Journal of International Dispute Settlement, 2022, 13, 264–308
https://doi.org/10.1093/jnlids/idac008
Advance Access Publication Date: 11 May 2022
Article

Missing Masters: Causes, Consequences and Corrections for States' Disengagement from the Investment Treaty System

Ladan Mehranvar * and Lise Johnson**

ABSTRACT

Proponents of the international investment law system have treated the concept of depoliticization as a key justification of the investor–state arbitration mechanism. However, this rationale has been increasingly questioned. The system is itself a reflection of the asymmetrical power relations that exist among various actors. We examine data on states' exercise of their interpretive powers through unilateral interpretations, as a potential means of shifting power away from capital, and identify the factors that may make such engagement more or less likely. What emerges is the asymmetrical patterns of engagement and influence in shaping the law, tilting the balance not just away from states generally, but from Global South states in particular. We propose various reforms that seek to recognize and address the enduring role of politics in the system, produce more just outcomes, and be more inclusive of *all* state parties in the development of international investment law.

1. INTRODUCTION

The international investment treaty system has been endorsed at the global level by the majority of governments. Today there are over 2200 international investment

* Columbia Center on Sustainable Investment, Columbia Law School, USA. E-mail: lm3458@columbia.edu
** Curtis, Mallet-Prevost, Colt & Mosle LLP, UK; Columbia Center on Sustainable Investment, Columbia Law School, USA. E-mail: ljj2107@columbia.edu

Curtis, Mallet Prevost, Colt Mosle LLP, among other areas, represents states in treaty–based investor–state dispute settlement, the topic covered by this paper. The views expressed in this article, however, are those of the authors and not necessarily those of the Columbia Center on Sustainable Investment, or of Curtis, Mallet Prevost, Colt Mosle LLP, or its clients. We thank the anonymous reviewers and the editors for their helpful comments and guidance. We also thank Tonya Putnam, Marco Valesquez Ruiz, David Gaukrodger, Leila Kazemi, Charles–Emmanuel Côté and Lisa Sachs for their valuable feedback and comments on earlier drafts; David Schneiderman for insightful conversations on the topic; and Susan McGregor for her guidance on the visualization of the data. We gratefully acknowledge the funding support from the Swiss Agency for Development and Cooperation (Award #81064730) and the Open Society Foundation (Grant #OR2018–43202).

treaties and over 300 free trade agreements with an investment chapter in force[1] (collectively, "investment treaties"), with virtually every country having entered into at least one such agreement. Investment treaties provide investors of one state party to the treaty (the "home" state) with protection of their investments within the territory of the other state party to the treaty (the "host" state). The obligations are reciprocal on paper, with each state, at least in theory, required to provide foreign investors the same standards of treatment.[2] The majority also empower investors to bring claims against the host state for violations of treaty obligations before arbitration tribunals, typically without the need to exhaust local remedies. The number of investor–state disputes has reached an estimated 1100 (known) cases, as of December 2020,[3] with some awards as high as USD 50 billion.[4]

Architects and current proponents of the investment treaty regime have routinely asserted that investor–state dispute settlement (ISDS) was formulated to 'depoliticise' investment disputes.[5] By this they meant, on the one hand, removing a direct home state government role in pursuing its citizens' investment claims against the host state government, and so avoiding potentially violent or costly diplomatic confrontations between states. The host state, on the other hand, would arguably be shielded from the coercive vagaries of the home state government, including the so-called 'gunboat diplomacy' of yesteryear or other forms of pressure.[6] As a result of these arrangements, the investor, a private foreign actor, can unilaterally invoke a highly legalized treaty-based dispute settlement mechanism against a host state for breach of treaty obligations without the need for home state espousal or even approval. An ad hoc arbitration tribunal—modelled on commercial arbitration and almost always consisting of three appointees, often with revolving roles as negotiators, arbitrators, experts, and counsel—is thereby given the power to resolve the dispute and award damages.

1 See the United Nations Conference on Trade and Development (UNCTAD) Investment Policy Hub <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 1 January 2022.

2 There may be some differences. For instance, with respect to the scope of the relevant obligations, states may adopt different exceptions or reservations narrowing their commitments to provide pre-establishment protections. However, the content of the relevant obligation is generally stated as being the same for each state party.

3 UNCTAD, 'Investor-State Dispute Settlement Cases: Facts and Figures 2020' (September 2021) *IIA Issues Note 4*, 1 <https://investmentpolicy.unctad.org/publications/1256/investor-state-dispute-settlement-cases-facts-and-figures-2020> accessed 1 January 2022. This is undoubtedly an underestimate as the total number of ISDS cases is unknown because arbitrations may be kept confidential.

4 *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227, Final Award (18 July 2014), para 1827.

5 Martins Paparinskis, 'The Limits of Depoliticisation in Contemporary Investor-State Arbitration' (2012) 3 Select Proc ESIL 271, 271–72 ('The contemporary state practice, case law and legal writings consider it almost axiomatic that depoliticisation is the purpose of investment protection regime (even if differing about its implications and the degree of successful achievement)').

6 See Ursula Kriebaum, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes' (2018) 33(1) ICSID Rev 14, fn 5 for a list of sources for this claim. See also Jason Webb Yackee, 'Politicized Dispute Settlement in the Pre-Investment Treaty Era: A Micro-Historical Approach' (2017) Legal Studies Research Paper Series, Paper No 1412 1 (Yackee argues that although the theory of gunboat diplomacy is not implausible, the international investment law literature offers very few actual examples of gunboat diplomacy in practice).

The depoliticized narrative has been highlighted by many prominent international arbitrators, practitioners, government officials and legal scholars.[7] In fact, the effort to detach "politics" from the administration of international investment law was part of a political project at the core of the World Bank's promotion of the International Convention on the Settlement of Investment Disputes (ICSID).[8] With institutions and processes of law framed as neutral and universal, the concept of a depoliticized investment law regime justified a new realm of social and economic relations at the transnational level. Professor Koskenniemi once wrote that, '[o]rganizing society through legal rules is premised on the assumption that these rules are objective in some sense that political ideas, views, or preferences are not'.[9] Indeed, the depoliticized promise of the system could have been fulfilled if an autonomous and coherent dispute-settlement mechanism was established, where independent and impartial adjudicators that are well-versed not only in public international law, but also relevant domestic laws, resolved disputes based on objective and previously agreed and formulated standards. In that case, it may have been prudent for states to sign treaties with ISDS provisions. Doing so would both obviate the need for potentially abusive diplomatic protection by powerful home states, and abuses of power by host states.[10] The outcome of such neutrally-applied legal rules within a predictable system would reflect a more depoliticized space to resolve investor disputes.

However, the reality is that the international investment law system, not unlike other areas of international law, is law riddled with politics (or politics riddled with law, depending on your perspective).[11] ISDS processes and institutions are not simply means of enforcing predetermined and legally codified treaty norms regarding the rights and freedoms of capital, and how those rights and freedoms relate to other competing interests and actors. Rather, ISDS processes and institutions are themselves reflections and tools of distributional politics determining 'who gets what, when, and how.'[12]

7 See, eg Charles N Brower and Sadie Blanchard, 'From "Dealing with Virtue" to "Profiting from Injustice": The Case Against "Re-Statification" of Investment Dispute Settlement' (2014) 55 Harv Int'l L J 45. See also the references cited in Geoffrey Gertz, Srividya Jandhyala and Lauge N Skovgaard Poulsen, Legalization, Diplomacy, and Development: Do Investment Treaties De-Politicize Investment Disputes?' (2018) 107 W Dev 239, 242.

8 The origins of the depoliticization narrative are often traced to two prominent World Bank officials: Aron Broches, the founder of the ICSID, and Ibrahim Shihata, the Secretary-General of the ICSID in the 1980s. Broches, who chaired the preparatory meetings for the ICSID, repeatedly asserted in his introductory speech at each meeting that, 'the Convention would offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and would insulate such disputes from the realm of politics and diplomacy'. See International Center for Settlement of Investment Disputes, *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States: Documents Concerning the Origin and the Formulation of the Convention* (1968) Vol II, Part 1, Documents 1–43 [ICSID History] in Addis Ababa (16–20 December 1963) 236, 242; Santiago (3–7 February 1964) 298, 303; Geneva (17–22 February 1964) 367, 372; Bangkok (27 April–1 May 1964) 458, 464; and also Ibrahim FI Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1(1) ICSID Rev 1.

9 Martti Koskenniemi, 'The Politics of International Law' (1990) 1 EJIL 4, 7.

10 Gertz, Jandhyala and Poulsen (n 7) 240.

11 See generally Jason Webb Yackee, 'Controlling the International Investment Law Agency' (2012) 53(2) Harv Int'l L J 391.

12 Harold D Lasswell, *Politics; Who Gets What, When, How* (Whittlesey House, McGraw-Hill Book Co, Inc 1936).

As the number of ISDS cases has risen, academics, policymakers and civil society actors have questioned whether the ISDS system appropriately balances power between states, investors, and tribunals; and whether investors are seeking, and tribunals are issuing, decisions that unduly question and constrain states' domestic political choices and policy space. Answering the first question in the negative, and the second in the affirmative, states have developed various approaches for pulling back some of their power.[13] For instance, they have introduced mechanisms into their treaties whereby the treaty parties can issue interpretive clarifications that will be binding on ISDS tribunals.[14] Others have clarified within their treaties how the treaty should be applied to the facts on certain issues, particularly politically sensitive, important, or complex issues, thereby taking those matters away from the tribunal.[15] States have also added language into treaties and procedural rules clarifying that the treaty parties have the right to inform tribunals how they believe the treaties should be interpreted, and can exercise these rights through written submissions in pending ISDS cases and participation in oral hearings.[16]

Various authors and states have thus identified (i) how ISDS has shifted the crucial power to interpret and apply treaties' indeterminate rules from states to investors and arbitral tribunals; (ii) how, consequently, investors and tribunals have expanded their power in ways that unduly intrude on domestic policy space; and (iii) how states could reform treaties and change practices so as to shift the power back to themselves. But the commentary and practice have largely failed to identify and grapple with the fundamental political realities that pervade and effectively lock in the existing power imbalances and prevent the reform approaches from playing any meaningful role for the majority of respondent states. This article fills that gap.

In this article, we document and explain how the inherently political system of ISDS not only shifts power away from states (the 'State → Tribunal/Investor Shift'), but also shifts power to home states and investors and away from respondent host states (the 'Host State → Home State Shift'). We explain how, due to that Host State → Home State Shift, certain strategies that are often cited as viable approaches for addressing the State → Tribunal/Investor Shift are only impactful in theory, not in practice, for Global South states. The actual use of these strategies—namely, joint and unilateral interpretive statements—is shaped, and limited, by political and power dynamics between states, and between investors and states (and their other stakeholders). Until those dynamics are understood and addressed within reform strategies, efforts to shift interpretive power to states, and limit investors' and ISDS tribunals' undue interference with domestic policy space, will fail for many states on the receiving end of claims. We therefore propose some reforms so as to reinsert

13 See, eg Jeremy Sharpe, 'From Delegation to Prescription: Interpretive Authority in International Investment Agreements, in C Brower and others (eds), *By Peaceful Means: International Adjudication and Arbitration* (OUP 2022); Jesse Coleman and others, 'International Investment Agreements, 2015-2016: A Review of Trends and New Approaches' in Lise Johnson, Lisa Sachs and Jesse Coleman (eds), *Yearbook on International Investment Law and Policy* (OUP 2017), paras 2.41–2.48.

14 See examples cited in Coleman and others, ibid, paras 2.45–2.47.

15 ibid, paras 2.41–2.44; see also Sharpe, ibid.

16 See Sharpe (n 13); see also UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration, art 5.

states, particularly Global South states, into the process of shaping investment treaty law.

We begin in Section 2 by briefly describing the critical role that power and politics has played and continues to play in the establishment and evolution of investment treaty law. We zoom in to discuss one potential way of shifting the power back to states: states' exercise of their interpretive powers through unilateral submissions to tribunals, whether as a respondent state, or as a non-disputing treaty party (NDTP). An NDTP is often the home state of the investor, but can also include other treaty partners in the case of a multilateral agreement. By intervening in ISDS proceedings, NDTPs can make submissions informing the adjudicators of what they consider the relevant treaty to mean.[17]

In Section 3, we present our data on states' practices with respect to unilateral interpretations of treaty provisions via NDTP submissions. What this section reveals, despite some exceptions, is a persistent practice of silence by capital exporting states[18] as NDTPs, which appears to enable the interpretation and application of treaties that are relatively broad, and investor success rates that are relatively high, as compared to outcomes under treaties with more consistent and frequent NDTP participation. We also show that depending on whether the state actor is a capital importer/respondent state or capital exporter/home state influences how that state can or does participate in the system, and how it has influenced the development of the law in this area.

In Section 4, we draw from the data and analysis in Section 3 to elaborate further on the causes and consequences for NDTP engagement and disengagement, and also suggest relevant reforms. We group the causes into two main types: a lack of opportunity, which primarily and negatively affects capital importing/respondent states, and a lack of motive, which primarily affects and depresses engagement by capital exporting/home states. In proposing some reforms, we also consider, and critique, justifications that are often given for NDTP silence, including the desire to depoliticize disputes. We argue that the decision to stay silent and give investors and tribunals wide rein to advance and adopt, respectively, treaty interpretations is just as political as the decision to provide input to tribunals and more carefully supervise investors' invocation, and tribunal interpretations, of investment treaties.[19] Consequently, it is crucial to be more mindful of how and why these political decisions on (dis)engagement are being made, more knowledgeable of what their consequences are, and better equipped to shape such engagement decisions in the future.

17 Rodrigo Polanco, 'Unilateral Home State Participation in ISDS' in Rodrigo Polanco (ed), *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* (CUP 2019) 167, 167–68 ('[n]on-disputing state party interventions are not a new idea. The 1962 OECD Draft Convention on the Protection of Foreign Property included such a right for both investor–state and to state-to-state arbitration. Even the OECD's failed Multilateral Agreement on Investment contained a provision allowing NDSP submissions. It is also included in the Tribunal Rules of Procedure of the Iran–United States Claims Tribunal').

18 In this article, we use the term 'capital exporting state' to mean a net capital exporting state under the specific treaty in question, ie they export more than, or roughly the same as, they import to the other treaty party. Similarly, the term 'capital importing state' is defined as a net capital importing state under the specific treaty.

19 See also Martti Koskenniemi, 'Speaking the Language of International Law and Politics: Or, of Ducks, Rabbits and Then Some' in Jeff Handmaker and Karin Arts (eds), *Mobilising International Law for 'Global Justice'* (CUP 2018) 31 ('A trial appears 'political' as soon as such issues as the role of imperialism, nationalism, economic interests, institutional ambitions, etc. are included in the conceptual frame, and it is good to remember that refraining from engaging with these issues is just as political as engaging with them').

In Section 5, we end with the assumptions and limitations of the conclusions we make, and the reform options we suggest, based on the data and analysis in this article.

2 THE POLITICS OF INTERNATIONAL INVESTMENT TREATY LAW AND POWER CONFERRED TO TRIBUNALS AND INVESTORS

A. The Role of Politics at the Inception of the System

Politics plays a significant role in the development of investment treaty law, both historically and currently. While investment treaty law has evolved since the first investment treaty was signed in 1959,[20] and the first ISDS case was awarded in 1990,[21] the general outline of the system was laid down in the 1950s and 1960s.[22] The fundamental drive to protect the investments, and advance the interests, of their nationals from undesirable effects of host state actions, was a project led by wealthy states of the Global North, as the historic source of capital.[23] The portrayal of the system as purely legal, and based on the conclusion of treaties between equal sovereigns, ignores the fact that the institutional design and promotion of investment treaties 'reflect[s] deliberative strategies on the part of powerful states'.[24] Model investment treaties authored by capital exporting states have been adopted by state parties worldwide, oftentimes between states with no equality of bargaining power.[25] Indeed, there is now empirical research[26] that shows the critical role that geopolitics

20 Germany–Pakistan BIT (1959). The first investment treaty that included consent to the ICSID Convention was Netherlands–Indonesia BIT (1968). See also Wolfgang Alschner, 'The Impact of Investment Arbitration on Investment Treaty Design: Myths versus Reality' (2017) 42(1) Yale J Int'l L 1, 9.

