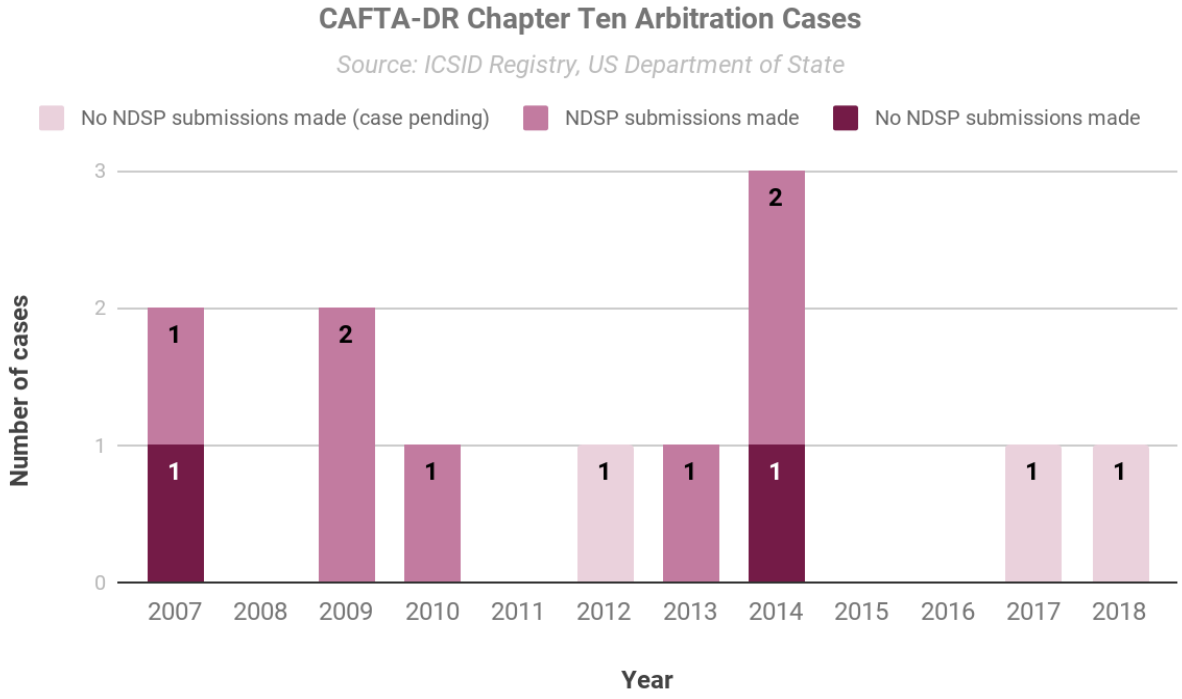
[118] This excludes cases which have been withdrawn, discontinued, settled, or were still pending at the time of writing.

[119] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23.

[120] *RDC v. Guatemala*, First Non-Disputing State Party Submission of El Salvador, 19 March 2010.

Figure 10: Cases in which NDSP submissions were made (CAFTA-DR)

(Year Commenced)



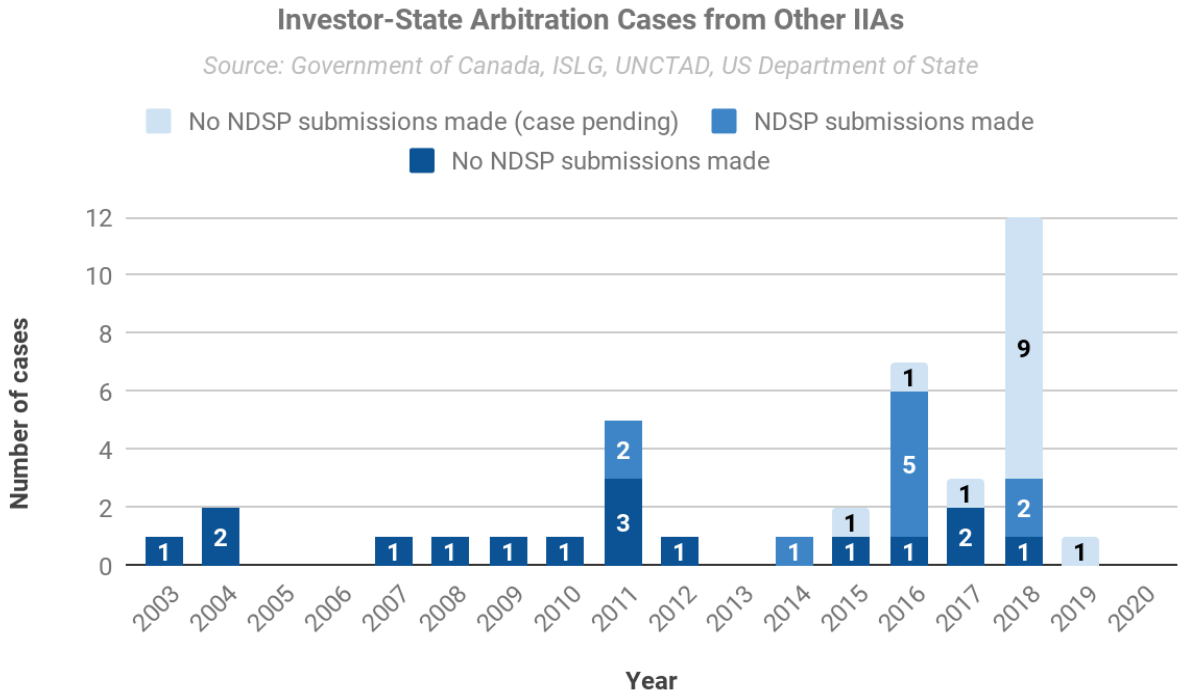
79. In Investor-State arbitrations arising from IIAs other than the NAFTA and the CAFTA-DR, the first NDSP submission was made by the United States in *Renco v. Peru*,[121] pursuant to Article 10.20.2 of the United States-Peru TPA (2006). Since then, NDSP submissions have been made in 10 out of 36 Investor-State arbitration cases arising from IIAs which contain NDSP submission provisions (see Figure 11 below).[122] All 10 cases involve an IIA to which either Canada or the United States is a party, and all NDSP submissions have been made by either Canada or the United States.

[121] *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No UNCT/13/1, Non-Disputing State Party Submission of the United States of America, 10 September 2014.

[122] The 36 Investor-State arbitration cases exclude cases which have not been concluded yet, i.e., were still pending at the time of writing.

Figure 11: Cases in which NDSP submissions were made (Other IIAs)[123]

(Year commenced)



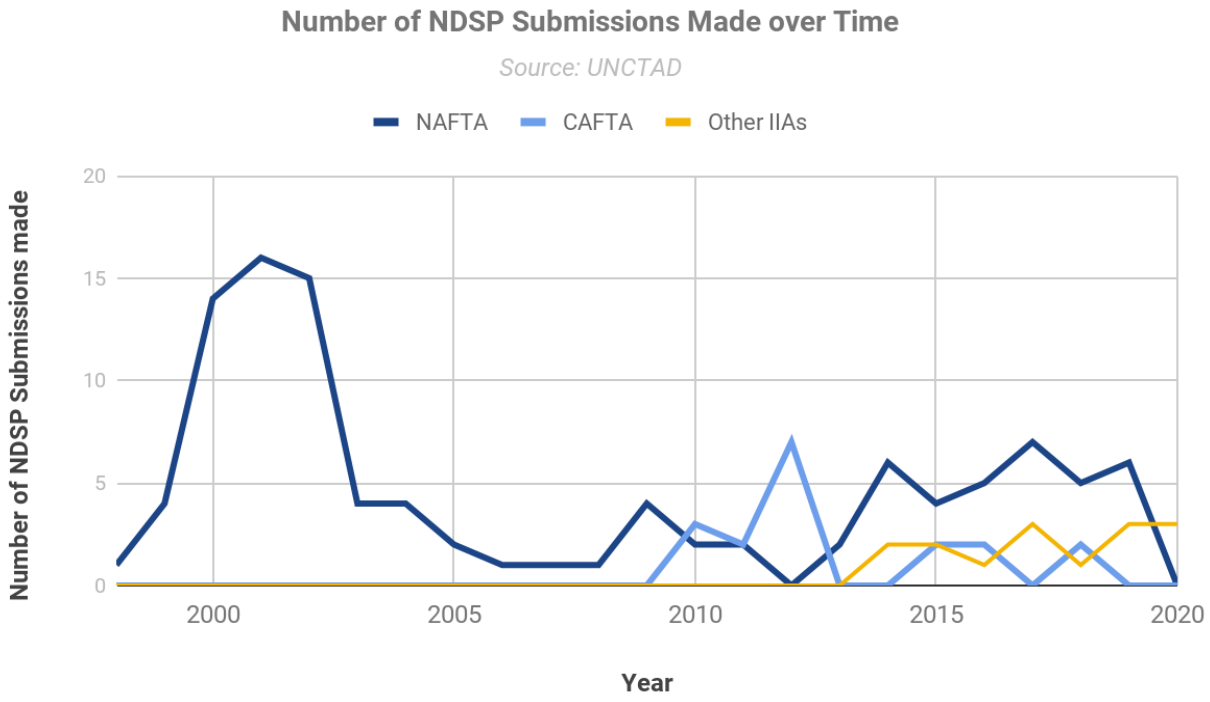
80. Canada has made NDSP submissions in two out of the 24 cases that have arisen from Canadian IIAs containing NDSP submission provisions (approximately 8.3%). In contrast, the United States has been an active participant as NDSP, having made NDSP submissions in eight out of the nine cases that have arisen from its IIAs containing NDSP submission provisions (approximately 88.9%). As will be discussed in Part III.C(2), the United States' active participation in treaty interpretation over time may give rise to a long-standing, consistent position on treaty interpretation which could be of significant influence in arbitral tribunals' interpretation of their treaties and similarly-worded treaty provisions.

[123] This excludes three cases, for which information is not publicly available: *Lumina Copper v. Republic of Poland*, *Zamora Gold v. Republic of Ecuador*, UNCITRAL and *Scotiabank v. Argentina*, UNCITRAL.

(2) Number of NDSP submissions made over time

81. Aside from the number of Investor-State arbitration cases in which NDSP submissions were made, we also tracked the number of NDSP submissions made over time (see Figure 12 below). We observe that the number of NDSP submissions made in NAFTA Chapter Eleven and CAFTA-DR Chapter Ten cases over time share a similar pattern of an initial spike and peak, followed by a gradual decrease that is generally maintained over the years. In contrast, a different pattern is observed with regard to the NDSP submissions made in Investor-State arbitrations arising from other IIAs. Their number per year has remained relatively consistent over time, with only minor fluctuations.

Figure 12: Number of NDSP Submissions Made over Time[124]

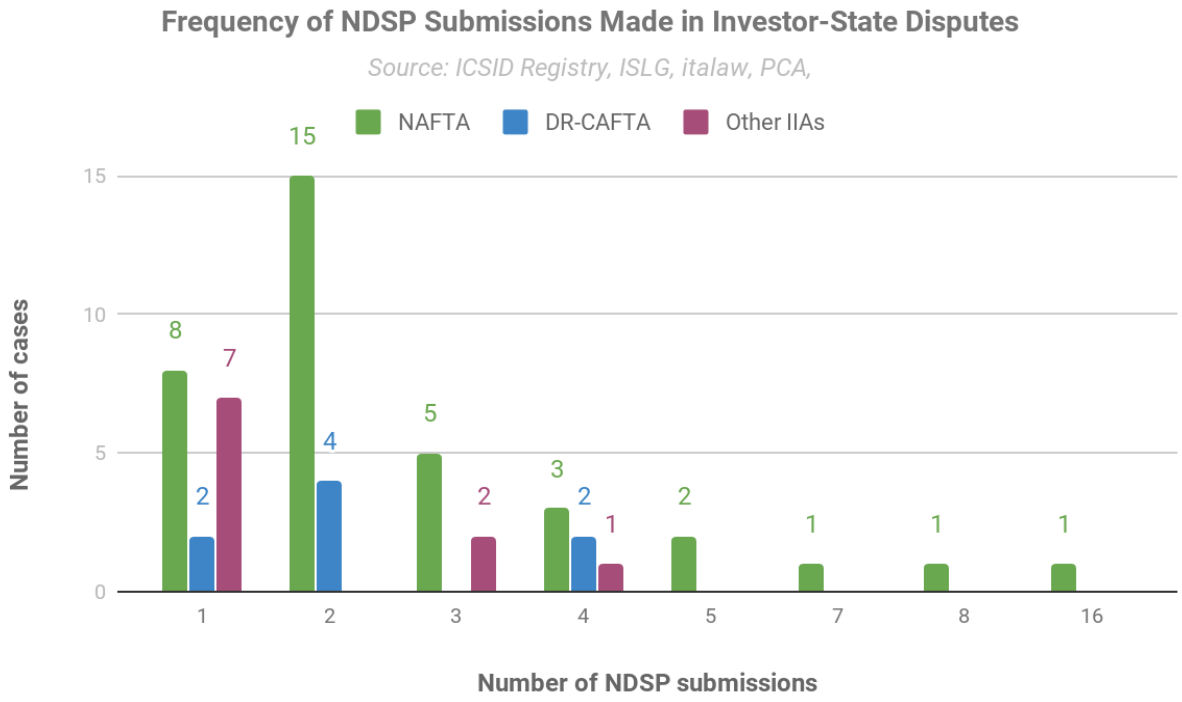


[124] Excludes data points from two NDSP submissions made in *Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, which are not publicly available.

(3) Frequency of NDSP submissions made in each Investor-State arbitration

82. Often, multiple NDSP submissions are made throughout the course of a single case by multiple NDSPs. Hence, the number of NDSP submissions made outnumbers the number of arbitrations in which they have been made — in 54 Investor-State arbitration cases, a total of 141 NDSP submissions were made. In most cases (36 out of 54, or approximately 68.4%), either one or two NDSP submissions were made. However, there are three outlier cases which have seen the submission of seven,[125] eight,[126] and sixteen[127] NDSP submissions respectively. Figure 13 below presents the number of Investor-State arbitrations in which NDSP submissions have been made, against the number of NDSP submissions that have been made in each case.

Figure 13: Frequency of NDSP Submissions Made in Investor-State Disputes



[125] *United Parcels Service of America Inc. v. Government of Canada*, ICSID Case No UNCT/02/1.

[126] *Methanex Corporation v. United States of America*, UNCITRAL.

[127] *Pope & Talbot v. Canada*.

83. However, the fact that the number of NDSP submissions outnumbers the number of arbitrations in which they have been made does not lead to the conclusion that NDSPs have been consistently making multiple submissions in each arbitration. We identify three factors that explain why multiple NDSP submissions may be made in a single Investor-State dispute.

84. First, tribunals have on occasion specifically invited NDSPs to submit their views on certain issues that arise in the course of proceedings. Such invitations have been extended in six out of the total 54 cases.[128] For example, in *Bayview v. Mexico*, the tribunal invited the NAFTA Parties to file written submissions on specific questions regarding the claimants' standing under the NAFTA, as well as on the concept of territoriality in relation to NAFTA Articles 1102 and 1105.[129] Similarly, in *Pope & Talbot v. Canada*, the tribunal asked the respondent to inform the other NAFTA parties of its questions regarding the motivations of the NAFTA Free Trade Commission to issue the FTC Interpretation ("NAFTA FTC Interpretation"),[130] and invite them to submit their comments.[131] More recently, in *Renco v. Peru*, the tribunal invited the United States to comment on certain questions it had posed to the disputing parties regarding the relevance of the principle of severability in connection with the legal effect of the reservation contained in the claimant's waiver.[132] As will be discussed further in Part III.C(3), tribunals tend to be more explicit in their consideration of NDSP submissions where such submissions were specifically invited by the tribunal.

85. Second, multiple NDSP submissions may be made in a single Investor-State dispute when proceedings coincide with external developments that may affect the tribunal's decision-making, such as the release of a new arbitration award under the same underlying IIA, or the release of a joint interpretive statement by parties to the underlying IIA. In such situations,

[128] These cases are: *B-Mex, LLC and Others v. Mexico*, ICSID Case No. ARB(AF)/16/3, after the hearing on jurisdiction; *Mesa Power v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, after the hearing; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4 ("*Mobil v. Canada (I)*"), after the hearing; *Bayview Irrigation District and others v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, after the hearing on jurisdiction; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, after the hearing on merits; and *Pope & Talbot v. Canada*, before the hearing on damages.

[129] *Bayview v. Mexico*, Tribunal's Letter to NAFTA Parties, 16 November 2006.

[130] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001.

[131] *Pope & Talbot v. Canada*, Tribunal's Letter to the Respondent, 17 September 2001.

[132] *Renco v. Peru*, Third Non-Disputing State Party Submission of the United States, 11 October 2015, para 2.

NDSPs may have an interest in making their views known regarding these developments, and one avenue is through making NDSP submissions. For example, after the close of the hearing in *ADF v. USA*, the damages award in *Pope & Talbot v. Canada* was rendered and a few days after, the claimant sought to submit it as authority. In response, all three NAFTA parties made post-hearing submissions regarding the award.[133] Similarly, in *Mesa Power v. Canada*, after the hearing had closed, the award in *Bilcon v. Canada*[134] was rendered and the claimant requested it to be admitted as a supplemental authority.[135] Both Mexico and the United States made submissions regarding issues of NAFTA interpretation raised in *Bilcon v. Canada*.[136]

86. Another example of external developments influencing NDSPs' decisions to make submissions can be seen in the NDSP submissions following the release of the NAFTA FTC Interpretation, which clarified the interpretation of NAFTA Article 1105(1).[137] Following that, eight NDSP submissions were made regarding the MST provision and the applicability of the NAFTA FTC Interpretation in then-ongoing NAFTA Chapter Eleven arbitrations, notwithstanding that either the hearing on the issue had already concluded,[138] or that a decision on the issue had already been made.[139]

[133] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Second Non-Disputing State Party Submission of Canada, 19 July 2002; *ADF v. USA*, Second Non-Disputing State Party Submission of Mexico, 23 July 2002.

[134] *Bilcon of Delaware et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015.

[135] *Mesa Power v. Canada*, Claimant's Letter to the Tribunal, 6 April 2015; Award, 24 March 2016, para 192.

[136] *Mesa Power v. Canada*, Tribunal's Letter to Parties, 4 May 2015; Award, 24 March 2016, para 199.

[137] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001.

[138] *Methanex v. USA*, Third Non-Disputing State Party Submission of Canada, 8 February 2002; *Methanex v. USA*, Third Non-Disputing State Party Submission of Mexico, 11 February 2002.

[139] In *Pope & Talbot v. Canada,* Sixth Non-Disputing State Party Submission of Mexico, 1 October 2001; Sixth Non-Disputing State Party Submission of the United States of America, 2 October 2001; Seventh Non-Disputing State Party Submission of Mexico, 6 November 2001; Seventh Non-Disputing State Party Submission of the United States of America, 6 November 2001; Eighth Non-Disputing State Party Submission of Mexico, 3 December 2001; Eighth Non-Disputing State Party Submission of the United States of America, 3 December 2001.

87. Third, where arbitration proceedings are bifurcated or trifurcated, NDSPs have the opportunity to make submissions on different issues arising at different stages of proceedings. This contributes to a higher total number of NDSP submissions made in each case.

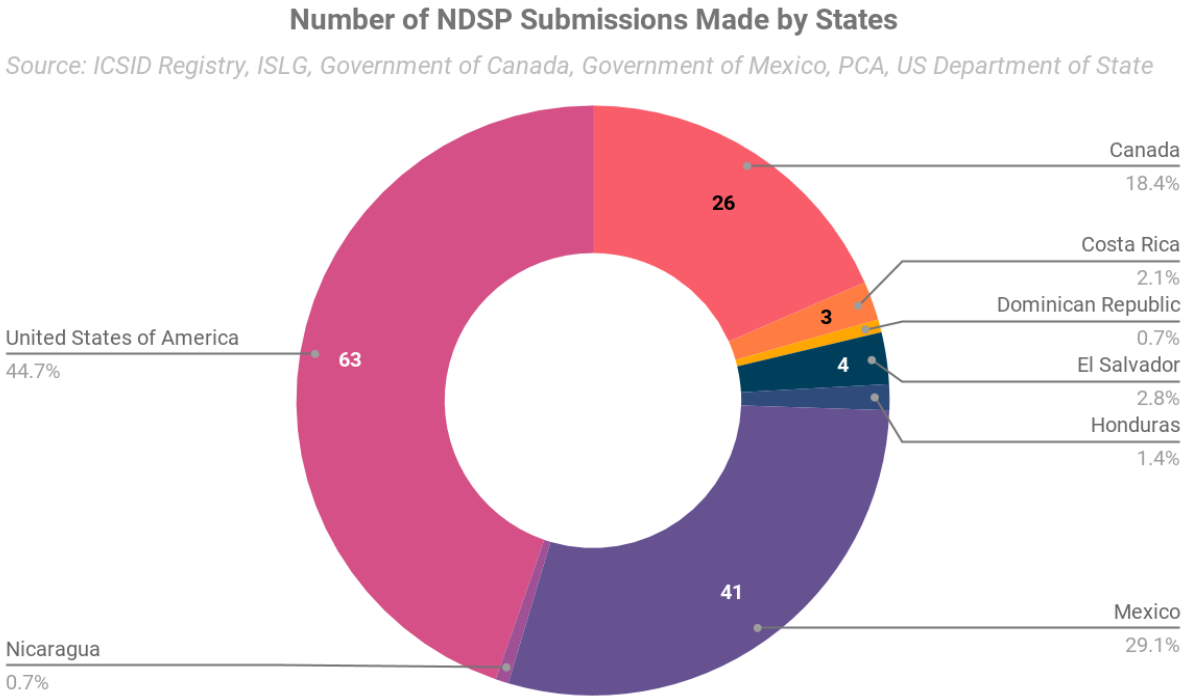
B. Identities of States that have been making NDSP submissions

88. There are two elements regarding the identity of States who have been making NDSP submissions: (i) their actual identity (e.g., "United States", "Canada", "Mexico"); and (ii) their institutional position in the context of the particular Investor-State dispute (i.e., "home State", "non-disputing, non-home State"). This section will examine both in turn.

(1) States that have made NDSP Submissions

89. Our empirical survey reveals that the practice of making NDSP submissions has been exclusive to the North and Central American States. In NAFTA Chapter Eleven arbitrations, both Mexico and the United States have each made 41 NDSP submissions, while Canada has made 24. In CAFTA-DR Chapter Ten arbitrations, the United States has made seven NDSP submissions, El Salvador has made four, Costa Rica has made three, Honduras has made two, and the Dominican Republic and Nicaragua have each made one. In Investor-State arbitrations commenced pursuant to other IIAs, the United States has made fifteen NDSP submissions while Canada has made two. Overall, the United States is the most active in making NDSP submissions, followed by Mexico and Canada (see Figure 14 below**)**.

Figure 14: Number of NDSP Submissions Made by States



90. There are several reasons that could potentially explain this disparity. Most States outside the Americas may not be making NDSP submissions simply because they rarely find themselves as a respondent to Investor-State arbitration. Amongst all non-NAFTA and non-CAFTA-DR States that have had cases brought against them under IIAs containing NDSP submission provisions,[140] only Colombia has been a respondent in more than three cases.[141] Hence, for most non-NAFTA and non-CAFTA-DR States, the interpretation of treaty provisions may not be a pressing concern, at least insofar as they believe it is unlikely that they will face claims in the near future. Furthermore, States that have never had to make a submission on a treaty provision as respondent may not have fully developed their interpretation of these provisions since there is little pressure to do so. As an NDSP to an

[140] These non-NAFTA and non-CAFTA-DR States are: Argentina, Barbados, Colombia, Croatia, the Czech Republic, Ecuador, India, Iraq, Kazakhstan, the Republic of Korea, Morocco, Oman, Panama, Peru, Poland, Romania, Rwanda, Serbia, Slovakia, Uruguay, Venezuela and Vietnam.

[141] Colombia has been a respondent in eight cases pursuant to the Canada-Colombia FTA (2008) and the United States-Colombia TPA (2012).

Investor-State dispute, there is arguably even less pressure to provide a position on treaty interpretation.

91. Second, States who have been a respondent to Investor-State arbitration on multiple occasions may nonetheless be reluctant to expend resources to make an NDSP submission because they may believe that its perceived cost would outweigh its perceived benefit. This is particularly so for States that have a limited capacity in terms of the expertise required to make submissions themselves, the time to act upon the opportunity, or the resources to hire outside counsel to do so on their behalf. From the cases surveyed, we observe that NDSPs are given an average of two weeks to make their submissions after the disputing parties have filed their submissions. Within these two weeks, NDSPs would have to review the disputing parties' written submissions, decide whether they would make an NDSP submission and, if required, seek advice from the relevant State departments on what their position should be and then articulate this position in writing.

92. Furthermore, as we shall see in Parts III.B and III.C below, there is still great uncertainty regarding the effectiveness of NDSP submissions in influencing tribunals' decision-making. As a result, the combination of the above factors may lead States to conclude that it would not be in their overall interest to make NDSP submissions.

(2) Institutional position of States that have made NDSP Submissions

93. Another element of a State's identity in the context of Investor-State arbitration is its specific position in the dispute. For example, in arbitrations arising out of BITs, there is only the home State of the claimant investor and the respondent host State. However, in arbitrations arising out of MITs, apart from the respondent, there is also the home State and other non-disputing State(s). NDSP submissions can be made by any of the latter two States. [142] A study of the institutional role of States that make NDSP submissions is useful because it

[142] In this regard, we observed that the only States to have made NDSP submissions as home States are Canada and the United States. Out of Canada's 26 NDSP submissions, 15 were made as a home State; and out of the United States' 63 NDSP submissions, 53 were made as a home State. Costa Rica, the Dominican Republic, El Salvador, Honduras, Mexico, and Nicaragua have yet to make any NDSP submission as home States. This disparity could be attributed to the fact that most of these States are capital-importing and hence would not have had many opportunities to make NDSP submissions as a home State in the first place.

somewhat challenges views expressed in academic literature that home States, as NDSPs, will usually side with their national investor. As we shall see, this does not appear to be the case. Nevertheless, we acknowledge that since the practice of making NDSP submissions has only been limited to a handful of States to date, our conclusions may only be accurate for that group of States (*supra* [89]).

94. The unique dynamic of Investor-State arbitration means that even though the home State is not a party to the dispute, it still has an interest in the protection of its nationals.[143] Hence, one might expect home States to be more active in making NDSP submissions as compared to non-disputing, non-home States, and submit interpretations that support its national investors. As a result, some arbitrators have raised concerns that the practice of allowing NDSP submissions may increase the likelihood of home States exercising a form of disguised diplomatic protection in ongoing disputes.[144] However, this only reflects half of the picture. NDSPs recognise that they may be respondents in future litigation. Hence, when they make NDSP submissions, it would also be logical for them to support interpretations that are consistent with the respondent host State in order to prevent interpretations that would benefit an investor.[145] Therein lies the additional layer of complexity when home States make NDSP submissions – they must balance their interest in protecting their nationals in the present dispute against their interest in protecting themselves in potential future disputes. In this regard, our empirical findings lead us to conclude that most NDSP submissions support the interpretation adopted by the respondent host State.

