

A Matrix Analysis on ISDS Reform: Preliminary Considerations

Professor Wenhua Shan

Xi'an Jiaotong University, China

University of Cambridge, UK



西安交通大学法学院
XI'AN JIAOTONG UNIVERSITY SCHOOL OF LAW

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I. De-politicisation and Re-politicisation: The Turning Tides on ISDS

1. FCN

– Resolution of investment disputes by

- (1) negotiating with the sovereign (Negotiation);
- (2) suing the sovereign in the sovereign's own courts where defenses of sovereign immunity may be readily available (Local Remedy);
- (3) lobbying their home government to negotiate diplomatically, and possibly to espouse a claim on their behalf before the International Court of Justice (Diplomatic Protection).



I. De-politicisation and Re-politicisation: The Turning Tides on ISDS

2. Earlier BITs

- The first BIT was concluded in 1959 between Federal Republic of Germany and Pakistan
- Dispute Settlement Mechanisms (DS): No direct investor-state dispute settlement procedures; submission of disputes to the International Court of Justice or ad hoc State-to-State arbitration.

3. ICSID and Later BITs

- ICSID: 1965
- Later BITs: ISDS became the norm.



ISDS: A SMART DS Mechanism for Investment

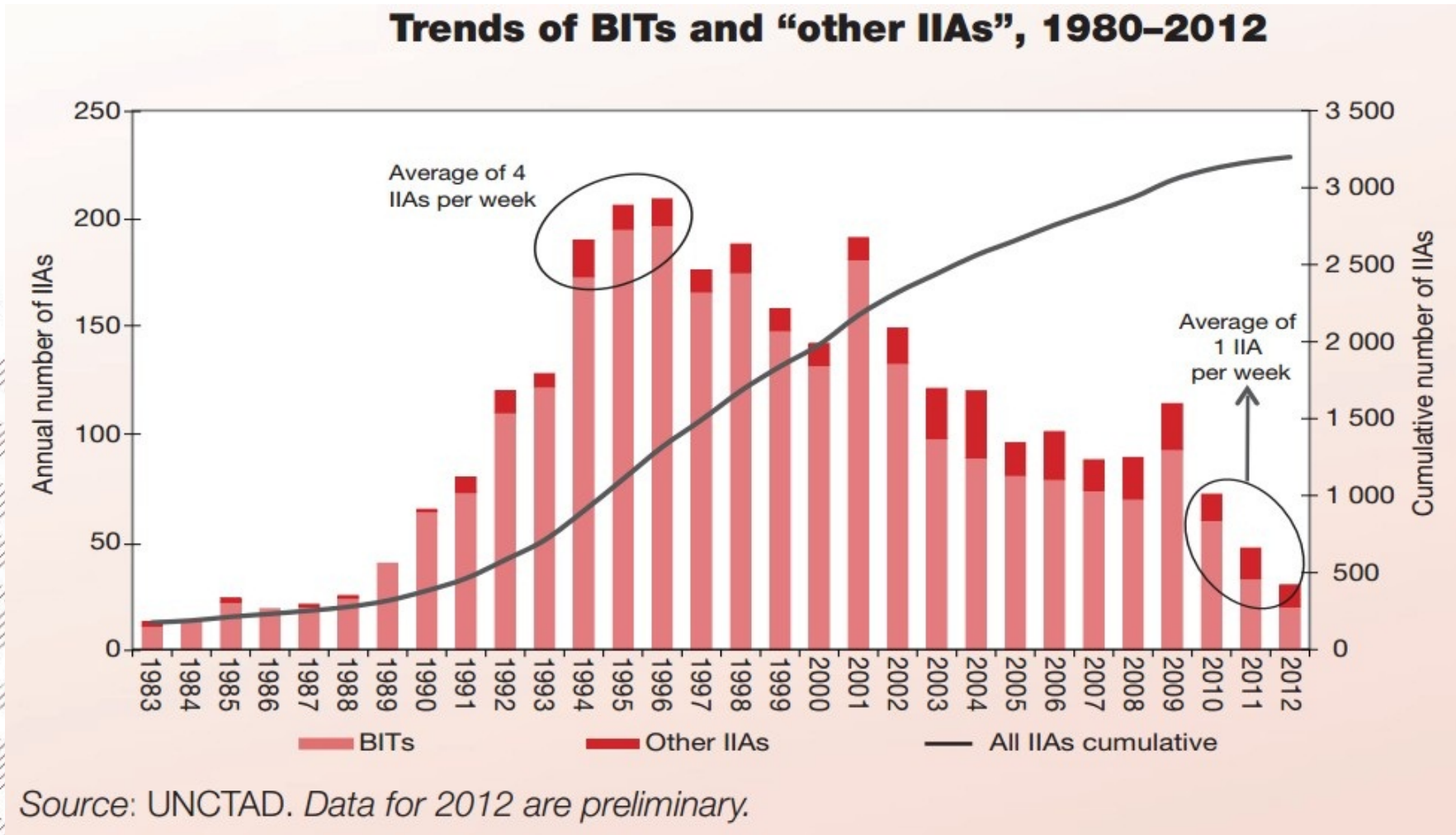
Why SMART: **Depoliticising** investment dispute settlement by allowing investors to directly resort to investor-state arbitration mechanism to resolve their disputes with the host state.