21 *Asian Agricultural Products Ltd v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award (27 June 1990).

22 Nicolás M Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules* (OUP 2021).

23 Louis T Wells, 'The Emerging Global Regime for Investment: A Response' (2010) 52 Harv Int'l L J 42, 44–6; Jeswald W Salacuse, 'The Emerging Global Regime for Investment' (2010) 51 Harv Int'l L J 427, 433–34; and Todd Allee and Clint Peinhardt, 'Evaluating Three Explanations for the Design of Bilateral Investment Treaties' (2014) 66(1) World Politics 47, 49–52.

24 Allee and Peinhardt, ibid 82.

25 Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements' (2016) 19(3) JIEL 561, 574, 577; David Schneiderman, 'The Global Regime of Investor Rights: Return to the Standards of Civilised Justice?' (2014) 5(1) Transnat'l L Theory 60, 72; Lauge N Skovgaard Poulsen, 'Bounded Rationality and the Diffusion of Modern Investment Treaties' (2014) 58 Int'l Stud Q 1; Todd Allee and Clint Peinhardt, 'Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions' (2010) 54 Int'l Stud Q 1.

26 Allee and Peinhardt, 'Delegating Differences', (ibid) 23 (this is an empirical study showing that 'power matters as an explanation for international arbitration . . . We find that more powerful countries prefer to delegate authority for settling investment disputes to a third party like ICSID – and are particularly likely to push for and achieve international legal delegation when they possess the greatest bargaining power'; and that 'for many of the world's weakest and most dependent countries, the inclusion of ICSID clauses within BITs is not so much a choice as it is a requirement'). See also Allee and Peinhardt (n 23) 82 (the authors offer evidence that the content of bilateral investment treaties 'reflect deliberative strategies on the part of powerful states'. They conclude that geopolitics is 'an important part of powerful states' economic agreements and dispute-settlement design' and that the regime, as a result, 'disproportionately benefits capital exporters'); and Alschner and Skougarevskiy (n 25) 574, 576 (the authors demonstrate an underlying asymmetry in treaty negotiations between developed and developing countries, suggesting that the latter 'seem to have little say over the content of the treaties they sign', and that, therefore, 'richer countries tend to be the rule-makers in BIT negotiations while poorer states tend to be the rule-takers').

played in the design and promotion of investment treaties, where wealthier countries were the rule-makers and poorer countries were the rule-takers.[27]

Champions of the system often point out that the conclusion of any treaty is an exercise of a state's sovereignty, and that state parties to investment treaties formally accepted the same obligations under the agreements to which they signed. However, poorer states of the Global South, which are often capital-seeking and resource-rich, did not determine the content and expectations of investment treaties.[28] These governments 'ha[d] their hands tied for them'.[29] In addition, treaty obligations were not perceived as reciprocal in practice because the overwhelming burden of these agreements was assumed by states in the Global South, while the benefits accrued mainly to private entities in economically powerful states.[30] Indeed, for many of the world's weakest and most capital-dependent states, the inclusion of an international arbitration clause was 'not so much a choice as it [was] a requirement'.[31] Because investment relations underlying these treaties 'were marked by decidedly asymmetric capital flows from a (developed) source to a (developing) destination country',[32] it was unlikely that a developed (or capital exporting) state would be sued by an investor from a developing (or capital importing) state under these treaties.[33] Investment treaties were thus created by states of unequal power with the vision that they would disproportionately benefit one of the parties.[34]

B. The Continuing Role of Politics in the Development of Investment Treaty Law: The State → Tribunal/Investor Shift

Politics and power not only had a central role at the inception of the investment treaty system; there are strong political elements and power asymmetries entrenched in the system today. Power and politics find inroads due to the high level of indeterminacy of treaty provisions, which necessitate the discretionary clarification of state obligations. These obligations are given meaning through the ISDS system. The creation of that system reflects a political decision to give investors standing on the same plane as states to advance interpretations of international law, and to entrust and empower party-appointed arbitrators to decide investors' cases.

The legal obligations expressed in investment treaties lack precise language (e.g., what does it mean to treat an investor fairly and equitably?); and the adjudicators tasked with interpreting and applying these vaguely formulated obligations are provided with very little guidance on the rules of interpretation.[35] Arbitrators have wide latitude to decide whether a particular rule applies, to specify the content and

27 Alschner (n 20) 35.
28 Alschner and Skougarevskiy (n 25); Allee and Peinhardt (n 25); Tim R Samples, 'Winning and Losing in Investor-State Dispute Settlement' (2019) 56(1) Am Bus L J 115, 133.
29 Allee and Peinhardt (n 23) 82.
30 Kenneth J Vandevelde, 'Brief History of International Investment Agreements' (2005) 12 UC Davis J Int'l L & Pol 157, 171.
31 Allee and Peinhardt (n 25) 23.
32 Alschner (n 20) 34.
33 ibid 35.
34 Allee and Peinhardt (n 23) 82.
35 Charles H Brower II, 'Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes' in *Yearbook on International Investment Law and Policy 2008-2009* (2009) 347, 356.

contours of the rule, to determine how it is to be applied, and to establish who needs to prove what to prevail. In doing so, they 'exercise a de facto lawmaking role filling the normative gaps left open by the treaty drafters'.[36] As Wolfgang Alschner aptly puts it, '[t]his practice has given rise to a sort of "investment common law" – a body of investment case law that is widely used to elucidate the meaning of core [investment treaty] provisions across treaties'.[37] Yet, this jurisprudence provides minimal consideration of the views, practices and agreements of the state parties to these treaties.[38]

The semantic indeterminacy of treaty language has led to what Professor Sornarajah calls 'arbitral adventurism', which has proliferated an 'avalanche' of creative interpretations[39] in ways arguably unintended by the contracting parties.[40] It has also enabled outcomes that are unjustifiably inconsistent[41] and unpredictable, which has triggered a backlash against the investment arbitration system more generally.[42]

The power delegated to and exploited by arbitrators has enabled them to determine their own power within the system. And they have exercised this power in ways that expand their power relative to domestic institutions'.[43] The power conferred on arbitrators has also enabled them to exercise substantial amounts of

36 Alschner (n 20) 12.

37 ibid 13. This is despite judicial and arbitral decisions not being sources of international law, unless governments adopt them into treaty or customary law, etc.

38 Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 Am J of Int'l L 179, 179.

39 Muthucumaraswamy Sornarajah, 'Creating Jurisdiction Beyond Consent', in *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 136, 143.

40 For instance, in the recent *Eco Oro v Colombia* case, the tribunal rejected the treaty parties' arguments about the proper interpretation and application of the general exceptions clause; see *Eco Oro Minerals Corp. v Republic of Colombia*, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), paras 826–37 (also see below at pages 47–48). See also, eg Thomas W Wälde, 'Interpreting Investment Treaties: Experiences and Examples' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christopher Schreuer* (OUP 2009) 724, 737; Kyla Tienhaara, 'Investor-State Dispute Settlement' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press 2017) 677 (and beyond); Federico M Lavopa, Lucas E Barreiros and M Victoria Bruno, 'How to Kill a BIT and not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties' (2013) 16(4) J Int'l Econ L 869, 872.

41 The concern of inconsistent outcomes in ISDS arises when the same investment treaty standard or rule of customary international law is interpreted differently in the absence of justifiable ground for the distinction; and when they are inconsistent with state party intent, or with broader societal objectives and other areas of law and policy. See Lise Johnson and Lisa Sachs, 'Inconsistency's Many Forms in Investor-State Dispute Settlement and Implications for Reform' *CCSI Briefing Note* (Nov 2018) <https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1031&context=sustainable_investment_staffpubs> accessed 1 January 2022.

42 Above n 39. See also Gus Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010' (2018) 29(2) EJIL 507; and Lukasz Gorywoda, 'How States Manage Their Obligations Under Bilateral Investment Treaties: Opportunistically Changing the Rules of the Game or Legitimately Exercising Their Sovereign Rights? (Part I)' *Kluwer Arbitration Blog* (28 Aug 2017) <http://kluwerarbitrationblog.com/?p=18190&preview=true&_ga=2.68232721.1861464403.1610564446-81922804.1610564446> accessed 1 January 2022.

43 See Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration' (2016) 53(2) Osgoode Hall L J 540.

discretion in scrutinizing host state policies and decisions on regulatory issues and allocation of resources, which may have (directly or indirectly) affected the investor's rights under the investment treaty. These domestic policies and decisions can relate to the reliability of the host state's domestic judicial systems,[44] to the right of access to water, to the protection of the environment, to safeguarding public health, and to managing financial crises, among others. In this way, the arbitration system serves as 'a medium capable of disempowering state legislative potentials and delegitimizing public regulatory interventions in the market'.[45]

Relatedly, the arbitration provision—and the absence of a law obligating the investor to instead rely on local remedies—has essentially stripped host state judiciaries of jurisdiction to decide questions of how investment should be governed and how to allocate limited resources among competing interests, which itself is a deeply political move.[46]

This is exacerbated by the fact that treaty parties are significantly constrained in their ability to challenge decisions. While they can try to set aside or annul those decisions on certain narrow grounds, disputing parties are generally not able to challenge decisions based on the fact that they got the law wrong, or incorrectly applied the law to the facts. Moreover, challenges to some ISDS cases, brought under ICSID, are not brought to domestic courts, but are decided within the ICSID system itself. Thus, if an award is challenged based on the argument that an ICSID tribunal overstretched its authority and invaded territory properly left to domestic institutions, a body within the ICSID system decides this issue of the proper allocation of power between ISDS tribunals and domestic institutions.

Additionally, the ISDS system gives investor claimants significant power and opportunity to make their voices directly heard on the meaning of treaties, to which they are neither the drafters nor the signatories. These private litigants are the only party that can initiate claims under these treaties; and in doing so they are able to advance interpretations that may conflict with the state parties' intentions or expectations of their treaty. Investor claimants are heard in each ISDS dispute, and as returned to further below, their interpretation of the treaty is given at least as much weight as that of a respondent treaty party. Investor voice is thus amplified by the investment treaty law system. This contrasts with other areas of international economic law, where the direct and unfiltered perspectives of non-state actors on issues of international law being reviewed and adjudicated are much rarer. It has been said that ISDS has 'unleash[ed] the political power of multinational firms',[47] by providing them a privileged legal status based on their unilateral power to invoke rights, interpret treaties as they see fit, and access public money through a mechanism that is available only to them.[48]

44 See generally *Loewen Group, Inc v United States*, ICSID Case No ARB(AF)/98/3, Award (25 June 2003); *Mondev Int'l Ltd v United States*, ICSID Case No ARB(AF)/99/2, Award (11 October 2002).

45 Amr A Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism' (2000) 41(2) Harv Int'l L J 419, 430.

46 See above n 19, 41.

47 Nicolás M Perrone and David Schneiderman, 'International Economic Law's Wreckage: Depoliticization, Inequality, Precarity' in Emilios Christodoulidis, Ruth Dukes and Marco Edward Elgar Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar Publishing Ltd 2019) 446, 452.

48 Gus Van Harten, 'Is It Time to Redesign or Terminate Investor-State Arbitration?' (2017) *Centre for Int'l Governance Innovation* <https://www.cigionline.org/articles/it-time-redesign-or-terminate-investor-state-arbitration/> accessed 1 January 2022.

Moreover, the adjudicator appointment system in ISDS magnifies investors' power. It is relatively unique in that it reflects a political choice to give private claimants powers equal to the state's in terms of who gets to select adjudicators to determine outcomes of disputes. In international law adjudication, that potentially outcome-determinative political power of adjudicator appointment is traditionally held by states. In international investment law, however, it is also delegated to private actors who are the key (and arguably only) beneficiaries of the investment protection system. These private actors, unlike states, do not necessarily have the aim of ensuring that their appointments help produce decisions that align with the treaty parties' longer-term visions of international law, the way such law governs relations between states, or the way such law impacts domestic laws, policies or institutions.

One might presume that a powerful state—the *demandeurs* of investment treaties and ISDS, as noted above—would be unwilling to subject itself to the scrutiny of a third-party adjudicative body, which can make decisions on the legality of domestic laws or policies that may have adversely impacted a foreign investor. However, ISDS was envisaged to be used by investors *from* powerful states and not by investors *against* them. Yet, as a number of capital exporting states have been subject to claims, we have also seen accelerated efforts at reform aimed at walking back from the State → Tribunal/Investor Shift. We examine those next.

C. Strategies Available to Treaty Parties to Regain Control over Development of Law

There are various strategies available to states that have grown wary of the State → Tribunal/Investor Shift of the investment treaty law system. These include terminating treaties, renegotiating their substantive and/or procedural elements, clarifying the meaning of treaties through binding interpretations, or clarifying the treaties through unilateral interpretations that may be persuasive or authoritative, but not binding. This article focuses on the final option, which, as discussed in the section on assumptions and limitations, also has implications for the viability and desirability of the other possible paths.

The interpretation of treaties by states, as has already been recognized by numerous commentators and states,[49] is a potentially valuable tool presently available to states so that they can clarify their understanding of the treaty.[50] After all, the rules of treaty interpretation contemplate a role for states as ongoing 'masters of their treaties'.

While there are various ways for states to exercise their interpretive authority, we focus on the use of unilateral submissions made by treaty parties during ISDS

49 See, eg Geoffrey Gertz and Taylor St. John, 'State Interpretations of Investment Treaties: Feasible Strategies for Developing Countries' (June 2015) GEG & BSG Policy Brief, 2; above n 38; Lise Johnson and Merim Razbaeva, 'State Control Over Interpretation of Investment Treaties' (April 2014) CCSI Policy Paper; Lauge N Skovgaard Poulsen and Geoffrey Gertz, 'Reforming the Investment Treaty Regime: A 'Backward-Looking' Approach' (March 2021) Briefing Paper, Global Econ & Finance Prog; and UNCITRAL, WGIII, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Interpretation of Investment by Treaty Parties' (17 January 2020) Thirty-ninth session (New York, 30 March–3 April 2020), para 6 and fn 4 <https://undocs.org/A/CN.9/WG.III/WP.191> accessed 1 January 2022.

50 UNCITRAL WGIII, ibid, para 15; above n 11.

proceedings. Unilateral statements and conduct may establish—or contribute to the formation of—subsequent agreement and/or practice under the Vienna Convention on the Law of Treaties (VCLT) article 31(3).[51] Such statements include submissions filed by treaty parties—ie the respondent state or an NDTP, including the home state of an investor—during an investment dispute. To constitute 'subsequent agreement' that tribunals must take into account under the VCLT, the unilateral submissions made by states must match. In other words, the practice or statements of the home state regarding the meaning of an investment treaty must evidence the same interpretation as the host state. Thus, through their input, or lack thereof, the NDTP holds important power to buttress, or counter, the interpretations advanced by the state being sued under its treaties.

We focus on unilateral submissions because they are and have been tools readily utilizable by states. Some tools for increasing state control over treaty interpretation depend on there being specific provisions in treaties. For instance, some treaties provide that state parties to a treaty may issue interpretations (or issue decisions on interpretation and application) of the treaty that are binding on arbitral tribunals. But these provisions, while increasingly common, are found in only a minority of existing texts. In contrast, customary international law recognizes that states can unilaterally express their views on proper treaty interpretation and that such practices, when establishing agreement of the state parties, must be taken into account by arbitral tribunals.

Moreover, unilateral submissions do not give rise to the same coordination challenges that joint interpretations (or treaty amendments) do. A state can formulate and submit its interpretation without first negotiating and agreeing on precise language with the other treaty party or parties. It may, as a matter of practice, seek such agreement prior to making any submission to a tribunal, but it is not, as a matter of law, required to do so.

Thus, NDTP input is an available and relatively low-cost strategy for states to employ in order to address concerns with investment treaties. Consequently, patterns of use and non-use of this mechanism can help generate insights regarding states' perceptions of how their investment treaties are being interpreted, and/or illustrate the policy choices states' are making in terms of whether and how to manage their treaties.