95. Our findings suggest that the positions taken by both home States and non-disputing, non-home States in their submissions often support the respondent State instead of their national investor. Such support often tends to be explicit, as many NDSP submissions expressly

[143] Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 American Journal of International Law 179, p 220; Polanco (n 10), p 190.

[144] E.g. Gabrielle Kaufmann-Kohler, 'Non-Disputing State Submissions in Investment Arbitration' in L Boisson de Chazournes, M Kohen and J Viñuales (eds), *Diplomatic and Judicial Means of Dispute Settlement* (Martinus Nijhoff Publishers 2012) 323-5.

[145] W Alschner, 'The Return of the Home State and the Rise of 'Embedded' Investor-State Arbitration' in S Lalani and R Polanco (eds), *The Role of the State in Investor-State Arbitration* (Brill/Nijhoff, 2014) 311; Polanco (n 10), p 190.

"agree", "concur" or "endorse" certain positions taken by the respondent State,[146] while asserting that the investor's position either has "no proper basis",[147] is "inaccurate",[148] or is "simply wrong and, if accepted, would have dangerous and completely unintended ramifications".[149]

96. A recent example can be found in *Lone Pine v. Canada*, where the United States supported the respondent's position in favour of the police powers doctrine,[150] i.e., that States can adopt measures for the protection of the public interest without having to compensate for any interference with property rights that may result, as long as such measures are non-discriminatory and adopted in good faith. This directly opposed the claimant's position, who in turn responded that "[t]he definition of police powers advanced by the NAFTA parties in this arbitration would render the text of Article 1110(1)(d) meaningless."[151]

97. Even in the few obvious instances where an NDSP supported the position of the claimant on issues of treaty interpretation, such support was partial and in relation to very specific issues.[152] For example, in *Metalclad v. Mexico*, the United States supported the claimant's view that the actions of local governments are subject to NAFTA standards, and that the term "tantamount to expropriation" in Article 1110 addresses measures that indirectly expropriate investments.[153] At the same time, however, the United States sided with the respondent in rejecting the claimant's suggestion that "tantamount to expropriation" was

[146] *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Non-Disputing State Party Submission of Mexico, 12 January 2016, para 7.

[147] *UPS v. Canada*, Non-Disputing State Party Submission of Mexico, August 2002, para 18.

[148] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Non-Disputing State Party Submission of Costa Rica, 20 May 2011, para 5.

[149] *Pope & Talbot v. Canada*, Non-Disputing State Party Submission of Mexico, 25 May 2000, 2.

[150] *Lone Pine Resources Inc. v. Government of Canada*, UNCITRAL, Non-Disputing State Party Submission of the United States of America Pursuant, 16 August 2017, paras 16-17; *Lone Pine v. Canada*, Canada's Counter-Memorial, 24 July 2015, paras 492-498.

[151] *Lone Pine v. Canada*, Claimant's Reply to the Submission of the United States of America and Mexico Pursuant to Article 1128 of the NAFTA, 22 September 2017, para 13.

[152] Polanco (n 10), p 177.

[153] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Non-Disputing State Party Submission of the United States of America, 9 November 1999, paras 3, 9.

intended to create a new category of expropriation not previously recognized in customary international law.[154] Another example is seen in *Feldman v. Mexico*, where the United States supported the claimant's interpretation that NAFTA did not bar a claim by a natural person who was both an American citizen and a permanent resident of Mexico.[155] However, at the same time, the United States supported the respondent's position on the issue of whether the three-year limitation period for making a claim under Article 1117(2) required the claimant to simply deliver a notice of intent, or to actually submit a claim to arbitration.[156]

98. The above examples suggest that these particular NDSPs have likely already developed their own interpretations of certain treaty provisions, so that it is in their interest to make submissions that are consistent with such interpretation. Indeed, the positions taken by NDSPs cannot be considered *in silos*. Rather, they must be viewed in the larger context of that State's previous submissions on the same point, either as respondent or NDSP. As will be discussed in Part II.E below, in all cases surveyed, the interpretations put forth in NDSP submissions are consistent with that State's long-standing position on that particular treaty provision. These interpretations are independent of a particular dispute, such that the NDSP may support, in principle, the interpretation of either the claimant or respondent on different issues. In light of this, the risk of a covert return of diplomatic protection through NDSP submissions made by the home State is unlikely to materialize.

C. Stage of proceedings in which NDSP submissions are made

99. This section considers our empirical findings on the stage of arbitration proceedings in which NDSP submissions have been made, with a focus on whether NDSPs have been making submissions on issues directly relevant to the stage of arbitration.[157]

[154] *Metalclad v. Mexico*, Non-Disputing State Party Submission of the United States of America, 9 November 1999, paras 9-14.

[155] *Feldman v. Mexico*, Non-Disputing State Party Submission of the United States of America, 6 October 2000, para 3.

[156] *Ibid*, para 14.

[157] For the number of NDSP submissions made at each stage of the proceedings in the cases surveyed, see ANNEX E.

100. For the purposes of our survey, we have categorized arbitration cases into "single-stage", "bifurcated" and "trifurcated" proceedings.[158] This section focuses on the NDSP submissions made in bifurcated and trifurcated proceedings only because at each stage of these proceedings, only certain issues are live. Where issues on jurisdiction, merits and damages are heard separately, one would expect disputing parties' submissions (and in connection, NDSP submissions) to only address the issues pertinent to each stage. By contrast, in single-stage proceedings, there is only one stage in which parties, including NDSPs, may express their view on every issue arising in the case.[159]

101. Further, the various issues addressed in NDSP submissions are classified into seven broad categories: jurisdiction, substantive, procedural, remedies, causation-related, State responsibility, and views on other arbitral awards.[160]

(1) NAFTA Chapter Eleven Arbitrations

102. Out of 36 cases under NAFTA Chapter Eleven, 12 were held as bifurcated proceedings,[161] and 4 were held as trifurcated proceedings.[162] The number of NDSP submissions made in each stage of proceedings is set out in ANNEX E.

[158] Single-stage proceedings refer to arbitrations where the tribunal only conducted one oral hearing. Bifurcated proceedings refer to arbitrations where the issues were split into two stages, either jurisdiction followed by merits and damages, or jurisdiction and merits followed by damages. Finally, trifurcated proceedings refer to arbitrations where the issues were split into three stages, one each for jurisdiction, merits, and damages.

[159] We observe that NDSP submissions made in single-stage arbitration proceedings concern a variety of issues, i.e., jurisdictional, substantive, procedural, remedies, causation-related, State responsibility, and views on other arbitral awards.

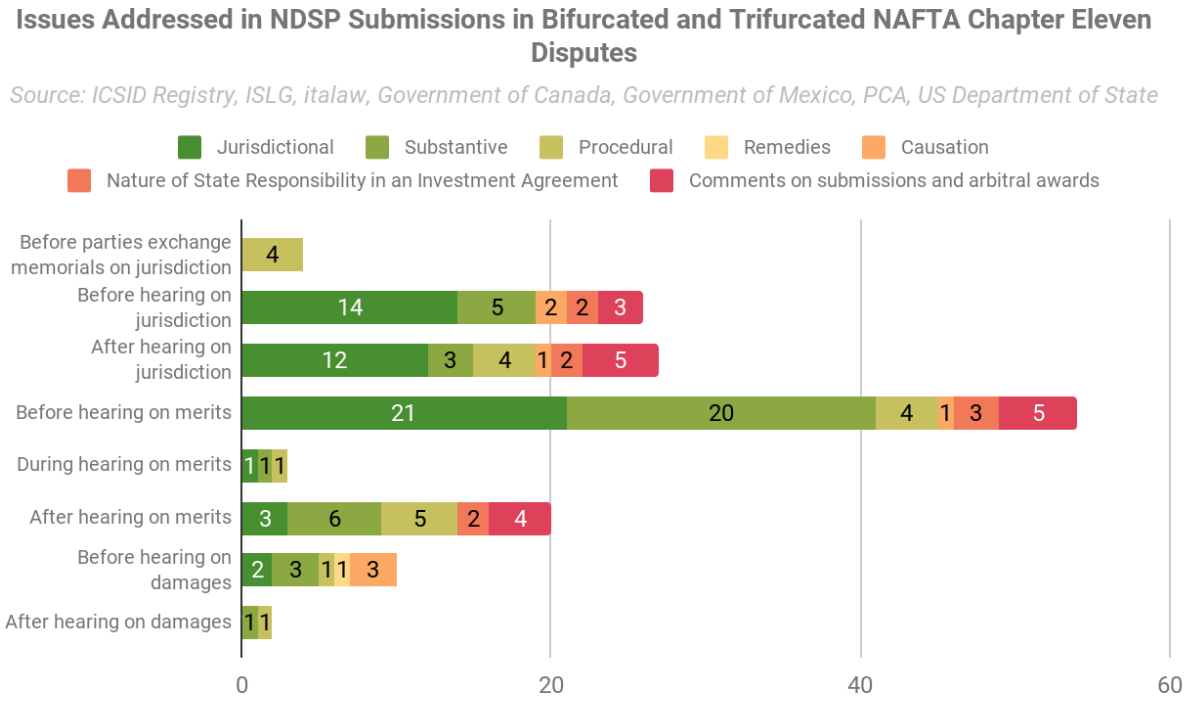
[160] See Annex F.

[161] In *Feldman v. Mexico*, even though no oral hearing was conducted on the issue on jurisdiction, the tribunal considered the issues of jurisdiction and merits separately. Thus, this case is categorized as "bifurcated". The NDSP submissions made by Canada and the United States before the tribunal issued its Award on Jurisdiction have been categorized as "after oral hearing on jurisdiction."

[162] In *Pope & Talbot v. Canada*, the merits issues were discussed in two separate oral hearings. NDSP submissions made before both oral hearings on Phase 1 and Phase 2 Merits are categorized as "before oral hearing on merits", and the submissions made after both oral hearings on Phase 1 and Phase 2 Merits are categorized as "after oral hearing on merits".

103. Generally, the issues addressed by NDSP submissions in these cases reflect the stage of proceedings in which they were made.[163] However, there have been a few occasions in which NDSP submissions appear to address issues that are irrelevant to the stage of proceedings. This would be the case, for instance, when an NDSP submission made before a hearing on jurisdiction also addresses an issue on substantive treaty protection, or when an NDSP submission made before a hearing on the merits also addresses jurisdictional issues (see Figure 15 below).

Figure 15: Issues Addressed in NDSP Submissions in Bifurcated and Trifurcated Disputes (NAFTA)



104. However, most of these NDSP submissions that address issues seemingly irrelevant to that particular stage of proceedings have a discernible justification for doing so. This would be

[163] For example, out of all the issues addressed before and after a hearing on jurisdiction, more jurisdictional issues were raised (26, or approximately 49.1%) as compared to any other issue. The same is observed for substantive issues addressed before and after a hearing on merits (26, or approximately 35.1%), as well as for causation-related issues before and after a hearing on damages (3, or approximately 25%).

the case, for example, when NDSPs respond to a position argued by a disputing party in its written submissions. In *Resolute Forest v. Canada*, Mexico addressed Article 1102(3), a *substantive* treaty protection, in its submission before the oral hearing on *jurisdiction*.[164] This was made in response to the respondent's Reply Memorial on Jurisdiction in which the respondent had argued that Article 1102(3) cannot be interpreted as rendering treatment accorded by a state's political subdivision, constituency, or province the national standard for the entire country.[165]

105. In addition, there are also instances where the tribunal decided it would postpone an issue to a subsequent stage of proceedings. For example, in *Methanex v. USA*, following the hearing on jurisdiction, the tribunal decided to join the jurisdictional issue of the scope of an "investment" under Article 1139 to the merits stage of proceedings because it was closely-related to the claim for expropriation under Article 1110.[166] Hence, the NDSP submission made by Mexico before the merits hearing also addressed the jurisdictional issue of the definition of "investment" and its role in the application of Article 1110.[167]

106. To this end, very few NDSP submissions that advance interpretations of treaty provisions seemingly without regard to the particular stage of proceedings do not have an easily discernible justification for doing so. One example is in *Loewen v. USA*, where Mexico addressed Article 1121 in its NDSP submission after the hearing on *merits*.[168] In response, the respondent pointed out that this was "irrelevant to the merits of this (or any other) NAFTA Chapter Eleven dispute, as Article 1121 is a *jurisdictional* provision only" (emphasis added).[169]

[164] *Resolute Forest Products Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2016-13, Non-Disputing State Party Submission of Mexico, 14 June 2017, paras 12-13.

[165] *Resolute Forest v. Canada*, Respondent's Reply Memorial on Jurisdiction, 29 March 2017, para 161.

[166] *Methanex v. USA*, Partial Award, 7 August 2002, para 88.

[167] *Methanex v. USA*, Fourth Non-Disputing State Party Submission of Mexico, 30 January 2004, paras 6-8.

[168] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Second Non-Disputing State Party Submission of Mexico, 9 November 2001, pp 7-14.

[169] *Loewen v. USA*, United States' Response to Non-Disputing State Party Submissions, 7 December 2001, p 7.

(2) CAFTA-DR Chapter Ten Arbitrations

107. Out of the eight CAFTA-DR Chapter Ten arbitration cases in which NDSP submissions have been made, half were held as bifurcated proceedings. The number of NDSP submissions made in each stage of the proceedings is set out in ANNEX E. All of these submissions focused only on the interpretation of jurisdictional or substantive treaty provisions.

108. Moreover, jurisdictional issues were only addressed before and after the hearing on jurisdiction, while substantive issues were addressed after the hearing on the merits. Only one NDSP submission made before the hearing on jurisdiction addressed both jurisdictional and substantive issues.[170] This reflects a pragmatic approach to making NDSP submissions, addressing only issues immediately live to the stage of proceedings. That being said, the focused nature of these NDSP submissions do not seem to have any significant effect on their reception by tribunals. Out of 28 instances where the tribunal had an opportunity to refer to the positions advanced by NDSPs, they only appear to have done so eight times.[171]

(3) Investor-State arbitrations arising from other IIAs

109. There are ten Investor-State arbitration cases commenced under seven IIAs, other than the NAFTA and CAFTA-DR, under which NDSP submissions have been made.[172] All seven IIAs are BITs to which either Canada or the United States is a treaty party. Of these ten cases, nine were conducted as single-stage proceedings, and only one was bifurcated. The number of NDSP submissions made in each stage of the proceedings in these cases is set out in ANNEX E.

110. In the bifurcated case, the NDSP submissions made were directly relevant to the issues arising in the stage of proceedings in which the submissions was made. In *Bridgestone v.*

[170] *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Non-Disputing State Party Submission of the United States of America, 11 March 2016.

[171] See Annex H.

[172] These IIAs are: Canada-Colombia FTA (2008); Canada-Peru FTA (2008); United States-Korea FTA (2007); United States-Oman FTA (2006); United States-Panama TPA (2007); United States-Peru TPA (2006); and the United States-Uruguay BIT (2005).

Panama,[173] each of the four NDSP submissions made by the United States was directly relevant to the issues arising in its respective stages of proceedings. The first and second submissions were made before and after the hearing on the respondent's expedited objections to the investor's claim, and addressed both jurisdictional issues, and a procedural issue regarding expedited objections.[174] The third submission was made before the hearing on the remaining issues and addressed substantive and remedies-related matters.[175] During the hearing, the United States made its fourth submission orally, addressing both substantive and remedies-related issues as well.[176]

111. Nevertheless, this is too small a sample size to draw any general and meaningful conclusion regarding the relationship between the issues addressed in NDSP submissions made in bifurcated arbitration proceedings arising from bilateral IIAs and the stage of proceedings in which they are made.

D. Content of NDSP submissions

112. The NDSP submission provisions in the NAFTA,[177] CAFTA-DR[178] and other IIAs[179] restrict these submissions to interpretation of the respective IIA.[180] Hence, most NDSP submissions begin with a disclaimer that the NDSP is not taking a position on how the interpretation of the treaty applies to the facts of the arbitration case. For example, in NAFTA

[173] *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34.

[174] *Bridgestone v. Panama*, First Non-Disputing State Party Submission of the United States of America, 28 August 2017; Second Non-Disputing State Party Supplemental Submission of the United States of America, 25 September 2017.

[175] *Bridgestone v. Panama*, Third Non-Disputing State Party Submission of the United States of America, 7 December 2018.

[176] *Bridgestone v. Panama*, Fourth Non-Disputing State Party Submission of the United States, 29 July 2019.

[177] Article 1128.

[178] Article 10.20(2).

[179] See, for example: Canada-Peru FTA (2008), Article 837(3); Canada-Colombia FTA (2008), Article 827(2); United States-Uruguay BIT (2005), Article 10.20(2); United States-Panama TPA (2007), Article 10.20(2); Korea-United States FTA (2007), Article 11.20(4); Oman-United States FTA (2006), Article 10.19(2); and United States-Peru TPA (2006), Article 10.20(2).

[180] See Part I.B(1) above.

Chapter Eleven arbitrations, the first paragraph of NDSP submissions is usually worded as follows:

> "Pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), the United States of America makes this submission on questions of interpretation of the NAFTA. The United States *does not take a position, in this submission, on how the interpretations offered below apply to the facts of this case*, and no inference should be drawn from the absence of comment on any issue not addressed below (emphasis added)."[181]

113. The attempt to clearly delineate between treaty interpretation and application is consistent with the purpose of NDSP submissions, i.e., to give NDSPs a voice in the interpretation of their own treaty instruments. Restricting the content of these submissions only to treaty interpretation issues allows ISDS tribunals to refer to them as authoritative sources of treaty interpretation, reducing the concern of covert attempts at diplomatic protection that might compromise due process. In practice, however, this line is not so clearly drawn.

114. This section will discuss the treaty provisions which most frequently are the objects of NDSP submissions, before highlighting instances where NDSP submissions appear to have gone beyond a "pure" treaty interpretation and engaged in a discussion of the facts of the case.

(1) NDSP submissions interpreting treaty provisions

115. As described above, our survey has categorized issues addressed in NDSP submissions into seven broad categories: jurisdictional, substantive, procedural, remedies, causation, State responsibility, and views on other arbitral awards (*supra* [44]). The total number of NDSP submissions made on each issue in Investor-State arbitrations arising from NAFTA, CAFTA-DR and other IIAs respectively is set out in ANNEX F.

116. Across Investor-State arbitrations arising from all IIAs, the most common treaty provision addressed by NDSPs is the provision providing for the MST. In NAFTA Chapter Eleven

[181] *Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Non-Disputing State Party Submission of the United States of America, 23 August 2019, para 1.

arbitrations,[182] the interpretation of Article 1105 was the most common, having been addressed in 42 NDSP submissions. In CAFTA-DR Chapter Ten arbitrations,[183] the interpretation of Article 10.5 is again the most common, having been addressed in 13 NDSP submissions. Following this same pattern, in Investor-State arbitration arising from other IIAs, the interpretation of the MST provision is once again the most common, having been addressed in eight NDSP submissions.[184]

117. The MST provision continues to be the object of many NDSP submissions. For example, prior to the NAFTA FTC Interpretation, claimants to NAFTA Chapter Eleven arbitrations argued that "fair and equitable treatment" was a standard of treatment beyond customary international law.[185] Even after the NAFTA FTC Interpretation clarified that Article 1105(1) prescribes the customary international law MST, the content of this standard remained an issue of contention between claimant investors and the NAFTA parties. In this regard, claimants have argued that the customary international law MST encompasses, *inter alia*, the obligation not to breach the legitimate expectations of investors,[186] transparency,[187] and good faith.[188] In response, the NAFTA parties have made submissions as NDSPs to reject these interpretations of Article 1105(1).[189] Similarly, in the context of the CAFTA-DR and

[182] The following NDSP submissions are excluded from this survey because they are not publicly available: Mexico's submissions in *UPS v. Canada* (May 2002), *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (July 2002) and two submissions in *S.D. Myers v. Canada* (January 2000 and September 2001).

[183] The following NDSP submissions are excluded from this survey: Honduras' submissions in *RDC v. Guatemala*, *Commerce Group v. El Salvador* and *TECO Guatemala Holdings, LLC. v. Republic of Guatemala*, ICSID Case No. ARB/10/23, because they are in Spanish and there is no official translation; and El Salvador's first NDSP submission in *RDC v. Guatemala* because it is not publicly available.

[184] The United States' first two NDSP submissions in *Omega v. Panama* are excluded from this survey because they are not publicly available.

[185] *Methanex v. USA*, Claimant's Reply to the Statement of Defense, 28 August 2000, para 76.

[186] *Mercer International, Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Request for Arbitration, 30 April 2012, para 91.

[187] *Mesa Power v. Canada*, Notice of Arbitration, 4 October 2011, para 62.

[188] *Chemtura v. Canada*, Claimant's Memorial, 28 June 2008, para 37.

[189] On the alleged obligation not to violate an investor's legitimate expectations, see *Mercer v. Canada*, Non-Disputing State Party Submission of Mexico, 8 May 2015, para 19. On the alleged obligation of transparency, see *Vento Motorcycles v. Mexico*, Non-Disputing State Party Submission of the United States of America, 23 August 2019, para 21. On the alleged obligation of good faith, see *Mesa Power v. Canada*, First Non-Disputing State Party Submission of the United States of America, 25 July 2014, para 7.

other IIAs, claimants have argued that the MST includes the obligation not to violate investor's legitimate expectations.[190] In response, NDSPs have either rejected or qualified this interpretation through their submissions by emphasizing that customary international law must be determined by an examination of State practice and *opinio juris*, so that findings by other tribunals that so-called autonomous "FET" provisions protect investors' legitimate expectations are not authoritative.[191]

118. Notwithstanding these submissions, tribunals' decisions on the MST have been inconsistent. The tribunals in both *Waste Management v. Mexico* and *Thunderbird v. Mexico* decided that breach of an investor's legitimate expectations was relevant to determining whether the MST had been violated.[192] On the other hand, the tribunal in *TECO v. Guatemala* rejected the investor's contention that the MST included an obligation not to violate legitimate expectations, citing the NDSPs' submissions in its reasoning.[193] Hence, this area of law is, as the *Merrill & Ring v. Canada* tribunal described it, a "broad and unsettled discussion".[194] Consequently, it is unsurprising that many NDSP submissions have been made to address the proper interpretation of this provision.

119. In comparison to the MST obligation, other treaty provisions have received much less attention from NDSPs. A possible explanation for States' restraint in making NDSP submissions on other less controversial treaty provisions stems from the fact that States

[190] For CAFTA-DR cases, see *TECO v. Guatemala* (n 183), Notice of Arbitration, 20 October 2010, para 73; and *Ballantine v. Dominican Republic*, Amended Statement of Claim, 4 January 2017, para 199. For Investor-State arbitrations arising from other IIAs, see *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Claimant's Memorial on the Merits, 29 May 2015, para 151; and *Omega v. Panama*, Claimant's Memorial, 25 June 2018, para 161.

[191] For CAFTA-DR cases, see *TECO v. Guatemala*, Non-Disputing State Party Submission of El Salvador, 5 October 2012, para 14; *TECO v. Guatemala*, Non-Disputing State Party Submission of the Dominican Republic, 5 October 2012, para 10; *TECO v. Guatemala*, Non-Disputing State Party Submission of the United States of America, 23 November 2012, para 6; and *Ballantine v. Dominican Republic*, Non-Disputing State Party Submission of the United States of America, 6 July 2018, para 23. For Investor-State arbitrations arising from other IIAs, see *Bear Creek Mining v. Peru*, Non-Disputing State Party Submission of Canada, 9 June 2016, para 12; and *Omega v. Panama*, Third Non-Disputing State Party Submission of the United States of America, 3 February 2020, para 24.

[192] *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/98/3, Final Award, 26 June 2003, paras 98, 132; and *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, 26 January 2006, para 194.

[193] *TECO v. Guatemala*, Award, 19 December 2013, para 621.

[194] *Merrill & Ring v. Canada*, Award, 31 March 2010, para 182.

consider both the reciprocal and long-term consequences of supporting certain interpretations of the treaty. This refers to how those views align with past positions that they have adopted, or future positions that they envisage taking as a potential respondent in an Investor-State dispute.[195] In practice, States may face significant legal, and even political, backlash for taking inconsistent positions, either from tribunals, other States or even investors themselves. There may also be economic repercussions in the form of deterring potential investors from making investments in that State, thus weakening capital inflow.

(2) NDSP submissions that appear to go beyond a "pure" treaty interpretation

120. NDSP submission provisions were designed to allow the NDSP to assist the tribunal by offering its views on the interpretation of the treaty instrument by virtue of its status as a treaty party. In other words, these provisions were not intended to turn the NDSP into a quasi-litigant by giving it a right to argue for or against an outcome in the case. Doing so is arguably an abuse of the right to make NDSP submissions.

121. In some instances, however, our survey has revealed that a small number of NDSP submissions have arguably gone beyond taking a principled position on the interpretation of a treaty provision, and have instead attempted to apply their interpretation of the treaty to the facts of the particular case or to make a normative argument regarding the outcome of the case. Out of all 141 NDSP submissions made, we have identified six submissions that have arguably gone beyond a "pure" treaty interpretation. All six submissions were made by Mexico, in NAFTA Chapter Eleven arbitration cases.[196] We discuss each in turn.

122. In *Pope & Talbot v. Canada*, during Phase 1 of the Merits stage, Mexico made an NDSP submission which, although it initially disclaimed that it would "refer" to established facts

[195] J Coe Jr, 'Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods' (2003) 36 Vanderbilt Journal of Transnational Law 1381, p 1410.

[196] *Ethyl v. Canada*, Non-Disputing State Party Submission of Mexico, 11 March 1998, 2; *Loewen v. USA*, Non-Disputing State Party Submission of Mexico, 16 October 2000, paras 10, 12; *Pope & Talbot v. Canada*, Second Non-Disputing State Party Submission of Mexico, 2 April 2000, paras 32-35, 53, 56-59, 69-70, 72, 78-80, 83, 95; Fourth Non-Disputing State Party Submission of Mexico, 5 November 2000, 9; Seventh Non-Disputing State Party Submission of Mexico, 3 December 2001, paras 6, 17-18.

of the case,[197] in the end appeared to *apply* Mexico's interpretation of the relevant NAFTA provisions to those facts to make various normative conclusions.[198] To illustrate, regarding the obligation not to unlawfully expropriate without compensation under Article 1110, Mexico submitted that:

> "There is no question that, under the commonly accepted standards as to what constitutes a direct or indirect expropriation at international law, the acts complained of do not even remotely resemble the acts that other international arbitral tribunals have found to be expropriations.
>
> …
>
> The ownership and control of the Claimant's investment has not been affected or even interfered with at all by the regulatory acts at issue."[199]

Similarly, regarding the obligation to provide national treatment under Article 1102, Mexico submitted that:

> "There is no indication from the pleadings that the Claimant can point to its investment being discriminated against by virtue of its foreign ownership…. It is not enough that the Claimant finds itself restricted in exporting lumber to the United States. It is not enough for the Claimant to argue that some other producer received more quota."[200]

Finally, regarding the issue of performance requirements under Article 1106, Mexico submitted that:

> "[E]ven if Canada's measures taken to implement the SLA could somehow be covered by Article 1106, as measures reasonably necessary to implement the

[197] *Pope & Talbot v. Canada*, Second Non-Disputing State Party Submission of Mexico, 2 April 2000, para 2.