Therefore:

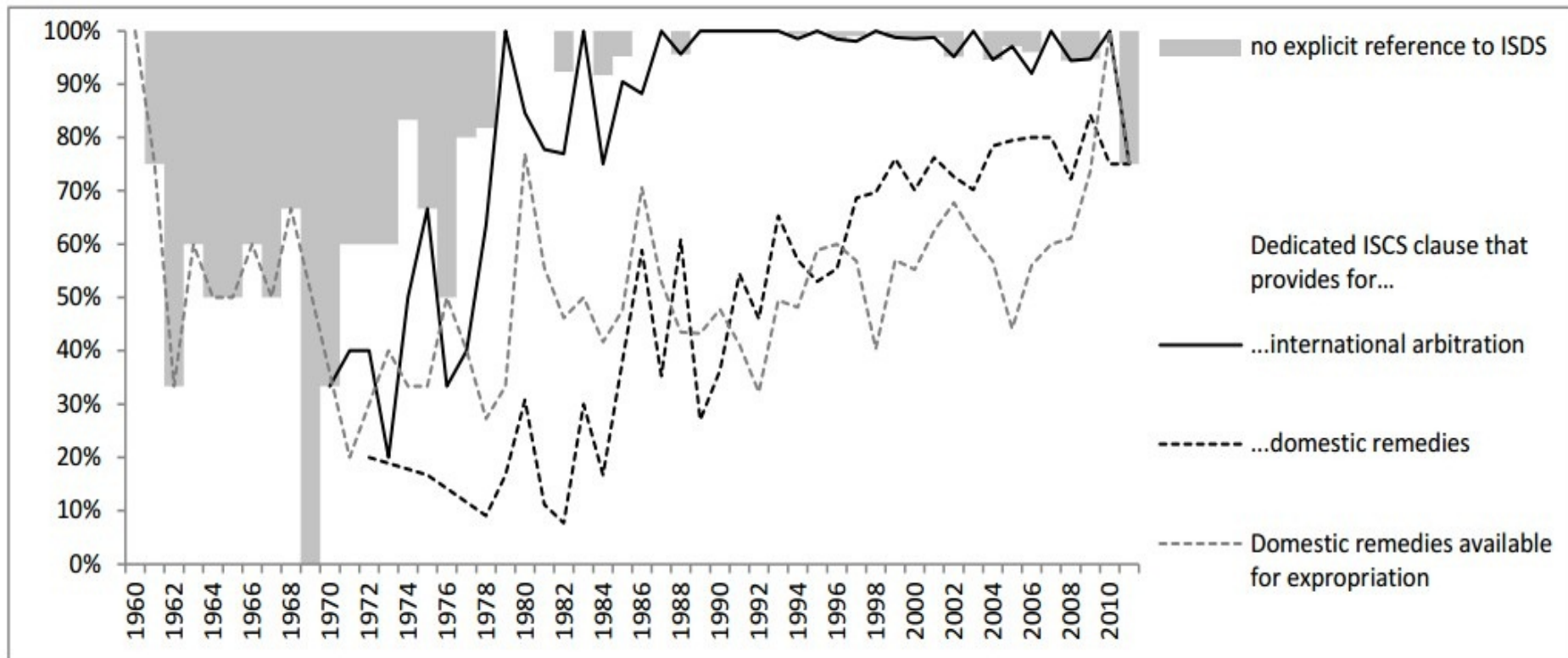
- DS becomes SMALLER and more HANDY (because it is no longer state-state business), and
- More INVESTOR(USER)-FRIENDLY (because investors can directly sue and appoint arbitrators)



3. Proliferation of IIAs



Proportion of bilateral treaties concluded in a given year that explicitly provide for access to international arbitration and domestic judicial review in dedicated sections on ISDS and to domestic judicial review in expropriation clauses; the grey shaded sections indicate the proportion of treaties that contain no explicit reference to an ISDS mechanism.



Joachim Pohl, Kekeletso Mashigo, Alexis Nohen (2012). "Dispute settlement provisions in international investment agreements: A large sample survey", OECD Working Papers on International Investment, No. 2012/2, OECD Investment Division, www.oecd.org/daf/investment/workingpapers. at p. 11



