# The Role of States in Treaty Interpretation

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A JOINT CENTER OF COLUMBIA LAW SCHOOL
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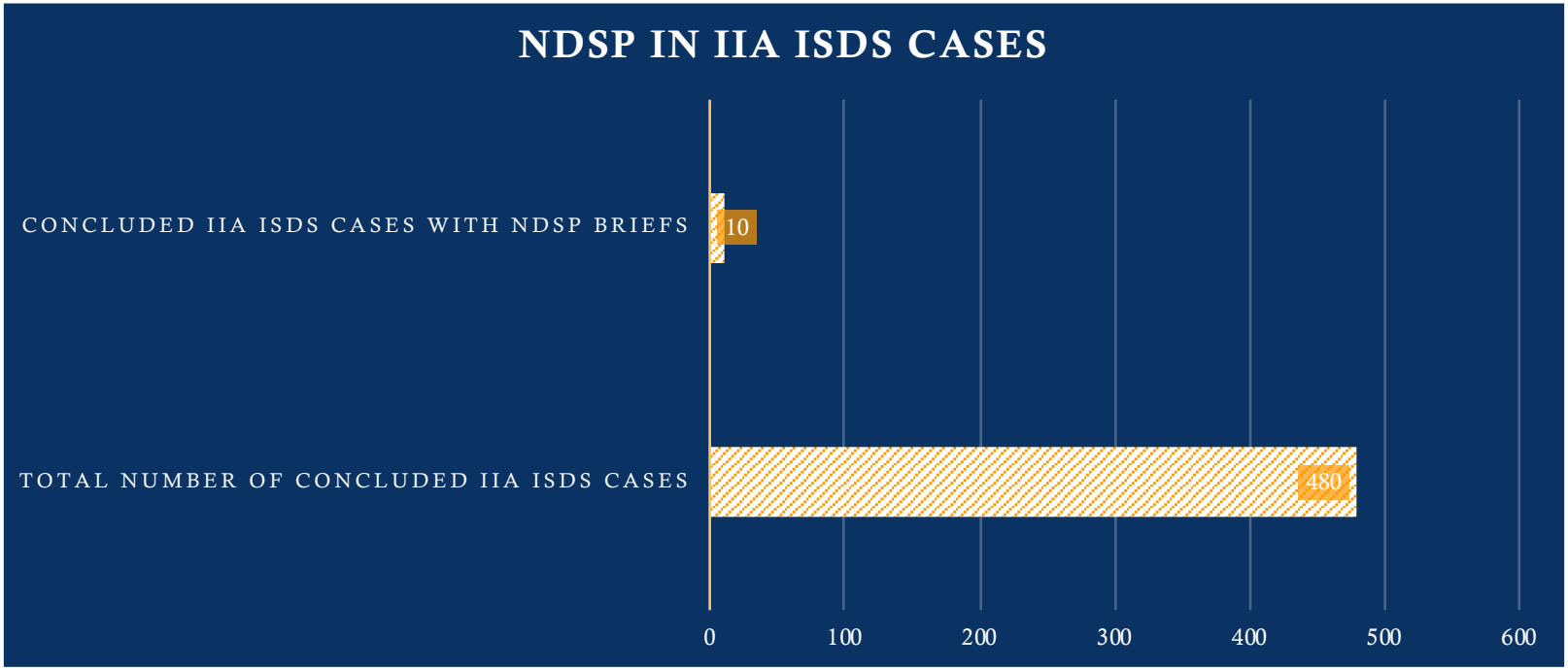
# Non-Disputing State Party (NDSP) Briefs in IIA ISDS Cases




*The Concluded IIA ISDS Cases include Concluded ISDS Disputes under BITs, and Concluded ISDS Disputes under multilateral IIAs *except for the NAFTA, CAFTA, and ECT*

**Concluded ISDS Disputes are those in which awards have been rendered or settlements reached; pending and discontinued cases are not included.

Source: CCSI calculations as of May 27, 2020, using data from italaw, UNCTAD, PITAD, and other public sources

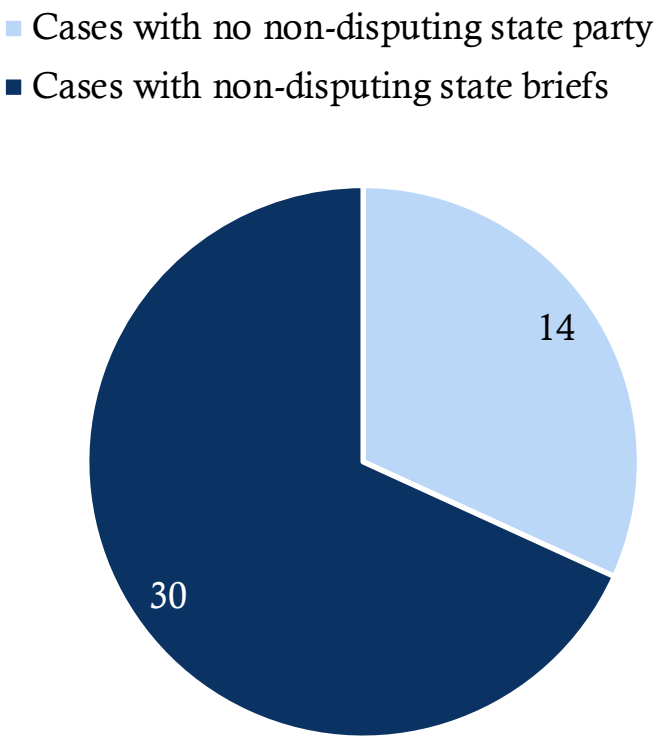
# NDSP Submissions in Concluded Cases under BITs and other IIAs