[198] *Ibid*, paras 32-35, 53-59, 69-84, 95.

[199] *Ibid*, paras 33, 35.

[200] *Ibid*, paras 69-70.

> SLA they would be protected from NAFTA challenge by virtue of the subsequent treaty.
>
> Thus, notwithstanding the Claimant's characterization of various aspects of the SLA's implementation as performance requirements, these are simply not the type of measures that the Parties were seeking to discipline in Article 1106."[201]

123. In its Interim Award, the tribunal did not appear to accord Mexico's NDSP submission any weight, and in any event did not make any comment about the normative nature of this submission. Regarding the national treatment claim, the tribunal postponed its decision on the grounds that more evidence was required.[202] Regarding the issues on expropriation and performance requirements, the tribunal only considered the disputing parties' submissions in making its decision and did not refer to Mexico's NDSP submission at all.[203] That said, this may not be an accurate reflection of how NDSP submissions that appear to go beyond treaty interpretation are received by arbitral tribunals, considering the tribunal's apparent neglect of Mexico's second NDSP submission was not exclusive to that submission. In its Interim Award, the tribunal also did not refer to the other NDSP submissions which were limited to a principled, "pure" interpretation of the NAFTA.[204]

124. Also, during Phase 2 of the Merits stage in *Pope & Talbot v. Canada*, Mexico made the following submission on the requirement to exhaust domestic remedies prior to being able to file a claim for breach of Article 1105:

> "If the Investor had a legal complaint about the establishment of the quota system or its administration, a Canadian court was the appropriate forum to hear such complaints. The Investor apparently chose not to avail itself of such remedy. Instead, it has asked this Tribunal to in effect ignore its failure to challenge the

[201] *Ibid*, paras 94-95.

[202] *Pope & Talbot v. Canada*, Interim Award, 26 June 2000, para 44.

[203] *Ibid*, paras 64, 96.

[204] *Pope & Talbot v. Canada*, First Non-Disputing State Party Submission of the United States of America, 7 April 2000; Second Non-Disputing State Party Submission of the United States of America, 25 May 2000; and Third Non-Disputing State Party Submission of Mexico, 25 May 2000.

> acts complained of in Canada and to take it upon itself to evaluate the acts against a vague international standard. This amounts, in Mexico's respectful submission, to a circumvention and the *de facto* usurpation of the jurisdiction of the Canadian courts."[205]

In its decision, the tribunal did not consider this issue at all. Consequently, it did not refer to Mexico's NDSP submission.[206]

125. Again, during the damages stage in *Pope & Talbot v. Canada*, Mexico made an NDSP submission on whether one of the measures at issue could be the subject of a new finding of liability under Article 1102, stating that:

> "A review of the pleadings, correspondence and transcripts in Mexico's possession does not reveal any allegation by the Claimant, or any prior indication by the Tribunal, that the verification review episode could engage liability under Article 1102. …
>
> Mexico respectfully submits that a new finding of liability based on Article 1102 would rightly be perceived as calculated to circumvent the FTC Interpretation of Article 1105 … and thereby avoid applying the governing law."[207]

Similarly, in its decision, the tribunal did not consider this issue because it had already concluded that the Investor would be entitled to damages by reason of the Respondent's breach of Article 1105 in respect of that measure. Hence, it did not refer to Mexico's NDSP submission.[208]

126. Next, in *Ethyl v. Canada*, on the issue of whether the investor had standing to bring the claim, Mexico submitted that:

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[205] *Pope & Talbot v. Canada*, Fourth Non-Disputing State Party Submission of Mexico, 5 November 2000, pp 6, 9.

[206] *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001.

[207] *Pope & Talbot v. Canada*, Seventh Non-Disputing State Party Submission of Mexico, 3 December 2001, paras 17-18.

[208] *Pope & Talbot v. Canada*, Award in Respect of Damages, 31 May 2002, para 66.

> "On the facts, this case involves a measure relating to trade in goods. The enforcement of rights that may accrue under Chapter Three accrue not to the Claimant but to the United States. …
>
> As in other potential international trade cases, the present Claimant is entitled to petition the United States authorities to commence such proceedings. However, it is not open to the Claimant to use the Investor-State mechanism to launch what is in reality a challenge against a trade measure in the guise of an investment dispute."[209]

In its decision, the tribunal did not refer to Mexico's NDSP submission at all, and declined to exclude the Claimant's claim on this basis.[210]

127. Furthermore, in *ADF v. USA*, Mexico made a normative statement regarding the jurisdiction of that tribunal to decide whether the measure at issue was a breach of the NAFTA, stating that:

> "Mexico agrees with the United States that the measures complained of by the Claimant relate to the treatment of goods in a government procurement context, not investments, and therefore are not within the scope of Chapter Eleven. … For that reason, this Tribunal has no jurisdiction to consider what is in reality a complaint about U.S. government procurement practices."[211]

In its decision on this point, the tribunal did not mention Mexico's NDSP submission at all, but came to a conclusion consistent with its position by referring to the definition of "procurement" in NAFTA Chapter Ten.[212] However, it is interesting to note that the tribunal referred to this same NDSP submission in its decision on the MST obligation.[213]

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[209] *Ethyl v. Canada*, Non-Disputing State Party Submission of Mexico, 11 March 1998, 2.

[210] *Ethyl v. Canada*, Award on Jurisdiction, 24 June 1998, paras 62-64.

[211] *ADF v. USA*, First Non-Disputing State Party Submission of Mexico, 18 January 2002, 2.

[212] *ADF v. USA*, Award, 9 January 2003, para 161.

[213] *ADF v. USA*, Award, 9 January 2003, para 179.

128. Lastly, in *Loewen v. USA*, on the issue of conditions precedent to instituting proceedings under NAFTA Chapter Eleven, Mexico submitted that:

> "In Mexico's respectful submission, therefore, Article 1121 precluded The Loewen Group, Inc. from simultaneously commencing or continuing claims for damages under Chapter Eleven and in any other *fora*, including the U.S. domestic court, based upon the measure that is alleged to be a breach of Chapter Eleven."[214]

In its decision, the Tribunal concluded that this issue should be postponed to the hearing on the merits, and did not refer to Mexico's NDSP submission at all in explaining its reasons for reaching such a conclusion.[215]

129. Our findings suggest that NAFTA Chapter Eleven tribunals do not seem to give much attention to the fact that some NDSP submissions may appear to make normative conclusions regarding the outcome of the case. Hence, while it is undesirable in principle for NDSPs to make submissions that go beyond treaty interpretation, empirical evidence suggests that there are no real penalties should they choose to do so. That said, this is too small a sample size to draw any meaningful conclusion regarding the effect of making NDSP submissions that appear to apply treaty provisions to the facts of the particular case. To this end, it is worth noting again that across all ISDS cases, the large majority of NDSP submissions made were limited to a principled, "pure" interpretation of the relevant treaty provisions.

E. Consistency of NDSP submissions

130. In this section, we examine the consistency of NDSP submissions both (i) between treaty parties in a particular Investor-State arbitration; and (ii) in relation to a State's position in past submissions, either as NDSP or as respondent. These findings will be discussed with a view towards the potential immediate and long-term effects of making consistent, repeated submissions.

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[214] *Loewen v. USA*, First Non-Disputing State Party Submission of Mexico, 16 October 2000, para 12.

[215] *Loewen v. USA*, Decision on Hearing of Respondent's Objections to Competence and Jurisdiction, 5 January 2001, para 74.

(1) Consistency among treaty parties' positions in a particular Investor-State dispute

131. Consistency between treaty parties in a particular Investor-State arbitration refers to cases where NDSPs have taken a similar position as the respondent State on the interpretation of the relevant treaty positions. The question of the weight to be accorded to such interpretations is discussed in Part III.A below.

132. An obvious means of detecting such consistency in interpretations is from the extensive citation and endorsement of submissions made by other treaty parties in the same proceedings. For example, in *Mesa Power v. Canada*, Mexico cited the United States' first NDSP submission in that case to support its interpretation of NAFTA Article 1105.[216] In addition, there are instances where NDSPs concur *entirely* with submissions made by other NDSPs in the same case. This is seen in instances where NDSPs endorsed submissions made by other NDSPs or the respondent in their entirety. Such NDSP submissions tend to be short and express simply the NDSP's agreement with that other submission. For instance, in *Lone Pine v. Canada*, Mexico directly cited to Canada's Counter-Memorial to support its interpretation that NAFTA Article 1110 includes the police powers doctrine.[217] In another example, in *Merrill & Ring v. Canada*, Mexico's submission contained but one paragraph, stating:

> "The United Mexican States concurs with in its entirety the Submission of the United States of America…. The United Mexican States also verifies and expressly endorses the observations of the United States of America in connection with the findings of the arbitral tribunal in *Feldman v. the United Mexican States*…."[218]

Likewise, in *Pope & Talbot v. Canada*, the United States' two-paragraph-long submission stated:

[216] *Mesa Power v. Canada*, Non-Disputing State Party Submission of Mexico, 12 June 2015, para 9.

[217] *Lone Pine v. Canada*, Non-Disputing State Party Submission of Mexico, 16 August 2017, para 8.

[218] *Merrill & Ring v. Canada*, Non-Disputing State Party Submission of Mexico, 2 April 2009.

> "The United States fully concurs with Canada in the views expressed in Canada's letter…to the Tribunal regarding the NAFTA Free Trade Commission's interpretation…of Article 1105 and that interpretation's applicability to pending NAFTA Chapter Eleven arbitrations. The United States also concurs with Canada that Article 1103 cannot be relevant to, or constitute and issue with respect to, the interpretation of Article 1105."[219]

133. In addition to advancing similar interpretations, some NDSP submissions also expressly assert that the treaty parties' common, concordant, and consistent position in that case constitutes the authentic interpretation of the provision in question.[220] For instance, in its submission to the *Pope & Talbot v. Canada* tribunal, Mexico stated that:

> "As the sovereign States who both drafted and signed the international treaty, their shared view must be considered to be authoritative. The concurrence of the United States, the Party of the investor, shows the settled and uncontroversial nature of the interpretation advanced by each of the NAFTA Parties."[221]

More recently, in *B-Mex v. Mexico*, Canada submitted that:

> "The fact that a concordant interpretation is not only reasonable but accords with the views of NAFTA and other tribunals on the same issue lends all the more credence to their value and demonstrates the important role that Article 1128

[219] *Pope & Talbot v. Canada*, Non-Disputing State Party Submission of the United States of America, 2 October 2001 para 2.

[220] For example, see *Pope & Talbot v. Canada*, Non-Disputing State Party Submission of Mexico, 25 May 2000, 3; *Methanex v. USA*, Second Non-Disputing State Party Submission of Canada, 30 April 2001, para 37; *Methanex v. USA*, Second Non-Disputing State Party Submission of Mexico, 30 April 2001, para 1; *Feldman v. Mexico*, Second Non-Disputing State Party Submission of Canada, 28 June 2001, para 7; *Detroit International Bridge Company v. Government of Canada*, UNCITRAL, PCA Case No. 2012-25, Non-Disputing State Party Submission of Mexico, 14 February 2014, paras 22-23; *Mercer v. Canada*, Non-Disputing State Party Submission of Mexico, 8 May 2015, para 11; *Mercer v. Canada*, Non-Disputing State Party Submission of the United States of America, 8 May 2015, para 11; *Mesa Power v. Canada*, Second Non-Disputing State Party Submission of the United States of America, 12 June 2015, para 3; *Windstream v. Canada*, Non-Disputing State Party Submission of the United States of America, 12 January 2016, para 28; *Eli Lilly and Company v. Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Non-Disputing State Party Submission of Mexico, 8 March 2016, para 8; and *B-Mex v. Mexico*, Non-Disputing State Party Submission of Canada, 17 August 2018, para 11.

[221] *Pope & Talbot v. Canada*, Non-Disputing State Party Submission of Mexico, 25 May 2000, p 3.

> submissions play in creating greater certainty for investors under the NAFTA. That a concordant view of the NAFTA Parties pursuant to Article 1128 submissions has not been formalized in a FTC Note of Interpretation does not diminish this result. Where the concordant views of the NAFTA Parties on a question of treaty interpretation are established, such views should be given significant weight by a tribunal as a subsequent agreement by the Parties."[222]

134. The same point was also made by the United States in its NDSP submission in *Renco v. Peru*, where it stated:

> "The Parties to the U.S.–Peru TPA agree that if all formal and material requirements are not met, the waiver shall be deemed ineffective and…the tribunal will lack jurisdiction. The Parties' common, concordant, and consistent positions constitute the authentic interpretation of Article 10.18 and, under the Vienna Convention on the Law of Treaties, 'shall be taken into account, together with the context.'"[223]

135. It is noteworthy that this practice by treaty parties of forming consistent and concordant views on questions of treaty interpretation so far appears to be exclusive to the NAFTA. Such practice is yet to be seen in CAFTA-DR Chapter Ten arbitrations, for instance.

136. That being said, there may be instances where treaty parties adopted different language in expressing a common interpretation, and as a result, the adjudicator concluded that there was no common position between the treaty parties. This was notwithstanding treaty parties' assertion of a common, agreed interpretation. For example, in *Cargill v. Mexico*,[224] while Canada and the United States did not make NDSP submissions in the arbitration proceedings, they participated as interveners in Mexico's subsequent application to the Ontario Court of Appeal to set aside the arbitral award. In particular, they made submissions on the issue of

[222] *B-Mex v. Mexico*, Second Non-Disputing State Party Submission of Canada, 17 August 2018, para 11.

[223] *Renco v. Peru*, Third Non-Disputing State Party Submission of the United States of America, 11 October 2015, para 8.

[224] *Cargill, Incorporated v. Mexico*, ICSID Case No. ARB(AF)/05/2.

whether NAFTA tribunals could award a claimant damages for loss suffered in their home States, as the *Cargill* tribunal had done in awarding damages for the Investor's "upstream" losses of lost sales for its high fructose corn syrup products manufactured in the United States (the home State), and exported into Mexico via its Mexican subsidiary.[225] On the consequences of the *Cargill v. Mexico* award, Canada submitted:

> "[That] [i]nvestors from Mexico and the United States could obtain the benefits of Chapter Eleven based only on a limited investment in Canada while retaining substantial elements of the investments…in their home State or elsewhere in the world … was not the scope of protection Canada or the other NAFTA parties intended."[226]

In comparison, the United States submitted:

> "[T]he relief available for claims submitted under Article 1116 is limited to damages incurred by an 'investor' for damages incurred in its capacity as an investor – seeking to make, making, or having made an 'investment' in the territory of another NAFTA Party. …
>
> Moreover, Article 1139(h)(ii)…does not treat 'revenues or profits' as 'investments' in themselves. Instead, 'revenues or profits' are elements of the type of contract that may (as an example) give rise to 'interests that arise from the commitment of capital or other resources in the territory' of the respondent State – with the 'interests,' not the 'revenues or profits,' constituting the 'investment' under Article 1139. Indeed, without these limitations, any income arising from a claimant's exports to entities located in the respondent State might be characterized as an 'investment' under Article 1139. ….

[225] *Cargill v. Mexico*, Award, 18 September 2009, paras 521-523.

[226] *Mexico v. Cargill, Incorporated*, 2011 ONCA 622 ("*Cargill v. Mexico (Setting Aside)*"), Response of the Intervener, the Attorney General of Canada to the Application for Leave to Appeal, 18 January 2012, para 5.

> … Mexico, Canada and the United States have consistently expressed the same view on this point to NAFTA arbitral tribunals."[227]

137. In the end, the Ontario Court of Appeal acknowledged the common position of the NAFTA parties, but only as regards the point that requested damages must relate to the investment and to the investor as an investor.[228] However, on the interpretation that damages awarded are also to exclude losses suffered by an investor in its home business operation, including those caused by the breach, the Ontario Court of Appeal found that there was no "clear, well-understood, agreed common position."[229] This suggests that even though treaty parties' submissions may be similar in *substance*, there is no guarantee that a tribunal or court would perceive and interpret their submissions as such.

138. However, there have been a few instances in which treaty parties were not in agreement regarding the interpretation of a particular treaty provision. For example, in *Methanex v. USA*, the NAFTA parties held different views regarding the participation of a third-party in the proceedings as an *amicus curiae*. On the other hand, there have also been instances like *Ballantine v. Dominican Republic*, where the United States submitted that an investor with dual nationality must not have dominant and effective nationality of the respondent State at the time of submission of the claim, in order to bring a claim under CAFTA-DR Chapter Ten.[230] In contrast, Costa Rica submitted that the crucial moment is on the date the claimant first acquires knowledge of the alleged breach.[231] In its decision, the tribunal accepted both interpretations and held that compliance with the dominant and effective nationality requirement is required both at the moment the of the alleged breach and the moment the claim is submitted.[232] Thus, there is no conclusive view on how tribunals treat NDSP

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[227] *Cargill v. Mexico (Setting Aside*), Factum of the Intervenor Submitted by the United States of America, 31 January 2011, paras 5, 13, 19.

[228] *Cargill v. Mexico (Setting Aside*), Decision on the Application to Set Aside Award, 4 October 2011, para 84.

[229] *Cargill v. Mexico (Setting Aside*), Decision on the Application to Set Aside Award, 4 October 2011, para 84.

[230] *Ballantine v. Dominican Republic*, Non-Disputing State Party Submission of the United States of America, 6 July 2018, para 4.

[231] *Ballantine v. Dominican Republic*, Non-Disputing State Party Submission of the United States of America, 6 July 2018, para 3-10.

[232] *Ballantine v. Dominican Republic*, Award, 3 September 2019, para 526.

submissions where there are divergent positions on treaty interpretation as generally, few tribunals have made reference to NDSP submissions in their written decisions and awards.[233]

(2) Consistency of States' positions across other Investor-State disputes

139. Another aspect of consistency in NDSP submissions is in relation to that State's position in past submissions across all Investor-State disputes, either as NDSP or as respondent. Our survey tracks the interpretations adopted by each State in its submissions as respondent to an Investor-State arbitration, and then cross-refers them against the interpretations asserted in its NDSP submissions in other Investor-State arbitrations. The results of our empirical survey reveal that States have been largely consistent in the interpretations they have advanced. However, again, this is limited to the handful of States that have made NDSP submissions (*supra* [89]).

140. We have used two indices demonstrating such consistency, which we examine in turn below: consistency evinced through extensive citation and cross-referencing; and consistency evinced through drafting NDSP submission in similar language.

(a) Evinced through extensive citation and cross-referencing

141. Similar to assessing consistency in treaty interpretation between treaty parties in the same dispute, an obvious way to detect consistency in a State's interpretation of a particular treaty provision, across Investor-State disputes, is from extensive references to submissions made in other disputes. There have been instances where States as NDSPs would refer to their NDSP submissions made in other cases to explain their present position. For example, in *Aven v. Costa Rica*, the United States attached in its NDSP submission a prior NDSP submission made in *Berkowitz v. Costa Rica* and simply stated:

> "The United States' views on the interpretation of Article 10.5 are reflected in paragraphs 11-24 of the attached non-disputing Party submission…in the CAFTA-DR Chapter Ten case [*Berkowitz v. Costa Rica*].

[233] See Part 187 below.

> The United States' views on the interpretation of Article 10.7 and Annex 10-C…are reflected in paragraphs 25-31 of the attached non-disputing Party submission…in the CAFTA-DR Chapter Ten case [*Berkowitz v. Costa Rica*]"[234]

142. An example in the NAFTA context is the United States' NDSP submission in *Pope & Talbot v. Canada*, to which the United States attached its prior submission in *Metalclad v. Mexico* and stated:

> "The United States has addressed certain of these issues [with respect to expropriation] in its submission in the *Metalclad* case. We invite the Tribunal to consult that document, which is attached, for an explanation of the position of the United States on the meaning of the phrase 'measure tantamount to expropriation.'"[235]

143. Additionally, an example from Investor-State disputes arising under other IIAs comes again from the United States' oral NDSP submission in *Bridgestone v. Panama* regarding the issue of the investor's recoverable damages under the US-Panama TPA. In its submission, the United States referred to its submission (as intervenor) in Mexico's application to set aside the arbitral award in *Cargill v. Mexico*, simply stating that:

> "The United States has made a comparable submission on this issue in the context of the NAFTA as an intervenor in Mexico's action to partially set aside a NAFTA Award in the Court of Appeals for Ontario. That was the case of *Cargill vs. Mexico*."[236]

144. To further emphasize the consistency among treaty parties in treaty interpretation, NDSPs may also reference submissions made by *other* treaty parties in *other* Investor-State disputes arising from the same treaty. An example of this can be seen in El Salvador's NDSP submission in *Berkowitz v. Costa Rica*. To support its position that the customary

[234] *David Aven et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Non-Disputing State Party Submission of the United States of America, 2 December 2016, paras 2-3.

[235] *Pope & Talbot v. Canada*, First Non-Disputing State Party Submission of the United States of America, 7 April 2000, para 14.

[236] *Bridgestone v. Panama*, Fourth Non-Disputing State Party Submission of the United States, 29 July 2019, lines 15-20.

international law MST under CAFTA-DR Article 10.5 does not include the protection of investors' expectations, legitimate or otherwise, El Salvador referenced NDSP submissions on the same issue made by itself, the Dominican Republic, Honduras, and the United States in the *TECO v. Guatemala* case. In so doing, El Salvador stated in its *Berkowitz v. Costa Rica* submission:

> "At least five of the seven CAFTA-DR Parties have declared in the previous CAFTA-DR arbitrations that there is no role for investors' expectations in an analysis of whether a State has complied with its international obligations under CAFTA-DR Article 10.5."[237]

145. We also observe that NDSPs may on occasion also cross-refer to submissions made in Investor-State disputes arising out of *other* IIAs in support of their interpretation of a similarly drafted treaty provision. For example, in *Berkowitz v. Costa Rica*, a CAFTA-DR case, El Salvador relied on the United States' submissions in *Apotex v. USA (III)*[238] and *Grand River v. United USA*[239] (both NAFTA cases) to buttress its arguments on the interpretation of the MST provision;[240] and further cited to the United States' NDSP submission in *Merrill & Ring v. Canada*[241] (another NAFTA case) in support of its interpretation of when the three-year statute of limitations of CAFTA-DR Article 10.18.1 is triggered.[242] NDSP submissions made in Investor-State arbitrations arising from bilateral IIAs also share this practice. In *Omega v. Panama*, the United States cited its previous NDSP submission in *Mercer v. Canada* (a NAFTA case) in support of its interpretation of the

[237] *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Non-Disputing State Party Submission of the Republic of El Salvador, 17 April 2015, para 11.

[238] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1 ("*Apotex v. USA (III)*"), Counter-Memorial on the Merits and Objections to Jurisdiction of Respondent United States of America, 14 December 2012, para 353.

[239] *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Counter-Memorial of Respondent United States of America, 22 December 2008, paras 96-100.

[240] *Berkowitz v. Costa Rica*, Non-Disputing State Party Submission of the Republic of El Salvador, 17 April 2015, paras 10, 18.

[241] *Merrill & Ring v. Canada*, Submission of the United States of America, 14 July 2008, para 5.

[242] *Berkowitz v. Costa Rica*, Non-Disputing State Party Submission of the Republic of El Salvador, 17 April 2015, para 31.

proper test to establish a breach of MFN treatment under Article 10.4 of the US-Panama TPA.[243]

146. In our view, such practice is legitimate given that the treaties surveyed share many similarities such as the parties involved and treaty protection provisions. Many provisions in the CAFTA-DR and other IIAs surveyed were either taken from the NAFTA, or drafted in reaction to situations faced in NAFTA Chapter Eleven cases[244] and is thus instructive as part of the object and purpose of the provision.[245] Understood in this respect, it is unsurprising that NDSPs cross-reference their submissions in other Investor-State arbitrations in order to ensure the consistent interpretation of similarly drafted provisions in its other treaties. This practice is also acknowledged by arbitral tribunals as they refer to interpretations adopted by NAFTA Chapter Eleven tribunals in their decision-making.[246]

147. In addition, as respondents, States have also referred to their previous NDSP submissions, as well as to those of other treaty parties in other disputes. For instance, even though there were no NDSP submissions made in *Cargill v. Mexico* on the obligation of national treatment, Mexico referred to submissions made by NAFTA Parties in previous disputes, and asserted that:

> "All three NAFTA Parties have expressed this view in various NAFTA proceedings…. Mexico submits that the Tribunal should give due deference to the consistent position of the three NAFTA Parties."[247]

[243] *Omega v. Panama*, Third Non-Disputing State Party Submission of the United States of America, 3 February 2020, para 3.

[244] An example of this is Article 10.20.4 of the United States-Panama TPA (2007), which was designed to enable a tribunal to dismiss claims that are demonstrably doomed to failure at an early stage to save time and costs. This was in response to the United States' experience in *Methanex v. USA*. At an early stage, the United States argued that the claims were inadmissible for being without legal merit, but the Tribunal ruled that it could not address this issue in a preliminary stage. Only after years of costly proceedings did the tribunal finally dismiss the claims, on the ground that they fell outside its jurisdiction, and, in any event, were devoid of legal merit.

[245] VCLT, Article 31(1).

[246] *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, para 382; *Bear Creek Mining v. Peru*, Award, 30 November 2017.

[247] *Cargill v. Mexico*, Rejoinder of Respondent, 2 May 2007, paras 287-289.

148. Likewise, in *Resolute Forest v. Canada*, Canada cited submissions made by all three NAFTA Parties in previous NAFTA disputes in support of its position that the national treatment obligation in Article 1102 is designed to protect against nationality-based discrimination.[248] Another example is seen in *B-Mex v. Mexico*, where Mexico cited NDSP submissions made by NAFTA parties in *KBR v. Mexico* and *Mesa Power v. Canada* to support its position that compliance with the conditions and formalities set out in NAFTA Chapter Eleven is necessary to establish the consent of the respondent to arbitration pursuant to Article 1122(1).[249]

149. That being said, our survey finds that this practice has been limited to NAFTA Parties. None of the respondent States in CAFTA-DR Chapter Ten disputes have made use of previous NDSP submissions to buttress their positions on treaty interpretation. A likely reason for this is that the respondents to CAFTA-DR disputes have, in general, made very few NDSP submissions, and these submissions may not have addressed treaty provisions that come into question in the disputes to which they are respondent.

150. For Investor-State disputes arising under other IIAs, none of the respondent States in these cases have made any NDSP submissions, much less in multiple cases.

(b) Evinced through drafting with similar language

151. Another way through which States may evince consistency in their interpretations of treaty provisions across different disputes is by drafting their NDSP submissions similarly to their previous submissions on the same point. For example, regarding its position on denial of justice under NAFTA Article 1105, the United States' NDSP submission in *Lion v. Mexico*[250] shares similar wording with its submission in *Eli Lilly v. Canada*.[251] Another

[248] *Resolute Forest v. Canada*, Respondent's Counter-Memorial on Merits and Damages, 17 April 2019, para 250 and in particular, footnotes 523-525.

