

The Rationale of ISDS Reform

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I ISDS: Its Birth and Background

1. The rationale of the ISDS system

In search of a “smart” DS for investment disputes of purely or primarily economic/commercial nature.



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.

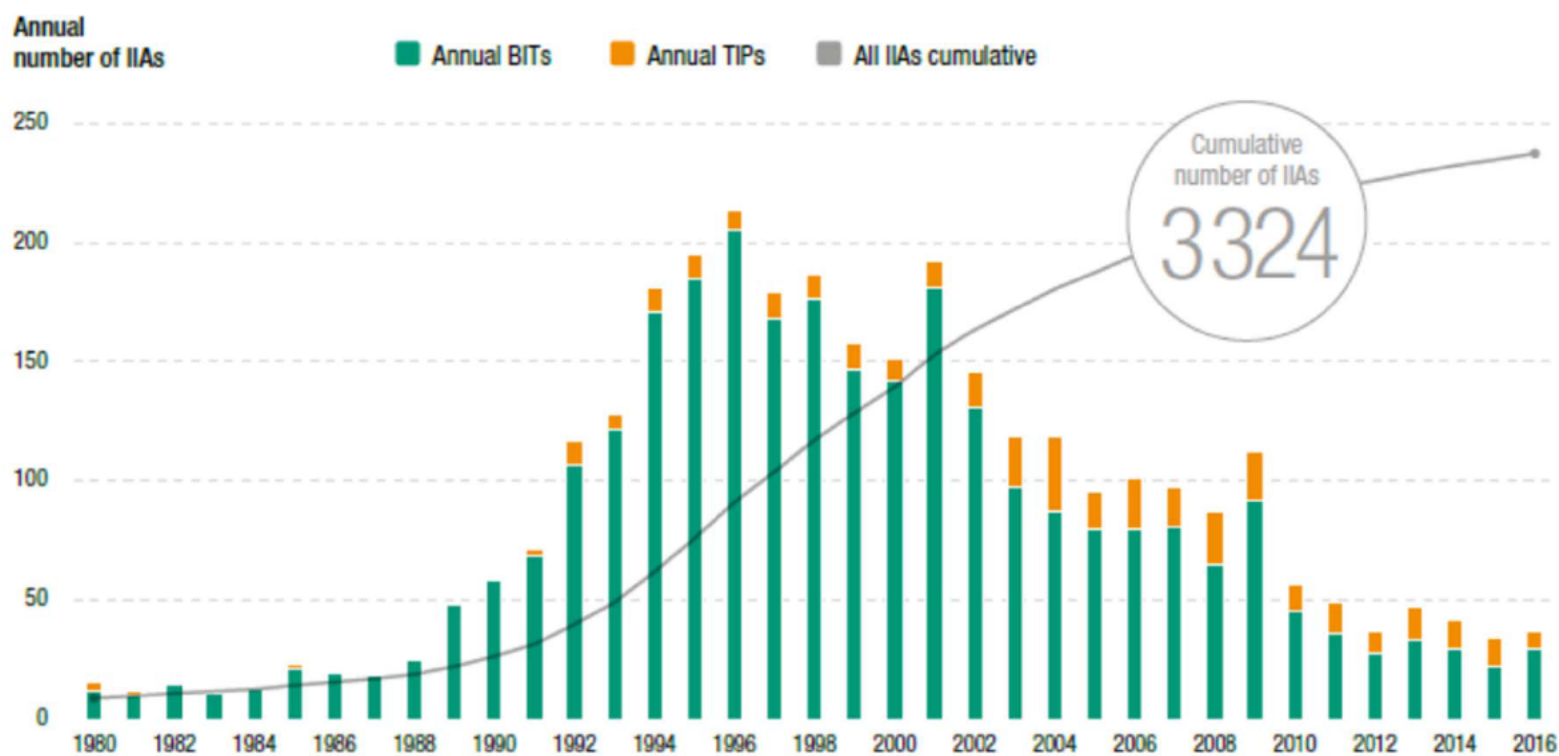
ICSID and Later BITs

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



Proliferation of IIAs

Figure III.11. Trends in IIAs signed, 1980–2016

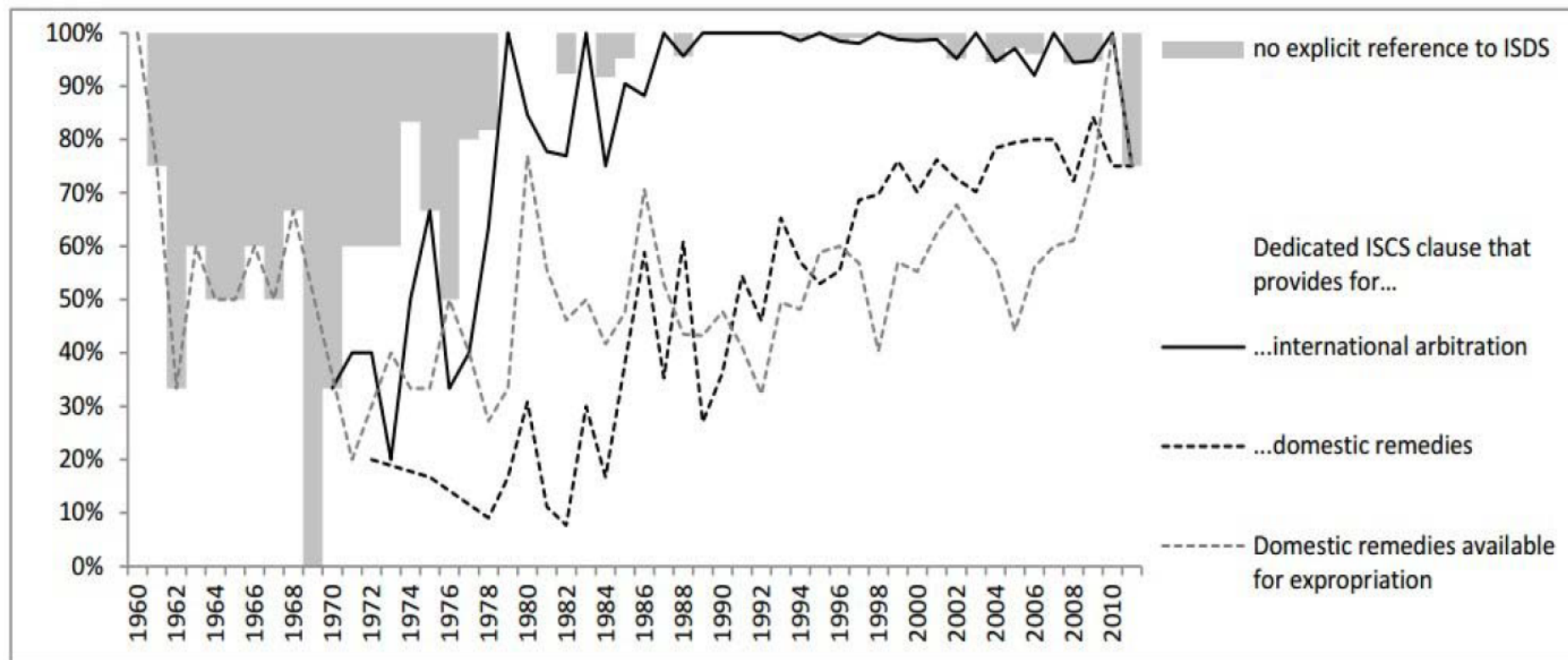


Source: ©UNCTAD, IIA Navigator.



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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



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2. The “smartness” of the system

- For investors, they do not need to beg their home states to espouse their disputes against the host states but could directly sue the host state.
- For home states, they are freed from direct involvement in investment disputes of their investors
- For host states, they do not have to directly confront normally more powerful capital exporting states on the one hand and they may attract FDI by accepting such mechanism.
- For all players, it is smart because it is based on a international arbitration, which has been widely accepted as the most appropriate mechanism for settling international commercial disputes.



3. The presumed pre-conditions for the proper functioning of the system

The system should be:

- Either confined to only economic/commercial or similar disputes, or
- Adjusted accordingly if it is dealing with non-economic or non-commercial disputes.