(except ECT, NAFTA, and CAFTA)

| Respondent State | Investor State | Case Name | Date of Submission of NDSP | No of cases with NDSP | Investor/State won? | State Party that submitted NDSP | No of submissions made | Date of Decision |
|---|---|---|---|---|---|---|---|---|
| Slovakia | Netherlands | Achmea v. Slovakia (I) | 7-Jul-10 | 1 | Investor | Netherlands | 1 | Oct 26, 2010 (Jurisdiction); Dec 7, 2012 (Award) |
| Slovakia | Austria | EURAM Bank v. Slovakia | 13-Oct-11 | 1 | State | Austria<br>Czech Rep | 1<br>1 | Oct 22, 2012 (Jursidction), June 4, 2014 (Second Jurisdiction); Aug 20, 2014 (Award on Cost) |
| Oman | USA | Al Tamimi v. Oman | 22-Sep-14 | 1 | State | USA | 1 | Nov 3, 2015 (Award) |
| Peru | USA | Renco v. Peru (I) | Sept 10, 2014; Sept 1, 2015; Oct 11, 2015 | 1 | State | USA | 3 | July 15, 2016 (Partial Jurisdiction); Nov 9, 2016 (Final Award) |
| Peru | Canada | Bear Creek Mining v. Peru | 9-Jun-16 | 1 | Investor | Canada | 1 | Nov 30, 2017 (Award) |
| Russian Federation | Ukraine | Everest and others v. Russia | Nov-16 | 1 | Investor | Ukraine | 1 | March 20, 2017 (Jurisdiction); May 2, 2018 (Merits) |
| Russian Federation | Ukraine | Stabil and others v. Russia | Jun-16 | 1 | Investor | Ukraine | 1 | June 26, 2017 (Jurisdiction); April 12, 2019 (Award) |
| Russian Federation | Ukraine | Ukrnafta v. Russia | Jun-16 | 1 | Investor | Ukraine | 1 | June 26, 2017 (Jurisdiction); April 12, 2019 (Award) |
| Uruguay | USA | Italba v. Uruguay | 11-Sep-17 | 1 | State | USA | 1 | March 22, 2019 (Award) |
| Korea | USA | Seo v. Korea | 19-Jun-19 | 1 | State | USA | 1 | Sept 24, 2019 (Award) |
| Total | | | | 10 | | | 13 | |

# NAFTA Cases & NDSP Briefs

**# of NAFTA Cases with NDSP Briefs**




**# of NDSP Submissions Made in Concluded Cases:**

91

*Concluded Cases (44) are those with awards or settlements;
this does not include pending cases or cases that have been discontinued.

Source: CCSI calculations as of May 27, 2020, using data from italaw, UNCTAD, PITAD, and other public sources

# NAFTA NDSP Submissions

| Respondent State | # of cases with NDSP submissions | Non-disputing State Party | Nationality of Investor | # of cases that NDSP submitted NDSP brief | # of NDSP submissions made by NDSP | Investor/State won? |
|---|---|---|---|---|---|---|
| USA | 7 | Canada | 7 | 5 | 11 | Respondent State 7 |
| | | Mexico | 0 | 6 | 12 | Investor 0 |
| Canada | 14 | USA | 14 | 13 | 27 | Respondent State 7 |
| | | | | | | Investor 5 |
| | | Mexico | 0 | 13 | 25 | Settled 2 |
| Mexico | 9 | Canada | 1 | 7 | 9 | Respondent State 7 |
| | | USA | 8 | 7 | 7 | Investor 2 |
| Total | 30 | | | | 91 | |

Source: CCSI calculations as of May 27, 2020, using data from italaw, UNCTAD, PITAD, and other public sources

# Reasons for NDSP Silence?

1. Lack of awareness
2. Political considerations
3. Cost-benefit calculations
4. No opportunity to be in NDSP position

# Potential Solutions?

| Potential Cause | Potential Solution, e.g., |
| --- | --- |
| **Home state's lack of notice** | Increased transparency |
| **Political considerations** | Introduce new approaches regarding the meaning of silence (e.g., host state's interpretation presumptively valid) |
| **Cost-benefit considerations** | - Support coordination on and preparation of NDSP briefs<br>- Clarify role of NDSP briefs<br>- Introduce new approaches regarding meaning of silence |
| **No opportunity to be non-disputing state party** | Provide greater platforms for unilateral interpretations outside the context of disputes |

Consider sending claims to, or filtering them through, state-to-state mechanisms

# Thank you!

- For more information, including on data, please contact
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