[249] *B-Mex v. Mexico*, Respondent's Memorial on Jurisdictional Objections, 30 May 2017, paras 60-63.

[250] *Lion Mexico Consolidated L.P. v. Mexico*, ICSID Case No. ARB)AF/15/2, Non-Disputing State Party Submission of the United States, 21 June 2019, paras 7-8.

[251] *Eli Lilly v. Canada*, Non-Disputing State Party Submission of the United States of America, 18 March 2016, paras 20-21.

example is seen in the United States' NDSP submissions in *Detroit v. Canada*[252] and *KBR v. Mexico*,[253] both of which are worded in exactly the same way, and thus clearly advance the same US position in relation to the kinds of disputes that are arbitrable under NAFTA, the limitations period, and the waiver requirement. Such practice is also prevalent in the context of Investor-State arbitrations arising from other IIAs. On the issue of the expedited review mechanism under the Article 11.20 of the US-Korea FTA, the language of the United States' NDSP submission in *Seo v. Republic of Korea*[254] to a large extent mirrors its previous NDSP submission in *Bridgestone v. Panama*.[255]

152. In all these cases, tribunals have recognised the common position of treaty parties with regard to the interpretation of the provision at issue in each case. Hence, the use of similar wording in NDSP submissions is an additional, albeit indirect, method for treaty parties to evince a common position on treaty interpretation.

F. Conclusion

153. As of the time of writing, NDSP submissions have only been made by North and Central American States. The high proportion of NAFTA and CAFTA-DR Investor-State disputes in which NDSP submissions have been made suggests that this practice is becoming a common feature in these disputes.

154. The institutional position of a State as either home State or non-disputing, non-home State appears to have little influence over its decision to make NDSP submissions. Instead, our findings on the treaty provisions addressed in NDSP submissions leads us to the conclusion that it is more likely the degree of controversy of the issue raised in the dispute that motivates NDSPs to make submissions. Specifically, NDSPs appear to be more incentivised to make

[252] *Detroit v. Canada*, Non-Disputing State Party Submission of the United States of America, 14 February 2014.

[253] *KBR v. Mexico*, ICSID Case No. UNCT/14/1, Non-Disputing State Party Submission of the United States of America, 30 July 2014.

[254] *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Non-Disputing State Party Submission of the United States of America, 19 June 2019, paras 10-11.

[255] *Bridgestone v. Panama*, First Non-Disputing State Party Submission of the United States of America, 28 August 2017, paras 10-11.

submissions on areas where the law is not settled, a prominent example of this being the content of the customary international law MST.

155. Generally, our survey indicates that the issues addressed in NDSP submissions are either: (i) directly relevant to the issues arising in a particular stage of the arbitral proceedings; (ii) responses to specific questions posed by the tribunal; or (iii) responses to external developments independent of the specific Investor-State dispute. A prominent example of the latter has been the issuance of the NAFTA FTC Interpretation in 2001, following which we observed an increase in NDSP submissions made by the NAFTA parties to address its relevance to pending ISDS proceedings at the time.

156. Finally, we also observed that treaty parties have been largely consistent in their positions on treaty interpretation, both when acting as NDSPs and as respondents. In specific disputes, consistency among the treaty parties may have the immediate effect of constituting the kind of "subsequent agreement" which must be taken into account by the tribunal in its decision, as envisaged by Article 31(3)(a) of the VCLT. From a broader perspective, consistent, repeated positions on treaty interpretation by the treaty parties may over time evince a long-standing common agreement as to the proper interpretation of particular treaty positions. This would give greater credence to the argument that such long-standing consensus constitutes a type of "subsequent practice" that the tribunal must take into account. In this regard, we observe that tribunals have accepted NDSP submissions as an authoritative source of interpretation where there was extensive citation and reference to treaty parties' previous submissions on the same point, as opposed to in cases where the long-standing nature of such interpretation was not as obvious.[256]

[256] See Parts III.B and III.C below.

III. THE EFFECTIVENESS OF NDSP SUBMISSIONS

A. Position under General International Law: Significance of NDSP Submissions

(1) Vienna Convention on the Law of Treaties

157. NDSP submissions concern the interpretation of IIAs. Hence, in order to determine the weight to be accorded to these submissions, it is necessary to turn first to the rules of treaty interpretation codified in Articles 31 to 33 of the VCLT.

158. Article 31 of the VCLT, widely regarded as reflective of customary international law,[257] lays down the general rule of treaty interpretation, which states that the text of a treaty should be interpreted in good faith in accordance with its ordinary meaning in context and in light of the treaty's object and purpose.[258]

159. Article 31 also lists additional means for treaty interpretation. These are either defined as forming part of the treaty's context (i.e., any agreement made between all contracting parties in connection with the conclusion of the treaty, or any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty), or as elements that must be taken into account together with the context (i.e. any subsequent agreement or subsequent practice establishing the understanding of the parties regarding the interpretation of a treaty).

160. The latter means are of particular relevance to this Memorandum's analysis. As formulated in Article 31(3) of the VCLT, the interpretation of a treaty *shall* take into account:

> "(a) any *subsequent agreement* between the parties regarding the interpretation of the treaty or the application of its provisions; [and] (b) any *subsequent*

[257] *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment*, ICJ Reports 2004, p 279, para 100; *LaGrand (Germany v. United States of America), Judgment*, ICJ Reports 2001, p 466, para 99; *Kasikili/Sedudu Island (Botswana/Namibia) Case, Judgment*, ICJ Reports 1999, p 1059, para 18; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment*, ICJ Reports 1991, p 53, para 48.

[258] The exact wording of Article 31(1) of the VCLT is as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

> *practice in the application of the treaty which establishes the agreement* of the parties regarding its interpretation" (emphases added).

161. Subsequent agreement and subsequent practice represent forms of authentic interpretation whereby all parties to a treaty agree on, or at least accept, an interpretation of the treaty's terms.[259] As the analysis below will demonstrate, NDSP submissions made in the course of a dispute can constitute a subsequent agreement or subsequent practice, and can therefore guide tribunals towards an interpretation that is consistent with the intention and common will of the treaty parties, which is after all the goal of treaty interpretation.[260]

162. Indeed, Article 31 does not contain a hierarchy of the various means of interpretation included therein. The various means mentioned are, at least in principle, of *equal* value,[261] as *all* the elements of the general rule of interpretation provide the basis for establishing the "common will and intention of the parties by objective and rational means."[262] Therefore, according to Nolte, subsequent agreements between the parties and subsequent practice in

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[259] See Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2008), p 429.

[260] See, for example, the tribunal's observation in *Rhine Chlorides Arbitration concerning the Auditing of Accounts (Netherlands/France)* (2004) 144 ILR 259, Award, 12 March 2004, para 62, that the general rule of interpretation codified in Article 31 of the VCLT "should be viewed as forming an integral whole, the constituent elements of which cannot be separated. Moreover, this is the approach that is now taken by the International Court of Justice and by certain international arbitral bodies. All the elements of the general rule of interpretation provide the basis for establishing the common will and intention of the parties by objective and rational means."

See also E Bjorge, 'Time Present and Time Past: The Intention of the Parties and the Evolutionary Interpretation of Treaties', in G Abi-Saab, K Keith, G Marceau, and C Marquet (eds), *Evolutionary Interpretation and International Law* (Hart Publishing 2019), p 35.

[261] ILC, *Yearbook of the International Law Commission* (United Nations 1966) vol II, A/CN.4/SER.A/1966/Add.l, pp 219-220, paras 8-9. See also Villiger (n 259), p 435.

[262] *Rhine Chlorides*, Award, para 62:

> "The Tribunal considers that [Article 31 of the Vienna Convention] should be viewed as forming an integral whole, the constituent elements of which cannot be separated. Moreover, this is the approach that is now taken by the International Court of Justice and by certain international arbitral bodies. All the elements of the general rule of interpretation provide the basis for establishing the common will and intention of the parties by objective and rational means."

(Unofficial English translation provided by the PCA's website. In the French original, the passage states: "Le Tribunal considère que [l'article 31 de la Convention de Vienne] doit être envisagée comme formant un tout intégré, dont les éléments constitutifs ne peuvent être séparés. C'est d'ailleurs cette approche qui est maintenant adoptée par la Cour internationale de Justice et par certains organes d'arbitrage international. Tous les éléments de la règle générale de l'interprétation sont à la base d'une recherche objective et rationnelle qui permet d'établir l'intention et la volonté communes des parties.").

the application of the treaty which establish the agreement of the parties possess "the same importance for the process of interpretation as the ordinary meaning of the terms of the treaty, the context of these terms, and the object and purpose of the treaty."[263]

163. The above remarks imply two important limitations to the general import of subsequent agreements and practice in the interpretive process. First, the text of the treaty is often given primacy *vis-a-vis* the subsequent agreements and subsequent practice of the parties, as it is considered to be the "only and most recent expression of the common will of the parties" according to the ILC.[264] To clarify, reliance on the text should not be misunderstood as sole reliance on a literal reading of it. The notion of "good faith" in Article 31 prevents an excessively literal interpretation of a term by requiring consideration of its context and of other means of interpretation.[265] However, if subsequent agreements or practice contradict the ordinary meaning of the treaty text, they may be less persuasive as an *interpretation* of the treaty's terms, as opposed to an attempt at an amendment or modification of them. This will be considered in greater detail below in assessing how tribunals have responded to the FTC Interpretation Note.

164. Second, another limit on the import of subsequent practice and agreements is set by the object and purpose of the treaty. The main objective of all interpreters is to determine the intentions of the treaty parties by "reference to the form, the final clauses and *especially* the object and purpose of the treaty."[266] Thus, while subsequent agreements and practice may emphasise or reveal a certain intention of the treaty parties, the ICJ appears to take the view that these ultimately cannot alter the treaty's object and purpose.[267] This is so,

[263] G Nolte, 'Treaties and their Practice – Symptoms of their Rise or Decline' (2018) 392 Collected Courses of the Hague Academy of International Law 207, p 336.

[264] ILC, *Yearbook of the International Law Commission*, (United Nations 1964) vol II, A/CN.4/SER.A/1964/ADD.1, 56; ILC, *ILC Yearbook 1966* (n 261), 220, citing Max Huber (1952) 44 Annuaire de l'Institut de Droit International 199.

[265] Villiger (n 259), p 426.

[266] P Reuter, *Introduction to the Law of Treaties* (J Mico and P Haggenmacher tr, Kegan Paul International 1995), p 24; see also Bjorge (n 260), p 45.

[267] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (Merits) [2014] ICJ Rep 226, p 251, para 56.

notwithstanding the differing opinions as to whether subsequent agreements and subsequent practice can override the other means of interpretation under Article 31 of the VCLT.[268]

(2) Subsequent Agreement (Article 31(3)(a) of the VCLT)

165. Article 31(3)(a) of the VCLT defines the term "subsequent agreement" as "an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions." Although the agreement need not satisfy any requirement of formality, it must nevertheless constitute some form of a "single common act by the parties by which they manifest their common understanding",[269] with the objective of clarifying the meaning or application of the treaty in question. Hence, shared consensus is required amongst all treaty parties in the course of making their submissions in order for their views to fall under Article 31(3)(a).

166. The ILC's clarification that there is no need for a subsequent agreement to satisfy any requirement of formality may also suggest that there are situations beyond the issuance of a particular document by the relevant treaty parties that can fall within the scope of Article 31(3)(a). In particular, it would be germane to this report to consider whether multiple NDSP submissions made during the course of a dispute and coinciding in their views on an issue can be characterised as a "subsequent agreement". This will be addressed in Part III.C below after analysing the cases empirically.

167. While not completely analogous to NDSP submissions, it may be instructive to look at how tribunals dealt with the NAFTA FTC Interpretation. Specifically, the NAFTA FTC Interpretation clarified that the fair and equitable treatment to be accorded under

[268] See, for example, Lassa Oppenheim, *Oppenheim's International Law*, vol 1 (Robert Jennings and Arthur Watts eds, 9th edn, Longmans 1992), p 630: "The parties to a treaty often foresee many of the difficulties of interpretation likely to arise in its application, and in the treaty itself may define certain of the terms used. Or they may in some other way and before, during, or after the conclusion of the treaty, agree upon the interpretation of a term, either informally (and executing the treaty accordingly) or by a more formal procedure, as by an interpretative declaration or protocol or a supplementary treaty. Such authentic interpretations given by the parties override general rules of interpretation."

[269] ILC, 'Report of the International Law Commission on the Work of its 65th Session' (6 May–7 June and 8 July–9 August 2013) UN Doc A/68/10, p 34.

"international law",[270] should be understood as referring to the MST under customary international law,[271] is one such example of an attempt at a subsequent agreement.[272]

168. According to Article 1131(2) of the NAFTA, such interpretive notes are binding on a tribunal established under Chapter Eleven.[273] Despite this clear instruction, however, the NAFTA FTC Interpretation has given rise to differing decisions by arbitral tribunals and diverging views on whether it should be regarded as an authentic interpretation within the scope of Article 1131(2) of the NAFTA and a subsequent agreement under Article 31(3)(a) of the VCLT, or as an attempt at an (impermissible) amendment.[274] In particular, it has also elicited mixed reactions from NAFTA Chapter Eleven tribunals, with some interpreting and accepting it as a subsequent agreement, and others challenging its validity and interpreting the FET standard differently.

169. For instance, the *ADF* tribunal accepted the NAFTA FTC Interpretation as a subsequent agreement. In assessing whether the interpretive note constituted an interpretation or an amendment, the tribunal relied on the fact that the Note itself purported to be an interpretation, and therefore saw in it a subsequent agreement of the NAFTA parties. Hence, in the tribunal's view, and without expressly referring to Article 31(3)(a) of the VCLT, this clear instruction by the NAFTA parties meant that the tribunal had no authority to pursue the issue further.[275] Similarly, the *Methanex* tribunal squarely treated the NAFTA FTC Interpretation as a subsequent agreement (but with reference to Article 31(3)(a) of the VCLT) constituting an authentic interpretation, although they went further and opined that the

[270] Following the wording of Article 1105(1) of the NAFTA, which provides that: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

[271] See the NAFTA Free Trade Commission's Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001 which clarifies the scope of Article 1105(1) as "prescrib[ing] the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."

[272] G Nolte, *Treaties and Subsequent Practice* (OUP 2013), p 240.

[273] NAFTA Article 1131(2) states: "An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

[274] Charles Brower, 'Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105' (2006) 46(2) Virginia Journal of International Law 347, pp 349-350.

[275] *ADF v. USA*, Award, 9 January 2003, para 177; see also; Nolte, *Treaties and Subsequent Practice* (n 2722), p 241.

subsequent agreement should "override the ordinary principles of interpretation." [276] Accordingly, for the *Methanex* tribunal, the FTC's interpretation would be "entirely legal and binding on a tribunal seized with a Chapter 11 case."[277]

170. By contrast, the *Merrill & Ring* tribunal was more inclined to agree with the investor that the NAFTA FTC Interpretation was "closer to an amendment of the treaty rather than a strict interpretation."[278] Notwithstanding the binding character of the NAFTA FTC Interpretation, the tribunal took the view that this interpretation "[does not] necessarily reflect the present state of customary and international law".[279]

171. A reason for this controversy is the timing of the release of the NAFTA FTC Interpretation, which appears to have been made in an effort to "overrule" the *Metalclad v. Mexico, S.D. Myers v. Canada* and *Pope & Talbot v. Canada* awards. As these three awards adopted different reference points for evaluating claims under Article 1105(1), the NAFTA parties might have seen the circumstances as an opportunity to clarify the meaning of the provision and did so through the NAFTA FTC Interpretation. Furthermore, notwithstanding their differences, these three awards arguably marked a growing trend of relatively broad interpretations of Article 1105(1). Because this trend developed just as a series of NAFTA Chapter Eleven disputes approached critical junctures in the arbitration pipeline, these circumstances provided the NAFTA parties with the motivation to use an FTC Interpretation as a vehicle to pre-empt the interpretation in future cases.[280]

172. Hence, while some tribunals have accepted it as an authentic interpretation of the NAFTA, other tribunals have been more inclined to perceive of it as an (at least partial) amendment. At this stage, we may therefore conclude that attempts by treaty parties to come to a subsequent agreement on a matter of treaty interpretation would be seen as genuine, and thus

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[276] *Methanex v. USA*, Final Award of the Tribunal on Jurisdiction and Merits, 3 Aug 2005, Part II Chapter H, para 23.

[277] *Methanex v. USA*, Final Award of the Tribunal on Jurisdiction and Merits, 3 Aug 2005, Part IV Chapter C, paras 20-22.

[278] *Merrill & Ring v. Canada*, Award, 31 Mar 2010, para 192.

[279] *Ibid.*

[280] Cf Brower (n 274274), pp 353-355, who takes a particularly negative outlook of the FTC Note. He describes it as a "self-interested form of political intervention" designed to influence the outcome of pending disputes, thereby undermining its legitimacy and authenticity as an interpretive tool.

be more effective and persuasive, when they are made outside the context of pending disputes and even outside the context of anticipated or foreseeable disputes.

(3) Subsequent Practice (Article 31(3)(b) of the VCLT)

173. Article 31(3)(b) of the VCLT defines "subsequent practice" as "*conduct in the application of a treaty*, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty" (emphasis added). Similar to what is required for "subsequent agreement" under Article 31(3)(a), "subsequent practice" under Article 31(3)(b) must seek to clarify the meaning of the treaty or its application.

174. Drawing from the ILC's suggestion that practice must be "sufficiently extensive" to demonstrate a "common understanding" of the treaty parties,[281] we may extrapolate that, in order for the treaty parties to demonstrate a "subsequent practice", there must generally exist a certain degree of frequency and consistency of the State conduct in question. Hence, subsequent practice typically requires a plurality of acts. As argued by Sinclair, "a practice is a sequence of facts or acts and cannot in general be established by one isolated fact or act, or even by several individual applications".[282]

175. In particular, the requirement of plurality of acts appears to be the most apparent distinction between "subsequent practice" and mere "subsequent conduct". While practice requires an element of constancy (in that subsequent practice must be *sufficiently extensive* to reveal a common understanding of the parties as to the meaning of the terms[283]), conduct merely denotes the behaviour of the parties, which may constitute an *instance* of relevant practice or not.[284] In other words, whereas all subsequent "practice" is an instance of subsequent "conduct", not all subsequent "conduct" is a subsequent "practice" for purposes of Article 31(3)(b) of the VCLT.

[281] ILC, *ILC Yearbook 1966*, p 222, para 15.

[282] Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984), p 137.

[283] ILC, *ILC Yearbook 1966*, p 222, para 15.

[284] Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015), p 259.

176. Next, for any practice to fall under Article 31(3)(b), it must be conducted "in the application of the treaty." According to the ILC,[285] this requirement is broadly defined as including not only official acts at the international or national level which serve to apply the treaty, but also, *inter alia*, "[…] statements in the course of a legal dispute, or judgments of domestic courts."[286] NDSP submissions made before a tribunal thus appear to fall within the ambit of Article 31(3)(b), since they are clearly "statements [made] in the course of a legal dispute".[287]

177. An additional element for the practice in question to be relevant for purposes of the VCLT is that it must be, at the very least, acquiesced by the other treaty parties and that no other treaty party can raise an objection to it.[288] That said, Article 31(3)(b) does not require that the practice be individually performed by all treaty parties.[289] Instead, what is required is the parties' manifested or imputable agreement. Participation in the practice is the clearest evidence of this, however the key principle is that there must simply be a "sufficient nexus between the parties to the treaty and the practice, as distinct from actual participation of all parties in the practice concerned."[290]

178. Importantly, according to Article 31(3)(b), subsequent practice must "establish the *agreement* of the parties regarding [the treaty's] interpretation" (emphasis added). Hence, while the practice of all parties is not strictly required, the practice must be such as to establish an *agreement*. This is largely taken to mean that the practice be "concordant" i.e., identical or sufficiently close to identical, so as to show that the parties have demonstrated their agreement.[291] Again, this does not necessarily mean that there must have been practice

[285] ILC, '2013 Report on the 65th Session', p 28.

[286] ILC, '2013 Report on the 65th Session', p 30.

[287] *Ibid*.

[288] ILC, *ILC Yearbook 1966*, p 222, para 15: "By omitting the word 'all' the Commission did not intend to change the rule […] it omitted the word 'all' merely to avoid any possible misconception that every party must have individually engaged in the practice where it suffices that it should have accepted the practice."

[289] *Ibid*.

[290] Gardiner (n 284), p 267.

[291] Sinclair (n 2822), p 137.

by all parties to the treaty. Rather, it suffices if there is practice of one or more parties and good evidence that the other parties have endorsed the practice.[292]

179. As a clarificatory note on this point, there is no need to cross a specific threshold of concordant practice before engaging Article 31(3)(b). As the ILC has stated: "[t]he value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms."[293] Whether a practice is "concordant, consistent and common" is therefore not an entry criterion for Article 31(3)(b), but one that goes more towards the weight that a tribunal will likely give to a subsequent practice.[294]

180. We may thus conclude, in relation to Article 31(3)(b) of the VCLT, that a determination on the existence or lack thereof of a subsequent practice appears to be largely based on how an interpreter views the evidence presented before it.[295] This will be elaborated upon in greater detail in Part III.C below, and in this regard, it is apposite to note that our empirical analysis in Part III.B below seems to confirm that this is generally the case in practice.

181. Nevertheless, even if the above conditions are not satisfied, it may still be possible for the subsequent conduct of the treaty parties to serve as a supplementary means of interpretation according to Article 32 of the VCLT, provided that the meaning resulting from the application of Article 31 is ambiguous or obscure, or is manifestly absurd or unreasonable.[296]

(4) Effect of "subsequent agreement" and "subsequent practice" under the VCLT

182. With respect to the differences and overlaps between subparagraphs (a) and (b) of Article 31(3) of the VCLT, it should be noted that by distinguishing "any subsequent agreement" under Article 31(3)(a), and "subsequent practice […] which establishes the agreement of the

[292] Gardiner (n 28484), p 270.

[293] ILC, *ILC Yearbook 1966*, p 222, para 15 [sic].

[294] Gardiner (n 28484), p 257.

[295] Gardiner (n 28484), p 270.

[296] Torres Bernárdez, 'Interpretation of Treaties by the International Court of Justice following the Adoption of the 1969 Vienna Convention on the Law of Treaties' in Gerhard Hafner and others (eds), *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday* (Kluwer Law International 1998), pp 726ff; see also Villiger (n 259), p 436.

parties" under Article 31(3)(b), the ILC did not intend to denote a difference concerning their possible legal effect.[297] Indeed, once their existence is established, a subsequent agreement and a subsequent practice must simply be "taken into account" by the court or tribunal interpreting the treaty.

183. Rather, the difference between the two interpretive means lies in the fact that a "subsequent agreement between the parties" *ipso facto* has the effect of constituting an authentic means of interpretation of the treaty, whereas a "subsequent practice" only has this effect if its various constitutive elements, taken together, show "the common understanding of the parties as to the meaning of the terms".[298]

184. That said, the two means may well overlap with each other in the sense that one might be drawn upon in order to establish the existence of the other, or in order to persuade a tribunal that the pleaded subsequent agreement or practice is a clarification of the meaning of the treaty.[299]

B. Impact of positions advanced in NDSP submissions on arbitral decision-making

185. This section will analyse how tribunals have, in practice, considered NDSP submissions in their awards. Given that multiple issues may be addressed in a single NDSP submission, our survey tracks tribunals' reception of the positions taken by NDSPs on each specific issue as shown in publicly available decisions issued by tribunals. Having surveyed this data, we have classified tribunals' responses to interpretations advanced by NDSPs as follows:

1) Tribunal explicitly agreed with and cited the NDSPs' interpretation;

2) Tribunal's interpretation was consistent with the NDSPs' interpretation, but the tribunal did not cite the NDSP submissions; and

3) Tribunal adopted a different interpretation from that submitted by the NDSPs.

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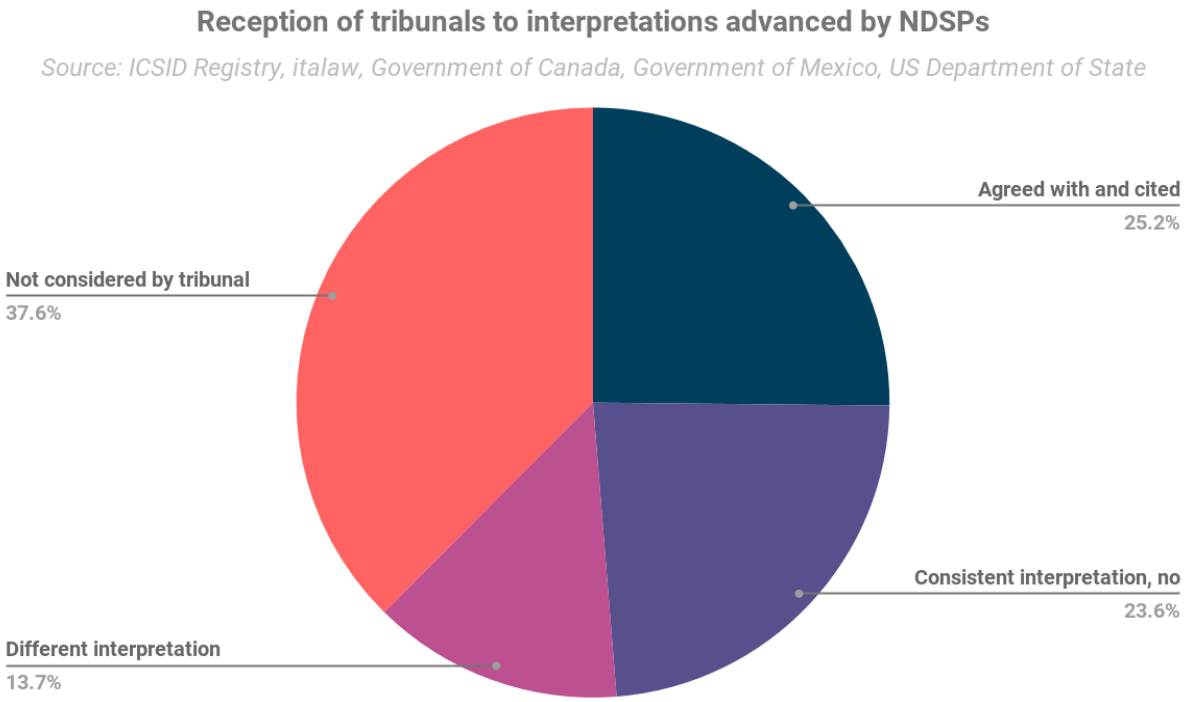
[297] [1966] *Yearbook of the ILC,* vol II, p 221-222, para 15.

[298] *Ibid.*

[299] Bjorge (n 2600), p 45.

186. Our survey has identified a total of 370 instances where NDSPs made a submission on treaty interpretation. Out of these 370 instances, 79 NDSP interpretations fall within the first category, 74 fall within the second category, and 43 fall within the third category (see Figure 16 below).[300] Thus, out of all instances where the tribunal had to make a decision on an issue which NDSPs have made submissions, we observe that in most cases, the tribunal followed the interpretation of the NDSPs. We discuss several examples of each category in turn.