I. De-politicisation and Re-politicisation: The Turning Tides on ISDS

3. The Turning Tide: The “Re-politicisation” Practices:

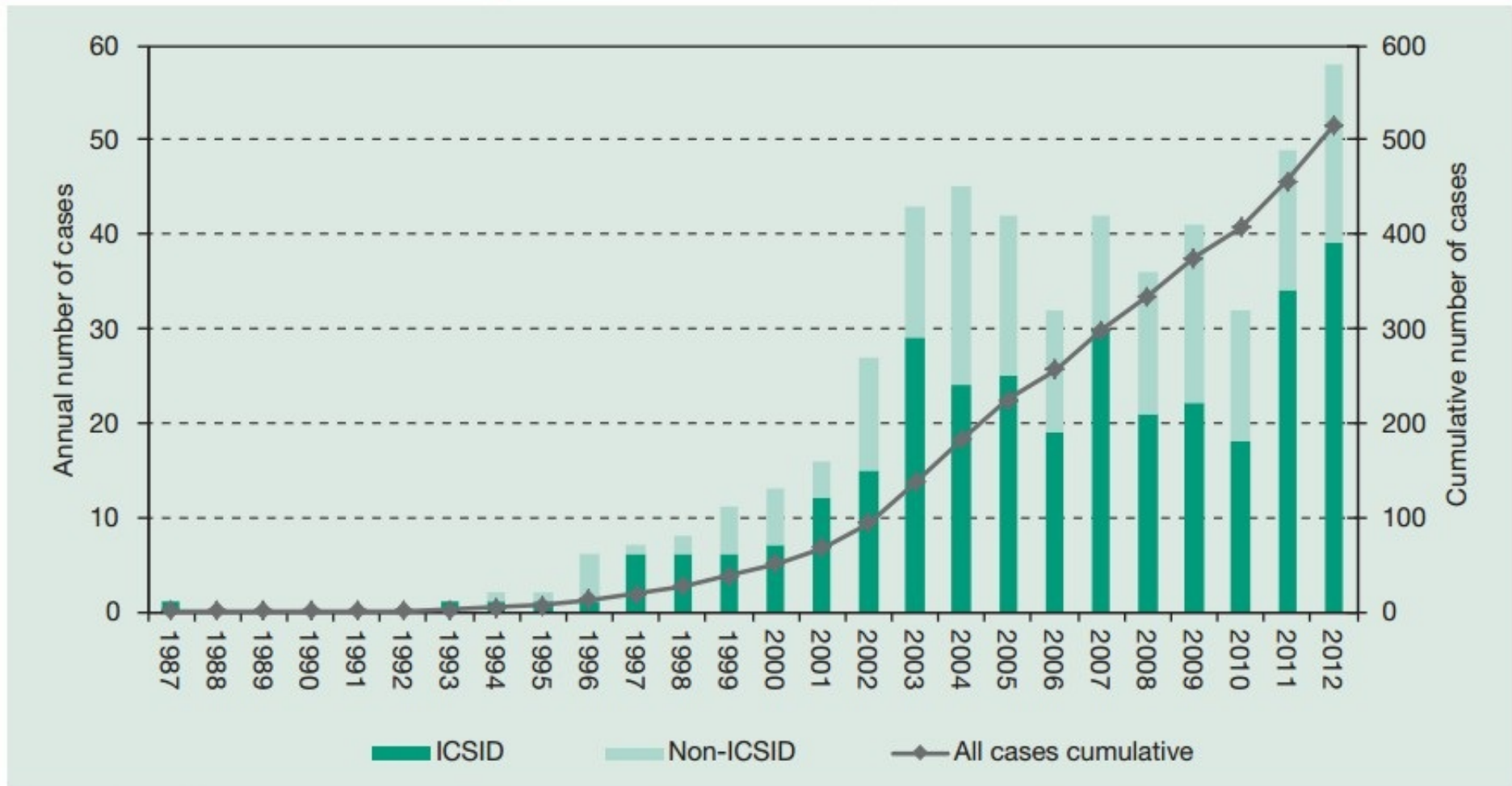
- Limiting the scope of ISDS
- Imposing controls over ISDS processes at different stages
- Abandoning ISDS altogether and reverting to the state-state diplomatic protection practices

4. Reasons:

- The surge of (increasingly complex) investment arbitration cases; and
- The legitimacy crisis of the ISDS system.