Indeed, there have been over 1100 (known) ISDS cases filed to date, each of which provides an opportunity for unilateral statements by respondent states and NDTPs that can contribute to the formation of subsequent agreement or practice and that must be taken into account by tribunals. But such input has, to date, been underexploited by both states and tribunals. Respondent states, when sued, are the most common exercisers of their voice, communicating to tribunals, investors, and their other treaty partners what they view their treaties to mean. Respondent submissions, however, are rarely made public. We therefore have limited record of what the

51 Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 331. VCLT, art 31(3) states that treaty interpretation *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 practice in the application of the treaty which establishes the agreement* of the parties regarding its interpretation' (emphasis added). See also Johnson and Razbaeva (n 49) 9.

respondent is directly saying about its treaty in the context of an ISDS proceeding. Generally, all that is available is the state's input as paraphrased, and then accepted or rejected, by the sitting tribunal if and when an award is made public. This leaves inaccessible a potentially significant source of state practice relevant for interpreting treaty provisions.[52]

From what we can observe, it appears that respondent state submissions are often discounted by tribunals as self-serving attempts to avoid liability, undercutting the role of respondent states as masters of their treaties.[53] Yet, tribunals may be less distrustful of submissions from NDTPs. This is because if an NDTP, which is often the home state, advocates for a narrower interpretation of the treaty's protections than its investors, it is going against the interests of those investors, which may be assumed to be going against the interests of the home state itself.[54] There is always an opportunity for an NDTP to make a submission during an ISDS proceeding on

52 Johnson and Razbaeva, ibid 12.

53 See, eg *Infinito Gold v Costa Rica*, ICSID Case No ARB/14/5, Award (3 June 2021), para 339 ('The submissions made by Costa Rica and Canada in this arbitration reflect legal arguments put forward in the context of this dispute to advance their respective interests. Although they happen to coincide, they do not reflect an *agreement* as just described over the interpretation of the BIT [which, according to the majority, needed to be reflected in a "joint manifestation of consent from the Contracting Parties, or at least an offer and acceptance, evidencing their common intention"]. Even if the Tribunal could infer an "agreement" from the Contracting States' submissions, *quod non*, this agreement would postdate the commencement of this arbitration and the Tribunal could not take it into consideration in favour of one litigant to the detriment of the other without incurring the risk of breaching the latter's due process rights.' The language in brackets comes from para 338, and seems to be an odd reading of the law regarding subsequent practice and agreement). See also, *Suez, Sociedad General de Aguas de Barcelona S.A and Vivendi Universal SA*, ICSID Case No ARB/03/19, Decision on Annulment (5 May 2017), paras 257–58 ('In respect of subsequent treaty practice, the Committee is aware that . . . Respondent also relied on the submissions made by Spain in its role as respondent in *Maffezini v. Spain* where it took the same position as Argentina in the present case. . .. Respondent argued that its own interventions in *Siemens v. Argentina* and the present case as well as Spain's interventions in *Maffezini*, which coincided in their interpretation. . . "*constitute the subsequent acts of the Parties that guide the Tribunal concerning the will of the Sovereigns on signing this Treaty.*" The Annulment Committee rejected Argentina's arguments. The Committee agreed with the statement by a separate tribunal, *Telefónica v. Argentina*, that it was "*not convinced that positions on interpretation of a treaty provision, expressed by a Contracting State in its defensive brief in an international direct arbitration . . . amounts to* 'practice' *of that State, as this requirement is understood in public international law, nor does it appear relevant in order to ascertain* "how the treaty has been in interpreted in practice" *by the parties thereto*'). In another case, under the NAFTA, *B-Mex v Mexico*, the subsequent challenge of the award in Canada reflects similar skepticism and discounting (and concerns by NAFTA parties about the treatment of their inputs); see *B-Mex, LLC and Others v Mexico*, ICSID Case No ARB(AF)/16/3, Partial Award (19 July 2019) (not referring to the five NDTP submissions made by the USA and Canada in the dispute and rejecting Mexico's corresponding interpretation) and Partial Dissenting Opinion of Raul E Vinuesa (6 July 2019), paras 95–100. See also *United Mexican States v Burr and others*, 2020 Ontario Superior Court of Justice 2376, Judgment (20 July 2020), paras 191–219 (considering, and ultimately rejecting, Mexico's arguments that the *B-Mex* majority's treatment of the non-disputing party submissions and approach to subsequent practice was a jurisdictional error). For other examples, see, eg *Silver Ridge Power BV v Italian Republic*, ICSID Case No ARB/15/37, Award (26 February 2021), paras 175, 225; *Gas Natural v Argentina*, ICSID Case No ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (17 June 2015), para 47, fn 12.

54 However, the link between the nominal home state and the investor is not necessarily clear or strong, and interpretations that benefit the investor do not necessarily benefit the home state. As discussed below, in connection with evaluating the impact of NDTP on outcomes, and factors influencing (dis)engagement, input by investors' home states also has been of questionable significance for a number of tribunals.

an issue of interpretation, even where the treaty does not explicitly provide for that. Yet, as shown below, publicly available data suggests that home states generally remain silent and refrain from engaging in this type of constructive dialogue.

By remaining silent, NDTPs miss the opportunity to counter the State → Tribunal/Investor Shift and address identified concerns of misinterpretation by tribunals. If NDTPs were more active in ISDS disputes, they could potentially help guide investment common law in a direction that is more consistent and more aligned with the state parties' understanding and meaning of their treaties and their obligations toward foreign investors. It could also enable the disputing parties to better predict the outcome of future disputes. In addition, the silence causes treaties with formally reciprocal obligations to be asymmetrical in effect. As we show in the next section, it is often the same treaty party that occupies the respondent state position in proceeding after proceeding. Their perspectives on their treaties are given no special weight. Indeed, host state views are often overridden in favour of investor claimants' arguments[55] on treaty interpretation even when the investors' proffered interpretations call for broader investment protections than their home states understood themselves as providing. In the next section, we outline the current state of NDTP silence. We then discuss its possible causes, effects and some ways of addressing those causes and effects.

3. UNILATERAL INTERPRETATION: PATTERNS AND PRACTICES

We have reviewed publicly known treaty-based claims reported on UNCTAD's Investment Dispute Settlement Navigator (updated as of 15 January 2021) and other publicly available websites,[56] which indicates that 450 cases have been concluded as of that date ('concluded cases'). These concluded cases include only decisions upholding claims in part or in full ('investor wins') and decisions dismissing all claims either at the jurisdictional, admissibility or merits stage ('respondent state wins').[57] The data does not include settled, discontinued or pending cases.

From this data, we find that most state parties remain silent during ISDS proceedings in which they are not the respondent state. NDTP submissions are thus extremely rare. This is especially the case for disputes that arise under treaties other than the North American Free Trade Agreement (NAFTA) and the Dominican Republic–Central America Free Trade Agreement (CAFTA–DR). NDTP submissions have been made in 71 out of the 450 concluded cases, ie 16%. If we exclude the disputes under the NAFTA and CAFTA–DR, the number decreases to 35 out of a total of 405 concluded cases, ie 9%.

Figure 1 below illustrates the number of cases (and the percentage in parentheses) in which NDTP submissions were made and not made under each of the

55 See, eg above n 43; *Infinito Gold v Costa Rica*, (n 53); *Eco Oro v Colombia*, (n 40); *B-Mex v Mexico* (n 53); *Apotex v USA*, (n 78).

56 This includes the ICSID website, press releases from companies and governments that are available online, and governmental websites reporting ISDS cases.

57 It is important to note that respondent states cannot ever actually 'win' ISDS cases; they can only not lose and thus succeed in avoiding to pay damages to the claimant.

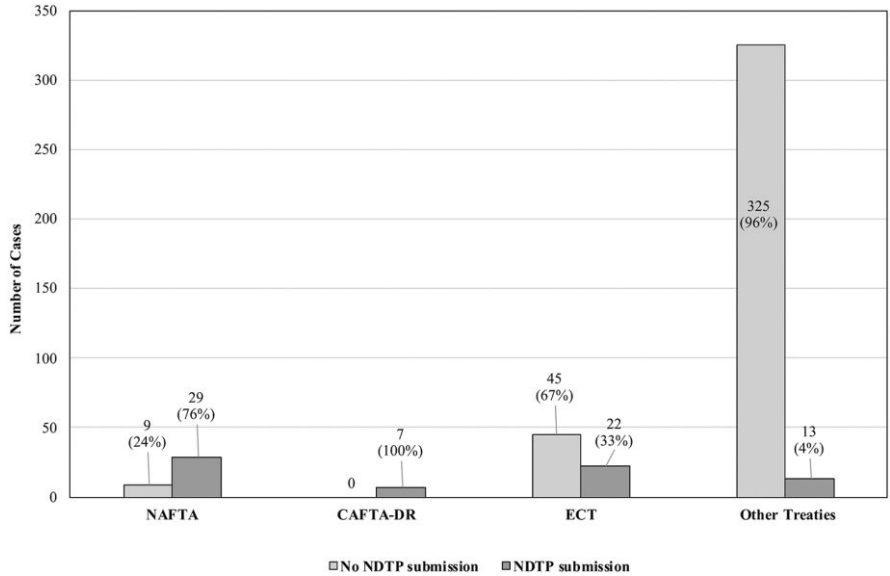

Figure 1. The number of cases (and percentage) with and without NDTP submissions under various investment treaties.

NAFTA, CAFTA–DR, Energy Charter Treaty (ECT), and 'Other Treaties' cases.[58] This section explores patterns under those four groups of cases, and identifies factors that may be influencing those patterns.

A. Non-disputing Treaty Party Submissions

(i) NAFTA and CAFTA–DR

There is more activity by treaty parties under the NAFTA and CAFTA–DR than under the broader universe of treaties (see Figure 1). State parties have a relatively well-developed and consistent practice of making unilateral submissions under these two treaties. Indeed, the use of NDTP submissions in the context of the NAFTA has been the rule rather than the exception, both by the home state of the investor and the third non-disputing state. Out of the 38 concluded NAFTA cases, there have been 29 cases in which a treaty party has made at least one NDTP submission (and sometimes more than one). In addition, 21 out of the 29 cases included submissions by both NDTPs to the proceeding. Among the 29 cases, the United States of America (USA or United States) has made a total of 34 submissions (in 20 cases), Canada has made 21 submissions (in 13 cases), and Mexico has made 35 submissions (in 17 cases).

58 We have divided the data into four categories: disputes arising under the NAFTA, CAFTA-DR, ECT and 'Other treaties'. There are some cases—most notably cases arising under the ECT—that rely on more than one investment treaty instrument. In these instances, we have chosen to include these cases under only one such instrument (the ECT) to avoid counting them more than once. In addition, while we include submissions made by NDTPs in investment arbitration disputes, we do not include those made during annulment proceedings of those disputes.

There are two key factors that may explain the level of NDTP engagement in NAFTA cases. First, given the more reciprocal nature of capital flows among the three states (especially the USA and Canada), they each have both offensive interests and defensive exposure to ISDS claims. Thus, it makes sense that each state has a strong vested interest in trying to influence the interpretation of the treaty since each expects to be a 'repeat player'[59] as a respondent and as a home state. Their continuous engagement demonstrates their desire to promote a more consistent and balanced long-term interpretation of the treaty, as opposed to supporting an individual investor in the short term.[60] The relative uniformity among the states occupying the respondent state and home state positions in a dispute is evidence of this motivation: see Table 1.

Secondly, the NAFTA explicitly affirms the right of NDTPs to submit statements during ISDS proceedings for the purposes of treaty interpretation that arise in the case, and facilitates exercise of that right.[61] It requires the respondent state to provide notice of claims to NDTPs, and share pleadings with them, so that the latter can determine whether to invoke the right to opine on issues of treaty interpretation.[62]

Similarly, but with fewer cases overall, NDTPs have made submissions in seven out of seven concluded cases under the CAFTA–DR. Like the NAFTA, there are provisions in the CAFTA–DR ensuring that NDTPs receive notice of, and filings related to, ISDS claims, and also clarifying that NDTPs have the right to provide input to tribunals on issues of interpretation.[63] In all seven cases, the investor's home state has been the USA, which has made an NDTP submission in all but one case.[64] With the exception of Guatemala, each of the other treaty parties has made at least one NDTP submission in at least one of the seven cases.

(ii) Energy Charter Treaty

Another set of cases arises under the ECT, which establishes a legal framework to which the European Union (EU) and its member states are parties, as well as a number of non-EU member state parties. Disputes arising under the ECT therefore provide ample opportunity for treaty parties (of which there are over 50) to weigh in as NDTPs without the risk of going against the specific interests of their own investors in any particular case. In addition, given the reciprocal investment flows between the treaty parties—especially among EU member states—one might expect to see a level

59 Above n 17, 169.

60 This was expressed by Meg Kinnear, the General Counsel in Canada's Trade Law Division at the time, who wrote in a letter to the *Pope & Talbot* tribunal, that '[t]he role of the NAFTA parties . . . with a clear interest in the proper operation of the [NAFTA] Agreement, transcends the merits of specific cases'. See *Pope & Talbot Inc v Canada*, UNCITRAL, Letter from Meg Kinnear to the Tribunal (1 October 2001), 4 <https://www.italaw.com/sites/default/files/case-documents/italaw8362.pdf> accessed 1 January 2022. See also Gabrielle Kaufmann-Kohler, 'Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?' in Laurence Boisson de Chazournes, Marcelo Kohen and Jorge E Viñuales (eds), *Diplomatic and Judicial Means of Dispute Settlement* (Brill | Nijhoff 2013) 307, 313.

61 NAFTA, art 1128.

62 NAFTA, art 1127.

63 CAFTA-DR, arts 10.20(2) and 10.21(1)–(2).

64 The one case that the USA did not provide an NDTP submission was *Commerce Group v El Salvador*, ICSID Case No ARB/09/17.

Table 1. NAFTA States as Respondents and Home States

	Respondent state	Home state
USA	10	27
Canada	13	11
Mexico	15	0
Total	38	38

Table 1 shows the number of cases (out of 38 cases in total) in which each of the treaty parties under the NAFTA has been a respondent state and a home state in an ISDS proceeding.

of engagement by NDTPs more akin to what is seen under the NAFTA. However, the data shows something vastly different. Individual state parties are completely silent, with one exception, the European Commission (EC).

The EU, through the EC, has sought to take part as an NDTP in several ISDS proceedings.[65] It has attempted to make an NDTP submission (sometimes more than once in a proceeding)[66] in 38 out of the 67 concluded ISDS cases, all of which were submitted in intra-EU disputes.[67] Most of these submissions are unavailable to the public; their existence (and content) is known only to the extent addressed by the tribunal in its decision(s).

Despite the 38 attempts of the EC to intervene with an NDTP submission, it appears that it has made a submission only in 22 of those cases. Of the remaining 16 cases, the tribunal rejected the intervention in six cases, and the EC declined to proceed with its submission in 10 cases, after the tribunal imposed a cost condition.[68] Hence, the more accurate observation (as illustrated in Figure 1) is that the EC filed an NDTP submission in 22 of the 67 total cases under the ECT.

65 The EC, which is an organ of the EU, an organization of states, is an NDTP in disputes under the ECT.

66 These numbers are based on the information that is made available to the public. The EC has—on several occasions—requested to take part in investment proceedings as an NDTP, but its request has been either rejected by the tribunal or accepted with conditions, including a financial undertaking on costs. This often means that the EC must bear its own costs and reimburse those of the parties to the proceeding for costs resulting from its intervention. In such cases, the EC has ultimately declined to intervene, with the exception of at least one case, in which the EC accepted the cost undertaking in *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain*, ICSID Case No ARB/14/1, Award (16 May 2018), paras 12–28. Therefore, in the cases in which the EC declined to intervene because of the cost condition, its submission was not made and therefore does not count as a case with an NDTP submission in our analysis.

