Interaction between BITs and the GATS
(What BIT signatories may want to keep in mind)

Rudolf ADLUNG
A story you may not have heard of before …

… the story of a country with three governments.
These are:

- **Foreign-Policy Government (FPG)**
  Invites foreign Presidents and PMs in order to promote international relations

- **Finance- and Investment Policy Government (FIPG)**
  Uses this opportunity to sign BITs based on the partner countries’ templates*

- **Trade-Policy Government (TPG)**
  Insists in the WTO that investment issues are not covered

* Total number of BITs: ≈ 2’900

But coordination matters…
► ca 60% of world FDI stock is in services
► Presence of foreign-invested suppliers falls under mode 3 (‘commercial presence’) of GATS
► MFN obligation applies regardless of existence of specific commitments*
► Therefore: Bilateral Investment Treaties (BITs) are ‘multilateralized’ – unlike *GATS-consistent* RTAs

* Exception: 17 WTO Members have listed MFN exemptions for their BITs.
Result of inter-ministerial coordination?
Structure of BITs signed with United States (June 2006)

<table>
<thead>
<tr>
<th>Country group</th>
<th>Sector coverage of BITs</th>
<th>Sector coverage of GATS commitments</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Average</td>
<td>Range</td>
</tr>
<tr>
<td>LDCs (4)</td>
<td>≈ 130</td>
<td>≈ 86-157</td>
</tr>
<tr>
<td>Developing (17)</td>
<td>≈ 131</td>
<td>≈ 93-157</td>
</tr>
<tr>
<td>Transition* (15)</td>
<td>≈ 131</td>
<td>≈ 94-157</td>
</tr>
<tr>
<td>Total (36)</td>
<td>≈ 131</td>
<td>≈ 86-157</td>
</tr>
</tbody>
</table>

* Including recent EU accession countries.  
Source: Adlung & Molinuevo (2008)
Rather than accepting existing BIT and RTA templates per se, it might be preferable first to think about potential consequences …

Starting point:

Liberal investment regimes are in a country’s economic self-interest and should therefore not be considered a ‘concession’ in trade negotiations.

BUT …
A range of issues remains to be clarified – within and between countries:

► Role of Investor-State DS, combined with monetary compensation? (→ potentially costly)
► Exclusion of certain issues from ISDS?
► Use of WTO-/GATS-type exceptions and carve-outs (→ SDGs, prudential measures, capital controls)?
► Sector coverage?
► Exclusion of sub-federal entities?
► Scope of national-treatment obligation? Inclusion of pre-establishment stage (→ ‘policy space’)?
► Possibility of ‘treaty shopping’ (→ scope of MFN clause)?
► Other issues (e.g., coverage of government procurement? Notification under GATS Art. III:3?)
Reminder: There are organizations in Geneva that could serve as fora for conceptual discussions and information exchange …

THANK YOU

rudolf.adlung@gmail.com