Known ISDS cases, 1987–2012

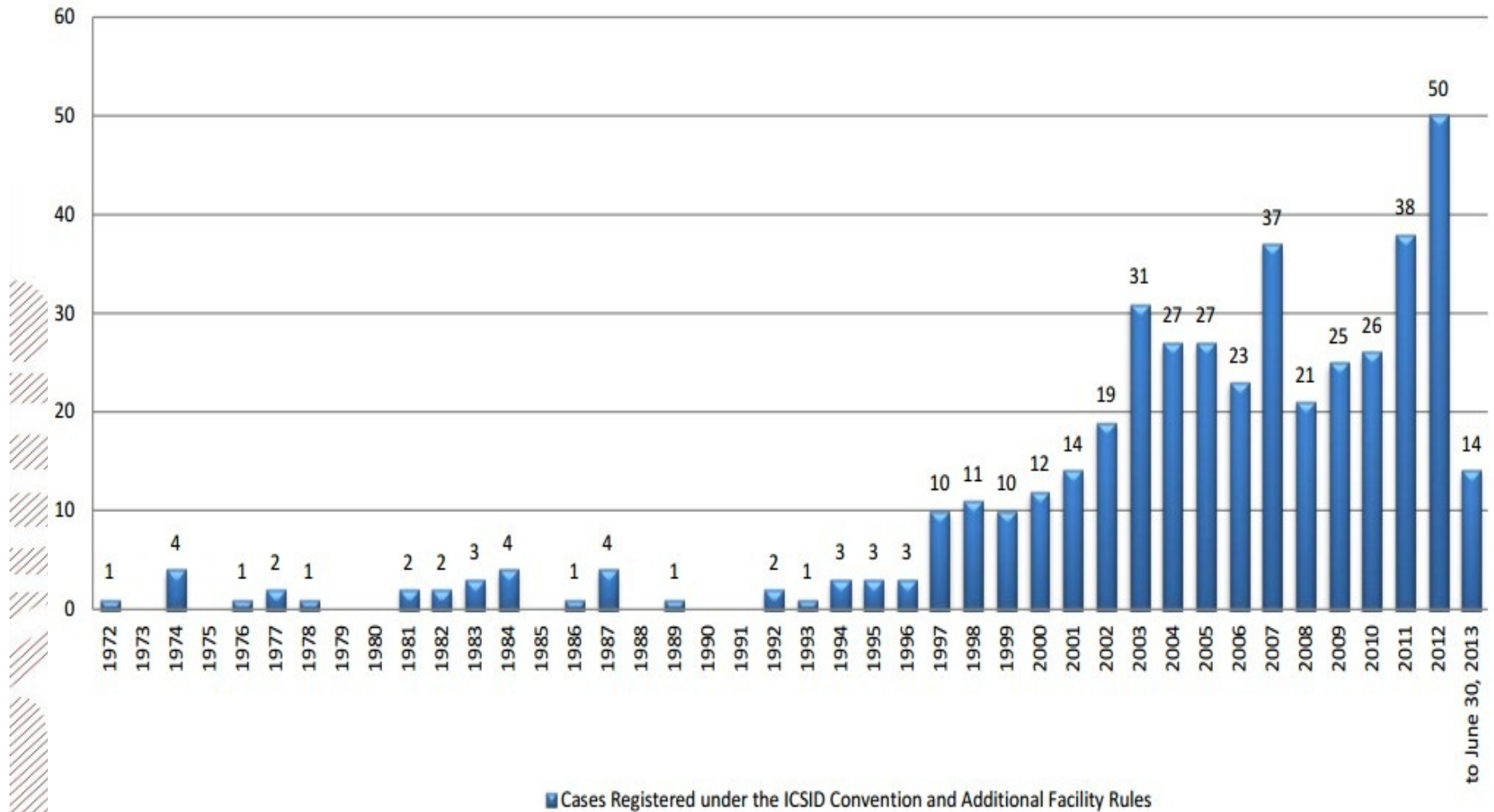


Source: UNCTAD.