67 We did not include one concluded case under the ECT in our dataset—*Mercuria Energy Group Limited v Republic of Poland*, SCC, Decision on Jurisdiction (1 December 2009), and Final Award (1 December 2011)—because neither decision is publicly available, and therefore we do not know whether the EC made an NDTP submission. We do know, however, that the respondent state prevailed in the case.

68 There were at least two cases—*Antaris Solar GmbH and Dr. Michael Göde v the Czech Republic*, PCA Case No 2014-01, and *Stadtwerke Munchen and others v Spain*, ICSID Case No ARB/15/1, in which the EC filed a submission despite rejecting the cost condition. The tribunal in the first case, stated that it 'would not consider the EU Commission Submission on the ground that the EU Commission did not undertake to pay in full the reasonable costs of the Parties resulting from the Submission;' see *Antaris* Award (2 May 2018), para 42. In the second case, the tribunal stated that it had informed the Parties by letter that: "the EC's submission of March 16, 2017 should not be part of the record of this proceeding. As such, the Tribunal will not consider the submission nor transmit it to the Parties for their comments;' see *Stadtwerke* Award (2 December 2019), para 29.

(iii) Other treaties

Our final category of cases is those brought under 'Other Treaties'. These are disputes brought under bilateral investment treaties (or BITs) and multilateral agreements other than the NAFTA, CAFTA–DR and ECT, of which there are a total of 338. Of these 338 cases, only 13 cases had at least one NDTP submission, which is far fewer than under the multilateral treaties discussed above.

Notably, the United States and Canada, as home states, have made NDTP submissions in five and three of these 13 cases, respectively. However, these eight cases are still a minority of the cases that investors from these two states have brought to date, ie five out of a total of 57 cases brought by investors from the USA, and three out of a total of 16 cases brought by investors from Canada. In two cases, where both the respondent state and the NDTPs were EU member states, the tribunal invited those NDTPs (and the EC) to submit observations.[69] Given the track record of EU member states' non-participation as NDTPs during ongoing proceedings, these NDTP submissions would likely not have been made but for the invitation of the tribunal. Finally, Ukraine has intervened with an NDTP submission in three cases brought by Ukrainian investors against Russia, none of which are publicly available, except for press releases offered by the arbitration institution.[70] However, given the inter–state dispute with regards to the territorial status of Crimea at the time, Ukraine's interventions likely implicated this broader dispute, which is relevant beyond the investor-state dispute or the interpretation of specific provisions of the investment treaty.

It thus appears from these 338 cases that states are, with a few exceptions, staying silent, and refraining from providing input as NDTPs. When interventions are submitted by an NDTP, they are more likely to be made where (i) the NDTP has a practice of making NDTP submissions; (ii) the applicable treaty encourages and supports NDTP submissions to be made; (iii) the treaty includes 'modern' or as-yet-to-be interpreted provisions, and treaty parties are particularly concerned that tribunals get early interpretations of these provisions right;[71] (iv) the dispute implicates broader issues of international law that transcend issues of investment treaty interpretation, eg state succession to treaties or land annexations; and/or (v) a tribunal requests submissions to be made by an NDTP. While any factor may not be sufficient to cause an NDTP to submit a unilateral interpretive statement, it may make a submission more likely.

B. Impact of NDTP Submissions

(i) Effectiveness of NDTP submissions

While NDTP submissions can in theory be a tool used by states to inform tribunals of their understanding of the treaties and rein in expansive interpretations of investor protections, assessing its impact in practice is more difficult. There are challenges of getting into the individual arbitrators' minds, understanding their collaborative

69 *Achmea B.V. v the Slovak Republic*, UNCITRAL, PCA Case No 2008-13 (formerly *Eureko B.V. v The Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension (26 October 2010), para 155.

70 See for eg *Everest Estate LLC et al. v the Russian Federation*, PCA Case No 2015-36, 'PCA Press Release on Issues of Jurisdiction and Admissibility and Non-Disputing Party Submission' (13 January 2017).

71 *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Submission of Canada Pursuant to Article 832 of the Canada–Peru Free Trade Agreement (9 June 2016).

decision-making, and dealing with the fact that many submissions and awards are not public. Given these issues, the data does not prove that the presence or absence of an NDTP submission *causes* a certain outcome in ISDS proceedings. In fact, even in cases in which the investor does not win, the tribunal may still be dismissive of an NDTP's interpretation. Nevertheless, gaps seem to have emerged between investment law as interpreted in NAFTA cases, and investment law in other ISDS cases. See Table 2 below.

The effect of the frequent and directionally consistent engagement by NDTPs in NAFTA cases[72] has resulted in a body of interpretations on the meaning and contours of investor protection standards and procedural provisions that are somewhat different—and in important ways narrower—than interpretations offered by investors in their NAFTA claims, and interpretations adopted by tribunals outside of the NAFTA context.[73] For instance, NAFTA state success rate in defending fair and equitable treatment (or FET) claims has been much higher (78%) than the success rate of respondents defending FET claims under other treaties (38%).[74] It also appears that the high number of NDTP submissions in NAFTA proceedings are having a spill-over effect in general: even in cases without NDTP submissions, tribunals may be influenced by submissions made by NDTPs in earlier proceedings. For instance, despite the lack of NDTP submissions in *Glamis Gold v USA*, *ADM v Mexico*, *Cargill v Mexico* or *Nelson v Mexico*, the tribunals in each of these cases cited NDTP submissions made before previous tribunals.[75]

72 There have been only two cases—*Metalclad v Mexico* and *Marvin Feldman v Mexico*—in our NAFTA dataset where the home state of an investor endorsed at least part of the position of the claimant in its NDTP submission. These cases appeared in Kaufmann-Kohler (n 60), which includes information on cases where the home state endorsed the position of the claimant investor under the NAFTA and is up to date as of 31 March 2011. To our knowledge, no other detailed study on this subject has been conducted since then. However, from our review of the NDTP submissions made under the NAFTA since then, it appears that the trend has not shifted: home states have sided with the position taken by the respondent state, and in doing so, have narrowed the substantive obligations provided in the treaty relative to the interpretations offered by claimant investors.

73 See, eg David Gaukrodger, 'The Balance Between Investor Protection and the Right to Regulate in Investment Treaties: A Scoping Paper' OECD Working Papers on Int'l Inv 2017/02 (OECD Publishing 2017) 26–27 (investors' 'legitimate expectations', for instance, play a more marginal role in NAFTA cases than under other treaties); and Patrick Dumberry, 'The Protection of Investors' Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105' (2014) 31(1) J of Int'l Arb 47; and *Bilcon v Canada*, PCA Case No 2009-04, Award on Damages (10 January 2019) (the ability of shareholders to recover 'reflective loss' damages for the companies in which they have invested is also less certain under the NAFTA than other agreements).

74 David Gaukrodger, 'Addressing the Balance of Interests in Investment Treaties: the Limitation of Fair and Equitable Treatment Provisions to the Minimum Standard of Treatment Under Customary International Law' OECD Working Papers on Int'l Inv 2017/03 (OECD Publishing 2017) 23; and UNCTAD, Fair and Equitable Treatment (2012) UNCTAD Series on Issues in Int'l Inv Agreements II, 61.

75 *Glamis Gold v USA*, UNCITRAL, Award (8 June 2009), paras 601, 612 and 618 (the tribunal cites the NDTP submissions made in both the *ADF Group v USA* and *Pope & Talbot v Canada* cases); *ADM v Mexico*, ICSID Case No ARB (AF)/04/5), Award (21 November 2007), paras 175–76 (the tribunal refers to the NDTP submissions of Canada and Mexico from the *Loewen v USA* case); *Cargill v* Mexico, ICSID Case No ARB(AF)/05/2, Award (18 September 2009), paras 275, 284–86, 291, 416 (the tribunal cites portions of Mexico's and Canada's NDTP submissions in the *ADF v USA* case, and Canada's NDTP submission in the *Metalclad v Mexico* case); and *Nelson v Mexico*, ICSID Case No UNCT/17/1, Award (5 June 2020), para 300 (the tribunal cites the NDTP submission of the USA in *Eli Lilly v Canada*).

Table 2. NDTP Participation and Win–Loss Rates

Treaty	Respondent state won	Investor won	# Concluded cases
NAFTA	28 (74%)	10 (26%)	38
CAFTA-DR	5 (71%)	2 (29%)	7
ECT	30 (45%)	37 (55%)	67
Other Treaties	176 (52%)	162 (48%)	338

Table 2 shows the number of cases (and the percentage in parentheses) that the respondent state or the investor has won under each of the four categories of IIAs.

As Table 2 indicates, out of the 38 concluded NAFTA cases, the respondent state won in 28 cases (or 74%), and the investor in 10 cases (or 26%). This ratio is in stark contrast to the outcome of ISDS cases under the ECT and Other Treaties. However, NAFTA states and other commentators have still questioned whether ISDS tribunals are adequately listening to the state parties or according their inputs due weight.[76] Tribunals have seemed to take varied approaches, including ignoring the submissions;[77] acknowledging them, but not giving them any practical significance;[78] according them some weight, but feeling free to depart from the submissions without much need for justification;[79] and treating the submissions with outright hostility.[80]

76 See, eg *Daniel W. Kappes and Kappes, Cassiday & Associates v Republic of Guatemala*, ICSID Case No ARB/18/43, Decision on Respondent Preliminary Objections (13 Mar 2020), para 160 (noting the *Bilcon* tribunal's approach to damages, which permitted claims for reflective loss notwithstanding the NAFTA parties' arguments that such damages were not available to the claimant); see also Gaukrodger (n 73), and cases cited, fn 51–54.

77 See *B-Mex v Mexico* (n 53).

78 For instance, in *Apotex v USA (II)*, although all treaty parties confirmed their view that the treaty's MFN provision could not be used to import a more favourable FET provision from another treaty, the tribunal declined to adopt that interpretation as a matter of law. Instead, the tribunal left the issue unresolved, conspicuously leaving the door open to future claimants to argue, and future tribunals to find, that such importation would indeed be permissible. See *Apotex Holdings Inc. and Apotex Inc. v United States of America*, ICSID Case No ARB(AF)/12/1, Award (25 August 2014), para 9.71 ('In the circumstances, the Tribunal does not decide whether or not the MFN provision in NAFTA Article 1103 can modify the content of NAFTA Article 1105(1). The Respondent submitted that all three NAFTA Parties are unanimously agreed that it cannot; but whether the NAFTA Parties are correct will have to await the decision of another NAFTA tribunal').

79 See, eg *Mesa Power v Canada*, UNCITRAL, PCA Case No 2012-17, Award (24 March 2016). The tribunal accepted the NAFTA states' positions on the role and treatment of the FTC statement on interpretation of art 1105 (paras 477–83), yet it disregarded their input on the role of arbitral decisions in informing the content of customary international law (para 501); cf *Mesa Power v Canada*, Second Submission of the USA (12 June 2015), paras 15–17; *Mesa Power v Canada*, Second Submission of Mexico Pursuant to NAFTA Article 1128 (12 June 2015), para 10; *Bilcon of Delaware, et al. v Canada*, PCA Case No 2009-04, Submission of the Government of Canada, Observations on the Award on Jurisdiction and Merits (14 May 2015), para 17. See also *Windstream Energy v Canada*, PCA Case No 2013-22, Award (27 September 2016), paras 347–61 (adopting a different approach to interpretation of art 1105 and the FTC statement than argued for by the state parties).

80 *Mesa Power v Canada*, UNCITRAL, PCA Case No 2012-17, Concurring and Dissenting Opinion of Judge Charles Brower (25 March 2016), para 30 ('. . . I have never experienced a case in which the other Party or Parties to a treaty subject to interpretation, appearing in a non-disputing capacity, have ever differed from the interpretation being advanced by the respondent State. Inevitably, they club together. Moreover, the interpretation given by a State Party in actual litigation cannot be regarded as an authentic interpretation').

The actual impact of NDTP submissions on the outcome of a proceeding seems more uncertain and ambiguous under the ECT. Some commentators have concluded that the impact of NDTP submissions by the EC in the final decision is in fact negligible,[81] and that tribunals have largely ignored these interventions.[82] Tribunals have adopted varying and inconsistent approaches in their treatment of NDTP submissions by the EC. Some of the reasons they have given for discounting (or outright rejecting) EC input is that such input runs counter, or would be fatal, to the investor's claims, and that the input is 'self-interested'.[83] This echoes sentiments expressed by other arbitrators, for instance under the NAFTA, and can lead to an approach whereby NDTP inputs that are favourable to investors' claims may have disproportionate influence over tribunals relative to interpretations that narrow the scope of substantive and jurisdictional protections.

In the context of the ECT, another factor potentially weakening the force of submissions is the silence of other NDTPs on the issues raised by the EC. No other state party, including the home state of the claimant, has made an NDTP submission in any of the 67 concluded cases under the ECT, according to publicly available information. In addition, the respondent states in these disputes do not always raise the same jurisdictional objections as the EC, for instance on the invalidity of the ISDS provision in an intra-EU investment treaty. If ECT member states engaged in ISDS proceedings with NDTP submissions to affirm or contest the interpretation of the applicable law in dispute, and especially if they did this repeatedly and in support of a common position, it would undoubtedly have greater persuasive power for tribunals examining the proper meaning of the ECT.[84] This would not only result in a shift in the interpretive power away from tribunals and to treaty parties, but it could also enhance the consistency and predictability of the system in the context of ECT disputes.[85]

81 Fernando Dias Simões, 'A Guardian and a Friend? The European Commission's Participation in Investment Arbitration' (2017) 25(2) Mich State Int'l L Rev 233, 299.

82 Hannes Lenk, 'Challenging the Notion of Coherence in EU Foreign Investment Policy' (2015) 8(2) Euro J of Legal Studies 6, 11.

83 See *Electrabel S.A. v Republic of Hungary*, ICSID Case No ARB/07/19, Award (25 November 2015), para 234. The tribunal suggested that it was discounting the EC's submission *because* it was fatal to the investor's case. If the test that the tribunal applies to its treatment of an NDTP submission is based on whether it is fatal to the investor, it is not only discouraging NDTP interpretations of a treaty that diverge from the investor's interpretation, but also creating a structural asymmetry in which states' inputs only matter if they tend toward a neutral or broadening effect on investor protections. In essence, the tribunal is approaching the task of interpretation based on a view of which interpretation is appropriate, and favouring the interpretation of a treaty provided by an investor, which *is not* a party to the treaty, over one provided by the EC, which *is* an organ of a party to the treaty.

84 Practice by only a subset of ECT parties with respect to interpretation of the treaty may not be adequate to establish agreement that must be taken into account by tribunals pursuant to VCLT art 31(3)(b). See, eg International Law Commission, *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries* (2018) United Nations Doc A/73/10, 20-21; Georg Nolte, 'First Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (2013) United Nations Yearbook Int'l L Comm'n 51, paras 92–110; Rahim Moloo, 'When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation' (2013) 31(1) Berkeley J of Int'l L 39, 64.

85 Above n 82, 19.

(ii) Missed opportunities

In light of the theoretical and apparent practical significance of NDTP engagement, this section has provided detailed data examining whether and to what extent NDTPs have utilized that tool. What emerges is largely a picture of disengagement by NDTPs. Table 3 below further highlights this and shows how this pervasive disengagement is a missed opportunity to address the State → Tribunal/Investor Shift. Indeed, the silence of some states is particularly significant as those states' treaties are used frequently by investors and interpreted repeatedly by tribunals.

As indicated in Table 3, among concluded cases, the USA has had at least 91 opportunities to provide input into disputes, with 91 being the number of cases in which it was a home state of the disputing investor, and each case providing an opportunity for at least one submission. But the USA has only provided input in 30 of those 91 cases, or 1/3 of the cases, and has limited its input to clarifying 7 out of 24 treaties being invoked. Canada follows a similar pattern, but with fewer cases. And although the rate of engagement of the USA and Canada is limited, it far surpasses that of other major home states. For instance, the Netherlands has had at least 45 opportunities to clarify the interpretation of its treaties, but has provided formal input in only one case, after it was invited to do so by the tribunal.[86] The United Kingdom (UK) has had 42 opportunities, Germany 37, and France 26, but none of these three states has weighed in with any submissions in any of those disputes.