II Critics of ISDS: Facts and Responses

1. Facts

Legitimacy Crisis--- 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

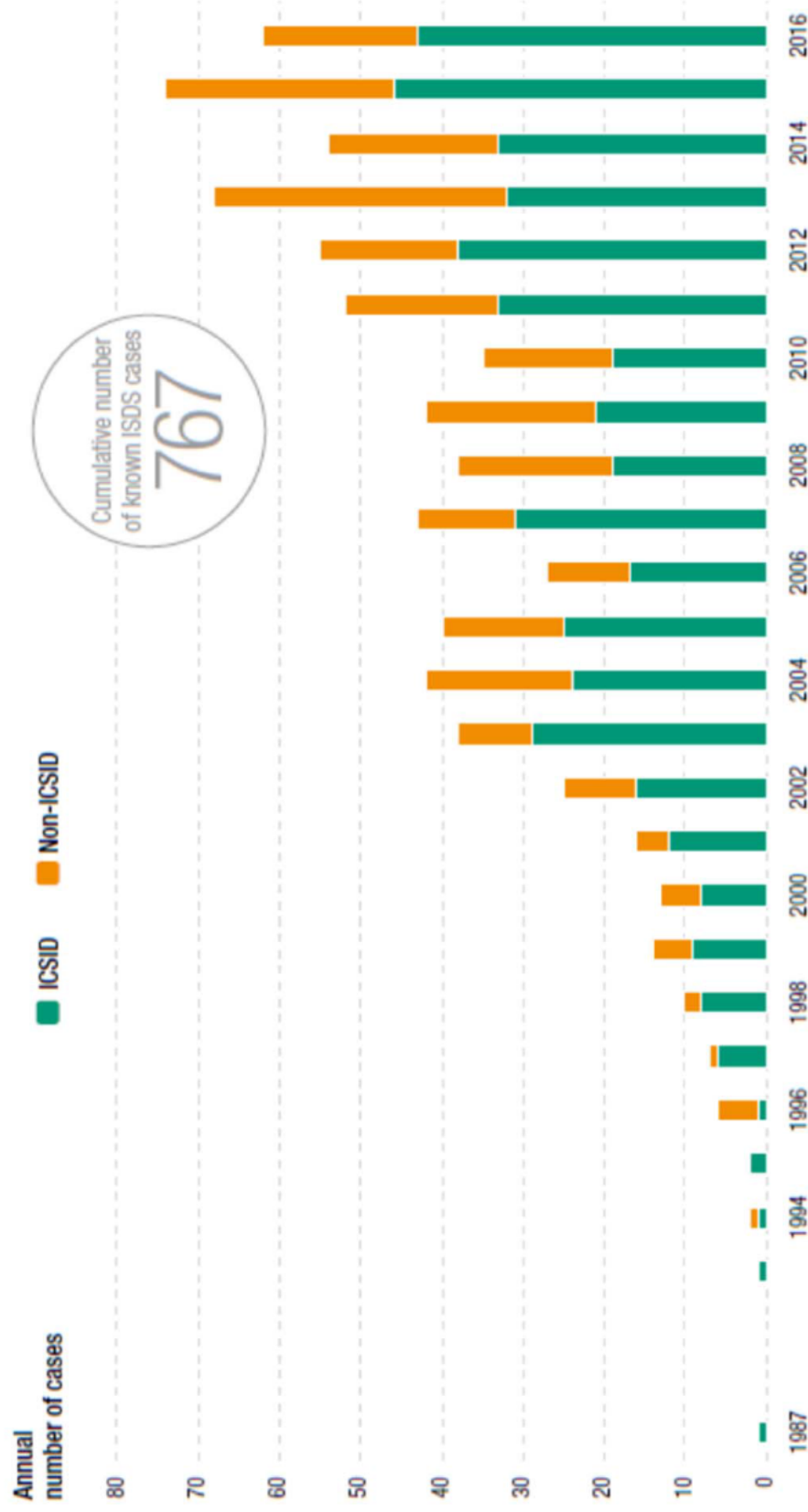
—Inconsistent interpretation; lack of predictability