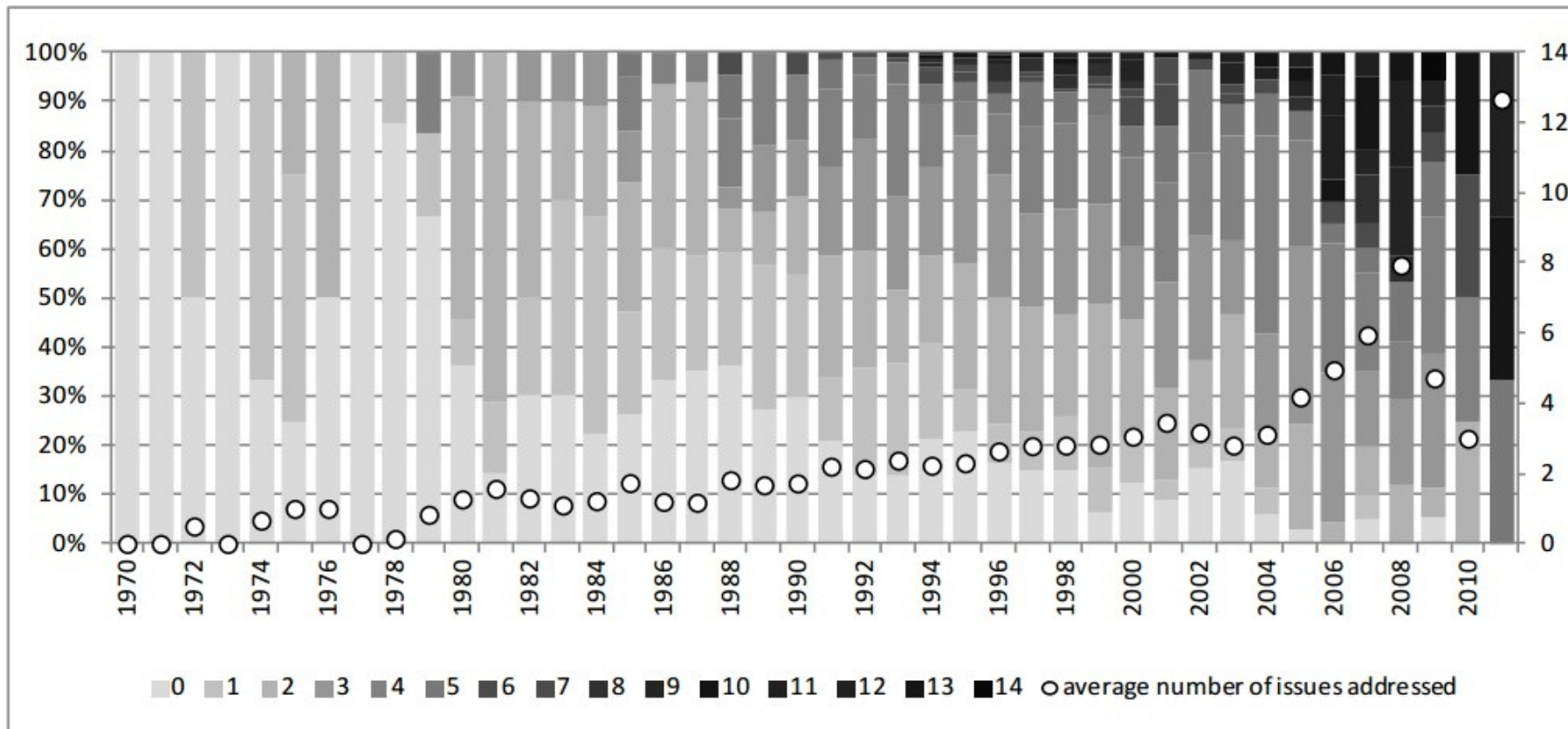


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Total Number of ICSID Cases Registered by Calendar Year:



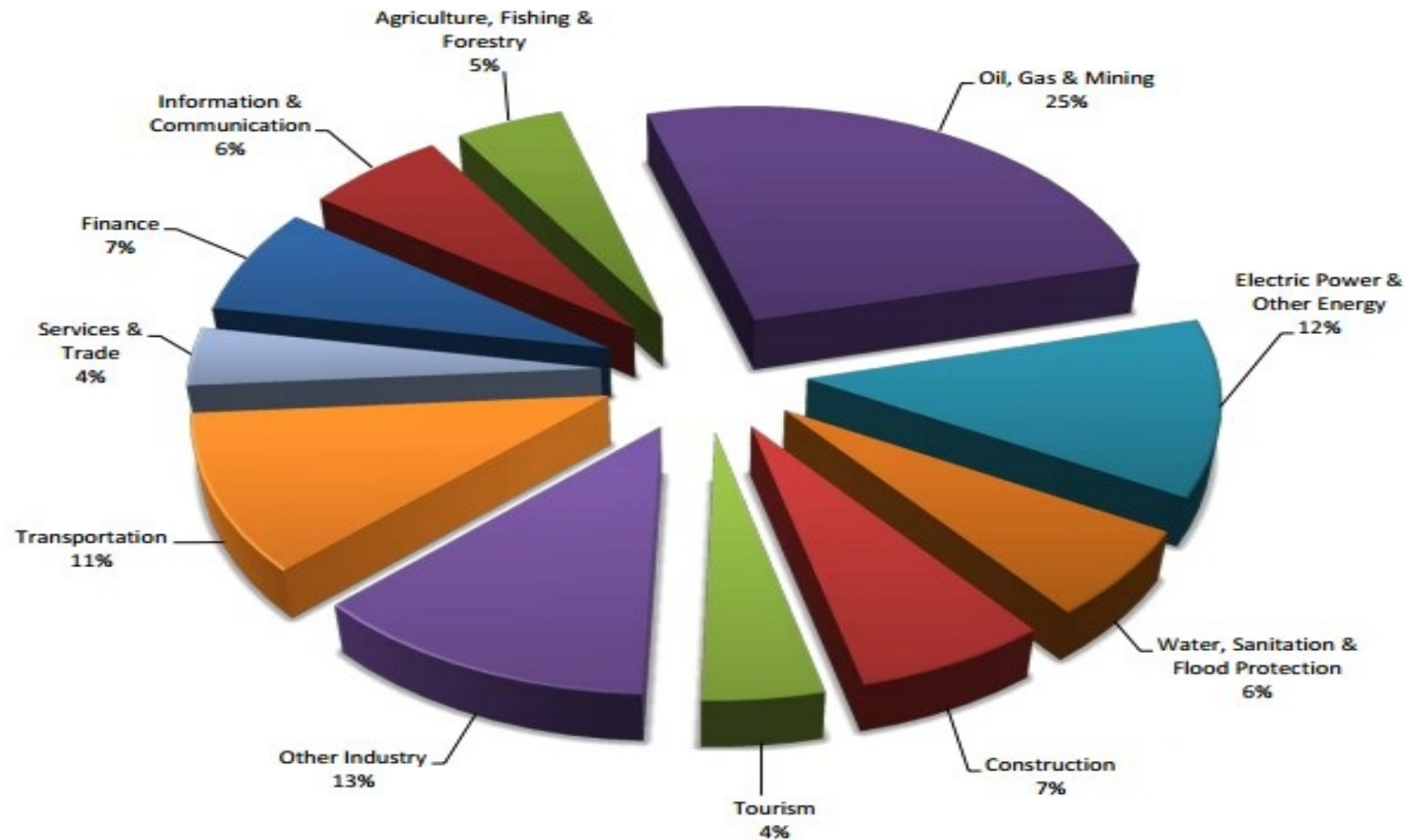
Average number of issues regulated in ISDS provisions in bilateral treaties concluded in a given year. Distribution (bars, left scale) and calculated average (dots, right scale).