The pervasive disengagement by home states is further illustrated in Table 4 below, which lists the top 10 respondent states, the majority of which are capital importing states, and the corresponding lack of engagement by their treaty counterparts during ISDS proceedings against them. The home state of the investor in these disputes almost never provides NDTP input, with the exception of cases against Mexico and Canada under the NAFTA. For instance, there have been no NDTP submissions made by the home state of investors in any of the 29 cases against Venezuela, the 27 cases against Argentina, the 24 cases against Spain, and the 23 cases against the Czech Republic. Because the lack of home state input is effectively treated as disagreement with the host state position, this disengagement is not only an affirmative failure to protect against or correct overly broad interpretations, but it is also a pattern of conduct that reinforces the structural bias in favour of tribunals' and investors' interpretation of the law. The host state's own voice on interpretation and application is essentially demoted to a level where it is at most equal to, but not greater than, the voice of private actors.

Greater state involvement through interpretive statements can shift investment arbitration closer to public international law adjudication (and away from private

86 There may be other cases in which a NDTP has provided input to a tribunal during an ISDS proceeding that are not included in this article because those cases were either settled, discontinued, or are still pending. For eg *Aguas del Tunari v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005), paras 258–60 (the tribunal wrote to the home state of the investor—the government of the Netherlands—posing specific questions on its interpretive positions of general application of the relevant BIT. The Dutch government provided its input to the tribunal, which the tribunal 'made no use of . . . in arriving at its decision'). However, because this case was eventually discontinued, it is not included in our dataset.

Table 3. Top Home States: Home State Opportunities—Seized and Missed—to Make NDTP Submissions

State	# Cases as home state (NDTP opportunity)	# Cases in which NDTP submission made	# Treaties affected	# Treaties under which NDTP submission made
USA	91	30	24	7
Netherlands	45	1*	19	1
UK	42	0	20	0
Germany	37	0	16	0
Canada	27	9	10	3
France	26	0	15	0
Spain	22	0	12	0
Luxembourg	22	0	7	0
Italy	19	0	14	0
Switzerland	14	0	12	0

*NDTP submission made at the request of the tribunal

Table 3 shows the top ten home states, including the number of cases in which each of the 10 home states have had an opportunity to provide input as an NDTP to an ISDS proceeding, the number of cases in which each home state did provide input as an NDTP, the number of treaties invoked in those cases, and the number of treaties under which the home state did provide input as an NDTP.

Table 4. Top Respondent States: Home State Opportunities—Seized and Missed—to Make NDTP Submissions

State	# Cases as respondent state	# Cases in which investor's home state made NDTP submission	# Treaties affected	# Treaties under which home state made NDTP submission
Venezuela	29	0	11	0
Argentina	27	0	9	0
Spain	24	0	3	0
Czech Republic	23	0	10	0
Mexico	19	8	4	1
Egypt	16	0	10	0
Canada	14	12	2	1
Ukraine	14	0	8	0
Ecuador	13	0	3	0
Hungary	13	0	8	0

Table 4 shows the top 10 respondent states, including the number of cases in which each has been a respondent in an ISDS proceeding, the number of cases in which the investor's home state has provided input as an NDTP, the number of treaties invoked in those cases, and the number of treaties under which the home state did provide input as an NDTP.

commercial arbitration),[87] which could ultimately drive the system towards more moderate outcomes,[88] ie less susceptible to politics and power asymmetries and more restrictive of expanding protections for capital.[89] Such statements are, at least in theory, presently and readily available tools for states. Then why are these tools playing such a minimal and lackluster role among states? In the next section, we explore possible reasons for state silence. Motive and opportunity both appear to be important factors shaping engagement of NDTPs.

4. CAUSES AND POTENTIAL REFORMS TO ADDRESS SYSTEMIC DISENGAGEMENT

While some states—particularly capital importing states under the relevant treaty—have strong reasons for wanting to engage as NDTPs, they often lack the opportunity to do so. In contrast, other states—particularly powerful governments or capital exporting states—have many opportunities to provide input as NDTPs, yet they remain silent because they lack the motivation to engage. Our analysis highlights how present practices reflect asymmetries in investment flows and create asymmetries in investment treaty law that, while reciprocal on paper, is anything but, in practice. Then, in light of the causes of disengagement, we explore what can be done to give states' voices—especially the voices of states that are presently muted—greater prominence. We propose various reforms that might help facilitate unilateral interpretations or compensate for their absence.

A. Host States' Lack of Opportunity

One of the most fundamental constraints on NDTP participation is the lack of opportunity. Capital importing states generally lack the opportunity to submit NDTP input during ISDS proceedings as they are (i) rarely in the more 'trusted' home state position; (ii) almost never in that position in the context of a treaty under which they are sued; and (iii) never in that position frequently enough for any given issue to build up adequate evidence of their practice and position under the VCLT.[90] A submission in one case under one treaty may not affect the interpretation of other treaties due to both its limited nature—constituting only one submission—and the fact that it was made in order to interpret another agreement.[91] With a few

87 Wolfgang Alschner, 'The Return of the Home State and the Rise of 'Embedded' Investor-State Arbitration' in Shaheeza Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration*, Nijhoff Int'l Inv Law Series, Vol 3 (Martinus Nijhoff Publishers 2014) 293, 297.

88 This has been recognized by other scholars, for eg above n 11; above n 38; Alschner, ibid; Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Interpretive Authority' (2014) 55(1) Harv Int'l L J 1.

89 See eg *Bilcon of Delaware, et al. v Canada*, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015), paras 435–38.

90 See General Assembly Resolution, A/RES/73/202 (20 December 2018), attaching and recommending the conclusions of the International Law Commission on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Conclusion 9(2) ('[T]he weight of subsequent practice under article 31, paragraph 3 (b), depends, inter alia, on whether and how it is repeated').

91 See, eg *National Grid Plc v the Argentine Republic*, UNCITRAL, Decision on Jurisdiction (20 June 2006), para 85 (finding that diplomatic notes exchanged between Argentina and Panama on interpretation of the MFN obligation were not significant for interpreting the MFN provision in the UK–Argentina BIT).

exceptions under the NAFTA and CAFTA–DR, there has been no publicly-known NDTP submission made by a capital importing state under an investment treaty in any ISDS proceeding.[92]

The majority of the top 10 respondent states (see Table 4) are rarely in the position of a home state (with two exceptions, Canada and Spain). Additionally, the treaties under which they are sued are almost never the same as those that their investors are offensively using (see Table 5 for more detail on this). Canada is an outlier among these 10 states: it has had frequent opportunities to be an NDTP, and these opportunities have been under the same treaty that is used to sue it, eg Canada has been sued 13 times by investors from the USA and its investors have sued the USA 10 times under the NAFTA. In total, Canadian investors have brought 27 claims against other states, and Canada, as the home state, has provided NDTP input in 9 of these cases (or 1/3), the majority of them under the NAFTA.

Spain, on the other hand, has been sued 24 times, most commonly under the ECT; and although its investors have sued 22 times, those cases have all been under treaties other than the ECT. Thus, the bases for claims against it do not overlap with the treaties invoked by its investors.[93] Spain could have submitted NDTP briefs in the cases its investors have brought against other states, or in the many claims brought by other investors against other states under the ECT. To the extent that Spain's position in those hypothetical NDTP briefs aligned with its positions as a respondent under the ECT, such NDTP input may have supported Spain's positions when defending against ECT claims. This could, in theory, be through two avenues: one is if its NDTP input had contributed to shaping investment common law generally in a more respondent-responsive direction, potentially as state practice informing supplementary means of treaty interpretation under article 32 of the VCLT;[94] another as evidence of subsequent practice forming agreement that must be taken into account by tribunals interpreting the ECT. Through the latter, however, the impact of Spain's submissions is questionable since subsequent practice of one, or even a larger minority of treaty parties to the ECT, is inadequate to establish 'agreement' under article 31 of the VCLT.[95]

Other than Canada and Spain, the remaining respondent states on the list have had even fewer opportunities, if any, to sit in an NDTP role. Moreover, that lack of opportunity is experienced by the vast majority of respondent states. What this reveals is that those states that are commonly respondent states, that are concerned about overly expansive interpretations of investment treaty protections, and that seek shields against future expansive interpretations offered by investors and often

92 Mexico has made several NDTP submissions in cases under the NAFTA; and with the exception of Guatemala, all state parties to the CAFTA–DR, have made at least one NDTP submission in one case brought under the CAFTA–DR. As already discussed, the engagement of NDTPs under the NAFTA and CAFTA–DR may reflect the relevance of inter-state relations that are close in diplomatic and geographic terms.

93 In addition, despite Spain having been sued under the ECT repeatedly, it has not once made a submission as an NDTP in other ISDS proceedings under the ECT, in which similar provisions of the treaty have been invoked as those against it.

94 See International Law Commission, *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries* (2018) United Nations Doc A/73/10, 20-21.

95 See sources cited above n 84.

accepted by tribunals,[96] should not see the possibility of making NDTP submissions as an important solution. Rather, something else is needed.

B. Possible Reforms to Address Systemic Lack of Host State Opportunity

One initial step to remedying the issues raised above is to more expressly recognize that capital importing states' limited opportunities as NDTPs means that their voices are systematically stifled; and to further recognize that such systemic sidelining needs to be redressed. In that context, the weight of respondent submissions and the legal significance of NDTPs' silence must be reconsidered.

The current presumption in ISDS proceedings is that NDTP silence is evidence of disagreement with the respondent state. To address the structural inequality, this needs to be shifted. First, investment treaties could establish rules of responsibility for NDTPs to engage constructively with their treaty partner(s) and the tribunal during ISDS proceedings.[97] A failure to do so would have legal ramifications. Secondly, investment treaties should incorporate rules of interpretation to clarify implications of silence. They could, for example, treat NDTPs' silence as acquiescing or waiving objections to the host state's position in the relevant dispute (or beyond), in particular if the respondent host state requests a response by the NDTP. Alternatively, the rules could create a presumption, rebuttable by investors, that the host state's proffered interpretation is valid.[98] This approach has been adopted in at least one instrument, the 2012 US Model BIT, which states that unless the NDTP makes a submission on a particular issue, 'the non-disputing Party shall be presumed, for purposes of the arbitration, to take a position . . . not inconsistent with that of the respondent'.[99]

These reforms would prevent a host state (and its stakeholders) from being effectively penalized by the home state's disengagement.

96 See above n 43.

97 Some states have built into their treaties consultation mechanisms that allow them to influence the interpretation and application of their treaties. For eg Australia–Uruguay BIT (2019) art 12, entitled 'Consultations between the Parties', states: 'The Parties shall consult at the request of either of them on matters concerning the interpretation or application of this Agreement;' Australia–Egypt BIT (2001) art 11 is identically worded; USA–Lithuania BIT (1998) art V, entitled 'State-to-State Consultations', states: 'Article V provides for prompt consultation between the Parties, at either Party's request, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.'

98 This is implied by *Ecuador v USA*, below nn 110 and 111; and is done in the US Model BIT (which provides that if a NDTP is silent on an issue, that NDTP 'shall be presumed, for the purposes of the arbitration, to take a position [on the relevant issue] not inconsistent with that of the respondent'). Similarly, and akin to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018) art 27.3(2) ('CPTPP') (which provides that, if a state party does not affirmatively indicate agreement with an interpretation by the Commission when the Commission considers the issue, and 'does not object in writing to the interpretation considered by the Commission within five days of that consideration', the 'decision shall be deemed to be reached'), silence could be viewed as evidencing agreement if the conduct of the other state(s) calls for a response but is met with silence. See also *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* Judgment of 23 May 2008, ICJ Reports 2008, para 121 (the International Court of Justice determined that, '[t]he absence of reaction [by one state party to an agreement] may well amount to acquiescence. That is to say, silence may also speak, but only if the conduct of the other State calls for a response'). In either case, unless and until contested by an NDTP, the respondent state's position would be presumptively valid.

99 2012 US Model BIT, art 20(3)(iv).

Other strategies could help encourage and facilitate subsequent agreement and practice in order to clarify the meaning of treaties, including by supporting states in approaching their treaty parties to seek agreement on interpretive clarifications; clarifying obligations of NDTPs to respond to such initiatives (discussed below); clarifying options for states that are met with silence in the face of such requests; and creating a platform whereby states can proactively and unilaterally publicise their understanding of their treaties.[100]

Complementary steps would be to increase transparency so that states have knowledge of NDTP opportunities. This could be done through the adoption of procedural rules that require claimants to give all treaty parties notice of their claims; rules for disputing parties and tribunals to publish all information submitted to and issued by tribunals in the relevant cases; and rules that clarify that NDTPs have a right to provide input to the tribunal on issues of interpretation through participation in hearings and written submissions.[101]

C. Home States' Lack of Motive

In contrast to states lacking the opportunity to engage as NDTPs, other states—particularly powerful governments or capital exporting states—have many opportunities to provide input as NDTPs, yet they remain silent because they lack the motivation to engage. We identify some factors that may contribute to this silence: (i) the home state is not itself exposed to claims; (ii) the home state wants its investors to be able to invoke strong protections and does not want to create tensions with its investors; (iii) the home state does not want to 'politicise' inter-state relations; (iv) the home state does not consider benefits of engagement to outweigh the costs; and (v) the home state is unaware of the claims its investors are filing, the arguments they are making, or the implications they are having.

(i) The home state is not exposed to claims

NDTP submissions can be used to guard against overly broad interpretations of treaties. Therefore, and as we see under the NAFTA, a state that has the desire to minimise the risk of being exposed to a claim or being found liable under a treaty will likely weigh in as an NDTP in ISDS proceedings. However, a state that has low or no potential exposure to claims under a particular treaty, or under any of its treaties, is unlikely to be motivated by risk.

Investment flows (and associated risks) under specific BITs commonly go in one direction: a primarily capital importing state faces risk of exposure to claims and liability while a primarily capital exporting state does not face similar risks. States that

100 This was suggested by Roberts (n 38).

101 The UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration (2014) would accomplish each of these aims; See <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf> accessed 1 January 2022. More widespread adoption and use of those rules, which can be done through ratification of the Mauritius Convention on Transparency, interpretive clarifications signalling intent to apply the rules, and agreements between disputing parties to use the rules, can help overcome one barrier to NDTP participation.

are frequently home states are rarely in the position of a respondent state,[102] and even more rarely in the home state position in the same treaties under which they are sued (if they are in fact ever sued). Figure 2 below shows how states (under the NAFTA and ECT) are likely to be primarily home states or respondent states under particular treaties, but rarely both.

The two exceptions in Figure 2 are Canada and the USA, which not only occupy both home and respondent state positions under the NAFTA, but do so frequently. Spain, on the other hand, has been a respondent state in 22 cases under the ECT, but has never been a home state under the ECT; and while it has been a home state in 22 cases under other treaties, it has been a respondent state in only two cases under other treaties. As a result, home states that are the source of many claims have comparatively limited defensive exposure or vested interest in clarifying or narrowing their treaty provisions.[103]

Figure 3 further illustrates how states are likely to be primarily home states or respondent states, but rarely both. This figure includes all 114 states used in our dataset.

As the data demonstrates, home states, at present, stay silent in investor–state disputes, even if they disagree with their investors' broad interpretations. This, in turn, negatively impacts respondent host states. Even when the home state does not affirmatively oppose the respondent host state's proffered interpretation, the home state's silence is not treated as evidence of an agreement with the host state. Instead, ISDS tribunals effectively treat host states' interpretations as if they have been disputed by silent NDTPs. Further complicating matters for the host state, silence by the home state is not evidence of a dispute capable of being resolved by a third-party adjudicator under the treaty, at least according to one tribunal.[104] Thus, respondent host states are trapped by the silence and inaction of their treaty partners.[105] Their positions are effectively assumed to be rejected by NDTPs, but they are unable to challenge and overturn those assumptions through state-to-state dispute settlement.