Figure 16: Reception of tribunals to interpretations advanced by NDSPs[301]



187. As an aside, we note that there were 118 submissions by NDSPs on issues which were not considered by the tribunal for a variety of reasons. Such reasons include: the tribunal directly

[300] A detailed list of how all NDSP interpretations in Investor-State disputes arising from the NAFTA, CAFTA-DR and other IIAs have been received by their relevant arbitral tribunals is set out in Annex G, Annex H, Annex I respectively.

[301] This excludes 56 issues on which NDSPs have made submissions, but the respective awards are either pending or not publicly available.

applied the treaty provision;[302] the tribunal decided it did not have jurisdiction to decide on the matter; [303] the issue addressed was not in contention during that stage of the proceedings; [304] or the dispute had already been settled amicably. [305] Additionally, submissions made by NDSPs in cases where the awards have not been published at the time of writing are similarly excluded from the scope of our analysis in this section as we are unable to draw any meaningful observations regarding the effectiveness of such NDSP submissions.

[302] For example, in *Mondev v. USA*, the tribunal did not consider Canada's NDSP submission regarding the appropriate test for "in like circumstances" under Article 1102 of the NAFTA because it considered that the claimant's claim "would clearly fail on the merits": see *Mondev v. USA*, Award, 11 October 2002, para 65. A similar example is found in *Thunderbird v. Mexico*, Award, 26 January 2006, paras 179-182, and *Mercer v Canada.*

[303] For example, in *Berkowitz v. Costa Rica*, the tribunal did not consider the NDSP submissions by El Salvador and the United States regarding expropriation under Article 10.7.1 of the CAFTA-DR because it had decided that it did not have jurisdiction over the claim: see *Berkowitz v. Costa Rica*, Interim Award, 25 October 2016, paras 270-272. This was also the case in *Ballantine v. Dominican Republic*, Award, 3 September 2019, para 600, and *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9*,* Award, 22 March 2019, para 286. In *Corona v. Dominican Republic*, the tribunal did not consider the United States' NDSP submission on the issue of waiver, as it had no jurisdiction to do so. This was also the case in *Loewen v United States of America.*

[304] For example, in *Bilcon v. Canada*, the tribunal did not consider the United States' NDSP submission regarding the scope of waiver required by Article 1121 of the NAFTA because it was not directly relevant to the issue at hand, which was the claimant's duty to mitigate. See: *Bilcon v. Canada*, Award on Damages, 10 January 2019. Additionally, in *Waste Management v. Mexico (II)* (n 192), the tribunal did not consider Canada's NDSP submission on the issues of arbitrable disputes, expropriation and governing law because it was not an issue in contention. This was also the case for the NDSP submissions made in relation to the issue of national treatment in *Mesa Power v. Canada,* as the issue was not in contention during the final award phase. Another example is in *Al Tamimi v. Oman*, where the United States' NDSP submission regarding the governing law was not considered by the tribunal because the issue was not in contention in that case. This is also observed in *Italba v. Uruguay* and *Bridgestone v. Panama*. In *Detroit v. Canada,* all the NDSP submissions were not considered by the tribunal because the issues that Mexico and United States had made submissions on were not in contention. In other cases, like *Merrill & Ring v. Canada,* the tribunal referred to the NDSP submissions on limitation periods but did not ultimately consider them, given that this issue was ultimately not necessary for consideration. Similarly, in *Mobil v. Canada (I)*, the tribunal noted that the United States' NDSP submission regarding subordinate measures in the context of measures excepted from NAFTA Chapter Eleven obligations "does not address the exact question before the Tribunal, as to whether existing subordinate measures are part of 'the measure' for the purposes of evaluating a new subordinate measure." See *Mobil v. Canada (I)*, Decision on Liability and on Principles of Quantum, 22 May 2012, para 315. See also *Eli Lilly v. Canada*, where tribunal summarised NDSP submissions but found it unnecessary to consider the issues.

[305] For example, in *Methanex v. USA*, the tribunal did not need to consider Canada's NDSP submission regarding the effect of an invalid waiver under Article 1121 of the NAFTA because it was settled amicably between the disputing parties. See: *Methanex v. USA*, Partial Award, 7 August 2002, paras 93-94.

(1) Explicit agreement and direct reference to the NDSPs' interpretation

188. Interpretations falling within this category were expressly accepted by tribunals. Such acceptance is evinced through reference to the NDSP submissions in the tribunal's decision. Out of the 79 NDSP interpretations in this category, 64 were in NAFTA Chapter Eleven disputes, 10 were in CAFTA-DR Chapter Ten disputes, and 5 were in Investor-State disputes arising from other IIAs.

189. However, notwithstanding their express acceptance of the NDSPs' interpretations, tribunals did not always place decisive weight on the interpretations. Indeed, we observe that even where tribunals expressly accept the NDSPs' interpretation, they often do so in addition to other methods of treaty interpretation. Further, besides agreeing with the NDSPs' positions, some tribunals have also discussed the specific legal status of such positions, i.e., whether it amounts to a subsequent agreement or practice within the meaning of Article 31(3) of the VCLT, or the weight to be accorded to them. However, this is the exception rather than the norm. In most instances, even when argued by the respondent[306] or NDSPs themselves, the tribunal only acknowledged the position taken by the NDSPs, and either came to an interpretation consistent with the NDSPs' position, or expressly agreed with and adopted that interpretation.

190. In the light of the above, we identified three main approaches adopted by tribunals that have expressly accepted the positions advanced by NDSPs:

a) Considered NDSPs' interpretation in addition to other interpretive tools or previous arbitral awards;

b) Discussed the legal status of NDSPs' interpretation, i.e., whether they amount to a subsequent agreement or subsequent practice; and

c) Simply agreed with the NDSPs' interpretations.

We discuss each sub-category in turn.

[306] For example, see: *Resolute Forest v. Canada*, Reply of the Government of Canada to the NAFTA Article 1128 Submissions of the Government of the United States and the United Mexican States, 12 July 2017, paras 6-8.

(a) Tribunal considered NDSP's interpretation in addition to other interpretive tools or previous arbitral awards

191. This sub-category involves instances where the tribunal considered the interpretations advanced by the NDSPs in addition to other interpretive tools under Article 31 of the VCLT, or an analysis of relevant jurisprudence. In many of these instances, the tribunal would base their interpretations primarily on other interpretive means under Article 31 of the VCLT,[307] an analysis of prior arbitral awards,[308] or a combination of these.[309] Tribunals would then buttress their interpretation by noting that it was consistent with the interpretations advanced by the NDSPs. Thus, it is not entirely clear how much weight was accorded to the interpretations advanced by NDSPs in these cases.

192. One example is the interpretation advanced by Mexico and the United States in *UPS v. Canada* on the issue of arbitrable disputes under NAFTA Chapter Eleven. The tribunal noted that Canada's position that Article 1116(1) provides that jurisdiction exists only where the investor is alleging a breach of Section A of NAFTA Chapter Eleven[310] was "supported by Mexico and the United States."[311] However, the tribunal went on to consider, *inter alia*, the particular wording and structure of Article 1116, whether there was any conflict between Article 1116(1) and Chapter Fifteen, and whether the scope of jurisdiction was conjunctive or disjunctive, before reaching the same conclusion that a breach of Section A of NAFTA Chapter Eleven for a claim to be brought under Article 1116(1).[312]

193. Also, in *Renco v. Peru*, the tribunal considered the plain language of Article 10.18(2)(b) of the United States-Peru TPA to conclude that it prevents an investor from seeking possible remedies within the host State's domestic legal system once he has invoked the dispute

[307] For example, see *Methanex v. USA*; *Feldman v. Mexico*.

[308] For example, see *ADF v. USA*; *Mondev v. USA*.

[309] For example, see *Mesa Power v. Canada*.

[310] *UPS v. Canada*, Award on Jurisdiction, 22 November 2002, para 59.

[311] *UPS v. Canada*, Award on Jurisdiction, 22 November 2002, para 58.

[312] *UPS v. Canada*, Award on Jurisdiction, 22 November 2002, paras 61-69.

settlement provisions in the Treaty. This was consistent with the United States' interpretation of Article 10.18(2)(b) as a "no U-turn waiver provision".[313]

194. In *Feldman v. Mexico,* one of the jurisdictional issues that arose was whether Mexico was entitled to raise any defence on the basis of the time limitation set forth in NAFTA Article 1117(2).[314] Hence, the tribunal had to determine when an arbitration claim is considered made. Noting the submissions of the United States and Canada (which concurred with Mexico's position), the tribunal concluded, again consistent with the parties' views, that the filing of a notice of arbitration and not the notice of intent constituted the submission of the claim to arbitration under NAFTA Articles 1116(2) and 1117(2).[315] Yet, the Tribunal did not engage in any substantial analysis concerning the legal import of the NAFTA parties' agreement in reaching its conclusion. Instead, it based its determination primarily on a textual analysis of the aforementioned provisions,[316] as well as a contextual analysis of other relevant provisions.[317]

195. A similar interpretive approach was adopted in *Canadian Cattlemen v. USA* addressing the same issue as the tribunal in *Feldman* above. The tribunal in *Canadian Cattlemen* considered the ordinary meaning of the text, in light of the context and object and purpose of the NAFTA, and the subsequent agreement and practice of the NAFTA parties under Article 31 of the VCLT. It also analysed decisions in other cases as supplementary means of interpretation under Article 32 of the VCLT, although greater priority was placed on the interpretive means under Article 31.

196. Another example is seen in *Mesa Power v. Canada*, where Mexico and the United States submitted that "procurement" in Article 1108(7)(a) of the NAFTA should be interpreted broadly. In its decision, the tribunal considered the object and purpose of the NAFTA, the

[313] *Renco v. Peru*, Second Non-Disputing State Party Submission of the United States, 1 September 2015, paras 3-4.

[314] *Feldman v. Mexico,* Interim Decision on Preliminary Jurisdictional Issue*s,* para 46(b).

[315] *Feldman v. Mexico,* Interim Decision on Preliminary Jurisdictional Issues, paras 44 and 62.

[316] *Feldman v. Mexico,* Interim Decision on Preliminary Jurisdictional Issues, para 44.

[317] Such as NAFTA Articles 1118, 1119, 1120(1), and Art 2103. See also *Feldman v. Mexico,* Interim Decision on Preliminary Jurisdictional Issues, paras 42 and 45.

decisions of the WTO Panel and Appellate Body regarding Article III:8(a) of the GATT,[318] as well as the interpretation adopted by the tribunals in *ADF v. USA* and *UPS v. Canada*[319] to reach the same conclusion as that advanced by the NDSPs in their submissions. In this regard, the tribunal noted that:

> "All three NAFTA Parties appear to support the broad notion of procurement as advanced by the tribunals in *ADF* and *UPS*."[320]

Thus, it appears that the tribunal's decision rested more heavily on NAFTA Chapter Eleven jurisprudence, using the common position advanced by the NDSPs to further support their decision.

197. A similar interpretive approach was also taken by the tribunal in *ADF v USA*, where the tribunal placed a greater emphasis on prior arbitral awards in arriving at their conclusion. Although the tribunal explicitly referred to the NDSP submissions of Canada and Mexico regarding the customary international law MST,[321] declaring that it was "equally important" to note the views of the NDSPs in that case,[322] in substance it appeared to place little weight on them. Instead, it relied more heavily on how the tribunal in *Mondev v. USA* had addressed the same issue,[323] to eventually arrive at the conclusion that the content of the MST was evolving and not necessarily confined to the *Neer* standard.[324]

198. Likewise, in *Windstream v Canada,* the tribunal stated that, in making its determination on whether an indirect expropriation has taken place under NAFTA Article 1110, it reviewed and considered the submissions of the United States and Mexico pursuant to NAFTA Article

[318] *Mesa Power v. Canada*, Award, 24 March 2016, paras 411-414.

[319] *Mesa Power v. Canada*, Award, 24 March 2016, paras 408-409.

[320] *Mesa Power v. Canada*, Award, 24 March 2016, para 410.

[321] *ADF v. USA*, Award, 9 January 2003, paras 57-60.

[322] *ADF v. USA*, Award, 9 January 2003, paras 178-179.

[323] *ADF v. USA*, Award, 9 January 2003, para 182.

[324] According to the decision of the US-Mexico Claims Commission in *Neer v. Mexico,* IV RIAA (US/Mexico Claims Commission 1926), pp 61-62, the treatment of an alien would constitute an international delinquency if it amounted "to an outrage, bad faith, wilful neglect of duty, or to insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".

1128.[325] Notwithstanding, it proceeded to analyse the relevant arbitral awards to determine how other NAFTA tribunals have interpreted the applicable test for determining whether an indirect expropriation has taken place under NAFTA Article 1110.[326]

(b) Tribunal discussed the legal status of NDSP's interpretation

199. This sub-category encompasses cases in which the tribunal engaged in a discussion of the legal status of the NDSP submissions. These cases are noteworthy in two respects. First, where there is a common position advanced by all treaty parties, tribunals that have addressed the legal status of these submissions have consistently construed them as "subsequent practice" within the meaning of Article 31(3)(b) of the VCLT. Second, even though treaty parties have frequently argued that such a common position also amounts to a "subsequent agreement", as of writing, no tribunal has accepted this argument.

200. Thus, for example, in *Mobil v. Canada (II)*, even though none of the NDSPs submitted on the issue of whether there is a single date from which the limitation period in Articles 1116(2) and 1117(2) of the NAFTA runs in cases of an alleged "continuing breach", the tribunal agreed with the submissions made by the NAFTA parties on this issue in *other* NAFTA Chapter Eleven disputes. In particular, the tribunal stated:

> "[The Claimant's interpretation] has clearly been rejected by all three NAFTA Parties in their practice subsequent to the adoption of NAFTA. In accordance with the principle enshrined in Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 1969, the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight."[327]

[325] *Windstream v. Canada,* Award, 27 September 2016, para 285, footnote 573.

[326] *Windstream v. Canada,* Award, 27 September 2016, paras 284-287.

[327] *Mobil v. Canada (II)*, Decision on Jurisdiction and Admissibility, 13 July 2018, para 158.

The tribunal also drew a distinction between the importance of a NAFTA FTC Interpretation and other forms of subsequent practice under Article 31(3)(b) of the VCLT, commenting that:

> "[T]here is a difference between the importance of a Free Trade Commission decision on interpretation and the importance of other forms of subsequent practice. The former is binding upon the Tribunal by virtue of NAFTA Article 1131, whereas Article 31(3)(b) of the Vienna Convention directs only that the latter kind of practice should be 'taken into account' in relation to interpretation. … Nevertheless, … it does not believe that the subsequent practice of the three NAFTA Parties can be disregarded merely because it takes [a] form different from a Commission decision."[328]

201. Most recently, in *Bilcon v. Canada*, one of the issues was whether Articles 1116 and 1117 of the NAFTA are to be interpreted to prevent claims for reflective loss from being brought under Article 1116. The United States submitted that Articles 1116 and 1117 addressed non-overlapping types of injury – investors seeking to recover losses incurred directly may bring a claim under Article 1116. Hence, where the alleged loss is to an enterprise the investor owns or controls, it must bring a derivative claim under Article 1117.[329] In its decision, the tribunal agreed that the consistent position taken by NAFTA Parties in their submissions to ISDS tribunals[330] constitutes subsequent practice, which is "one of several elements established by Article 31 of the VCLT to consider when interpreting a treaty."[331] After considering the plain text of Article 1116[332] as well as NAFTA Chapter Eleven

[328] *Mobil v. Canada (II)*, Decision on Jurisdiction and Admissibility, 13 July 2018, para 160.

[329] *Bilcon v. Canada*, Non-Disputing State Party Submission of the United States of America, 29 December 2017, para 4.

[330] Notwithstanding that Mexico did not make any NDSP submission on this point, which was also noted by the tribunal. See *Bilcon v. Canada*, Award on Damages, 10 January 2019, footnote 549.

[331] *Bilcon v. Canada*, Award on Damages, 10 January 2019, para 376.

[332] *Bilcon v. Canada*, Award on Damages, 10 January 2019, paras 371-375.

jurisprudence,[333] the tribunal took into account the "common position of the NAFTA Parties in their submissions to Chapter Eleven tribunals."[334]

The tribunal also commented:

> "The NAFTA Parties have an option to make a binding interpretation under Article 1131(2) but the fact they have not done so means that treaty interpretation simply follows the normal interpretative rules, which include taking account of subsequent agreements and subsequent practice of the parties."[335]

202. Another example is in *Canadian Cattlemen v. USA*, where Mexico took the position that NAFTA Article 1101(1)(a) only entitles investors that seek to make, are making, or have made an investment within the territory of another NAFTA Party.[336] Although the tribunal adopted an interpretive approach primarily based on the ordinary meaning of the text, in light of the context and purpose of the NAFTA, it further considered that the absence of an NDSP submission by Canada meant that there was no "subsequent agreement" on this issue. Notwithstanding, the tribunal accepted the Canadian Statement on Implementation of the NAFTA and its submissions as respondent in other NAFTA Chapter Eleven disputes as evidence of a "subsequent practice".[337] In this regard, the tribunal noted that the interpretation advanced by Mexico (and implied from Canada) confirmed its interpretation of NAFTA Article 1101(1)(a).[338]

(c) Tribunal simply agreed with NDSP's interpretation

203. In this last sub-category, the tribunal simply agreed with the interpretation advanced by the NDSPs and did not refer to other interpretive tools to support their conclusion. Further, the tribunal did not engage in any discussion as to the legal status of the interpretations advanced

[333] *Bilcon v. Canada*, Award on Damages, 10 January 2019, paras 381-387.

[334] *Bilcon v. Canada*, Award on Damages, 10 January 2019, paras 387, 389.

[335] *Bilcon v. Canada*, Award on Damages, 10 January 2019, para 377.

[336] *Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Non-Disputing State Party Submission of Mexico, 1 March 2007, para 13.

[337] *Canadian Cattlemen v. USA*, Award on Jurisdiction, 28 January 2008, paras 187-188.

[338] *Canadian Cattlemen v. USA*, Award on Jurisdiction, 28 January 2008, para 189.

by NDSPs, or the weight that should be accorded to them. Nevertheless, given that these tribunals agreed with and accepted the NDSPs' interpretations without consideration of other tools of treaty interpretation, it would appear that they gave these interpretations significant weight. It is also noteworthy to point out that most of these instances involve issues where the law is mostly settled.

204. For example, in *Bayview v. Canada*, regarding the scope of an "investor" in NAFTA Article 1101(a), the tribunal quoted the position asserted by the United States in its NDSP submission and held that "this is the clear and ordinary meaning that is borne by the text of NAFTA Chapter Eleven."[339] Similarly, in *Apotex v USA (III),* regarding the scope of an "investment" under Article 1139, the tribunal accepted the definition advanced by the Respondent and Mexico, stating that it "remain[ed] attracted to the succinct submissions of the Respondent and Mexico to the effect that the definition of an "investment" under both Article 1139(g) and 1139(h) must be read with [NAFTA Article] 1101(1), collectively requiring such investment to be "in the territory" of the host State".[340] This was so in spite of the "well-researched arguments by Counsel for the Claimants as regards the correct interpretation of Article 1139".

205. In *Chemtura v. Canada*, the tribunal agreed with the respondent and NDSPs that an FET clause from a BIT concluded by Canada could not be imported into the NAFTA "as a matter of principle".[341]

206. Likewise, the tribunal in *Resolute Forest v. Canada* stated that it "agrees with the Respondent, and with the other NAFTA Parties in their Article 1128 submissions" that Articles 1116(2) and 1117(2) of the NAFTA impose strict time limitations.[342]

207. Also, in *Mercer v. Canada*, the tribunal succinctly stated that it "agrees with the Respondent and with Mexico" that the appropriate test for discriminatory treatment under NAFT Articles

[339] *Bayview v. Mexico*, Award, 19 June 2007, para 100.

[340] *Apotex v. USA (III),* Award, 25 August 2014, para 7.62.

[341] *Chemtura v. Canada*, Award, 2 August 2010, para 235.

[342] *Resolute Forest v. Canada*, Decision on Jurisdiction and Admissibility, 30 January 2018, para 153.

1102 and 1103 is whether the *treatment* accorded to the investor or its investments was "in like circumstances".[343]

208. In the context of CAFTA-DR Chapter Ten disputes, even though the tribunal in *TECO v. Guatemala* had already decided that it had no jurisdiction, it considered the issue of the whether the legitimate expectations of investors' is part of MST obligation in *obiter*. The tribunal cited the NDSP submissions made by El Salvador, the Dominican Republic, and Honduras and adopted the common position advanced in those submissions.[344]

209. Similarly, in *Corona v. Dominican Republic*, the United States took the position that a continuing course of conduct cannot renew the limitations period under CAFTA-DR Article 10.18.1. The tribunal expressly agreed with this interpretation, on the basis that the interpretation should be consistent with the approach taken in NAFTA Chapter Eleven arbitrations, "as pointed out by the Respondent and the intervenor, the United States of America."[345]

210. In the context of Investor-State disputes arising from other IIAs, the tribunal in *Bridgestone v. Panama* quoted and directly adopted the test advanced by the United States in its "helpful Supplemental Written Submission" for firms that may be denied the benefits of investment protection provisions under Article 10.12.2 of the US-Panama TPA.[346] In the end, the Tribunal concluded that the Claimant did not fall into this category of firms which may be denied the benefits of investment protection.

[343] *Mercer v. Canada*, Award, 6 March 2018, paras 7.19-7.20.

[344] *TECO v. Guatemala*, Award, 19 December 2013, para 621, citing the Non-Disputing State Party Submissions of the Republic of El Salvador, paras 13-14; the Dominican Republic, paras 6, 7, 10; and the Republic of Honduras, paras 9-10. Even though the United States' NDSP submission was not included in the citation, the United States' position is substantively similar to that advanced by the other NDSPs. A possible factor for the exclusion of the United States' submissions could be that instead of directly advancing a position, the United States attached its previous NDSP submission in *Berkowitz v. Costa Rica* on this point.

[345] *Corona v. Dominican Republic,* Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, para 192.

[346] *Bridgestone v. Panama*, Decision on Expedited Objections, 13 December 2017, paras 290-291, 302.

(2) Consistent interpretation, but no direct reference to NDSPs' submissions

211. The difference between interpretations falling within this category from those in the first category is that tribunals under this category did not refer to the interpretations advanced by NDSPs in their written decisions. Even if these tribunals considered submissions made by the NDSPs, it was not explicitly recorded in their decision. Consequently, it is not clear how much weight was accorded to the interpretations advanced by NDSPs in these cases.

212. In total, our survey has identified 74 instances in which tribunals have followed this approach. Among these, 58 were in NAFTA Chapter Eleven disputes, 12 were in CAFTA-DR Chapter Ten disputes, and four were in Investor-State disputes arising under other IIAs. In this sub-section, only a few cases will be analysed since most of them were dealt with in a similar fashion.[347]

213. In *Pope & Talbot v. Canada*, all three NAFTA parties were united in their position that the phrase "measure tantamount to nationalization or expropriation" in NAFTA Article 1110 merely explains what an "indirect expropriation" means, and does not assert or imply the existence of an additional type of action that may give rise to liability beyond those encompassed in the customary international law categories of "direct" and "indirect" nationalization or expropriation.[348] In its decision, the tribunal based its conclusion on the submissions, testimony and evidence submitted by the disputing parties[349] and adopted the same interpretation.[350] It did not refer to the NDSP submissions by Mexico or the United States in any part of its reasoning. A similar approach was also taken by the tribunal in

[347] The other cases may be seen in Annex G.

[348] *Pope & Talbot v. Canada*, Respondent's Counter-Memorial, 29 March 2000, para 386; Second Non-Disputing State Party Submission of Mexico, 3 April 2000, paras 39, 44; First Non-Disputing State Party Submission of the United States of America, 7 April 2000, para 14; Third Non-Disputing State Party Submission of Mexico, 25 May 2000, p 10.

[349] *Pope & Talbot v. Canada*, Interim Award, 26 June 2000, para 96.

[350] *Pope & Talbot v. Canada*, Interim Award, 26 June 2000, para 97.

Metalclad in considering what constitutes an act tantamount to expropriation under NAFTA Article 1110.[351]

214. Another instance is in *Thunderbird v. Mexico*, where Canada submitted that the proper interpretation of the "in like circumstances" test in NAFTA Article 1102 was to assess whether the *treatment* was accorded in like circumstances, not whether it was accorded to like investors.[352] In its decision, the tribunal did not discuss the appropriate test for "in like circumstances", but instead delved directly into an application of the test. Nevertheless, from its decision, it appears that the tribunal adopted an assessment consistent with that advanced by Canada as it examined the circumstances surrounding the treatment accorded to the comparators put forward by the claimant, rather than the similarities between the comparators and the claimant.[353]

215. Also, in *Berkowitz v. Costa Rica*, both El Salvador and the United States made submissions on Article 10.18.1 of the CAFTA-DR, which provides for the limitations period for Investor-State claims to be made. They asserted that a continuing course of conduct by the State cannot renew the limitations period, and that it is not necessary for an investor to have knowledge of the precise extent of loss or damage before he is taken to have "acquired knowledge of the breach alleged".[354] Apart from summarizing the positions taken by both NDSPs as part of the procedural history, the tribunal made no reference to them in their decision. Instead, they relied primarily on the plain meaning of the text in Article 10.18.1 in coming to the same conclusion as that advanced by the NDSPs.[355]

(c) Tribunal arrived at a decision inconsistent with NDSP submissions

216. There have also been 43 instances where tribunals ultimately reached interpretations that conflicted with the expressed common views of the State parties in their NDSP

[351] *Metalclad v. Mexico,* Award, 30 August 2000, paras 102-112. The tribunal made no express reference to any of the NDSP submissions made by Canada or the United States despite arriving at a consistent interpretation with their views.

[352] *Thunderbird v. Mexico*, Non-Disputing State Party Submission of Canada, 21 May 2004, paras 4, 8, 13.

[353] *Thunderbird v. Mexico*, Award, 26 January 2006, para 178.

[354] *Berkowitz v. Costa Rica*, Non-Disputing State Party Submission of El Salvador, 17 April 2015, paras 29-31; Non-Disputing State Party Submission of the United States of America, 17 April 2015, paras 5, 10.

[355] *Berkowitz v. Costa Rica*, Interim Award, 30 May 2017, paras 170, 208-209.

submissions. In some instances, the tribunal considered but rejected the interpretation advanced by the NDSPs. In others, the tribunal did not indicate how or whether it considered the NDSPs' position in coming to its own interpretation.

