LDC Services: Geneva practitioners' seminar series on making sense of the GATS and applying good practices in services negotiations

Seminar 5: "Services in bilateral, regional and plurilateral negotiations: implications for the GATS and for LDCs"

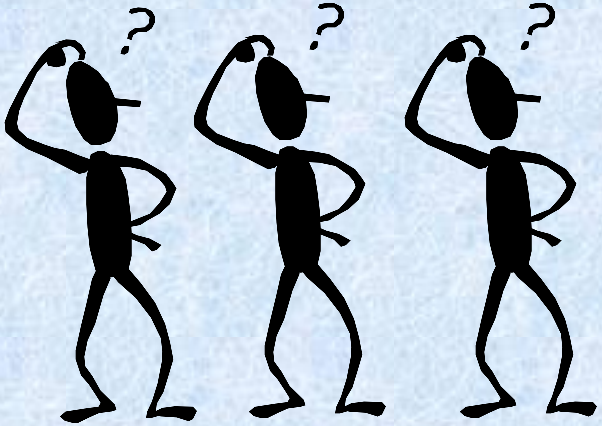
Interaction between BITs and the GATS

(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)

Country group	**Sector coverage of BITs**		**Sector coverage of GATS commitments**	
	Average	Range	Average	Range
LDCs (4)	≈ 130	≈ 86-157	17	9-29
Developing (17)	≈ 131	≈ 93-157	40	3-110
Transition* (15)	≈ 131	≈ 94-157	120	37-147
Total (36)	≈ 131	≈ 86-157	63	3-147

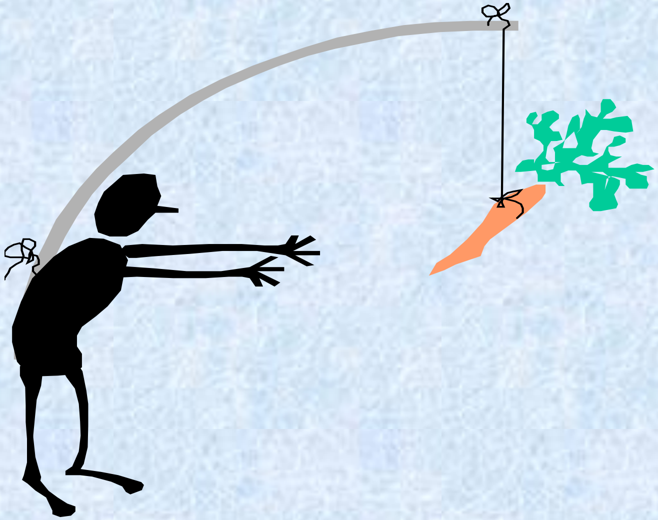
* Including recent EU accession countries.

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

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