(ii) The home state wants strong investor protections and relations

Some states may want their investors to enjoy and invoke 'strong' and broad investment protections against their host states. Motivated by this, predominantly capital

102 There are exceptions to this: Canada, Spain, Turkey and Russia have been on the defensive side of a large number of ISDS proceedings. Unlike Spain, Turkey and Russia, however, Canada has been more active as an NDTP in cases brought by its investors.

103 Degrees of exposure and risk, however, do not fully explain NDTP patterns. Under the ECT, recent years have shown a diversity of exposed states. In contrast to patterns under BITs, there are a number of states that have faced and may face claims (and potential liability) under the ECT. And, due to the multilateral nature of the treaty, each dispute could potentially give rise to dozens of NDTP submissions. Thus, one might expect to see patterns of engagement similar to those under the NAFTA. To date, however, apart from the EC, the NDTPs invariably refrain from providing input to tribunals under the ECT. Additionally, although the US' exposure under the CAFTA–DR is minimal, it routinely provides NDTP submissions in disputes its investors have brought against other CAFTA–DR state parties. This illustrates that while exposure and risk (or the lack thereof) may cause engagement (or disengagement), other factors are also motivating NDTP input, and may also be needed to drive it where it presently does not exist.

104 *Ecuador v USA*, below n 110, paras 203, 219.

105 For discussions of how power asymmetries are relevant in these cases and affect state parties' options and responses, see, eg Alschner (n 87), 330–31.

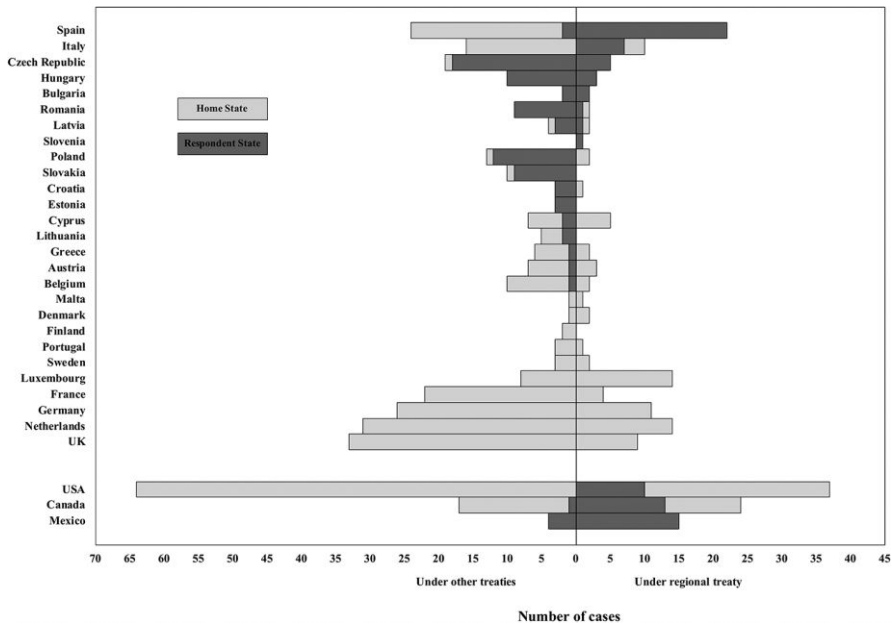

Figure 2. The number of cases in which EU Member States and NAFTA states are the home and respondent states under regional treaties and under all other treaties.

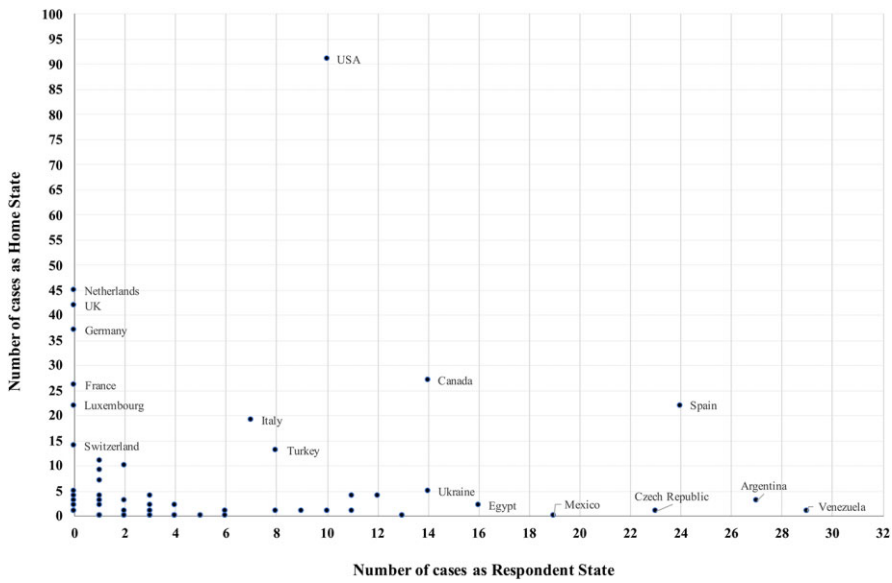

Figure 3. The Number of Cases in Which States Are in the Position of a Home State versus a Respondent State in ISDS Proceedings.

exporting states may not make NDTP submissions that offer narrow interpretations of treaties that could undermine their investors' broad interpretations (even if those same states would advance such narrowing interpretations if they were on the receiving end of a claim).[106] In addition, home states wishing to enable their investors to enjoy and invoke strong protections may provide investor-friendly input, especially if they do not perceive that such input will come at a cost to them.

Submissions on points that affirmatively buttress investors' (broader) readings of investment protection standards are relatively rare among NDTP inputs.[107] Instead, NDTP silence in the face of investors' arguments is the more dominant pattern. The desire of home states to enable their investors to invoke broad investor protections may not be strong enough to routinely drive home states to make investor-backing submissions; but it may be strong enough to motivate a pattern of silence even if the NDTP disagrees with the investors' interpretation, and even when those interpretations implicate crucial questions about how international investment protection affects domestic policy space to adopt public interest measures.[108]

As briefly discussed in the introductory section of this article, the ISDS system was allegedly formulated to detach politics from investor–state disputes. Some advantages of the system, it is argued, include the benefit for home states to deflect investor demands—irrespective of their strength and size—to get involved in investor–state disputes and free themselves of the burden to spend resources and political capital to help individual investors;[109] and more investors can benefit since their ability to invoke investment protections is not contingent on their economic or political power in their home state. Maintaining these protections against politicization is often cited as a reason for NDTP silence. Indeed, one US government official explained that offering an interpretative statement in an ISDS case 'would eviscerate a principal rationale for investor-State dispute mechanisms, which is to depoliticize

106 Roberts (n 88) 57.

107 See Kaufmann-Kohler (n 60) and above n 72: NDTP submissions made under the NAFTA are largely aligned with the interpretation of the treaty as presented by the respondent state, and rarely with that of the claimant investor's version. However, an example of a state providing input supporting its investor's position is the letter from the Swiss government critiquing the *SGS v Pakistan* tribunal's interpretation of the umbrella clause. See 'Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in the light of the Decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No. ARB/01/13 SGS Société Générale de Surveillance S.A. versus Islamic Republic of Pakistan', attached to the Letter of the Swiss Secretariat for Economic Affairs to the ICSID Deputy-Secretary General (1 October 2003), published in (February 2004) 19(2) Mealey's Int'l Arb Rep.

108 To refer to Switzerland again, when Philip Morris invoked a Swiss treaty to sue Uruguay for tobacco control measures, Switzerland did not provide any input to the tribunal seeking to clarify treaty standards. Ultimately, a two-member majority of the tribunal determined that the claims should fail, though the dissent would have upheld them. Anecdotal reports suggest that Swiss government officials responsible for investment treaty policy believed the majority reached the right conclusion. But the decision may have been unanimous, or more quickly resolved, had Switzerland provided input; and potential future claims may be avoided if Switzerland were to highlight that the dissent's interpretation did not and does not reflect the government's understanding of the treaty. See *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Uruguay*, ICSID Case No ARB/10/7, Concurring and Dissenting Opinion of Co-Arbitrator Gary Born (8 July 2016).

109 Joachim Pohl, 'Societal Benefits and Costs of International Investment Agreements A Critical Review of Aspects and Available Empirical Evidence', OECD Working Papers on Int'l Inv 2018/01 (OECD Publishing 2015), 49.

investment disputes and permit neutral and binding arbitration between the State and the investor'.[110]

But this depoliticization narrative may in fact obscure what is a more general political desire to provide broad and general support to investors, and retain the power to make political decisions regarding which investors to support (or not) in which cases against which other states. Under a system of diplomatic espousal or state-to-state claims, there may be concerns that only the largest or most politically connected investors will get the government's affirmative support for their claims. In contrast, with investment treaties and an ISDS system from which home states can disengage, states can give each and all of their investors implicit support. In such a system, a decision by a state to generally allow its investors free rein to advance interpretations of international law, and not follow ISDS cases or seek to correct incorrect arguments put forth by investors or accepted by tribunals, is in itself a political decision about the allocation of resources and interpretive power.[111] Thus, it is not that the ISDS system depoliticizes the relationship between states and investors; it reflects a tacit and political agreement by states to transfer power to their investors at a macro level.

Moreover, at the micro or case-specific level, states remain generally free to decide whether to make (or not make) a submission on a discretionary basis. This means that the size and political power of an investor may still be relevant to a home state's decision whether to provide a submission offering further support for the investor's position, a submission contesting the investor's position, or a decision to stay silent and fail to contest the investor's arguments (irrespective of whether the state actually agrees with those arguments). Thus, a decision to engage or not to engage in a particular dispute is also a political decision left to individual states, and a decision that may still be influenced by factors such as the investor's importance and connectedness, with the decision to stay silent being no less political than a decision to intervene.

(iii) The home state does not want to politicize inter-state relations

As noted above, ISDS is also often touted for its alleged ability to depoliticize relationships between home and host states: it protects the host state from undue political pressure placed on it by an investor's home state in connection with an investor–

110 These were the words of the USA government in the state-to-state arbitration case *Republic of Ecuador v United States of America*, UNCITRAL, PCA Case No 2012-5, Award (29 September 2012), para 201, quoting the US Statement of Defence. In this case, Ecuador had requested that the US government confirm by diplomatic note its agreement (or disagreement) with the claimant's interpretation and application of a specific treaty provision, namely the 'effective means' provision, in the *Chevron v Ecuador* case (*Chevron and TexPet v Ecuador*, PCA Case No 2007-02/AA277, Final Award (31 August 2011)), a claim brought under the Ecuador–USA BIT. However, the US government refused to do so, which gave rise to the *Ecuador v USA* case.

111 To refer to the *Ecuador v USA* case again, the US government refused to respond to Ecuador's request to provide its understanding of a provision in the Ecuador–USA BIT in the aftermath of the *Chevron v Ecuador* case (ibid), citing the depolitical nature of the system as its reason. However, the US has engaged as an NDTP in several other ISDS cases, providing a number of tribunals with its interpretation of the relevant treaty provisions. In fact, the US government's NDTP submission in *Gramercy v Peru* took a position on 'effective means' that was consistent with Ecuador's position in *Chevron v Ecuador*, which gave rise to the *Ecuador v USA* case, and for which the US made a decision not to intervene. See *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v Republic of Peru*, ICSID Case No UNCT/18/2, Submission of the USA (21 June 2019), para 36.

state dispute; and it prevents state parties' legal and diplomatic relations from being marred by inter-state political engagement around investor-state disputes.[112] Again, the use of NDTP submissions, it is argued, would re-politicise a purposefully depoliticised system. This is, therefore, another reason cited for NDTP disengagement.

The notion that NDTP would reintroduce undesirable political engagement between home and host states, however, is worth unpacking. When that is done, justifying NDTP disengagement based on a desire to avoid politicising state-to-state relations seems just as pretextual or inadequate as efforts to justify NDTP disengagement on the desire to depoliticise state-investor relations.

First, the desire to depoliticise state-to-state relations relating to international investment assumes that ISDS has in fact created a "depoliticised" landscape with which NDTPs should not interfere. Yet, there is evidence that ISDS and political engagement at the state-to-state level coexist,[113] and can complement one another. Indeed, this is also reflected by our data: states appear more likely to provide input as NDTPs when there are friendly inter-state relations, close geographic connections, or common membership in economic, policy, and diplomatic circles between the NDTP(s) and respondent state, e.g., NAFTA and CAFTA-DR treaty parties engage more often in ISDS disputes under these two treaties than under other treaties. The 2019 declaration of EU member states on ISDS in investment treaties between those EU member states is another relevant example.[114] It reflects a political agreement by EU member states to play active NDTP roles in intra-EU ISDS cases.[115] The declaration states that, "[i]n cooperation with a defending Member State," the EU member state that is the investor's home state "will take the necessary measures to inform the investment arbitration tribunals concerned"[116] of the position that EU law takes precedence over investment treaties concluded between EU member states and that, consequently, those underlying investment treaties do not contain valid offers to arbitrate capable of being accepted by an investor and conferring upon an arbitral tribunal the power to hear an intra-EU ISDS case.[117]

112 See, eg Kenneth J Vandevelde, *U.S. International Investment Agreements* (OUP 2009) 26–30.

113 Gertz, Jandhyala and Poulsen (n 7).

114 'Declaration of the Representatives of the Governments of the [EU] Member States, of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union' <https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf> accessed 4 March 2022.

115 ibid.

116 Above n 114 at 3.

117 Not all EU member states, however, aligned on the question of the effect of the *Achmea* judgment and EU law on the jurisdiction of ISDS tribunals under the ECT. While the majority of EU member states signed the declaration indicating that there was no valid consent under intra-EU ISDS cases under bilateral investment treaties or the ECT, a number were not ready to or did not want to make the point regarding the ECT. See 'Declaration of the Representatives of the Governments of the Member States [of the Republic of Finland, the Grand Duchy of Luxembourg, the Republic of Malta, the Republic of Slovenia, and the Kingdom of Sweden], of 16 January on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union' <https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf> accessed 4 March 2022; 'Declaration of the Representative of the Government of Hungary, of 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union' <https://2015-2019.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf#!DocumentBrowse> accessed 4 March 2022.

Secondly, research suggests that state-to-state engagement is not the gunboat diplomacy of the past, where the home state is advocating the investor's case through force or the threat thereof, but dialogue on relevant issues.[118] This is also reflected by our data: NDTP submissions in ISDS tend to advance interpretations that narrow the scope of treaty protections and ISDS exposure,[119] oftentimes supporting the position of the respondent host state.

Thirdly, and related to the first two points, the depoliticization justification assumes that NDTP engagement would be more political than NDTP disengagement. But the view that home state engagement as an NDTP would politicise state-to-state dynamics is based on an inaccurate and unhelpful dichotomy that equates silence with depoliticization and engagement with politicization, and ignores the fact that the decision to weigh in as an NDTP in a particular case can be just as political as a decision to stay silent on the matter. Similarly, at the macro level, a state's broader decision to create a system for following and making submissions in disputes pursued by its investors abroad, is just as political as a decision that such engagement should be avoided or should not be made a domestic priority that warrants public resources. To refer to the 2019 EU declaration again: EU member states made a political decision and commitment to provide input on a specific and relatively narrow issue of the connection between a certain subset of investment treaties (intra-EU investment treaties) and a particular issue of law (the autonomy of the EU legal order). They could have similarly agreed and committed to engage when, for instance, their investors' claims related to climate policy, the protection and fulfilment of human rights, corruption, tax evasion or avoidance, or other issues. That, however, was not done. The political agreement to provide NDTP input was a much narrower one, one that in turn preserved much of the State → Tribunal/Investor Shift.

Patterns of NDTP practice thus reflect political decisions to engage or, much more commonly, to stay silent, creating an asymmetrical system where rules that are similar *as written* in treaties can be very different *as applied* against different states. When there is NDTP engagement, the submissions can act as a restraint on investor and tribunal overreach. In contrast, when such NDTP engagement policing investors' interpretations is absent, the investors' proffered interpretations stand a greater chance of success.[120] This lends credit to critiques of the system as being vestiges and manifestations of inequality and imperialism that can be applied against host

118 ibid. In his article, Yackee questions the prevalence of gunboat diplomacy in practice, stating that 'the international investment law literature curiously fails to articulate any actual historical examples of such a dynamic at work [other than the Venezuelan sovereign debt crisis of 1902-03, in which the British, German, and Italian governments blockaded Venezuela in part because of that country's refusal to pay its foreign debts. . .]'; see Yackee (n 6) 7.