217. In *Pope & Talbot v. Canada*, during the Preliminary Objections stage, Mexico submitted that under NAFTA Article 1101, a measure can only "relate to" an investment if it is primarily directed at that investment, rather than if it merely has an "effect" on it. In this connection, an allocation of quota should properly be characterised as a measure relating to trade in goods, and thus *prima facie* outside the scope of NAFTA Chapter Eleven.[356] This was consistent with the position advanced by Canada. In its decision, the tribunal rejected this interpretation because, in its view, it would give rise to an absurd result when applied to the specific facts of the case.[357]

218. Subsequently, during Phase 2 of the Merits stage, all three NAFTA parties expressed the view that NAFTA Article 1102 was designed to protect against discrimination on the basis of nationality and that, to establish a breach of the provision, a claimant had to demonstrate that it (or its investment) was treated less favourably due to its nationality.[358] Although the tribunal noted that the parties shared a common view, it disregarded that interpretation, and found (with arguably limited reasoning) that it would "tend to excuse discrimination that is not facially directed at foreign owned investments,"[359] since such an approach prohibits treatment that discriminates on the basis of the foreign investment's nationality. Instead, it reasoned that a formulation focusing on the like circumstances question would require addressing *any* difference in treatment. In reaching this conclusion, however, the tribunal did not engage in any analysis of the persuasive weight of the parties' agreement under the VCLT.

219. In addition, before the NAFTA FTC Interpretation was issued, the *Pope & Talbot* tribunal had the opportunity to consider whether the presence of the fairness elements in Article

[356] *Pope & Talbot v. Canada*, First Non-Disputing State Party Submission of Mexico, 3 December 1999, para 10.

[357] *Pope & Talbot v. Canada*, Decision on the "Measures Relating to Investment" Motion, January 2000, para 33.

[358] *Pope & Talbot v. Canada*, Government of Canada Supplemental Counter-Memorial, 8 November 2000, para 98.

[359] *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para 79.

1105 meant that they were *additive* to the requirements of international law.[360] However, the tribunal expressly rejected the United States' submission that the NAFTA parties intended to reject the additive character of the BITs. Instead, it held that the term "FET" in Article 1105(1) was *additive* to the customary international law standard, and thus required treatment above and beyond the customary international law standard.[361]

220. In coming to this decision, the tribunal considered that:

> "The United States supports this contention solely by pointing to the language of Article 1105; it offered no other evidence to the Tribunal that the NAFTA parties intended to reject the additive character of the BITs. Consequently, the suggestions of the United States on this matter *do not enjoy the kind of deference that might otherwise be accorded to representations by parties to an international agreement* as to the intentions of the drafters with respect to particular provisions in that agreement."[362] (emphasis added)

Further, the tribunal noted that both Canada and Mexico were silent on this issue, even when the tribunal had requested them to produce evidence to support the United States' contention.[363] On the other hand, the tribunal supported its interpretation through an analysis of what it presumed the NAFTA parties had intended, based on its assumptions regarding the relationships of the NAFTA parties with one another, and with other countries.[364]

221. Then, after the NAFTA FTC Interpretation was issued, the *Pope & Talbot* tribunal requested Canada to supply all drafting history supporting the NAFTA Parties' alleged intent to restrict

[360] *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para 110.

[361] *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para 113.

[362] *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para 114.

[363] *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, footnote 110.

[364] The Tribunal reasoned that by including Article 103(2), which provides that the NAFTA prevails over the GATT, the Parties were emphasizing the special importance to themselves of the NAFTA undertakings, and thus it was unlikely that Parties would have intended to curb the scope of Article 1105 vis-à-vis one another when they had granted broader rights to other countries that cannot be considered to share the close relationships with the NAFTA parties that they share with one another. See *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para 115.

"international law" to custom for the purposes of Article 1105(1).[365] In some 1,500 pages of documents supplied by Canada, reflecting over forty drafts of Chapter Eleven, the tribunal could find no use of the word "customary" to qualify "international law" in the provision that became Article 1105(1).[366]

222. Subsequently, in *S.D. Myers v. Canada*, Canada argued that damages recoverable under Chapter Eleven were limited to compensation for harm accruing to the investment, or to the harm suffered by the investor in its capacity as an investor, which the United States and Mexico agreed with in their NDSP submissions.[367] Notwithstanding the accord amongst the NAFTA parties vis-à-vis the appropriate scope of damages, the tribunal ultimately came to an interpretation that was contrary to the NAFTA parties' position without making any reference to the NDSP submissions in their written decision.[368] Instead, it appeared to base its decision largely on the language of NAFTA Chapters Eleven and Twelve,[369] and how the treaty provisions excluded the application of the cumulative principle that the tribunal adopted in the first partial award of this case.[370]

223. In *GAMI v Mexico,* the tribunal also disagreed with and rejected the position advanced by the United States' NDSP submission, in relation to the issue of who has standing to bring a claim under NAFTA Article 1116. The United States submitted that NAFTA Article 1116 entitles minority shareholders to bring a claim for loss or damage on their own behalf, referring to *Barcelona Traction* as authority for the rule that shareholders may assert claims only for injuries to their interests and not for injuries to the corporation. However, the tribunal did not accept that *Barcelona Traction* established a rule that must be extended beyond the issue of the right of espousal by diplomatic protection.

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[365] *Pope & Talbot v. Canada*, Award in Respect of Damages, 31 May 2002, para 37.

[366] *Pope & Talbot v. Canada,* Award in Respect of Damages, 31 May 2002, paras 43, 46.

[367] In *S.D. Myers v. Canada*: Second Submission of Mexico, 12 September 2001, paras 3-7; Second Submission of Mexico, 25 September 2001, paras 25-26; Submission of the United States of America, 18 September 2001, para 3.

[368] *S.D. Myers v. Canada*, Second Partial Award, 21 October 2002, paras 123-139.

[369] *Ibid.*

[370] *S.D. Myers v. Canada,* First Partial Award, 13 November 2000, paras 291-294, 318.

224. More recently, in *B-Mex v. Mexico*, both Canada and the United States submitted that a NAFTA Chapter Eleven tribunal would lack jurisdiction *ab initio* if the claimant does not meet the conditions precedent to arbitration set out in NAFTA Articles 1119, 1121 and 1122, and this failure cannot be cured by the tribunal.[371] The majority decided, against the positions taken by all three NAFTA parties, that failure to meet these requirements could be cured.[372] However, the dissenting arbitrator took the opposite view based on the plain meaning of the text of the provisions as well as NAFTA Chapter Eleven jurisprudence.[373] In addition, he observed that the NDSPs' interpretation supported his view.[374]

C. Observations: Factors affecting the effectiveness of NDSP submissions

225. From the empirical survey of the cases above, it is evident that arbitral tribunals have not been consistent in the weight they give to NDSP submissions, or whether they consider them as instances of authentic interpretation. Where tribunals have engaged in an analysis of whether the NDSP submissions amount to a subsequent agreement or subsequent practice, they have always classified them in the latter category. In this regard, it remains to be seen whether multiple NDSP submissions made in the course of a dispute that coincide in their views on an issue can be characterised as a "subsequent agreement".[375]

226. Accordingly, this section focuses on evaluating factors that may contribute to the effectiveness of NDSP submissions in influencing tribunals' decision-making as instances of a "subsequent practice". The 2018 ILC Report states clearly that the "weight of

[371] *B-Mex v. Mexico*, First Non-Disputing State Party Submission of Canada, 28 February 2018, paras 2-3, 8-9; First Non-Disputing State Party Submission of the United States of America, 28 February 2018, paras 2-12.

[372] *B-Mex v. Mexico*, Partial Award, 6 July 2019, para 60.

[373] *B-Mex v. Mexico*, Partial Dissenting Opinion, 6 July 2019, paras 53, 62.

[374] *B-Mex v. Mexico*, Partial Dissenting Opinion, 6 July 2019, para 99.

[375] On this question, the tribunal in *Canadian Cattlemen v. USA* appears to suggest that, while possible, a high threshold has to be met in order for multiple NDSP submissions to "rise to the level of a 'subsequent agreement'" mainly because of the "limited experience thus far with many of the subtleties and implications of Chapter Eleven of the NAFTA." (para 187). In addition, the tribunal noted the absence in that case of any NDSP submission made by Canada, which, to the tribunal's mind, could not have been seen either as evidence of Canadian support for the claimants' position, or as evidence of Canadian opposition (para 187). Nonetheless, the tribunal was ultimately of the view that there was evidence of a sequence of facts and acts that amounted to a concordant, common and consistent practice, which constituted a "subsequent practice" within the meaning of VCLT Article 31(3)(b) (para 189).

subsequent practice under Article 31(3)(b) depends, *inter alia*, on whether and how it is repeated."[376] It is also worth reiterating that the value and significance of subsequent practice will naturally depend on the extent to which it is "concordant, common and consistent".[377]

227. This is indeed confirmed by our survey of the cases in Part III.B above. Notwithstanding the comparatively few number of cases where tribunals appear to have disregarded (i.e. failed to expressly refer to or cite) the NDSP submissions, our survey found that tribunals tend to give more weight to NDSP submissions when:

- A common position is advanced by all treaty parties in that dispute;
- The position advanced by treaty parties has been consistent over time; and
- The tribunal specifically invites the NDSPs to submit on certain issues.

(1) Consistency among treaty parties' positions in a particular Investor-State dispute

228. Consistency between treaty parties in the context of a dispute includes cases where NDSPs have adopted a similar position as the respondent State on the interpretation of the relevant treaty positions. As seen from our empirical analyses in Parts II.E and III.B,[378] most NDSP submissions support the position of the respondent in treaty interpretation. Thus, it is not unusual to find alignment in the positions of all treaty parties on the interpretation of a treaty provision in a particular case. In this connection, agreement between treaty parties has the short-term effect of elevating individual submissions from an interpretation advanced by that State, to a "subsequent practice establishing the agreement of the parties" which must be taken into account by tribunals pursuant to Article 31(3)(b) of the VCLT.[379]

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[376] ILC, *Report on the Work of the Seventieth Session (2018)*, A/73/10, Conclusion 9(2), 15.

[377] Gardiner (n 284), p 156; footnote 110, citing Sinclair (n 282).

[378] See also Annex G.

[379] See, e.g., *Mobil v. Canada (II)*, Decision on Jurisdiction and Admissibility, 13 July 2018, paras 158, 160 (noting the positions of the three NAFTA parties on that agreement's statute of limitations and acknowledging that in accordance with Article 31(3)(b) of the Vienna Convention on the Law of Treaties, such subsequent practice is entitled to "considerable weight"); *Bilcon v. Canada*, Award on Damages, 10 January 2019, para 379 ("the consistent practice of the NAFTA Parties in their submissions before Chapter Eleven tribunals in making a clear distinction between the application of Article 1116 and Article 1117 can be taken into account in interpreting the provisions of NAFTA. Thus,

229. That being said, there have been anomalous cases where the tribunal rejected a shared interpretation. For instance, in *Pope & Talbot v. Canada*, Mexico submitted that the shared view of the NAFTA parties that NAFTA Article 1102 prevents only nationality-based discrimination "shows the settled and uncontroversial nature of the interpretation advanced by each of the NAFTA Parties".[380] However, the tribunal rejected this interpretation. A plausible reason for their rejection may have been the lack of supporting evidence from Canada and Mexico as they only referred to the ordinary meaning of the text in supporting their interpretation.[381] Hence, the presence of supporting evidence may influence a tribunal to be more inclined to place greater weight on the treaty parties' views.

230. Conversely, where treaty parties do not agree with one another, some tribunals appear to have given little consideration to the NDSP submissions. For example, in *Methanex v. USA*, the NAFTA parties held different views regarding the participation of third parties in the proceedings as *amici curiae*. In its decision, despite making cursory reference to the NDSP submissions, the tribunal based its analysis primarily on the practice of other tribunals and a study of the treaty text and applicable arbitral rules.[382] It also expressly stated that it did not rely on one of the arguments raised by Mexico in its NDSP submission regarding the tribunal's authority to allow submissions by *amici curiae*.[383]

231. As an aside, while divergent interpretations offered by NDSPs may nonetheless come within Article 32 of the VCLT to serve as a supplementary means of interpretation, they would not have the same weight as an interpretation that has the unanimous consensus of all treaty parties. In fact, some claimants may also argue that the tribunal should pay serious attention

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the NAFTA Parties' subsequent practice militates in favour of adopting the Respondent's position on this issue […]"); *Canadian Cattlemen v. USA*, Award, paras 13, 187-189 (noting that the interpretation advanced by Mexico (and implied from Canada) confirmed its interpretation of Article 1101(1)(a) of the NAFTA, and accepting the Canadian Statement on Implementation of the NAFTA and its submissions as respondent in other NAFTA Chapter Eleven disputes as evidence of a "subsequent practice").

[380] *Pope & Talbot v. Canada*, Non-Disputing State Party Submission of Mexico, 25 May 2000, p 3.

[381] *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, footnote 110.

[382] *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001, paras 29-34, 38-46.

[383] *Ibid*, para 47.

to areas where treaty parties are not in agreement with one another,[384] suggesting that divergent interpretations could detract from the weight given to individual NDSP submissions.

232. The approach adopted by the tribunal in *Methanex v. USA* is not conclusive of how tribunals treat NDSP submissions in cases where there are divergent positions on treaty interpretation, as there have also been instances where tribunals accepted the interpretations advanced by NDSPs despite seemingly inconsistent views. For example, in *Ballantine v. Dominican Republic*, the United States submitted that an investor with dual nationality must not have dominant and effective nationality of the respondent State at the time of submission of the claim, in order to bring a claim under CAFTA-DR Chapter Ten.[385] In contrast, Costa Rica submitted that the crucial moment is on the date the claimant first acquires knowledge of the alleged breach.[386] Notwithstanding, the tribunal accepted both interpretations and held that compliance with the dominant and effective nationality test is required both at the moment the of the alleged breach and the moment the claim is submitted.[387]

233. In any case, it would be difficult to arrive at a conclusive view on how tribunals treat NDSP submissions where there are divergent positions on treaty interpretation as generally, few tribunals have made explicit reference to, or substantially analysed, NDSP submissions in their written decisions.[388]

234. Additionally, there have also been instances where one or more treaty parties declined to make any NDSP submissions, but the tribunal nonetheless found that the submissions of some treaty parties amounted to a subsequent practice by cross-referencing to the position adopted by the silent party in previous cases or submissions. This observation is consistent with Gardiner's comment that subsequent practice can still be made out if there is practice

[384] *Resolute Forest v. Canada*, Hearing on Jurisdiction and Admissibility, 15 August 2017, paras 306:16-307:1.

[385] *Ballantine v. Dominican Republic*, Non-Disputing State Party Submission of the United States of America, 6 July 2018, para 4.

[386] *Ballantine v. Dominican Republic*, Non-Disputing State Party Submission of the United States of America, 6 July 2018, paras 3-10.

[387] *Ballantine v. Dominican Republic*, Award, 3 September 2019, para 526.

[388] See Part 187 above.

of one or more treaty parties, and good evidence that the other treaty parties have endorsed the practice (*supra* [177]; footnote 2920). This will be elaborated upon in subsection (2) below.

(2) Position advanced by treaty parties is consistent over time

235. As discussed in Part II.E above, another aspect of consistency of the interpretations advanced by NDSPs is in relation to a State's position in past submissions across all Investor-State disputes, either as an NDSP or respondent. To this end, our empirical survey revealed that States have been largely consistent in the interpretations they have advanced, although we note that this is limited to the handful of States that have made submissions.

236. The potential long-term effect of making repeated, consistent submissions on the interpretation of a particular treaty provision is to cement that State's position in international investment law jurisprudence. This is useful in evincing long-standing State practice, which may in turn be used to buttress a State's advocacy for the same interpretation in subsequent disputes. In this regard, repeated, consistent submissions on treaty interpretation across cases are arguably even more effective in advocating a particular position, especially when made by all treaty parties, because they could more easily be construed as acts of authentic interpretation and a "subsequent practice" that must be "taken into account" by tribunals when interpreting the treaty.[389]

237. By way of example, in *Canadian Cattlemen v. USA*, the United States submitted that all three NAFTA Parties had confirmed its interpretation of Chapter Eleven's purpose, which is to protect investors and investments with respect to another NAFTA Party's territory.[390] It pointed to its own statements on the issue of the definition of an "investor" under the NAFTA before this tribunal and elsewhere; to Mexico's NDSP submission in this arbitration; and to Canada's statements on the issue, first in implementing the NAFTA, and, later, in its counter-memorial in *S.D. Myers v. Canada*, and asserted that a "subsequent agreement" had

[389] See Part III.A(3) below; also see *Bilcon v. Canada*, Award on Damages, 10 January 2019, p 430.

[390] *Canadian Cattlemen v. USA*, Award, para 173.

been reached on this issue by the NAFTA Parties.[391] Although the tribunal held that this did not amount to a "subsequent agreement", it concluded there was evidence of a sequence of facts and acts that amounted to a concordant, common and consistent practice, which constituted a "subsequent practice" within the meaning of Article 31(3)(c) of the VCLT.[392]

238. Likewise, in *Bilcon v. Canada,* the tribunal held that Canada's and the United States' submissions on the interpretation of NAFTA Articles 1116 and 1117 constitute subsequent practice, although it also took into account the consistent practice of all NAFTA Parties in other cases, such as in *Pope & Talbot v. Canada, UPS v. Canada, Mondev v. USA*, and *GAMI v. Mexico*, where the NAFTA parties advanced a similar position on the interpretation of Articles 1116 and 1117. These submissions established the "common position" of the NAFTA parties, and therefore, according to the *Bilcon v. Canada* tribunal, amounted to a subsequent practice to be taken into account.[393]

239. However, somewhat ironically, the tribunal in *Bilcon,* at least in substance, interpreted the MST under NAFTA Article 1105 to include a stand-alone obligation to protect an investor's legitimate expectations despite the NAFTA parties' common and long-standing position to the contrary.[394] Hence, while such consistent practice from non-disputing state parties across multiple investor-state disputes may influence the weight that tribunals place on NDSP submissions, tribunals themselves have not been consistent in doing so.

240. Another example is in *B-Mex v. Mexico*, where the respondent cited NDSP submissions made in *KBR v. Mexico* and *Mesa Power v. Canada* to support its position that compliance with the conditions and formalities set out in NAFTA Chapter Eleven is necessary to establish the consent of the respondent to arbitration pursuant to Article 1122(1) and that this went to the tribunal's jurisdiction.[395] The majority based their interpretation of Article

[391] *Canadian Cattlemen v. USA*, Respondent's Memorial, 7-8; Award, para 186.

[392] *Canadian Cattlemen v. USA*, Award, para 189.

[393] *Bilcon v. Canada*, paras 376-379, 389.

[394] *Bilcon v. Canada,* paras 446-454, where the tribunal found Canada to be in breach of Article 1105 because the investor's legitimate expectations to operate the quarry were, in essence, frustrated.

[395] *B-Mex v. Mexico*, Respondent's Memorial on Jurisdictional Objections, 30 May 2017, paras 60-63.

1122(1) on other interpretive tools under Article 31 of the VCLT,[396] and ultimately held that the textual analysis alone was dispositive of the issue.[397] However, the dissenting arbitrator was of the view that the tribunal "cannot ignore the submissions made by the Contracting Parties, especially when they *reassert and unanimously confirm a recurrent trend*,"[398] citing Canada's NDSP submission that the NAFTA parties' "common, concordant and consistent views form a subsequent practice that shall be taken into account."[399] The divergent views in this case therefore further emphasise the inconsistency in how tribunals have approached repeated, consistent submissions on a particular treaty provision across cases.

241. However, in most cases, tribunals have not made any pronouncement on whether consistent, past submissions of treaty parties on the interpretation of a treaty provision amounts to a subsequent practice. For example, in *Resolute Forest v. Canada*, Canada cited submissions made by all three NAFTA parties in previous NAFTA disputes in support of its position that the national treatment obligation in Article 1102 is designed to protect against nationality-based discrimination only.[400] While the tribunal did not discuss whether these submissions amount to subsequent practice, it took into account Canada's submissions (along with the relevant legal framework and NAFTA jurisprudence), and ultimately agreed with the NAFTA parties on their interpretation of Article 1102(3).[401] Similarly, in *Renco v Peru,* the United States' NDSP submissions were well-received by the tribunal because of its extensive NAFTA practice.

242. Notwithstanding the fact that tribunals have often not expressly analysed the import of subsequent agreement or practice in terms of Article 31(3) of the VCLT, [402] it appears that these means of interpretation are implicitly invoked nonetheless through the tribunals'

[396] *B-Mex v. Mexico,* Partial Award, 19 July 2019, pp 30-48.

[397] *B-Mex v. Mexico,* Partial Award, 19 July 2019, para 150.

[398] *B-Mex v. Mexico,* Partial Dissenting Opinion of Arbitrator Raul E Vinuesa, 6 July 2019, para 96.

[399] *B-Mex v. Mexico,* Partial Dissenting Opinion of Arbitrator Raul E Vinuesa, 6 July 2019, p 19, footnote 53.

[400] *Resolute Forest v. Canada*, Respondent's Counter-Memorial on Merits and Damages, 17 April 2019, para 250 and in particular, footnotes 523-525.

[401] *Resolute Forest v. Canada,* Decision on Jurisdiction and Admissibility, 30 January 2018, para 290.

[402] See Andrea Menaker, *Treatment of Non-Disputing State Party Views in Investor-State Arbitrations* (Brill 2009), p 68.

acknowledgement or acceptance of the parties' NDSP submissions, in accordance with the interpretive tools under Article 31 of the VCLT. States should therefore endeavour to adopt consistent positions vis-à-vis their past submissions and their treaty parties, as these will likely increase the weight that tribunals will place on them in interpreting the relevant treaty provision.

(3) Where the tribunal specifically invites the NDSPs to submit on certain issues

243. In addition, where NDSPs have been specifically invited by the tribunal to make submissions on certain issues, tribunals tend to be more explicit in their consideration of these submissions. However, it should be noted at the outset that there is a relatively small sample size for this category of cases (*supra* [84]), and hence the observations may not be entirely representative of how tribunals have or will treat NDSP submissions where they have invited NDSPs to do so.

244. For example, in *Bayview v. Mexico,* the NDSPs were invited to make written submissions on the question of the standing of the Irrigation Districts as Claimants under NAFTA.[403] The tribunal considered the United States' NDSP submissions extensively and accepted the position advanced by them, although this may be in part also be due to the United States' NDSP submissions being consistent with the ordinary meaning of the text.[404] Similarly, the tribunal in *Mobil v. Canada (I)* invited submissions from the NDSPs on the specific questions of the meaning of "adopted and maintained" under NAFTA Article 1108, and whether subordinate measures are included in a NAFTA party's reservation.[405] The tribunal accepted the NDSPs' common position, noting that their submissions supported the ordinary meaning of the term "adopted or maintained".[406]

245. In the *Bilcon v. Canada* award itself, the tribunal invited the United States and Mexico to make submissions on specific questions of treaty interpretation, including*, inter alia,* the

[403] *Bayview v. Mexico,* Award on Damages, p 6, para 18.

[404] *Bayview v. Mexico,* Award on Damages, p 16 to 18, see also p 22, para 100.

[405] *Mobil v. Canada (I)*, Award, p 129, para 291.

[406] *Mobil v. Canada (I)*, Award, p 131, para 295.

issue of interpreting NAFTA Articles 1116 and 1117. In considering the context of these articles, the tribunal referred to the submissions made by both the respondent state and the United States,[407] and engaged in an extensive analysis of their positions as well as the legal import of their submissions. Ultimately, the tribunal came to the conclusion that their positions were a 'plausible explanation' for the existence of the two separate provisions,[408] and considered that their positions constituted a subsequent practice under Article 31(3)(b) of the VCLT,[409] even going so far to apply it as an interpretive tool.[410]

246. Subsequently, in *Mesa Power v. Canada,* the tribunal invited both NDSPs to submit their observations on the relevance and impact of the *Bilcon v. Canada* award, and specifically how it would impact the interpretation of the minimum standard of treatment under NAFTA Article 1105.[411] The tribunal summarised the positions taken by the NAFTA Parties,[412] and noted that their positions were consistent.[413]

247. That being said, there are also anomalous cases where the tribunal specifically invited NDSP submissions on certain issues, but either did not make reference to them in their written decisions, or rejected them. For example, in *B-Mex v. Mexico* and *Feldman v. Mexico,* while the tribunals' interpretation of the relevant treaty provisions were consistent with that of the NDSPs, no reference was made to their submissions in their analysis.

248. More interestingly, the tribunal in *Pope & Talbot* had invited the NDSPs to make submissions specifically on the issues of damages[414] and also make specific comments on NAFTA Articles 1103 and 1105.[415] However, despite the invitation, these submissions were

[407] *Bilcon v. Canada*, Award on Damages, para 373. It should be noted that while Mexico was invited to make NDSP submissions on this issue as well by the tribunal on 9 November 2017, they had chosen not to do so.

[408] *Bilcon v. Canada*, Award on Damages, para 374.

[409] *Bilcon v. Canada*, Award on Damages, paras 376 to 378.

[410] *Bilcon v. Canada*, Award on Damages para 379.

[411] *Mesa Power v. Canada,* Award, p 31, para 194.

[412] *Mesa Power v. Canada,* Award, p 115, paras 491 to 494.

[413] *Mesa Power v. Canada,* Award, para 504.

[414] *Pope & Talbot,* Award on Damages, para 6.

[415] *Pope & Talbot,* Award on Damages, para 12.

either not considered or rejected (specifically, the submissions on NAFTA Article 1105 that pertained to how the minimum standard of treatment ought to be interpreted). A plausible reason for this, as aforementioned, was because the NAFTA FTC Interpretation could have potentially been viewed as an attempt to overrule the tribunal's interpretation of what "international law" under Article 1105 referred to. In any case, the tribunal based their decision primarily on drafting history of Article 1105, noting that the word "customary" was not used to qualify "international law" in the provision that became Article 1105(1).[416]

249. Accordingly, from the small sample size of cases above, it is observed that tribunals are generally inclined to place greater weight, or at least consider the parties' position, on NDSP submissions where they have invited NDSPs to do so on specific issues. Nonetheless, it is not always the case that tribunals will accept the NDSP's position(s), particularly where the tribunal views it as being inconsistent with other interpretive tools under VCLT Article 31, such as in *Pope & Talbot.* Given that the drafting history may reveal the object and purpose behind a treaty, this example therefore supports the ICJ's view that subsequent agreements and practice cannot ultimately alter a treaty's object and purpose.

D. Conclusions

250. Our findings confirm the views in existing secondary literature that tribunals have generally accepted the NDSPs' views regarding the interpretation of treaty terms in cases where the NDSP submissions have reflected a consensus amongst *all* parties to the treaty, but less so where there has been some, but less than unanimous, agreement among treaty parties.[417] In the absence of unanimous agreements, NDSP submissions could still technically come within Article 32 of the VCLT and serve as a supplementary means of interpretation.[418] However, it should be again emphasised that they would generally not have the same

[416] *Pope & Talbot,* Award on Damages, para 37.

[417] For instance, see Menaker (n 402), p 68.