(3) Procedural maxim of arbitration

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



Figure III.12. | Trends in known treaty-based ISDS cases, 1987–2016

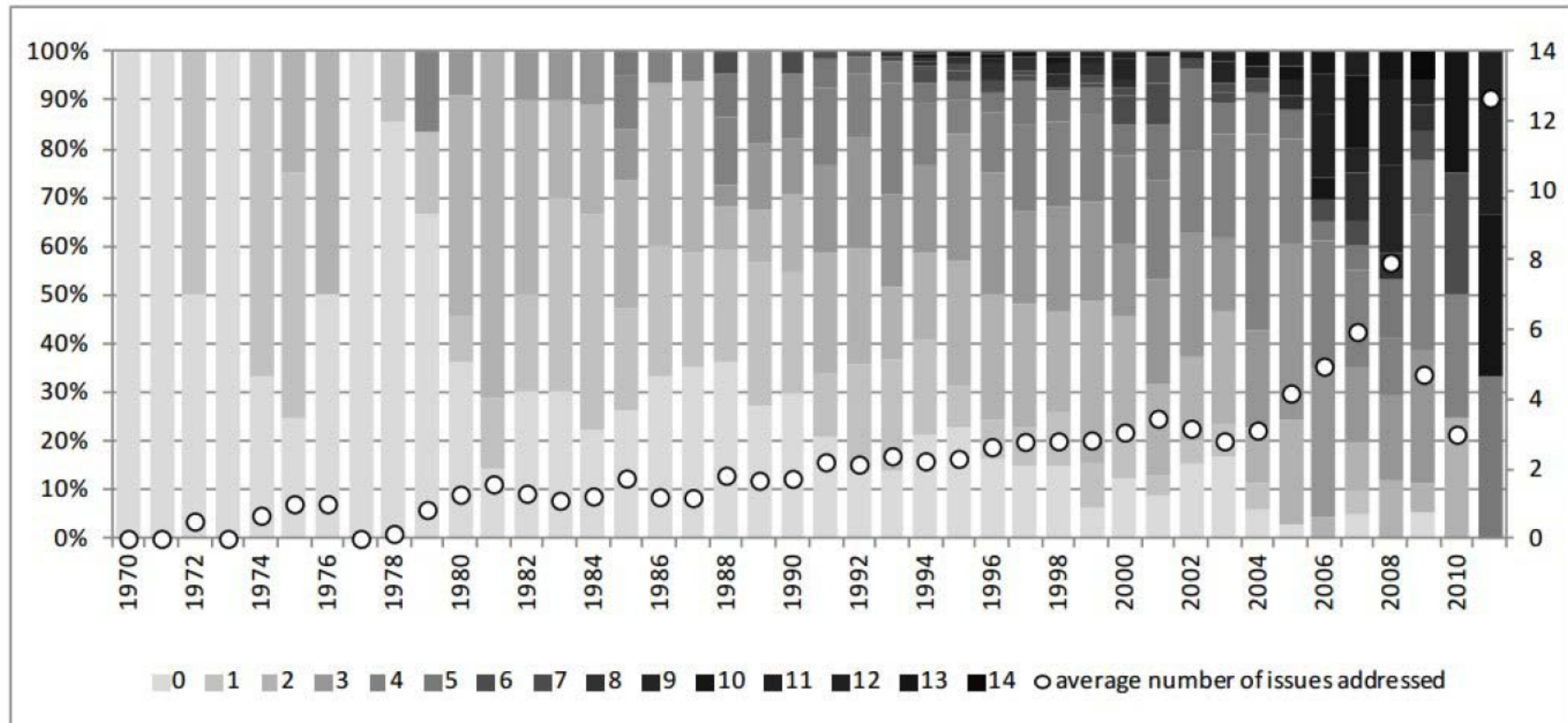


Source: ©UNCTAD, ISDS Navigator.

Note: Information has been compiled on the basis of public sources, including specialized reporting services. UNCTAD's statistics do not cover investor-State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signalled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continuously adjusted as a result of verification and may not match case numbers reported in previous years.



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).