Joachim Pohl, Kekeletso Mashigo, Alexis Nohen (2012). "Dispute settlement provisions in international investment agreements: A large sample survey", OECD Working Papers on International Investment, No. 2012/2, OECD Investment Division, www.oecd.org/daf/investment/workingpapers. at p.41



Distribution of All Cases Registered under the ICSID Convention and Additional Facility Rules by Economic Sector*:



Source:
ICSID
Caseload
Statistics
2013-2

* This sector classification is based on the World Bank's sector codes, available at <http://siteresources.worldbank.org/PROJECTS/Resources/SectorCodesLists.pdf>.



I. De-politicisation and Re-politicisation: The Turning Tides on ISDS

Legitimacy Crisis of ISDS--- ISDS no longer **SMART** as the **essentially commercial** DS mechanism is increasingly called upon to deal with issues of **public policy** and wide **social concern**:

(1) Policy space:

–increasing review of domestic public policy

(2) Inconsistent awards:

–Inconsistent interpretation; lack of predictability

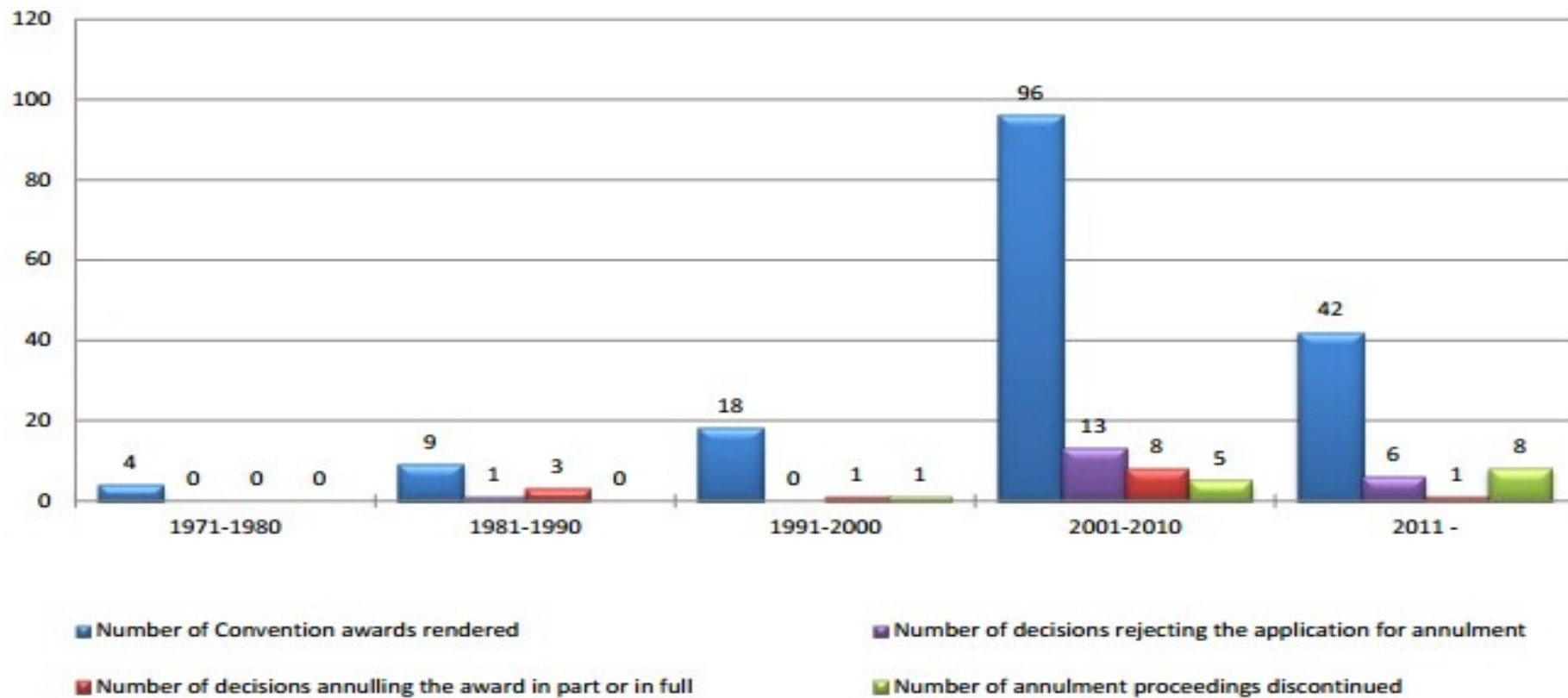
(3) Procedural maxim of arbitration:

–Confidentiality; public access to arbitral hearing and awards;
participation of non-disputing state





Awards Rendered and Outcomes in Annulment Proceedings under the ICSID Convention, by Decade:



Source: ICSID Caseload Statistics 2013-2



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II. Redefining and Rebalancing: The Reform Efforts on ISDS

- Revolution: Some Latin American States, Australia, South Africa
- Reform: Most other countries
 - Redefining the ambit of ISDS:
 - Carving-out and fine-tuning
 - Refine the ISDS procedures:
 - Joint determination (JD);
 - Joint interpretation (JI)
 - Appeal mechanism



Redefining the Scope of ISDS

	ISDS	No ISDS	Time limits
China-Canada BIT 2012	NT MFN MST Expr Trsf SM DB Fina Tax	NS review and approval of an investment(Art (34))	6 m cooling; within 3 year
CHN-JAP-KOR TIT 2012	“Any investment dispute” (art15.1); (Envn measures art23)	IP and prudential measures (art 15.12)	4 m cooling; within 3 years
US 2012 Model BIT	NT MFN MST Expr Trsf PR SM Publication	Envn and Lbr (art37) (and No G2G)	6m; within 3year
ECT 1994	Disputes relating to an investment under Part III (SM Expr Trsf Subrogation)	Only Expr applies to tax (art21(5)(a))	3m;



Refining Corresponding ISDS Procedures

	Prerequisite procedure	Optional procedures	Appeal	Interpretation
China-Canada BIT 2012	--	JD for prudential measures (or G2G)		
CHN-JAP-KOR TIT 2012	JD for tax (art21.5.b)	--		
US 2012 Model BIT	JD for tax (6m)(art21)	JD for financial services (4m)(art20)	Appeal (art 28(10))	JI (art30-31)
China 2010 Model BIT	JD for tax (6m)(art11)			JI (2m)
ECT 1994	JD for tax (6m)(art21(5)(b)(ii))	--	--	



Is there a way to
rationalize ?
the *fragmented* practices in
ISDS reform



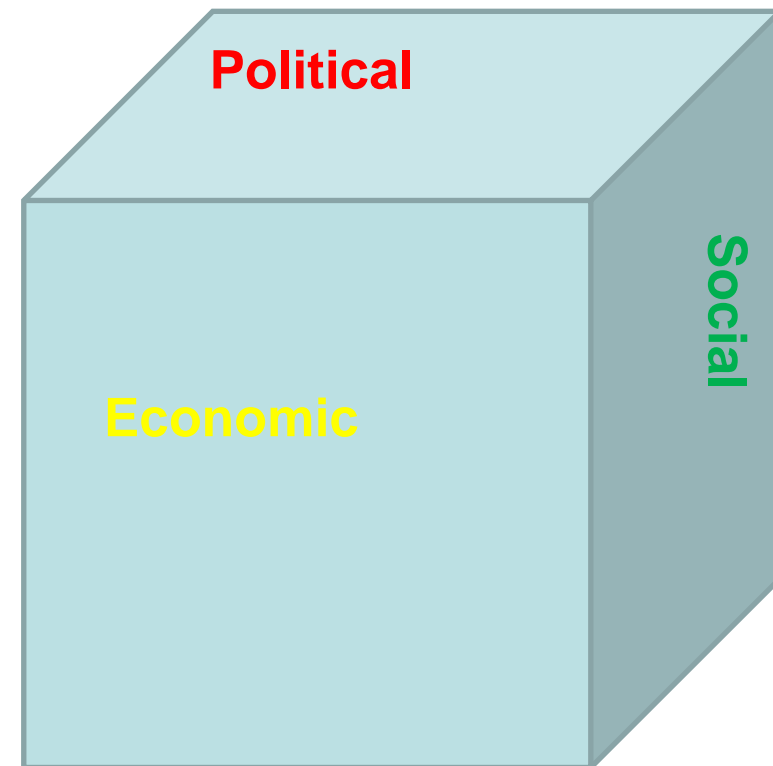
III. Political and Social Dimensions: A Matrix Analysis on ISDS

The 3-D of an investment Dispute:

Economic

(*fundamental/default*), Political
and Social dimensions

- **Pure or primary economic disputes:** smarter and easier to deal with
- But, when it is **compounded with significant political and social interests**, it is no longer smart and cannot be easily swallowed by ISDS.