119 This is based on our review of submissions, and is supported by other authors who have looked at the issue. See, eg Alschner (n 87) 314–15; and Kaufmann-Kohler (n 60) 312–13.

120 As discussed above, the success rates for respondent host states in cases under the NAFTA and CAFTA–DR are generally higher than under other treaties. However, as with the issue of risk, political and geographic closeness do not fully explain patterns of engagement and disengagement. European practice under the ECT illustrates this point. The EC routinely seeks to provide input in intra-EU disputes under the ECT, but does not similarly provide input in non-intra-EU claims under that treaty. This supports the premise that geographic and political proximity is a factor driving input. In contrast, EU member states appear to prefer to stay silent when other EU states are sued under that treaty or other intra-EU agreements.

states in ways that home states would not tolerate for themselves. The home states may decide to step in (or not) on cases involving certain issues, involving certain investors, or involving certain respondent states. Yet it is power they have generally reserved for contexts in which they perceive risks to themselves, for instance in the form of ISDS claims (as under the NAFTA), or with respect to particular issues (such as the autonomy of the EU legal order under the ECT). The power to engage is not, however, exercised in defence of Global South states, in turn revealing latent politicization in the ISDS system.

(iv) The costs of NDTP submissions may outweigh the benefits

A state may not provide NDTP input because the costs of making such submissions—including creating tensions with investor claimants, the costs associated with monitoring disputes, instituting systems to prepare and vet submissions, the time, resources and capacity it takes to draft and file such submissions, and the risk of adverse cost awards—outweigh the potential benefits, including enhancing the investment treaty system by establishing more balanced and correct (ie as intended by the treaty parties) treaty interpretations. This is especially an obstacle for capital importing states, which may be relatively resource-constrained as compared to capital exporting states.[121]

Overall, cost constraints do not explain why capital exporting states, often home states, do not generally weigh in on the interpretation of their treaties in a bilateral or multilateral treaty context. In 79% of concluded ISDS cases, the investor is from the USA, Canada or Western Europe.[122] These states, together, account for 68% of the worldwide outward FDI stock (in the year 2020).[123] They are relatively wealthy, with resources to devote to NDTP engagement, yet they rarely (if ever) submit interpretive statements during ISDS proceedings.[124]

Nevertheless, specific types of costs seem to be impactful. One such type of cost is the risk of NDTP liability. In some cases, tribunals have conditioned their acceptance of NDTP submissions on the NDTP's commitment to pay the costs incurred by the disputing parties in responding to that submission, eg in the context of the EC's efforts to provide submissions under the ECT. Such conditions have caused the

121 It is also possible that capital importing states have domestic policies in place to dissuade (or prohibit) actions, such as the submission of a NDTP intervention, because of its potential effect on the interests of foreign investors currently located in their territory.

122 We include the following states as being part of Western Europe: Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Switzerland, Spain, Sweden and the UK.

123 This was calculated from the data derived from UNCTAD Stat <https://unctadstat.unctad.org/wds/TableViewer/tableView.aspx?ReportId=96740> accessed 1 January 2022. See also, Daniel Behn, Malcolm Langford and Laura Létourneau-Tremblay, 'Empirical Perspectives on Investment Arbitration: What do We Know? Does it Matter?" (21 January 2020) Academic Forum on ISDS Concept Paper 2020/1 5 (figure 1.4 illustrates the most frequent claimant home states in ISDS cases, according to their dataset: UK at 77 cases, 26 treaties; USA at 155 cases, 33 treaties; Canada at 47 cases, 15 treaties; Netherlands at 88 cases, 34 treaties; Germany at 57 cases, 24 treaties; and Spain at 44 cases, 17 treaties).

124 As noted above, the exception to this is the USA and Canada, which have made submissions as home states in about 1/3 of the cases brought by their nationals, the majority of them under the NAFTA.

EC to refrain from providing input to tribunals in those cases.[125] As noted above, concerns about tensions with outward investors may also be a type of cost, discouraging engagement even when the state, as a general matter, understands and values the contributions that submissions can make to produce more just outcomes.

A state may also have doubts that an NDTP submission will be worth those costs. They may doubt the submissions will be impactful in the specific case presenting the NDTP opportunity. States may similarly feel that even if their NDTP submission has an impact in one case, it may not have any effect in other cases under the same treaty or under other investment treaties, reducing the desire to spend time and resources preparing those submissions. There are good reasons for these doubts, and they may work to dampen state input.

In *Infinito Gold v Costa Rica*, for instance, the majority rejected the interpretation offered by the respondent and home state, which was evidence of the parties' subsequent agreement on the meaning of the FET standard. The tribunal suggested that submissions made in the context of disputes should be discounted if adverse to the claimant's interests.[126] In *Eco Oro v Colombia*, the respondent and home state provided detailed submissions, including on their (shared) interpretation of the general exceptions clause. Both treaty parties agreed that if the exceptions clause applies, there can be no violation of the treaty and therefore no state liability to pay compensation. The tribunal, however, disagreed with their interpretation, oddly reasoning that 'had it been the intention of the Contracting Parties . . . the Article would have been drafted',[127] even though the state parties made their intentions abundantly clear in their respective submissions. In *Electrabel v Hungary*, the tribunal dismissed the EC's NDTP input on the basis that it was adverse to the investor claimant's position, a factor of questionable relevance to the issue of whether or not input is subsequent practice capable of establishing subsequent agreement.[128] And in *Philip Morris v Uruguay*, when the respondent host state sought to rely on the home state's interpretation of an identical provision in another BIT, which corresponded with its own interpretation, the tribunal dismissed it. The tribunal's reasoning was that it could 'raise due process concerns' if a subsequent unilateral statement by one state were given substantial weight.[129]

125 Notably, these cost orders in ISDS contrast with approaches in other areas of international law. As Wolfgang Alschner explains: 'From a public international law angle, it is not uncommon to allow for non-disputing party interventions. In the WTO, where such interventions are common practice, the inevitable additional costs and delays are borne by the WTO membership at large and are tolerated and even encouraged as an expression of the collective participation in a multilateral dispute settlement mechanism.' See Alschner (n 87) 316.

126 *Infinito Gold v Costa Rica*, (n 53).

127 *Eco Oro v Colombia* (n 40) para 829, and paras 826–37 more generally.

128 See *Electrabel v Hungary* (n 83), para 234.

129 *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016), para 476, stating: 'It would be quite novel and potentially raise due process concerns in investment arbitration cases if a subsequent unilateral statement by one State could be given substantial, let alone decisive, weight.' See also *B-Mex v Mexico* (n 53); the examples cited in above nn 77–80 related to the NAFTA; and examples discussed in Lise Johnson, 'New Weaknesses: Despite a Major Win, Arbitration Decisions in 2014 Increase the US's Future Exposure to Litigation and Liability' (January 2015) CCSI Briefing Note <https://ccsi.columbia.edu/sites/default/files/content/docs/publications/Brief-on-US-cases-Jan-14.pdf> accessed 1 January 2022.

In some cases, however, the issues at stake may be strong enough to drive input even in the face of doubts about the utility of those NDTP submissions. Such issues include states' perceptions of their exposure to ISDS claims and risk of liability, or broader questions of public international law. For example, Canada's NDTP submissions in the claims against Kazakhstan involving issues relating to state succession—issues that transcend the field of international investment law—may have tilted Canada's cost–benefit analysis in favour of a submission; Ukraine's submissions in the cases against Russia, which related to its annexation of Crimea, similarly go beyond questions of investment protection; and the EC's consistent engagement in intra-EU disputes under the ECT target regionally fundamental and crucial issues of the relationship between investment treaty law and EU law. However, general doubts and concerns about the State → Tribunal/Investor Shift and unduly expansive interpretations of investment treaty protections produced by that shift have apparently not been adequate to drive NDTP engagement.

(v) The home state is unaware of the claims its investors are filing

A final factor that may depress NDTP engagement is the lack of awareness and appreciation by home states of the claims that their investors are filing, the arguments they are making, and the issues at stake. While improvements have been made in the transparency of ISDS proceedings, investors can still file claims without giving their home states notice of such suits; and the cases can proceed without the home states receiving any of the relevant pleadings.

Due to bias or lack of information, NDTPs may also be unjustly inclined to presume that other states, which are frequently in the respondent position, do not have adequate legal and regulatory systems, and are in fact at fault. Relatedly, if the NDTP has not itself been faced with an ISDS claim or tribunal decision that it considers to unduly expand the meaning and power of investment treaty law, it may fail to appreciate the risk of tribunal error and overreach, and the importance of correcting against it.[130]

D. Reforms to Address Lack of Home State Motive

There are several options that could help address the factors depressing home states' motives to engage. With respect to home states' lack of fear of suit, reforms will be unlikely to shift capital flows or the treaty universe to such an extent that more states widely and equally perceive those risks. Nevertheless, reform options could be used to get around the issue of asymmetric exposure. The options discussed above with respect to NDTP silence during a dispute—eg establishing an obligation for NDTPs to engage constructively during ISDS proceedings, clarifying implications of NDTP silence, and/or creating a presumption that the respondent state's interpretation of the treaty is valid—could be used to shift the current presumption that NDTP silence is evidence of disagreement. This in turn, could help ensure that host states are not structurally disadvantaged by the asymmetrical flows of capital, claims and risks.

There are also ways to address the fact that some NDTPs may want to enable their investors to invoke broad protections, and may not want to undermine or upset

130 Poulsen (n 25); Lauge N Skovgaard Poulsen and Emma Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65(2) World Pol 273.

their investors' claims, even if they disagree with the investors' arguments about the treaty or its application. Approaches can be introduced that make NDTP decisions regarding whether or not to weigh in more routine and transparent, and less discretionary and subject to undue 'political' influence by investors and their agents. At the international level, one relevant approach is to integrate 'renvoi' procedures in treaties, which can send potential claims to the state parties to decide whether the case can proceed. Another is to change the weight given to NDTP silence, which would affect states' evaluations of whether, when and how to engage.

Another approach that could be adopted at the treaty level would be to require home state approval of claims before they can proceed.[131] This would help prevent the systematic political disengagement that characterizes the current system, and when accompanied by more transparency, could help increase public oversight and accountability regarding how treaties are being used.

At the domestic level, states could adopt legal or policy criteria clarifying that they will provide NDTP input to tribunals: in all ISDS cases in which their treaty is invoked; when certain issues are raised or at stake; when established and transparent domestic processes or institutions recommend such input; and/or when requested to do so by the tribunal or the respondent state. This will clarify states' roles with respect to their treaties, and inform investors in advance that their home state will weigh in during an ISDS dispute when one of its treaties is invoked.

States could also adopt policies or regulations requiring publication of claims filed by investors; requests by investors, respondent states or tribunals for home state engagement in ISDS disputes; decisions by the home state to file (or not to file) an NDTP submission; and the NDTP submission itself. These measures would help shed light on how political or policy considerations affect (dis)engagement, and enable greater public discussion of what types of 'political' activity around ISDS is and is not desirable and consistent with the aims of investment treaties.

These steps would not preclude 'politicisation' per se, but instead recognize the inherently political nature of investment treaties, investment relations and current NDTP practices, and seek to better inform debate and discussion around political (in)action, and to ultimately help produce more just ISDS outcomes.

The reforms discussed above—giving more weight to NDTP silence; clarifying criteria and guidelines regarding whether, when, and on what issues states will engage; requiring transparency of engagement decisions and the engagements themselves; and integrating filters so as to more routinely and predictably bring NDTPs into the treaty relationship—are all reform options that could be used to help address the discretionary nature of current politicized engagement or disengagement. These reforms may not address the causes of NDTP silence or selective input, but can help remedy the effects.

Reforms can also seek to both increase the benefits of NDTP engagement and reduce costs. For example, treaty provisions or arbitration rules could give clearer or

131 This is akin to a 'qui tam' action under US law, through which private citizens ('relators') have the ability to pursue claims for harms to the US government. The government can join the case, and can also seek to dismiss the case over the objections of the 'relator' if, for instance, the government deems the claims to be frivolous. See, eg Charles Doyle, 'Qui Tam: The False Claims Act and Related Federal Statutes' (26 April 2021) *Congressional Research Service*.

enhanced significance to respondent and NDTP submissions than they currently do; and increased scrutiny of tribunal reactions to NDTP input could help prevent tribunals from unjustifiably dismissing such submissions.[132] At the same time, reforms can seek to reduce the costs of making submissions in individual cases through strategies aimed at creating economies of scope and scale. For example, arbitration rules can clarify that tribunals cannot order NDTPs to be liable for additional costs incurred by the disputing parties responding to the submission; and can seek to reduce costs associated with investor relations by reducing discretion, increasing transparency, and clarifying practices of NDTP engagement. Public databases can be established of NDTP submissions and other filings from which any NDTP can draw; and up-front investments can be made in establishing domestic expertise and processes for NDTP submissions, which may increase efficiencies and reduce the costs of inputs in specific cases.

At the international level, assistance mechanisms, such as those being discussed within UNCITRAL's WGIII, could aid states in following disputes and providing input as NDTPs; making interpretive statements outside the context of disputes; and, to the extent that more significance is given to silence, assist states in following and engaging in cases.

Overall, transparency is essential to ensuring that NDTPs are aware of and understand how their treaties are being used. Additionally, it is incumbent upon NDTPs to follow the disputes and understand the arguments and issues. If home states cannot assume responsibility for monitoring how their treaties are used, and ensure that they are not used to advance erroneous or abusive arguments with potentially harmful effects on their treaty partners and their stakeholders, it raises the question of whether the home states should conclude or maintain these treaties.

5. ASSUMPTIONS, LIMITATIONS, AND IMPLICATIONS

A. Assumptions that inform suggested reforms

Certain assumptions or considerations inform the reforms suggested in this article. Their truth and relevance will therefore impact the desirability of certain paths and outcomes that may flow from them.

One assumption in this article is that greater NDTP engagement will support interpretations that are more accommodating of states' policy space and regulatory prerogatives, and more inclined to allow domestic jurisdictions to identify and resolve errors and flaws of domestic governance. We have based that assumption on several considerations. The first is that existing patterns of NDTP engagement have usually, but not always,[133] articulated a narrower interpretation of the treaty's

132 One potential model for such 'reactions' is the 'Drafters' Note on Interpretation of "In Like Circumstances" Under Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment)' under the CPTPP, see <https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/Interpretation-of-In-Like-Circumstances.pdf> accessed 4 March 2022. Other fora and mechanisms could also be used to produce treaty-specific or more general guidance to adjudicators.

133 Input from the disputing parties under the NAFTA and CAFTA–DR has tended to advance interpretations of the relevant treaties that are narrower than the interpretations being advanced by the investors. There are examples, however, of NDTP input seeming to support the investor's position. One well-known example is the Swiss letter to the ICSID tribunal in response to the *SGS v Pakistan* tribunal's interpretation of the umbrella clause, see above n 107.

obligations than the claimant's proffered reading. This suggests that although states may prefer broad interpretations that favour their investors, they may also act based on a longer-term, broader vision of the meaning of international law and the role it plays vis-à-vis domestic political prerogatives.