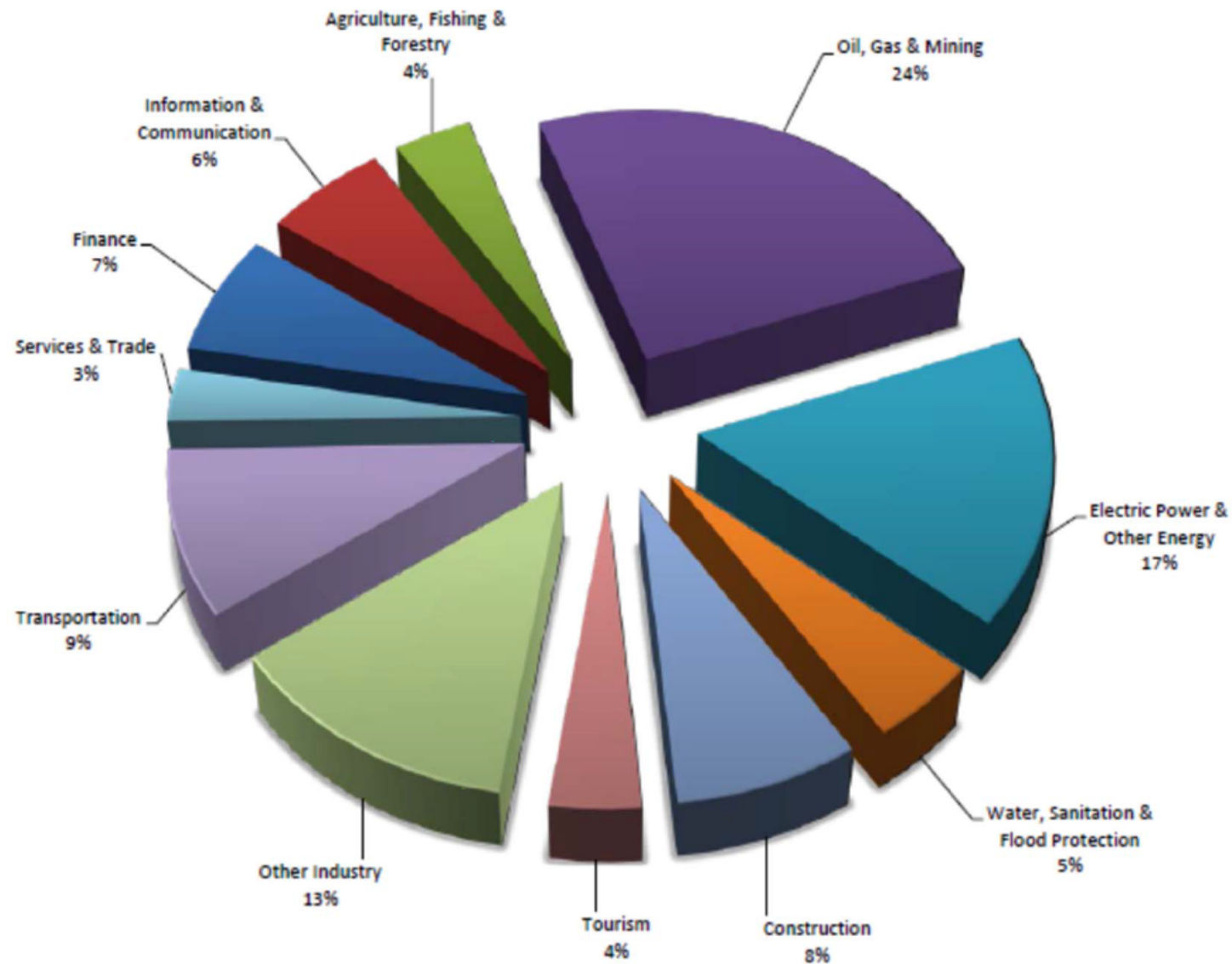


Joachim Pohl, Kekeletso Mashigo, Alexis Nohen (2012). "Dispute settlement provisions in international investment agreements: A large sample survey", OECD Working Papers on International Investment, No. 2012/2, OECD Investment Division, www.oecd.org/daf/investment/workingpapers. at p.41