[418] Villiger (n 259), pp 431-432.

authoritative force as an interpretation that enjoys consensus amongst all contracting parties.[419]

251. In addition, our findings also add important new insights on the practices of investment tribunals. In particular, we have identified that, despite the trend of accepting the views of NDSPs in some situations, most tribunals tend to be implicit about doing so and do not specifically address the legal status of the parties' NDSP submissions (i.e. whether the NDSP submissions amount to a subsequent agreement or practice within the meaning of Article 31(3)(a) or 31(3)(b) of the VCLT). Moreover, some tribunals have failed to do so even where there is a common view amongst all State parties to the treaty. Furthermore, there have also been notable exceptions where tribunals have outright rejected the unanimous interpretations of the treaty parties in favour of their own interpretation.[420]

[419] Additionally, the tribunal in *Mobil Investments Canada Inc. v. Government of Canada*, ICSID Case No. ARB/15/6 ("*Mobil v Canada (II)*") rejected the use of supplementary sources of interpretation on the basis that "These agreements and sources are not the NAFTA, they did not involve entirely the same parties to the negotiation, at times raise inter-temporal discontinuities, and the extent to which they did or did not influence the NAFTA parties in the preparation of the NAFTA text is not well established." (at para 230)

[420] A practice also recorded in Menaker (n 40202), p 64.

IV. RECOMMENDATIONS

252. Our empirical study in this Memorandum has shown that NDSP submissions in Investor-State disputes have the potential to enable States to reassert interpretive control over their treaties. This is because NDSP submissions assist the tribunal in coming to an interpretation that is consistent with the intentions of treaty parties.[421] Furthermore, where these interpretations correspond to the interpretations advanced by the respondent and evince a common view, this may constitute a "subsequent practice" to be taken into account by tribunals in interpreting the treaty provision.[422]

253. However, we also observe that NDSP submissions have been underutilized, with only Northern and Central American States making submissions in disputes arising from IIAs that the NAFTA parties entered into. One possible reason for their underutilization is that their effectiveness in influencing arbitral decision-making is rather uncertain. Thus, to enhance the effectiveness of such submissions in influencing arbitral decision-making, we propose a two-pronged approach which aims to improve both the: (i) mechanism of NDSP submissions; and (ii) NDSP submissions made by States in actual Investor-State arbitration cases.

A. Clarifying the mechanism of NDSP submissions

254. Our survey of NDSP submission provisions reveals that they tend to be vague regarding the procedure of making NDSP submissions, and the weight that should be given to such submissions.[423] As a result, it is often left to the tribunal's discretion to determine whether the submissions should be included in the procedural order, and the weight that should be accorded to them. In this regard, it is desirable to provide greater clarity in the NDSP submission provisions, so as to limit the tribunal's discretion in these matters.

255. To this end, we offer four recommendations:

1) Express the NDSPs' right to make submissions in unambiguous terms;

[421] See Part III.A above.

[422] See Part III.A above.

[423] See Part I.B(1), para 38 above.

2) Include procedural guidelines for NDSPs to make submissions;

3) Clarify the weight to be accorded to positions advanced by NDSPs, and require tribunals to provide reasons if they depart from these positions; and

4) State the significance, if any, to be attributed to NDSPs' silence in a dispute.

256. States may consider updating existing treaties containing NDSP submissions through the relevant legal processes,[424] or consider these recommendations in their future treaty-drafting practice.

(1) Express the NDSPs' right to make submissions in unambiguous terms

257. There is often confusion over whether NDSPs have a *right* to make NDSP submissions, or whether this is left to the tribunal's discretion. To avoid such uncertainty, treaty parties should make their intention of providing NDSPs with such a right explicit and clarify whether NDSPs can make submissions as of right, or whether it is left to the tribunal's discretion.

(2) Procedural guidelines for NDSPs to make submissions

258. Some IIAs do not contain any specific procedural guidelines for NDSPs wishing to make a submission on treaty interpretation, thus leaving the disputing parties and tribunals with a "blank sheet of paper" on the procedural aspects of such interventions.[425] However, from our empirical survey of cases, we observe that some tribunals have made a concerted effort to accommodate NDSP submissions in the organization of arbitration proceedings,[426] by setting up timeframes within which the NDSPs are to file their submissions. These timeframes are often set at the outset of the proceedings through specific procedural

[424] For example, the NAFTA FTC could consider issuing an Interpretive Note regarding Article 1128 of the NAFTA.

[425] This is also a view taken by M Kinnear, A Bjorklund and J Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer Law International 2008), 1128–32.

[426] M Hunter and A Barbuk, 'Procedural Aspects of Non-Disputing Party Interventions in Chapter 11 Arbitrations' (2003) 3 Asper Review of International Business and Trade Law 151, 163–5.

orders.[427] However, this is not a practice shared by all tribunals as there remain arbitrators who would not ordinarily account for NDSP submissions in the arbitration procedure, much less invite them. This might be difficult for tribunals which have less experience in dealing with NDSP submissions, as prior experience may help in setting procedural guidelines.[428] In this regard, clarifying the procedural aspects of NDSP submissions would be much welcome.

259. Treaty parties may consider incorporating procedural guidelines similar to the case management procedures used by some tribunals in dealing with NDSP submissions. Specifically, guidance should be given with respect to the deadline(s) for making NDSP submissions, relative to the procedural timeline. This would attenuate concerns of NDSPs abusing their rights to make submissions by, for instance, utilising it as a dilatory tactic. Consequently, this would also ensure greater fairness and transparency for investors.

260. Additionally, these guidelines could include procedural requirements for NDSPs to be notified of claims filed under their treaties, and receive documents submitted to and issued by tribunals, such as the disputing parties' written submissions and any of the tribunal's questions concerning treaty interpretation. Doing so would alleviate the risk of information asymmetry amongst treaty parties and assist NDSPs both in deciding whether to make an NDSP submission, and in making the submission itself.

261. Another procedural aspect which can be improved is the right of disputing parties to respond to NDSP submissions. The disputing parties' responses may enhance and fine-tune the arguments advanced by the NDSP. In this regard, Article 5(5) of the UNCITRAL Transparency Rules could serve as a blueprint as it ensures that disputing parties have a reasonable opportunity to present their observations on any submission by an NDSP.[429] In this connection, it could also be useful to clarify whether NDSPs are allowed to respond to

[427] For example, in *ADF v. USA*, the tribunal issued Procedural Order No 1 instructing the ICSID Secretariat to inform the governments of Canada and Mexico that any Article 1128 submissions should be filed within forty days after the service upon the Claimant of the Respondent's Counter-Memorial. See: *ADF v. USA*, Award, 9 January 2003, para 7.

[428] Polanco (n 10), pp 183-184. *TCW Group, Inc. and Dominican Energy Holdings, L.P. v. Dominican Republic*, UNCITRAL, Procedural Order N° 3, 16 December 2008, paras 3.15, 3.5. Ultimately, no NDSP submissions were made as the disputing parties settled the dispute.

[429] Article 5(5) of the UNCITRAL Transparency Rules provides that: "[t]he arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty."

the disputing parties' responses to the NDSPs' prior submissions. While such responses have neither been requested or made in any of the cases surveyed, in our view, it is better to pre-empt such a scenario and establish the applicable procedural rules from the outset.

262. Finally, we would also recommend treaty parties to include a provision similar to Article 5(4) of the UNCITRAL Transparency Rules, which ensures that any NDSP submissions do not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing parties.[430] Such a procedural safeguard serves to strike a balance between the interests of the treaty parties and the investors themselves and mitigates the risk of investors being overly disadvantaged by the right of NDSPs to make submissions.

(3) Clarify the weight to be accorded to NDSP submissions

263. As of writing, no NDSP submission provision expressly indicates the weight that tribunals should accord such submissions. The lack of guidance leaves NDSPs uncertain as to how much weight will be accorded to their submissions, should they choose to make one. In this regard, clarifying the weight to be accorded can alleviate this uncertainty, for example, a provision may stipulate that greater weight should be placed on NDSP submissions that they express a common, consistent and concordant view.

264. Further, for reasons of transparency and accountability, NDSP submission provisions could require tribunals to include reasons for departing from the views of the NDSPs in their written decisions, particularly where those interpretations are consistent amongst all treaty parties. Such a requirement ensures that tribunals will duly consider the positions advanced in NDSP submissions, thus encouraging greater transparency in the arbitral process overall.

(4) Significance, if any, to be attributed to NDSP(s)' silence in a dispute

265. Ultimately, treaty parties may choose whether or not to make NDSP submissions. However, as of writing, none of the NDSP submission provisions specifically sets out the effect of an

[430] Article 5(4) of the UNCITRAL Transparency Rules provides that: "[t]he arbitral tribunal shall ensure that any submissions does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing parties."

NDSP's decision not to make a submission.[431] Thus, an NDSP's silence, especially where specifically invited by the tribunal to make submissions on particular issues, can potentially be construed as acquiescence to the claimant or respondent's interpretation of a particular treaty provision. It would therefore be helpful for a treaty to clarify the significance of an NDSP's silence, as it may affect whether NDSPs choose to make a submission or not.

266. In this regard, reference can be made to Article 20(3)(c)(iv) of the US Model BIT (2012), which states that if an NDSP does not provide an oral or written submission regarding the respondent state's attempt to invoke certain defences, "the non-disputing Party shall be presumed, for the purposes of the arbitration, to take a position [on the applicability of the defence] *not inconsistent with that of the respondent* (emphasis added)." An alternative would be Article 5(3) of the UNCITRAL Transparency Rules, which provide that "the arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation [to do so]".

B. Drafting effective NDSP submissions

267. Apart from clarifying the mechanism for NDSP submissions, the effectiveness of NDSP submissions in influencing tribunals' decision-making may also be improved by effective drafting of such submissions. Based on our survey of tribunals' reception of NDSP submissions, we make three recommendations:

1) Clearly express a common position among treaty parties;

2) Clearly express a long-standing, consistent position; and

3) Be targeted in drafting NDSP submissions.

[431] In this regard, we note that in in the first few paragraphs of some NDSP submissions, the NDSPs have clarified that "no inference should be drawn from the absence of comment on any issue not addressed": see e.g. *Detroit v. Canada*, Submission of the United States, 14 February 2014, para 1.

(1) Clearly express a common position among treaty parties

268. The findings from our empirical survey suggest that NDSPs are most effective when they form a common position among all treaty parties.[432] In this regard, where a State is interested in making an NDSP submission on a treaty provision which all treaty parties have adopted the same interpretation, it is recommended to make such commonality clear. This can be done, for example, by adopting similar language, and by expressing agreement with the interpretation advanced by the other treaty parties.

269. However, between these two methods, the former carries a higher risk. If treaty parties' submissions are not worded identically, tribunals may not perceive their submissions as evincing a common position on interpretation. This was the case in *Mexico v. Cargill*, albeit in the context of a domestic court reviewing an application to set aside an arbitral award. Thus, treaty parties can more effectively ensure that their agreement is recognized by the tribunal by expressly stating such agreement. This may be done by citing and/or endorsing the submissions of other treaty parties in the same dispute.[433] That said, as our empirical survey showed that most NDSP submissions are filed on the same day (i.e. the deadline set by the tribunal), this would likely be limited to citing and endorsing the interpretation argued by the respondent,[434] or citing and endorsing the interpretations advanced by treaty parties in other cases.[435]

(2) Clearly express a long-standing, consistent position

270. In addition, treaty parties may seek to establish a subsequent practice with regard to their interpretation of a certain treaty provision. Doing so signifies to tribunals that such

[432] See Part III.C(1) above.

[433] For example, see *Mesa Power v. Canada*, Second Non-Disputing State Party Submission of Mexico, 12 June 2015, para 9, which expressly cites the NDSP submission made by the United States in the same case regarding Article 1105 of the NAFTA.

[434] For example, see *Eli Lilly v. Canada*, Non-Disputing State Party Submission of Mexico, 18 March 2016, para 15, which cites the respondent's Counter-Memorial in the same case regarding Article 1105 of the NAFTA.

[435] For example, see *Berkowitz v. Costa Rica*, Non-Disputing State Party Submission of El Salvador, 17 April 2015, paras 9-11, which expressly cites NDSP submissions made by other CAFTA-DR parties in other cases regarding Article 10.5 of the CAFTA-DR; *Mercer v. Canada*, Non-Disputing State Party Submission of Mexico, 8 May 2015, paras 18-19, which expressly cites the NDSP submission made by the United States in *Mesa Power v. Canada* regarding Article 1105 of the NAFTA.

interpretation is their long-standing and consistent position. Consistency in the positions adopted over time would make it more likely for tribunals to accept treaty parties' views as genuine expressions of their intentions.

271. In order to evince such consistency in interpretation, treaty parties have referred to past submissions made in other Investor-State cases, in which the same position was adopted. However, it may be difficult for tribunals to access these past submissions, especially if they are not publicly accessible. Thus, NDSPs should submit to the tribunal any of its past submissions it refers to, as well as other relevant documents.[436] Alternatively, treaty parties could consider making all their submissions on treaty interpretation either as respondent or an NDSP publicly available (to the extent that confidentiality allows). This would allow future tribunals and (potential) investors to easily access these submissions and more thoroughly assess how a given treaty provision has been previously interpreted past. Overall, this would promote greater transparency and certainty in the ISDS system.

(3) Be targeted in drafting NDSP submissions

272. Finally, we note that there have been a number of instances where the tribunal declined to consider the positions advanced by NDSPs in their submissions because they were not directly relevant to the issue or question faced by the tribunal.[437] In many of these instances, the NDSP submissions contain a lengthy exposition on that State's position regarding how the treaty provision should be interpreted, including espousing interpretations that were already accepted by both disputing parties. Thus, even if the NDSP submission asserts an interpretation regarding a controversial element of the treaty provision, there is a risk that this would be overshadowed by the NDSP's view on other less controversial elements.

273. In this regard, we recommend that NDSPs draft their submissions directly and concisely. Specifically, NDSPs could clearly highlight on which element of the treaty provision they intend to make submissions, while refraining from iterating their views on the uncontested

[436] For example, see *Pope & Talbot v. Canada*, Eighth Non-Disputing State Party Submission of the United States of America, 3 December 2001, which refers to and attached *Methanex v. USA*, Response of Respondent United States of America to Methanex's Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation, October 26, 2001.

elements of the provision. This would assist the tribunal in identifying and considering their view when interpreting that controversial provision.

CONCLUSION

274. In summary, our empirical study revealed that despite there being no guidance on the weight to accord positions advanced in NDSP submissions in tribunals' decision-making, tribunals have generally considered and accepted these submissions, especially where all treaty parties espouse the same view. In reaching this conclusion, this Memorandum analysed the legal frameworks in which NDSP submission provisions appear, the frequency in which NDSP submissions have been made, and the content of the NDSP submissions. It then discussed the weight that tribunals should in principle accord to such submissions, followed by evaluating the weight actually accorded in practice.

275. In the vast universe of IIAs and arbitration rules, NDSP submission provisions can be found in 78 IIAs and four arbitration rules. Both IIAs and arbitration rules generally provide that NDSPs have a right to make submissions on questions of treaty interpretation. However, on any other question, the IIAs and arbitration rules differ. The former is silent, whereas the latter provides the tribunal with the discretion to allow submissions on these questions. Additionally, arbitration rules stipulate considerations that the tribunal must make when exercising such discretion, such as whether the submission is tantamount to diplomatic protection or will unfairly burden or prejudice the disputing parties. Neither the NDSP submission provisions in IIAs or arbitration rules provide specific procedural guidance as to when an NDSP can file such a submission.

276. We note that when there are IIAs that include both an NDSP submission provision and reference to arbitration rules that have such a provision, both provisions might apply complementarily, or the IIAs' NDSP submissions provisions apply exclusively by virtue of the *lex specialis* rule.

277. Our survey found four sets of arbitration rules which contain NDSP submissions: (i) the UNCITRAL Transparency Rules 2014, (ii) the SCC Rules 2017, (iii) the SIAC IA Rules 2017, and (iv) the CIETAC IIA Rules 2017. Only the UNCITRAL Transparency Rules have been incorporated into IIAs: through (i) the Mauritius Convention (4 IIAs, up to 304 IIAs if treaty parties agree); (ii) express reference in IIAs (6 IIAs); (iii) express reference to the UNCITRAL Arbitration Rules (55 IIAs).

278. Out of the 2,577 IIAs surveyed, 78 have NDSP submission provisions. Our empirical study has shown most of such IIAs are signed by States in the Americas. We note, however, an interesting trend with Japan, which is the only non-NAFTA State to have entered into such IIAs. We posit that this may be likely due to Japan's increased interest in the role NDSP submissions play in ensuring that tribunals' interpretation of IIAs correctly reflect the intentions of the treaty parties.

279. Beyond the legal framework of NDSP submission provisions, our empirical study of all publicly available data as of 22 April 2020 has found 141 submissions made by NDSPs in 54 ISDS cases, all pursuant to NDSP submission provisions in IIAs. We also found NDSP submissions made pursuant to Third Party provisions in the arbitration rules applicable to a dispute, in particular Rule 37(2) of the ICSID Arbitration Rules. That being said, our Memorandum focused on submissions made pursuant to NDSP submission provisions, and examining how they have been received by arbitral tribunals

280. In analysing these NDSP submissions, we considered their volume and frequency, the identities of States that have made them, the stage of arbitration proceedings in which they were made, their content, as well as the consistency of positions taken by States in these submissions. In this regard, we found that only the Northern and Central American States have made NDSP submissions pursuant to NDSP submission provisions in IIAs. These submissions were either made in the context of the NAFTA, CAFTA-DR, or BITs to which either Canada or the United States is a treaty party. In this connection, we observe that since 2012, NDSP submissions have been made in all NAFTA Chapter Eleven arbitrations.[438]

281. NDSP submissions are principally intended to reflect the treaty parties' views on questions of interpretation. While there are a few that appear to touch upon factual issues in the particular dispute, the majority of NDSP submissions have been limited to a "pure" interpretation of treaty provisions. In this regard, we observe that NDSP submissions have addressed a wide variety of issues, including jurisdictional, substantive, procedural and

[438] With the exception of *JML Heirs LLC and J.M. Longyear LLC v. Government of Canada*, where the claim was withdrawn before any tribunal was constituted.

causation-related issues. The issues most frequently addressed in NDSP submissions are those that are controversial and have not yet been settled in law, such as the MST provision.

282. Subsequently, we observe that in most instances, the NDSP(s) adopted a position that supported the interpretation of the respondent. Consistency in the positions taken amongst treaty parties appears to have resulted in the emergence of agreed interpretations of particular treaty provisions. In some cases, tribunals have also expressly acknowledged the common position of treaty parties and characterised such concordance as subsequent practice, such as in the *Canadian Cattlemen v. USA* and *Bilcon v. Canada* awards. Furthermore, we also observe that NDSP submissions are often cited by States in their submissions as NDSPs, and as litigants, in subsequent Investor-State disputes. This leads to the conclusion that States have been consistent in the interpretations they adopt, both as NDSPs and as litigants in Investor-State disputes over time. Such consistency evinces a long-standing position of that State with regard to the interpretation of the treaty, which some tribunals have elevated as a "subsequent practice" to be taken into account in treaty interpretation.[439]

283. Nonetheless, our empirical study also demonstrates that while these are factors that may affect the weight accorded to NDSP submissions, there is no consistent practice of tribunals in treating NDSP submissions. In this regard, our survey has also revealed a number of anomalous cases. The varied approaches taken by arbitral tribunals thus makes it difficult to draw conclusive views regarding the weight that a tribunal will give to NDSP submissions.

284. Therefore, we conclude that while NDSP submissions have been effective to a considerable extent, there is still much to be improved upon. Our recommendations are two-fold: first, improving the mechanism of NDSP submissions; and second, improving NDSP submissions made by States in actual Investor-State arbitration cases.

285. Moving forward, we hope that our analyses and recommendations in this Memorandum will shed light in improving the mechanism of NDSP submissions in Investor-State disputes, as NDSP submissions are useful avenues for treaty parties to clarify and express the true meanings and intentions of the relevant treaty provisions. Further, having offered empirical

[439] VCLT, Article 31(3)(b).

insight on the current practice of NDSP submissions, we hope that it will encourage treaty parties to make NDSP submissions in subsequent Investor-State disputes arising from IIAs which contain NDSP submission provisions. Ultimately, this would contribute to ensuring the true intentions of treaty parties are revealed and given effect to in actual cases.

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1	Japan-Morocco BIT (2020), Article 16(4)(c)
2	Australia-Hong Kong Investment Agreement (2019), Article 24(3)(a)
3	Argentina-Japan BIT (2018), Article 24(4)
4	Australia-Peru FTA (2018), Article 8.2(4)(c)
5	Cambodia-Turkey BIT (2018), Article 9(2)(B)(ii)
6	Japan-Jordan BIT (2018), Article 23(4)(c)
7	Japan-United Arab Emirates BIT (2018), Article 17(4)(c)
8	Israel-Japan BIT (2017), Article 24(4)(c)
9	Rwanda-United Arab Emirates BIT (2017), Article 14(1)(c)
10	Argentina-Qatar BIT (2016), Article 14(3)(e)
11	Canada-Mongolia BIT (2016), Article 23(1)(3)
12	Chile-Hong Kong, China SAR BIT (2016), Article 21(4)(a)
13	Islamic Republic of Iran-Japan BIT (2016), Article 18(2)(b)
14	Japan-Kenya BIT (2016), Article 15(4)(b)(iii)
15	Mexico-United Arab Emirates BIT (2016), Article 11(3)(c)
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24	Cambodia-Russian Federation BIT (2015), Article 8.2(b)
25	Canada-Guinea BIT (2015), Article 24.1(3)
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28	Eurasian Economic Union-Vietnam FTA (2015), Article 8.38(3)(b)
29	Guinea-Bissau-Morocco BIT (2015), Article 9(3)(b)
30	Japan-Oman BIT (2015), Article 15(4)(c)
31	Japan-Ukraine BIT (2015), Article 18.4(c)
32	Japan-Uruguay BIT (2015), Article 21.3(c)
33	Mauritius-United Arab Emirates BIT (2015), Article 10(4)(d)
34	Republic of Korea-New Zealand FTA (2015) Article 10.20(3)(c)
35	Republic of Korea-Turkey Investment Agreement (2015), Article 1.17(5)(c)
36	ASEAN-India Investment Agreement (2014), Article 20(7)(d)
37	Australia-Republic of Korea FTA (2014), Article 11.16(3)(c)
38	Belarus-Cambodia BIT (2014), Article 8.2(d)

39	Canada-Côte d'Ivoire BIT (2014), Article 23(1)(c)
40	Colombia-France BIT (2014), Article 15.4(c)
41	Canada-Korea, Republic of FTA (2014), Article 8.23(1)(c)
42	Canada-Mali BIT (2014), Article 23(1)(c)
43	Canada-Nigeria BIT (2014), Article 24.1(c)
44	Canada-Senegal BIT (2014), Article 24(1)(c)
45	Canada-Serbia BIT (2014), Article 24.1(c)
46	Colombia-Turkey BIT (2014), Article 12(6)(b)
47	Egypt-Mauritius BIT (2014), Article 10.4
48	Israel-Myanmar BIT (2014), Article 8(2)(e)
49	Japan-Kazakhstan BIT (2014), Article 17(4)(c)
50	Kyrgyzstan-Qatar BIT (2014), Article 9.3(c)
51	Mexico-Panama FTA (2014), Article 10.17(3)(c)
52	Republic of Moldova-Montenegro BIT (2014), Article 8.2(c)

53	Republic of Korea-Myanmar BIT (2014), Article 11(2)(b)(iii)
54	Treaty on Eurasian Economic Union (2014), Article 6.85(3)

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IIAs with NDSP submission provisions and reference to the UNCITRAL Arbitration Rules (post 1 April 2014)

1	Japan-Morocco BIT (2020), Article 16(9)
2	Australia-Hong Kong Investment Agreement (2019), Article 29(2)
3	Argentina-Japan BIT (2018), Article 25(13)
4	Armenia-Japan BIT (2018), Article 24(13)
5	Australia-Peru FTA (2018), Article 8.2(2)
6	Japan-Jordan BIT (2018), Article 23(13)
7	Japan-United Arab Emirates BIT (2018), Article 17(17)
8	Canada-Mongolia BIT (2016), Article 23(1)(3)
9	Chile-Hong Kong, China SAR BIT (2016), Article 21(4)(a)
10	Islamic Republic of Iran-Japan BIT (2016), Article 18(2)(b)
11	Japan-Kenya BIT (2016), Article 15(4)(b)(iii)
12	Australia-China FTA (2015), Article 9.12(4)(c)
13	Burkina Faso-Canada BIT (2015), Article 25.1(3)
14	Canada-Guinea BIT (2015), Article 24.1(3)
15	Japan-Oman BIT (2015), Article 15(4)(c)
16	Japan-Uruguay BIT (2015), Article 21.3(c)
17	Republic of Korea-New Zealand FTA (2015), Article 10.20(3)(c)
18	Republic of Korea-Turkey Investment Agreement (2015), Article 1.17(5)(c)
19	Australia-Republic of Korea FTA (2014), Article 11.16(3)(c)
20	Canada-Côte d'Ivoire BIT (2014), Article 23(1)(c)
21	Canada-Mali BIT (2014), Article 23(1)(c)
22	Canada-Nigeria BIT (2014), Article 24.1(c)

23	Canada-Republic of Korea FTA (2014), Article 8.23(1)(c)
24	Canada-Senegal BIT (2014), Article 24(1)(c)
25	Canada-Serbia BIT (2014), Article 24.1(c)
26	Japan-Kazakhstan BIT (2014), Article 17(4)(c)
27	Mexico-Panama FTA (2014), Article 10.17(3)(c).