Another assumption is that if some of the reforms outlined in Section 4 relating to transparency and public oversight of NDTP engagement were also adopted, that might cause NDTP input to be more attuned to, and protective of, public interest measures. For instance, when news trickled out that trade officials in the USA and Switzerland were using their trade agreements with Colombia as legal hooks to pressure Colombia not to issue compulsory licenses aimed at improving access to medicine, civil society, academia, and politicians in the USA, Europe and beyond critiqued those diplomatic moves.[134]

When home states exercise power (on behalf of themselves and their investors) through silence, it is relatively unobservable and therefore, can escape attention and scrutiny. The investor beneficiaries may be particularly aware of the power of silence due to the freedom it leaves them to advance the interpretations and applications they support.[135] In contrast, other stakeholders, such as citizenry engaged on issues of global governance, human rights, and protection of the global commons, and media actors that help bring visibility to those issues, may not be as aware of or able to draw attention to the critical role of home state *inaction* in specific cases or at a systemic level. The reforms outlined in Section 4 would enable greater public awareness of and potential checks over how NDTPs are or are not engaging. This, in turn, could enable greater cooperation and alliances between respondent states of the Global South, and civil society organizations, academics and political actors[136] in the

134 See, eg the letter by US Senators Sherrod Brown and Bernard Sanders to US Trade Representative, Ambassador Michael Froman (26 May 2016) <https://www.keionline.org/sites/default/files/Senate-Colombian-Compulsory-License-May-26-2016.pdf> accessed 1 January 2020; and Gale OneFile News, 'Texas: Letter to Colombian President Encourages Grant of Compulsory License for Imatinib' (9 August 2016) US Official News <http://link.gale.com/apps/doc/A462225237/STND?u=columbiau&sid=summon&xid=5a7468c8> accessed 1 January 2022.

135 See also Martin 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 2017) 30, 45 (stating that '[t]he first player not playing for the reasserting team is one with considerable powers within the status quo: the investor').

136 See, eg the letter signed by dozens of Northern, Southern and international NGOs and addressed to US Trade Representative, Robert Lighthizer, 'RE: U.S. Government Pressure on Colombia in Light of OECD Accession' (20 March 2018) <https://www.keionline.org/wp-content/uploads/2018/03/Civil-Society-Letter-to-USTR-re-Colombia-OECD-March20-2018.pdf> accessed 1 January 2022; Ways & Means Press, 'House Democrats Press USTR to Clarify Position on Compulsory Licensing for Generic Medicines in Colombia' (25 May 2016) Congressional Docs & Pubs <https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Colombia%20Compulsory%20License%20Letter.pdf> accessed 1 January 2022. See also the coverage on the open-access website bilaterals.org of the pressure placed on Colombia by US and Swiss trade officials: Zoe Williams, 'Investigation: As Colombia Pushes for Cancer Drug Price-Cut and Considers Compulsory Licensing, Novartis Responds with Quiet Filing of an Investment Treaty Notice' (30 November 2016) IAReporter and bilaterals.org <https://www.isds.bilaterals.org/?investigation-as-colombia-pushes> accessed 1 January 2022 (while Investment Arbitration Reporter (IAReporter) conducted the investigation and reported on the story, bilaterals.org facilitated dissemination among civil society and others by posting the story on its free website).

North, further adjusting power imbalances between Global South and North states, and between investors and respondent states.

Another assumption is that home states may be becoming increasingly uncertain that benefits to all their outward investors are co-terminus with benefits to themselves. In recent decades, capital, assets, and headquarters have all become more mobile; and regulatory and tax arbitrage by international investors, which is facilitated by that mobility, has increased. These factors may prompt doubts among home state officials (and their constituents), that supporting outward investments invariably produces 'win-win' outcomes for the investors and home states alike. Thus, governments' willingness to act (or not act) in ways that support their investors' grievances with foreign host states may be waning. Home state willingness to back their investors through NDTP input or silence may be even lower if the investors are asking for interpretations of international law that the home states would not accept if applied against them, and even lower if investors are asking for interpretations or application of investment treaties in ways that prompt political pushback by other home state constituencies, such as environmental and labour organizations.

Our assumptions are further informed by the fact that states have other obligations and commitments under international law, including under international human rights law, which requires states to ensure that their investment treaties are consistent with their obligations to respect, protect and fulfil human rights.[137] This requires states to take measures even after the conclusion of their investment treaties,[138] which can include the actions they take, or do not take, as NDTPs to shape interpretations by arbitral tribunals. Just as the EU has sought to ensure that tribunals interpret intra-EU investment treaties in a manner consistent with interpretations demanded by EU law, we contend states should, and assume they will, seek to ensure that their treaties are not used in ways that undermine their commitments and obligations with respect to the protection and fulfilment of human rights and other areas of international law. The transparency referred to above will help ensure that states in fact do so.

B. Limitations and Implications of Reforms

The reforms suggested in Section 4 aim to overcome the limitations inherent in the currently dominant proposals for states to reassert their power in shaping the meaning and effect of investment law. The reforms we identify recognize that home states may have motives (though, as discussed above, not necessarily rational or compelling ones) to stay silent even where an investor is asserting an interpretation of the treaty that they would reject as applied against themselves; and home states may want to allow their investors to benefit from strong investment treaty protections and ISDS

137 See United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (10 August 2017) <https://digitallibrary.un.org/record/1304491?ln=en> accessed 1 January 2022; and 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises' (17 August 2021) Third Revised Draft <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf> accessed 1 January 2022.

138 See, eg General Comment No 24, ibid, para 13 (referring to ongoing obligations).

while they themselves remain largely insulated from investment claims. The reforms thus try to free respondent states from the systematic disadvantages they face due to home state silence, while also seeking to increase political pressure on home states to be more balanced in their engagement and disengagement decisions.

Nevertheless, while useful for those states committed to retaining investment protection treaties with ISDS, this article does not suggest that these are the optimal reforms for investment law. Indeed, there is an inherent tension in the proposals we make: NDTP conduct is presently contributing to, but also potentially helping resolve, the structural bias in the current ISDS system, which favours investors at the expense of respondent host states. As the authors have argued elsewhere, reform of international investment law merits a broader examination of what states, and their stakeholders, aim to achieve, and the best ways of achieving those aims, taking into account the costs and benefits of different options for the range of stakeholders and interests affected. Based on such a broader analysis, support for ISDS may rightly fade away entirely.

Existing NDTP patterns also help shed light on the opportunities and challenges of other possible reforms. As noted above, in addition to trying to influence interpretation through unilateral submissions forming implicit or explicit agreement that must be taken into account by tribunals, states can also potentially use treaty provisions allowing them to jointly formulate interpretations, or decisions on interpretation and application, that are binding on tribunals. Yet, a number of the factors that hinder unilateral submissions—including, in particular the asymmetries in investment flows, claims, and risks—may similarly hinder the formulation of binding joint positions. Such joint submissions may be even more challenging to produce because (i) they require inter–state coordination and agreement on exact language; and (ii) their bindingness and consequential nature may make states more hesitant about pursuing this route. Thus, if a state is reluctant to make NDTP submissions, it is likely to be even more reluctant to formulate joint binding interpretations.

Some proposals for ISDS reform call for existing treaties to be amended so as to create mechanisms for binding interpretations in the texts currently lacking such mechanisms, and for newer treaties to make such binding interpretations possible as a matter of course. But, as the data on NDTP (dis)engagement shows, the largely intractable divide between home states and respondent host states makes these provisions meaningless in practice for most respondent states.

Similar challenges also arise with respect to treaty renegotiations requiring buy-in from state parties that do not perceive risks. Absent other forces, such as pressure from a state's domestic stakeholders to ensure that its investment treaties are not used in ways that create or exacerbate human rights, social or environmental harms at home *or* abroad, it may be difficult to get those states that are silent as NDTPs to take bolder action such as renegotiating treaties' to protect against their misinterpretation and abuse, or jointly agreeing to terminate the treaties.

Given the political dynamics that NDTP (dis)engagement reveals, multilateral reform discussions appear to offer particularly important opportunities for adopting the approaches to interpretation suggested in this article. In a multilateral setting, Global South states may be able to access and use leverage they lack in bilateral negotiations, and can also coordinate with international and Global North civil

society organizations to increase their power vis-à-vis Global North states. On a bilateral level, states presently suffering from NDTP silence may be unable to get their negotiating partners to adopt rules changing the effect of otherwise persistent disengagement.

6. CONCLUSION

The current investment treaty law system has not fulfilled the promise of an objective, rules-based system detached from politics for which the rule-makers and promoters of the system so fervently championed (and continue to champion).[139] Capital exporting states not only created the rules of the current system on the basis of economic and political power asymmetries, they continue to determine the content and contours of investment treaty law,[140] while the hands of capital importing states remain largely tied.

First, there is a power differential that exists between tribunals and investors on the one hand, and state parties to investment treaties on the other hand. The rules of investment treaty law have provided tribunals and foreign investors free rein to assert new legal norms in investment law, and to expand state obligations and investor protections. These may be contrary to treaty parties' intent or expectations, and detrimental to host states, the majority of which are capital importing states of the Global South, including by compromising the state's budgetary resources and restricting the state's domestic regulatory power.

Our data and analysis show that, to date, states have not generally been active in asserting their interpretive power over their treaties, with the exception of disputing respondent states during an ISDS proceeding and a handful of NDTPs under two particular treaties; and investment tribunals have generally disregarded or undervalued state party interpretations of their treaties, including those proffered by disputing respondent states.

Secondly, there is a power differential that exists between states that are frequently at the receiving end of ISDS claims, ie capital importing states, and those whose investors are bringing these claims, ie capital exporting states. Our article shows that states seeking to expand the role of their voices in treaty interpretation are often on the receiving end of claims, and generally lack the opportunity to use interpretive tools and be meaningfully heard by tribunals. In contrast, those states that have significant opportunities to engage in disputes and help inform interpretation of their treaties are often the home states of investors, but are generally unmotivated to

139 These scholars have questioned the denial by the promoters of the linkage between law and politics: Charles Brower II, for instance, has challenged the depoliticisation narrative by arguing that investment arbitrations should in fact be considered political; see above n 35. Similarly, David Schneiderman, argues that '[i]t simply is not credible to claim that investment arbitration is emptied of politics', see David Schneiderman, 'International Investment Law's Unending Legitimation Project' (2017) 49 Loy U Chi L J 229, 260. Martins Paparinskis suggests that even with ISDS, the dispute between an investor and a host state remains politically sensitive, see above n 5.

140 Not only do the original rule-makers facilitate the development of investment treaty law, but they also continue to draft new treaty templates, which are circulated and used as a basis for negotiations worldwide. Other states—like India and South Africa—have drafted their own model treaties, but these have not been adopted by other countries.

exercise their interpretive powers to clarify whether, when and to what extent investors and tribunals are overreaching.

What our data also shows is that these two groups of states do not, for the most part, overlap. This means that some states are systematically sidelined in investment law making and shaping. Others have abdicated their roles, allowing investors and tribunals wide latitude to craft the law. As a result, the law is developing in an asymmetrical way where tribunals are empowered to issue overly broad interpretations of investment treaty provisions, and unchecked when they go too far. Those disproportionately affected by such overreach are capital importing states, which are left relatively voiceless under the current system.

Therefore, the structural bias inherent in the investment treaty law system appears as strong as ever. Like the origin of the system, politics and power dynamics continue to play a critical role in the development of investment common law. Treaty obligations that are reciprocal on paper are being developed and applied asymmetrically. Change is needed, and possible. Options to address this unfairness include terminating texts that give rise to lopsided obligations, or amending treaties so as to exclude ISDS and move all issues to a state-to-state level, thereby ensuring that treaty parties assume responsibility for their texts. But for states that do not wish to pursue those options of termination or ISDS excision, other reforms are available.

These reforms include establishing in investment treaties the responsibility for NDTPs to weigh in during ISDS proceedings; clarifying implications when NDTPs remain silent during an investor–state dispute; enabling the respondent state's position to be presumptively valid unless and until contested by an NDTP; and establishing rules in investment treaties clarifying the role and weight of both respondent state and NDTPs' input during a proceeding. The goal of these reforms is to ensure that states are integrated more routinely into the treaty relationship by regaining control over the development of investment common law and doing so transparently; and to help address the discretionary and objectionable nature of current politicised decisions to engage or to not engage.

These reforms are not sufficient to fix the legitimacy crisis of the current system, but represent a necessary minimum if the system is to be less prone to politics and power asymmetries, and more likely to produce better, more just outcomes. Pursuing other reforms, such as creating an international investment court or appellate mechanism, without addressing these issues, may only serve to provide unwarranted legitimacy and permanency to an institution entrenched with structural biases.

Table 5. Treaties Invoked against top 10 Respondent States versus Treaties Invoked by Investors of those States

Respondent state	Home state	# Cases investor won	# Cases state won	Home state	Respondent state	# Cases investor won	# Cases state won
Argentina	USA	8	0	Argentina	Spain	1	0
	UK	3	1		Peru	0	1
	Germany	2	2		Mexico	1	0
	France	4	0		Total	2	1
	France & Spain	2	0				
	Spain	2	0				
	Netherlands	0	1				
	Italy	1	0				
	Chile	0	1				
	Total	22	5				
Venezuela	Netherlands	5	2	Venezuela	Spain	0	1
	Canada	3	3		Total	0	1
	Spain	2	2				
	Barbados	1	3				
	Portugal/BLEU	2	0				
	UK	1	1				
	Germany	0	1				
	France	1	0				
	Switzerland	1	0				
	Switzerland/Chile	1	0				
	Total	17	12				
Czech Rep	Germany	0	9	Czech Rep	Slovakia	1	0
	UK	0	6		Total	1	0
	Netherlands	2	1				
	Canada	0	1				
	Luxembourg	0	1				
	Cyprus	0	1				
	USA	1	0				
	Israel	0	1				
	Total	3	20				

Table 5. Continued

Respondent state	Home state	# Cases investor won	# Cases state won	Home state	Respondent state	# Cases investor won	# Cases state won
Spain	Argentina	1	0	Spain	Venezuela	2	2
	Venezuela	0	1		Argentina	4	0
	Netherlands	2	1		Chile	1	1
	Germany	4	1		Mexico	2	0
	UK	1	0		Guatemala	0	2
	Luxembourg	2	0		Egypt	2	0
	Luxembourg/ Netherlands	2	1		El Salvador	0	1
	Luxembourg/UK	2	0		Russia	1	0
	Luxembourg/France	1	0		Peru	0	1
	Luxembourg/Sweden	1	0		Costa Rica	0	1
	Luxembourg/ Netherlands/ Germany	1	0		Algeria	0	1
	Luxembourg/ Denmark/Italy	1	0		Equatorial Guinea	0	1
	Malta/Switzerland	1	0		Total	12	10
	Portugal	1	0				
	Total	20	4				
Mexico	USA	5	9	Mexico	—	—	—
	Spain	2	0				
	Canada	0	1				
	France	1	0				
	Argentina	1	0				
	Total	9	10				
Egypt	USA	0	4	Egypt	Canada	0	1
	UK	1	2		Kuwait	0	1
	Spain	2	0		Total	0	2
	Belgium	0	1				
	Denmark	0	1				
	Greece	1	0				
	Finland	1	0				
	France	0	1				
	Italy	1	0				
	UAE	0	1				
	Total	6	10				

Table 5. Continued

Respondent state	Home state	# Cases investor won	# Cases state won	Home state	Respondent state	# Cases investor won	# Cases state won
Canada	USA	5	8	Canada	USA	0	10
	Egypt	1	0		Venezuela	3	3
	Total	6	8		Ecuador	1	1
					Kazakhstan	1	1
					Mexico	0	1
					Costa Rica	0	1
					Czech Rep	0	1
					Barbados	0	1
					Kyrgyzstan	1	0
					Peru	1	0
					Slovakia	0	1
					Total	7	20
Ecuador	USA	6	4	Ecuador	—	—	—
	Canada	1	1				
	Bahamas/France	1	0				
	Total	8	5				
Ukraine	USA	1	3	Ukraine	Russia	3	0
	Lithuania	0	1		Moldova	1	1
	Latvia	0	1		Total	4	1
	Austria	1	0				
	Germany	1	1				
	Gibraltar	1	0				
	Russia	1	0				
	Netherlands	1	0				
	UK	0	1				
	UK/Netherlands	1	0				
	Total	7	7				
Hungary	France	4	0	Hungary	—	—	—
	UK	1	2				
	Cyprus	1	1				
	Belgium	0	1				
	Netherlands/ Switzerland	0	1				
	Norway	0	1				
	Portugal	1	0				
	Total	7	6				