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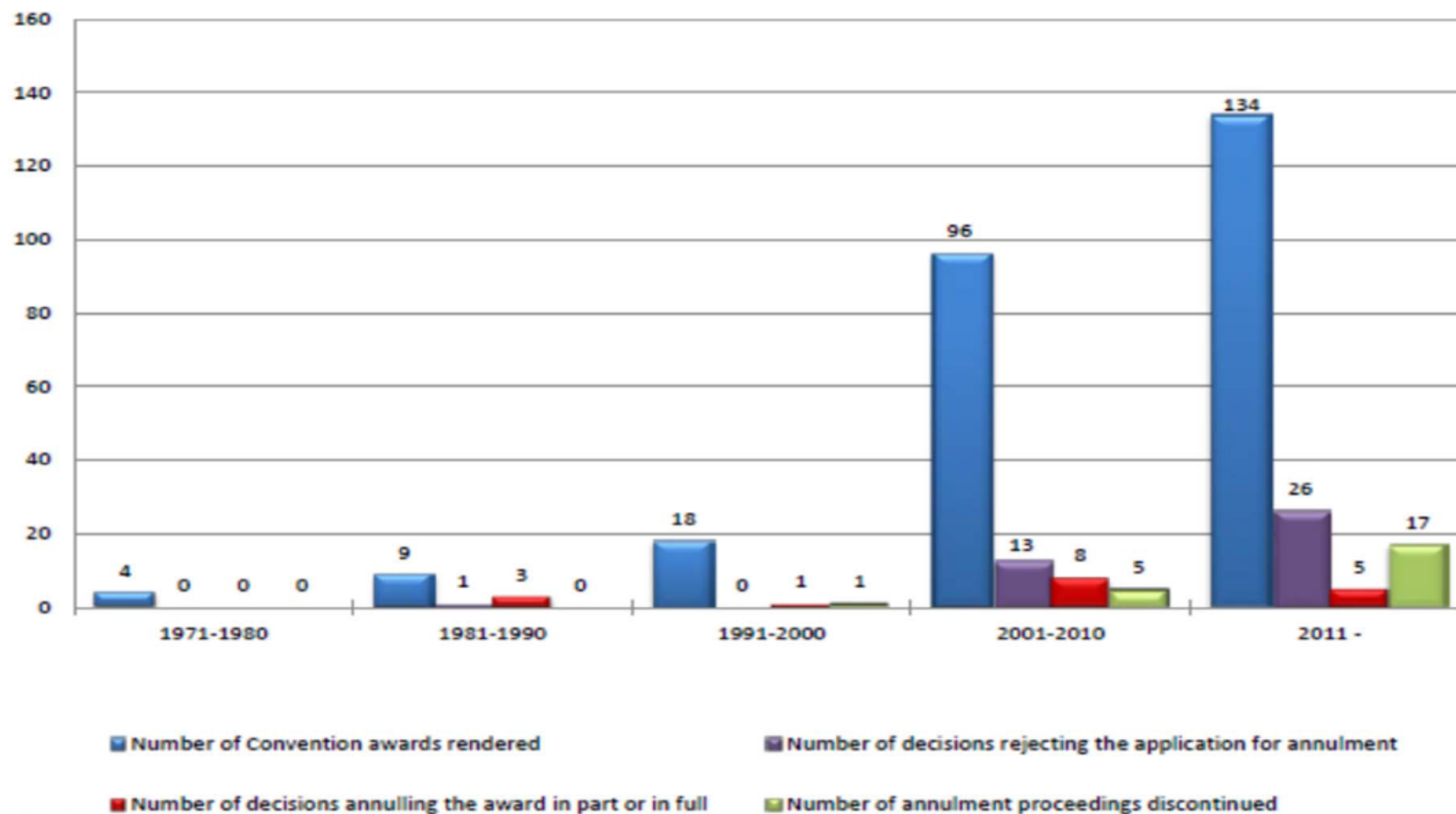
Chart 7: Distribution of All Cases Registered under the ICSID Convention and Additional Facility Rules, by Economic Sector*:



Source:
ICSID
Caseload
Statistics
2017-2

8. Annulment Proceedings under the ICSID Convention – Outcomes

Chart 11: Awards Rendered and Outcomes in Annulment Proceedings under the ICSID Convention, by Decade:



Source: ICSID Caseload Statistics 2017-2



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2. Responses

- Revolution: European Union (ICS), Some Latin American States.
- Reform: Most other countries
 - Redefining the ambit of ISDS:
 - 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
EU-Canada CETA	Post-establishment Non- discrimination Treatment, Investment Protection	Whole Section of Reservations and Exceptions	180 days



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)
EU-Canada CETA	Consultation	--	Appeal (Art 8.28)	JI (Art 8.42)



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



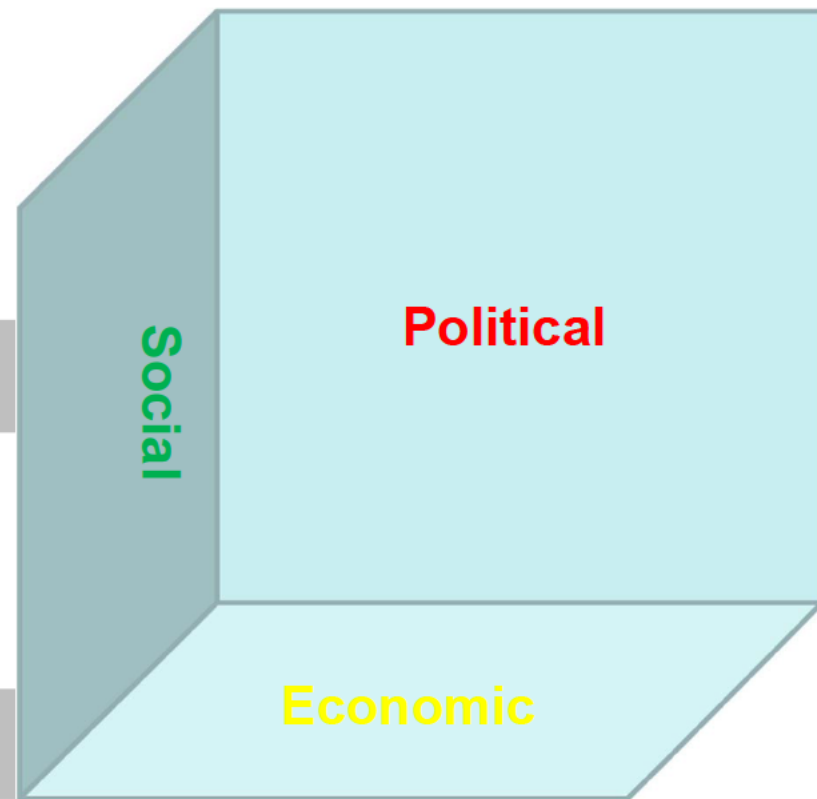
III Reforming the ISDS System: A Matrix Analytical Framework

The 3-D of an investment Dispute:

Economic

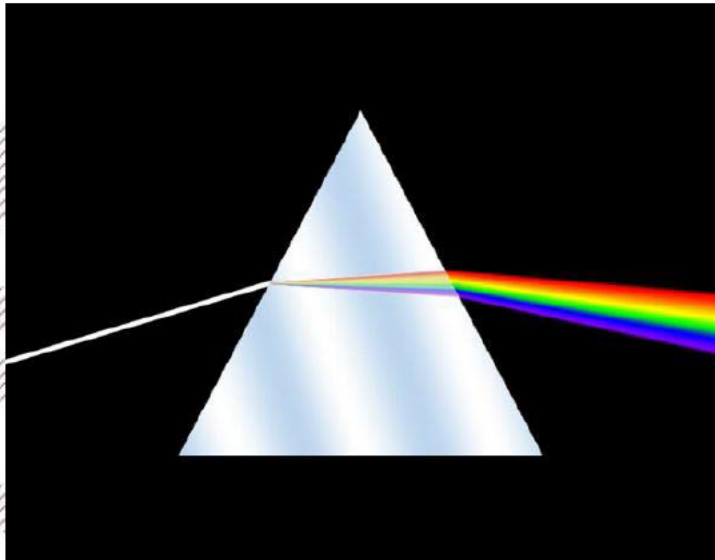
(*fundamental/default*), Political
and Social dimensions

- **Pure or primary economic disputes (“a flat or thin piece”)**: smarter and easier to deal with
- But, when it is **compounded with significant political and social interests (“a big chunky box”)**, it is no longer smart and cannot be easily swallowed by ISDS.