ANNEX C

IIAs with NDSP submission provisions (non-NAFTA parties)

1	Japan-Morocco BIT (2020)
2	Australia-Hong Kong Investment Agreement (2019)
3	Argentina-Japan BIT (2018)
4	Armenia-Japan BIT (2018)
5	Australia-Peru FTA (2018)
6	Japan-Jordan BIT (2018)
7	Japan-United Arab Emirates BIT (2018)
8	Chile-Hong Kong BIT (2016)
9	Japan-Kenya BIT (2016)
10	Australia-China FTA (2015)
11	Japan-Mongolia EPA (2015)
12	Japan-Oman BIT (2015)
13	Japan-Uruguay BIT (2015)
14	Korea, Republic of-New Zealand FTA (2015)
15	Korea, Republic of-Turkey Investment Agreement (2015)
16	Korea, Republic of-Vietnam FTA (2015)
17	Australia-South Korea FTA (2014)
18	Japan-Kazakhstan BIT (2014)
19	Japan-Mozambique BIT (2013)
20	New Zealand-Taiwan Province of China ECA (2013)
21	Iraq-Japan BIT (2012)
22	Japan-Kuwait BIT (2012)

23	India-Japan EPA (2011)
24	Japan-Papua New Guinea BIT (2011)
25	Japan-Lao People's Democratic Republic BIT (2008)
26	Japan-Peru BIT (2008)
27	Cambodia-Japan BIT (2007)

ANNEX D

IIAs that include general Third Party provisions

1	Australia-China FTA (2015)
2	Australia-Republic of Korea FTA (2014)
3	Austria-Kyrgyzstan BIT (2016)
4	Benin-Canada BIT (2013)
5	Burkina Faso-Canada BIT (2015)
6	CAFTA-DR
7	Cameroon-Canada BIT (2014)
8	Canada-Côte d'Ivoire BIT (2014)
9	Canada-Czech Republic BIT (2009)
10	Canada-Guinea BIT (2015)
11	Canada-Honduras FTA (2013)
12	Canada-Hong Kong SAR, China BIT (2016)
13	Canada-Jordan BIT (2009)
14	Canada-Republic of Korea FTA (2014)
15	Canada-Kuwait BIT (2011)
16	Canada-Latvia BIT (2009)
17	Canada-Mali BIT (2014)
18	Canada-Mongolia BIT (2016)
19	Canada-Nigeria BIT (2016)
20	Canada-Peru BIT (2006)
21	Canada-Senegal BIT (2014)
22	Canada-Serbia BIT (2014)

23	Canada-Slovakia BIT (2010)
24	Canada-United Republic of Tanzania BIT (2013)
25	Chile-Hong Kong SAR, China BIT (2016)
26	Chile-Uruguay BIT (2010)
27	Colombia-Costa Rica FTA (2013)
28	Colombia-France BIT (2014)
29	Colombia-Panama FTA (2013)
30	Colombia-Peru BIT (2013)
31	Georgia-Switzerland BIT (2014)
32	Hungary-Paraguay BIT (1993)
33	Islamic Republic of Iran-Slovakia BIT (2016)
34	Republic of Korea-New Zealand FTA (2015)
35	Mexico-Panama FTA (2014)
36	NAFTA
37	New Zealand-Taiwan (2013)
38	Pacific Alliance Additional Protocol (2014)
39	Rwanda-United States of America BIT (2008)
40	TPP (2016)
41	United States of America-Uruguay BIT (2005)

ANNEX E

Number of NDSP submissions made per stage of proceedings

<table>
<tr><td colspan="5">NAFTA Chapter Eleven disputes</td></tr>
<tr><td></td><td>Single-stage</td><td>Bifurcated (jurisdiction → merits + damages)</td><td>Bifurcated (jurisdiction + merits → damages)</td><td>Trifurcated</td></tr>
<tr><td>Before parties exchange memorials</td><td>2</td><td>2</td><td>0</td><td>2</td></tr>
<tr><td>Before hearing on jurisdiction</td><td rowspan="4">24</td><td>10</td><td rowspan="3">4</td><td>5</td></tr>
<tr><td>After hearing on jurisdiction</td><td>10</td><td>4</td></tr>
<tr><td>Before hearing on merits</td><td>5</td><td>6</td></tr>
<tr><td>During hearing on merits</td><td>0</td><td>1</td><td>0</td></tr>
<tr><td>After hearing on merits</td><td rowspan="3">13</td><td rowspan="3">4</td><td>0</td><td>5</td></tr>
<tr><td>Before hearing on damages</td><td>3</td><td>4</td></tr>
<tr><td>After hearing on damages</td><td>0</td><td>2</td></tr>
<tr><td>Total</td><td>39</td><td>31</td><td>8</td><td>28</td></tr>
</table>

CAFTA-DR Chapter Ten disputes		
	Single-stage	Bifurcated
Before hearing on jurisdiction	9	3
After hearing on jurisdiction		3
Before hearing on merits		0
After hearing on merits	0	3
Total	9	9

Investor-State disputes arising from other IIAs		
	Single-stage	Bifurcated
Before parties exchange memorials	1	0
Before hearing on jurisdiction	7	1
After hearing on jurisdiction		1
Before hearing on merits		1
During hearing on merits	0	1
After hearing on merits	3	0
Total	11	4

ANNEX F

Frequency of issues addressed in NDSP Submissions

Category		Issue	Number of NDSP submissions			
			NAFTA	CAFTA-DR	Other IIAs	Total
Jurisdiction	Ratione materiae	Scope of "investment" or "measure"	16		5	21
		Arbitrable disputes	31	1		33
		Measure "relating to" investor or investment	7			7
		Exceptions		4	6	10
		Notice of Intent	3			3
		Waiver	10	3	3	16
Jurisdiction	Ratione personae	Standing to bring a claim	13	2		15
Jurisdiction	Ratione temporis	Limitations period	14	5	3	22
		Waiting period before claim can be made	2			2
		When an arbitration claim is made	2			2

		Non-retroactivity of treaty	2	3		5
Jurisdiction	Conditions precedent to arbitration	Requirement to exhaust domestic remedies	2			2
		Valid consent to arbitration	6		2	8
Substantive		National treatment	24	1	4	29
		MFN treatment	6		4	10
		MST	43	13	9	65
		Performance requirements	3			3
		Expropriation	20	5	5	30
		Intellectual property rights-related	2			2
		Obligations from subsequent legal agreements	1			1
Procedural		Expedited review mechanism			3	3
		Amendment of claim	2			2
		Governing law	21		2	23
		Assignment of claim	1			1

	Interim measures	2			2
	Amicus curiae	4			4
	Revisiting issues already decided	1			1
Remedies	Monetary damages only	3		1	4
Causation-related	Causal nexus required	4		3	7
	Direct vs. derivative losses	7		1	8
	Prospective losses	4		1	5
State Responsibility	State responsibility	5			5
	Attribution of liability	8		1	9
Views on arbitral awards	Interpretation of treaty provisions by other arbitral tribunals	17			17

ANNEX G

Reception of positions advanced by NDSPs by NAFTA Chapter Eleven arbitral tribunals, mirroring our categorization in Part III.B.

Legend	**What it means**
Accepted	Tribunal explicitly agreed with and cited the NDSPs' interpretation
Consistent interpretation, no express ref.	Tribunal did not cite NDSP submissions but arrived at an interpretation consistent with the NDSPs'
Inconsistent interpretation, no express ref.	Tribunal did not cite NDSP submissions and adopted a different interpretation from that espoused by the NDSPs
Rejected	Tribunal cited the NDSP submissions but adopted a different interpretation
Not considered by tribunal	Issue was not considered by the tribunal

Case	**NDSP**	**Date of NDSP submission**	**Subject matter**	**Tribunal's reception**
Metalclad v. Mexico	Canada	28 July 1999	Expropriation	Consistent interpretation, no express ref.
			Governing law	Inconsistent interpretation, no express ref.
	United States	9 November 1999	Expropriation	Consistent interpretation, no express ref.
			NAFTA applies to local govts.	Consistent interpretation, no express ref.

Ethyl Corporation v. Canada	Mexico	11 March 1998	Scope of "measure"	Consistent interpretation, no express ref.
			Arbitrable disputes	Rejected
			Consent to arbitration	Consistent interpretation, no express ref.
Waste Management v. Mexico (I)	Canada	17 December 1999	Waiver	Consistent interpretation, no express ref.
S.D. Myers v. Canada	Mexico (not publicly available, information from Investor's Reply)	14 January 2000	Scope of "investment"	Not considered by tribunal
			Measures "relating to" investment or investor	Not considered by tribunal
			NT	Inconsistent interpretation, no express ref.
			MST	Consistent interpretation, no express ref.
			Expropriation	Consistent interpretation, no express ref.
	Mexico (not publicly available)	12 September 2001		
	United States	18 September 2001	Scope of "investment"	Not considered by tribunal
			Arbitrable disputes	Inconsistent interpretation, no express ref.

			Direct vs. derivative losses	Consistent interpretation, no express ref.
Loewen v. USA	Mexico	16 October 2000	Standing to bring claim	Not considered by tribunal
			Waiver	Consistent interpretation, no express ref.
			Scope of "measure"	Rejected
			View on other arbitral awards	Not considered by tribunal
	Mexico	9 November 2001	Requirement to exhaust domestic remedies	Consistent interpretation, no express ref.
			NT	Consistent interpretation, no express ref.
			MST	Consistent interpretation, no express ref.
			Governing law	Consistent interpretation, no express ref.
			Attribution of liability	Consistent interpretation, no express ref.
	Canada	9 November 2001	NT	Consistent interpretation, no express ref.
			MST	Consistent interpretation, no express ref.
			Governing law	Consistent interpretation, no express ref.
	Canada	27 June 2002	Governing law	Consistent interpretation, no express ref.

			View on other arbitral awards	Not considered by tribunal
	Mexico	2 July 2002	Nationality link	Consistent interpretation, no express ref.
			Governing law	Consistent interpretation, no express ref.
			No assignment of I-S claims	Consistent interpretation, no express ref.
			State responsibility in IIAs	Not considered by tribunal
Pope & Talbot v. Canada	Mexico	2 December 1999	Arbitrable disputes	Rejected
			Measures "relating to" investment or investor	Rejected
			State responsibility in IIAs	Not considered by tribunal
	Mexico	3 April 2000	Scope of "investment"	Inconsistent interpretation, no express ref.
			NT	Rejected
			Performance requirements	Consistent interpretation, no express ref.

			Expropriation	Consistent interpretation, no express ref.
			SLA between Parties	Not considered by tribunal
			Governing law	Not considered by tribunal
	United States	7 April 2000	NT	Rejected
			Performance requirements	Consistent interpretation, no express ref.
			Expropriation	Consistent interpretation, no express ref.
	Mexico	25 May 2000	NT	Rejected
			Expropriation	Consistent interpretation, no express ref.
	United States	25 May 2000	NT	Rejected
			Expropriation	Rejected
	United States	24 July 2000	Consent to arbitration	Not considered by tribunal
			Amendment of claim	Not considered by tribunal
	United States	1 November 2000	MST	Rejected
	Mexico	5 November 2000	Arbitrable disputes	Not considered by tribunal

			Requirement to exhaust domestic remedies	Not considered by tribunal
			MST	Inconsistent interpretation, no express ref.
			View on other arbitral awards	Accepted
	Mexico	1 December 2000	NT	Inconsistent interpretation, no express ref.
			MST	Inconsistent interpretation, no express ref.
			View on other arbitral awards	Accepted
	United States	1 December 2000	MST	Inconsistent interpretation, no express ref.
			View on other arbitral awards	Accepted
	Mexico	1 October 2001	MST	Inconsistent interpretation, no express ref.
	United States	2 October 2001	MST	Inconsistent interpretation, no express ref.
	Mexico	6 November 2001	MST	Inconsistent interpretation, no express ref.
			Governing law	Consistent interpretation, no express ref.
			Revisit issue already decided	Not considered by tribunal
	United States	6 November 2001	Monetary damages only	Not considered by tribunal

			Direct vs. derivative losses	Inconsistent interpretation, no express ref.
	Mexico	3 December 2001	NT	Not considered by tribunal
			MST	Rejected
			Governing law	Consistent interpretation, no express ref.
	United States (refers to a document not publicly available)	3 December 2001		
Mondev v. USA	Canada	6 July 2001	Limitations period	Not considered by tribunal
			Notice of Intent	Not considered by tribunal
			Consent to arbitration	Inconsistent interpretation, no express ref.
			Non-retroactivity of treaty	Consistent interpretation, no express ref.
			NT	Not considered by tribunal
			MST	Rejected
			Expropriation	Not considered by tribunal
			Governing law	Consistent interpretation, no express ref.
	Canada	19 July 2002	Direct vs. derivative losses	Consistent interpretation, no express ref.

			View on other arbitral awards	Accepted
	Mexico (not publicly available)	23 July 2002	View on other arbitral awards	
Methanex v. USA	Canada	10 November 2000	Participation as amicus	Accepted
	Mexico	10 November 2000	Participation as amicus	Inconsistent interpretation, no express ref.
	Canada	30 April 2001	Measures "relating to" inv.	Accepted
			Scope of "investment"	Not considered by tribunal (left to merits)
			Waiver	Not considered by tribunal (settled by parties)
			MST	Not considered by tribunal (left to merits)
			Prospective losses	Not considered by tribunal (left to merits)
			Proximate cause	Not considered by tribunal (left to merits)
			View on other arbitral awards	Consistent interpretation, no express ref.
	Mexico	30 April 2001	Measures "relating to" inv.	Accepted
			Scope of "investment"	Not considered by tribunal (left to merits)

			MST	Not considered by tribunal (left to merits)
			View on other arbitral awards	Not considered by tribunal
	Canada	8 February 2002	MST	Not considered by tribunal (left to merits)
			Governing law	Not considered by tribunal (left to merits)
	Mexico	11 February 2002	MST	Not considered by tribunal (left to merits)
			Governing law	Not considered by tribunal (left to merits)
	Canada	30 January 2004	NT	Accepted
			Expropriation	Consistent interpretation, no express ref.
	Mexico	30 January 2004	Scope of "investment"	Not considered by tribunal
			NT	Consistent interpretation, no express ref.
			MST	Consistent interpretation, no express ref.
			Expropriation	Consistent interpretation, no express ref.
			Governing law	Consistent interpretation, no express ref.
			Proximate cause	Not considered by tribunal
			View on other arbitral awards	Not considered by tribunal
Feldman v. Mexico	Canada	6 October 2000	Limitations period	Consistent interpretation, no express ref.

			When arbitration claim made	Accepted
			Non-retroactivity of treaty	Accepted
			Amendment of claim	Rejected
	United States	6 October 2000	Standing to bring claim	Consistent interpretation, no express ref.
			When arbitration claim made	Accepted
	Canada	28 June 2001	Scope of "investment"	Inconsistent interpretation, no express ref.
			Arbitrable disputes	Consistent interpretation, no express ref.
			Expropriation	Consistent interpretation, no express ref.
			Governing law	Not considered by tribunal
Waste Management v. Mexico (II)	Canada	19 March 2003	Arbitrable disputes	Not considered by tribunal
			MST	Accepted (at [92] and [99])
			Expropriation	Not considered by tribunal
			Governing law	Not considered by tribunal

UPS v. Canada	Mexico	11 June 2001	Participation as amicus	Rejected
	United States	11 June 2001	Participation as amicus	Rejected
	Mexico (not publicly available)	May 2002		
	United States	13 May 2002	Arbitrable disputes	Accepted
			MST	Accepted
			Delegation of govt. authority	Accepted
	Mexico	23 August 2002	Arbitrable disputes	Accepted
			Delegation of govt. authority	Accepted
			View on other arbitral awards	Not considered by tribunal
	United States	23 August 2002	Arbitrable disputes	Accepted
			NT	Not considered by tribunal
			MST	Accepted

			Direct vs. derivative losses	Not considered by tribunal
			Delegation of govt. authority	Accepted
			View on other arbitral awards	Not considered by tribunal
	Mexico	20 October 2005	NT	Not considered by tribunal
			MST	Not considered by tribunal
			Secondary rules do not change primary rules	Consistent interpretation, no express ref.
ADF v. USA	Canada	18 January 2002	MST	Accepted
			Governing law	Not considered by tribunal
	Mexico	18 January 2002	Arbitrable disputes	Not considered by tribunal
			MST	Accepted
			Governing law	Not considered by tribunal
	Canada	19 July 2002	Governing law	Not considered by tribunal
			View on other arbitral awards	Accepted
	Mexico	22 July 2002	View on other arbitral awards	Accepted

Thunderbird v. Mexico	Canada	21 May 2004	NT	Consistent interpretation, no express ref.
	United States	21 May 2004	Direct vs. derivative losses	Consistent interpretation, no express ref.
GAMI v. Mexico	United States	30 June 2003	Standing to bring claim	Rejected
			Direct vs. derivative losses	Consistent interpretation, no express ref.
			Proximate cause	Not considered by tribunal
Fireman's Fund v. Mexico	Canada	27 February 2003	Arbitrable disputes	Accepted
	United States	27 February 2003	Arbitrable disputes	Accepted
	Canada	2 September 2005	Reservations and exceptions	Accepted
Chemtura v. Canada	Mexico	31 July 2009	MST	Inconsistent interpretation, no express ref.
	United States	31 July 2009	MST	Inconsistent interpretation, no express ref.
			Governing law	Consistent interpretation, no express ref.
Grand River v. USA	Canada	19 January 2009	MST	Accepted
Canadian Cattlemen v. USA	Mexico	1 March 2007	Standing to bring claim	Accepted

			Arbitrable disputes	Accepted
Bayview v. Mexico	United States	27 November 2006	Standing to bring claim	Accepted
Merrill & Ring v. Canada	United States	14 July 2008	Limitations period	Not considered by tribunal
			View on other arbitral awards	Not considered by tribunal
	Mexico	2 April 2009	Limitations period	Not considered by tribunal
Mobil v. Canada (I)	Mexico	8 July 2010	Arbitrable disputes	Accepted
			Performance requirements	Inconsistent interpretation, no express ref.
	United States	8 July 2010	Arbitrable disputes	Accepted
	Mexico	21 January 2011	Arbitrable disputes	Not considered by tribunal
	United States	21 January 2011	Arbitrable disputes	Not considered by tribunal
Bilcon v. Canada	United States	19 April 2013	Limitations period	Consistent interpretation, no express ref.
			NT	Consistent interpretation, no express ref.
			MST	Inconsistent interpretation, no express ref.
			Waiver	Not considered by tribunal

		29 December 2017	Direct vs. derivative losses	Accepted
			Proximate cause	Consistent interpretation, no express ref.
			Prospective losses	Not considered by tribunal
Mesa Power v. Canada	Mexico	25 July 2014	Six-month waiting period	Accepted
			Arbitrable disputes	Accepted
			MFN	Not considered by tribunal
			Delegation of govt. authority	Not considered by tribunal
			Procurement under Art 1108	Accepted
	United States	25 July 2014	Six-month waiting period	Accepted
			Arbitrable disputes	Accepted
			MST	Accepted
			NT	Not considered by tribunal
			Governing law	Not considered by tribunal
			Prospective losses	Inconsistent interpretation, no express ref.

			Procurement under Art 1108	Accepted
	Mexico	12 June 2015	NT	Not considered by tribunal
			MST	Accepted
			View on other arbitral awards	Accepted
	United States	12 June 2015	NT	Not considered by tribunal
			MST	Accepted
			View on other arbitral awards	Accepted
Detroit v. Canada	Mexico	14 February 2014	Waiver	Not considered by tribunal
			Limitations period	Not considered by tribunal
	United States	14 February 2014	Waiver	Not considered by tribunal
			Limitations period	Not considered by tribunal
			Arbitrable disputes	Not considered by tribunal
Mercer v. Canada	United States	8 May 2015	Time bar	Accepted
			NT	Accepted
			Procurement	Not considered by tribunal

			Discriminatory treatment	Accepted
			Delegation of govt. authority	Not considered by tribunal (left to merits)
	Mexico	8 May 2015	NT	Accepted
			Procurement	Rejected
			Discriminatory treatment	Accepted
			Delegation of govt. authority	Not considered by tribunal (left to merits)
Apotex v. USA (III)	Mexico	8 February 2013	Scope of "investment"	Accepted
Windstream v. Canada	Mexico	12 January 2016	Scope of "investment"	Accepted
			MST (burden of proof)	Rejected (at [350])
			MST (content)	Accepted (at [356])
			Expropriation	Accepted (at [285])
	United States	12 January 2016	Arbitrable disputes	Not considered by tribunal
			NT	Not considered by tribunal
			MFN	Not considered by tribunal

			MST (burden of proof)	Rejected (at [350])
			MST (content)	Accepted (at [356])
			Expropriation	Accepted (at [285])
Lone Pine v. Canada	Mexico	16 August 2017	Measures "relating to" investment or investor	Award pending
			MST	
			Expropriation	
	United States	16 August 2017	Scope of "investment"	Award pending
			Measures "relating to" investment or investor	
			MST	
			Expropriation	
KBR v. Mexico	Canada	30 July 2014	Waiver	Award not publicly available
	United States	30 July 2014	Waiver	Award not publicly available
Eli Lilly v. Canada	Mexico	18 March 2016	Limitations period	Not considered by tribunal

			Scope of "investment"	Not considered by tribunal
			Arbitrable disputes	Not considered by tribunal
			MST (denial of justice)	Not considered by tribunal
			Expropriation	Not considered by tribunal
	United States	18 March 2016	Limitations period	Not considered by tribunal
			Arbitrable disputes	Not considered by tribunal
			MST (denial of justice)	Not considered by tribunal
			Expropriation	Not considered by tribunal
			Patents (Chapter 17)	Not considered by tribunal
		8 June 2016	Arbitrable disputes	Not considered by tribunal
			MST	Not considered by tribunal
			Expropriation	Not considered by tribunal
			Governing law	Not considered by tribunal
	Mexico	14 June 2017	Limitations period	Accepted

Resolute Forest v. Canada			Measures "relating to" investment or investor	Accepted
			NT	Accepted
	United States	14 June 2017	Limitations period	Accepted
			Measures "relating to" investment or investor	Accepted
			NT	Accepted
Mobil v. Canada (II)	United States	24 October 2017	Arbitrable disputes	Accepted
			Monetary damages only	Not considered by tribunal
	Mexico	7 November 2017	Arbitrable disputes	Accepted
			Monetary damages only	Not considered by tribunal
Lion v. Mexico	Canada	21 June 2019	Waiver	Award pending
			MST	
			Expropriation	
	United States	21 June 2019	Waiver	Award pending

			Standing to bring claim	
			Limitations period	
			MST	
			Expropriation	
B-Mex v. Mexico	Canada	28 February 2018	Standing to bring claim	Consistent interpretation, no express ref.
			Notice of Intent	Inconsistent interpretation, no express ref. (Majority) Accepted (Dissenting Arbitrator)
			Consent to arbitration	Consistent interpretation, no express ref.
	United States	28 February 2018	Standing to bring claim	Consistent interpretation, no express ref.
			Notice of Intent	Inconsistent interpretation, no express ref. (Majority) Accepted (Dissenting Arbitrator)
			Consent to arbitration	Consistent interpretation, no express ref.
			Scope of "investment"	Not considered by tribunal

	Canada	17 August 2018	Standing to bring claim	Consistent interpretation, no express ref.
	United States	17 August 2018	Standing to bring claim	Consistent interpretation, no express ref.
			Consent to arbitration	Consistent interpretation, no express ref.
	United States	21 December 2018	Standing to bring claim	Consistent interpretation, no express ref.
			Governing law	Inconsistent interpretation, no express ref.
Tennant Energy v. Canada	Mexico	27 November 2019	Interim measures	Award pending
	United States	27 November 2019	Interim measures	Award pending
Vento Motorcycle v. Mexico	Canada	23 August 2019	NT	Award pending
			MFN	
			MST	
	United States	23 August 2019	Nationality link	Award pending
			Limitations period	
			Scope of "investment"	
			NT	

			MFN	
			MST	
			Prospective losses	

ANNEX H

Reception of positions advanced by NDSPs by CAFTA-DR Chapter Ten arbitral tribunals

Case	NDSP	Date of NDSP submission	Subject Matter	Tribunal's reception
RDC v. Guatemala	El Salvador	19 March 2010	Non-retroactivity of treaty	Inconsistent interpretation, no express ref.
		31 January 2012	MST	Consistent interpretation, no express ref.
	Honduras	10 February 2012	MST	Consistent interpretation, no express ref.
	United States	31 January 2012	MST	Consistent interpretation, no express ref.
Pac Rim v. El Salvador	Costa Rica	13 May 2011	Exceptions (denial of benefits)	Accepted
			Scope of "investor"	Consistent interpretation, no express ref.
	United States	20 May 2011	Exceptions (denial of benefits)	Accepted
Commerce Group v. El Salvador	Costa Rica	1 November 2010	Waiver	Accepted
	Nicaragua	1 November 2010	Waiver	Accepted
TECO v. Guatemala	El Salvador	5 October 2012	MST (legitimate expectations)	Accepted
	Dominican Republic	5 October 2012	MST (legitimate expectations)	Accepted
	Honduras	15 November 2012	MST (legitimate expectations)	Accepted
	United States	23 November 2012	MST (good faith)	Consistent interpretation, no express ref.
Corona v. Dominican Republic	United States	11 March 2016	Limitations period	Accepted
			Waiver	Not considered by tribunal
			MST	Accepted (in *obiter*)
Berkowitz v. Costa Rica	El Salvador	17 April 2015	Limitations period	Consistent interpretation, no express ref.
			Non-retroactivity of treaty	Consistent interpretation, no express ref.

			MST	Not considered by tribunal
			Expropriation	Not considered by tribunal
	United States	17 April 2015	Limitations period	Consistent interpretation, no express ref.
			Non-retroactivity of treaty	Consistent interpretation, no express ref.
			MST	Not considered by tribunal
			Expropriation	Not considered by tribunal
Aven v. Costa Rica	United States	2 December 2016	Arbitrable disputes	Consistent interpretation, no express ref.
			Exceptions	Inconsistent interpretation, no express ref.
			MST	Consistent interpretation, no express ref.
			Expropriation	Consistent interpretation, no express ref.
Ballantine v. Dominican Republic	Costa Rica	6 July 2018	Limitations period	Not considered by tribunal
			Exceptions	Not considered by tribunal
			MST	Not considered by tribunal
			Expropriation	Not considered by tribunal
	United States	6 July 2018	Limitations period	Not considered by tribunal
			Scope of "investor"	Accepted
			NT	Not considered by tribunal
			MST	Not considered by tribunal
			Expropriation	Not considered by tribunal

ANNEX I

Reception of positions advanced by NDSPs by arbitral tribunals in Investor-State disputes arising from other IIAs.

Case	**NDSP**	**Date of NDSP submission**	**Subject Matter**	**Tribunal's reception**
Al Tamimi v. Oman	United States	22 September 2014	MST	Consistent interpretation, no express ref.
			Governing law	Not considered by tribunal
Renco v. Peru	United States	10 September 2014	Expedited review mechanism	Accepted
		1 September 2015	Waiver	Accepted
		11 October 2015	Waiver	Consistent interpretation, no express ref.
Bear Creek Mining v. Peru	Canada	9 June 2016	MST	Not considered by tribunal
			Expropriation	Consistent interpretation, no express ref.
Italba v. Uruguay	United States	11 September 2017	Scope of "investment"	Not considered by tribunal
			Exceptions (denial of benefits)	
			Limitations period	
			NT	
			MFN	
			MST	
			Expropriation	
			Remedies	
Gramercy v. Peru	United States	21 June 2019	Scope of "investment"	Award pending
			Consent to arbitration	
			Limitations period	
			Waiver	
			NT	
			MFN	
			MST	
			Expropriation	

			Proximate cause	
Eco Oro v. Colombia	Canada	27 February 2020	Exceptions	Award pending
			Expropriation	
Bridgestone v. Panama	United States	28 August 2017	Scope of "investment"	Not considered by tribunal
			Exceptions (denial of benefits)	Not considered by tribunal
			Expedited review mechanism	Accepted
		25 September 2017	Exceptions (denial of benefits)	Accepted
		7 December 2018	NT	Award pending
			MFN	
			MST	
			Proximate cause	
		29 July 2019 (oral)	MST	Award pending
			Prospective losses	
Omega v. Panama	United States (not publicly available)			
	United States (not publicly available)			
	United States	3 February 2020	Exceptions (denial of benefits)	Award pending
			MFN	
			MST	
			Expropriation	
			Governing law	
Seo v. Korea	United States	19 June 2019	Scope of "investment"	Consistent interpretation, no express ref.
			Limitations period	Not considered by tribunal
			Expedited review mechanism	Accepted
Elliott v. Korea	United States	7 February 2020	Scope of "investment"	Award pending

			NT	
			MST	
			Proximate cause	
			Attribution of liability	