Investment Disputes and Their Settlement

<p>Political</p> <p>Disputes</p>	<p>High</p>	<p>Low</p>
<p>Social</p> <p>High</p>	<p>Red Zone (for both politically sensitive and socially influential disputes)→</p> <p>No ISDS or closely State controlled and socially monitored ISDS</p>	<p>Blue Zone (for socially influential but politically less sensitive disputes)→</p> <p>Socially monitored ISDS</p>
<p>Low</p>	<p>Yellow Zone (for politically sensitive but socially less influential disputes)→</p> <p>State Controlled ISDS</p>	<p>(Green Zone, for purely or primarily economic disputes)→</p> <p>ISDS</p>



An Application of the Matrix Analysis

Disputes Social	Political	
		High
High	No ISDS or closely state controlled and socially monitored ISDS (essential security)	Socially Monitored ISDS (transparency, amicus curie submissions etc to address social concerns)
Low	State Controlled ISDS (JD or/and JI, for e.g., taxation, prudential measures)	ISDS (NT, MFN, FET, Transfer)

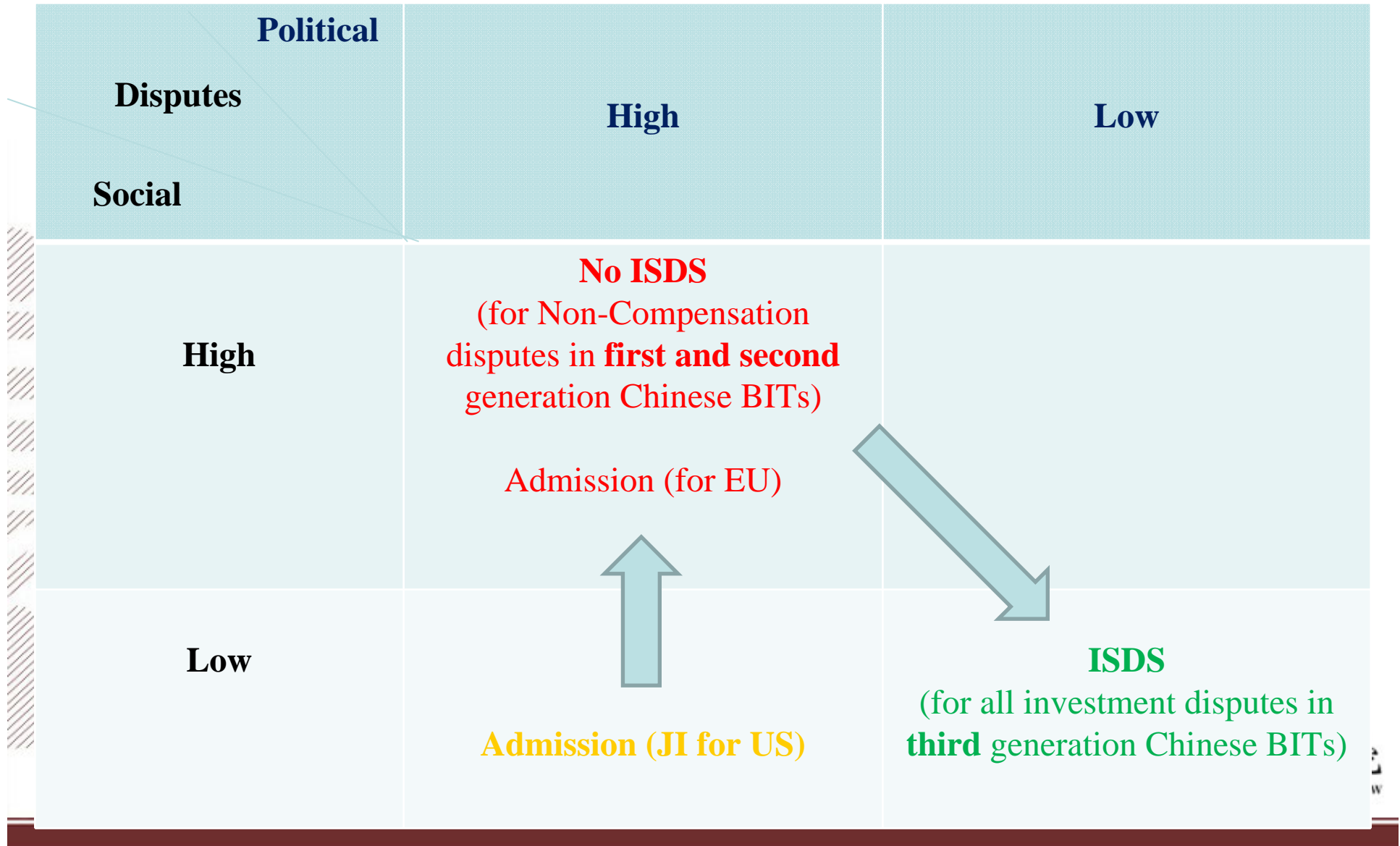


More careful analyses needed

- Techniques such as JI, JM, appeal and transparency, third party participation are useful to enhance political and social legitimacy, but they may not necessary fit for all disputes.
- More careful analyses are needed on both the disputes and the DS techniques to find best matches.



The Places and Time Dimensions



Conclusions:

- ISDS is a SMART DS mechanism intended for settling economic/property disputes, which becomes clumsy when it started to engage in politically and socially sensitive issues.
- A political/social matrix analysis may help to rationalize the current and future ISDS reform efforts.
- The types of disputes and DS techniques need to be more carefully analysed to achieve best matches or more tailor-made DS mechanisms.



Many thanks!



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