Investment Disputes in Perspective

A Prism for Investment Disputes



Matrix of Investment Disputes

<div>Political Sensitivity</div> <div>Social Sensitivity</div>	High	Intermediate	Low
High	Red Zone (politically and socially sensitive disputes)		
Intermediate		Yellow Zone (politically or socially sensitive disputes)	
Low			Green Zone (politically and socially insensitive disputes)



Further complications

➤ The Geographic Dimensions of the Matrix

- Different countries might view the same dispute differently in terms of its political and social effects.

➤ The Temporal Dimensions of the Matrix

- The same country might change its position on the same dispute from time to time.



IV. The “Re-smartising” Techniques: Cuts and Controls

1. Cuts:

- to cut the number of investment disputes by either expressly excluding certain of them from ISDS or attaching mandatory pre-arbitration steps to filter frivolous claims.
- Techniques: Exclusion; Filtering

2. Controls:

- After arbitration started, measure to control the arbitration process making sure it is conducted in a way that addresses the relevant political and social concerns.
- Techniques: State control; Social monitoring



1. Cuts

- Exclusion: outright cut of certain disputes from ISDS:

Application: Red Zone disputes

- Direct exclusion: directly excluding certain disputes from ISDS, E.g. NS in China-Canada BIT
- Indirect exclusion: limiting the scope of application of key substantive provisions to narrow down the basis of ISDS and hence indirectly cut the potential ISDS cases: e.g. the narrowing down of the definition of “investment”, the General Exception clauses in China-CANADA BIT and the commonly found “police power” exception on indirect expropriation



1. Cuts

- Filtering: Preliminary steps (pre-arbitration) to filter frivolous claims and prepare parties for serious claims

Application: all zones

- mandatory consultation (similar to WTO, claims that are not included in the consultation cannot be raised in arbitration stage): CETA
- Local Administrative Review (LAR): E.g., Chinese BITs
- Exhaustion of local remedies (India Model BIT 2015)
- Joint determination on certain disputes, e.g., on taxation



2. Controls

- State control: state control on the arbitration process:

Application: Red or Yellow Zone disputes

- JD: e.g., on prudential measures
- JI: on annexes in US model BIT or on all provisions as in NAFTA
- Appeal: in EU ICS, US model 2004 and 2012 and in certain US BITs



2. Controls

- Social Monitoring: Social input to address social concerns in investment disputes

Application: Green or Red Zone disputes

- Transparency
- Amicus curiae submission



V The Future: A “one size fits all” or “mix & match” solutions?

➤ Which solution?

➤ ISDS; Refined ISDS; or ICS?

➤ Or a “mix and match” of all?



<div>Political Sensitivity</div> <div>Social Sensitivity</div>	High	Intermediate	Low
High	Red Zone <i>G2G / Domestic Court</i>		
Intermediate		Yellow Zone <i>Refined ISDS</i>	
Low			Green Zone <i>Inte'l Commercial Arbitration</i>



VI Conclusions

- The ISDS system should be a “Smart” mechanism for a depoliticised, professional and swift settlement for investment disputes of pure or primarily economic or property nature.
- This system became “Unsmart” as it trespassed into issues of high political and social concerns.
- A “Matrix Analytical Framework” based on a 3-D analysis of the economic, political and social factors of the investment disputes helps to rationalise current ISDS reform proposals and to guide future reform agenda.



VI Conclusions

- Specific techniques to cut (exclusion or filtering) and control (including state control such as joint determination, joint interpretation and appeal, and social monitoring including transparency and amicus curiae submission etc) are analysed to match the varied needs of different investment disputes in accordance with such Matrix Analytical Framework.
- It is uncertain which solution will prevail in the future. The ICS system points to the right direction but may take time to take ground. Meanwhile, the ISDS system, as refined or “publicised”, may continue to play a major role in investment dispute resolution. Rome is still being built!



THANK YOU



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