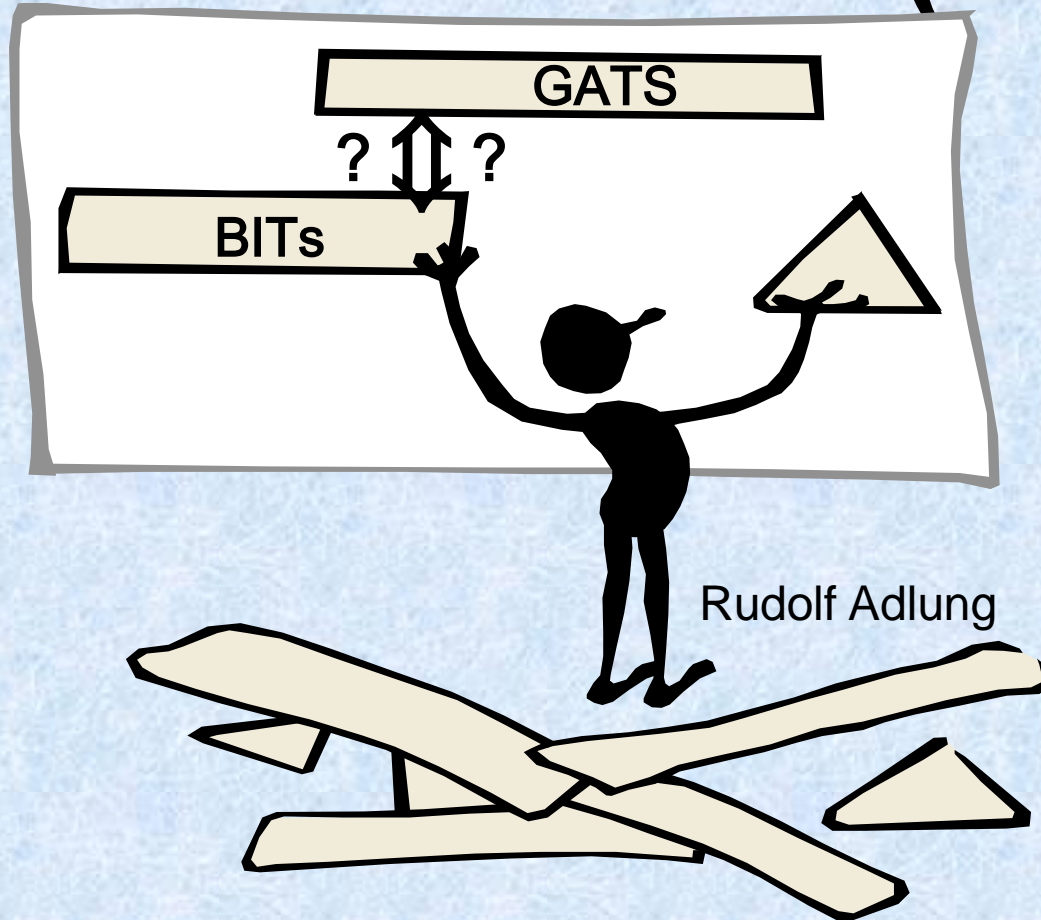


# Services Trade and Bilateral Investment Treaties (BITs)



## A priori expectation:

*'Bilateral investment agreements that focus on the non-discrimination in the treatment of foreign firms, lay specific standards of investment protection and contain provisions for the settlement of disputes, have an important impact on FDI inflows'*

(Banga, 2006)

... about 60 per cent of world investment stocks are in services

# BITs – A common feature of international economic relations

- Some 2'800 BITs signed to date, close to 2'000 have been ratified
- Virtually all Members are involved\*
- Most frequent signatories:  
Germany (> 130), China (> 110 ),  
Switzerland (> 110) and UK (> 100)

\* Some 95% of WTO Membership.

# BITs – Main Elements (I)

## Comparative standards of treatment

- MFN treatment among signatories
- National treatment of foreign-invested firms
  - Post-establishment: ‘Protection Treaties’
  - Pre- and post-establishment: ‘Liberalization Treaties’ (< 4% of all BITs)

# BITs – Main Elements (II)

## Other Treaty obligations (with/without equivalents in GATS?)

- Fair and equitable treatment
- Guarantees against expropriation
- Dispute Settlement (incl. Investor-to-State)
- Others (Transfers of funds, performance requirements, etc.)

# A Closer Look at 'Liberalization BITs'

## MAIN PROPONENTS

- **United States (~ 40 treaties)**
- **Canada (subject to grandfathering)**
- **Finland (recent BITs)\***
- **Japan (recent BITs)\*\***

\* Pre-establishment rights only for mergers and acquisitions

\*\* Significant sector reservations

# BITs vs. GATS (I)

- **BIT obligations extend to ‘measures affecting trade in services’ in the sense of Article I:1 of the GATS**
- **They are thus subject to the MFN obligation pursuant to Article II\***
- **Possible departures:**
  - (i) Article V (Economic Integration)**
  - (ii) MFN Exemptions**

\* Also potentially relevant: Article III:3 (notification)

# BITs vs. GATS (II)

- ad (i): **Since coverage is normally confined to mode 3 (commercial presence) and, possibly, mode 4 (presence of natural persons), BITs may not meet the relevant criteria**
- ad (ii): **Less than 10% of WTO Members have listed MFN exemptions for their BITs**
- **In other words: The vast majority of Members would need to extend GATS-related benefits on an MFN basis**

# Potentially relevant BIT provisions

- **Sector coverage and scope of national treatment commitments**  
(pre-/post establishment, existence of reservations/limitations)
- **Compensation for expropriation**
- **Investor-to-State dispute settlement**
- **Others**

# How to avoid tensions with GATS obligations? (I)

- **Amendment of the GATS (Art. X MA)**  
However: Is everybody able/willing to participate?
- **Understanding among WTO Members**
- **Carve-out for services in new BITs**  
However: Potential imbalance among the parties

# How to avoid tensions with GATS obligations? (II)

- **MFN exemptions**

However: Only for acceding countries

- **Extension of BIT obligations to all WTO Members: autonomously or via GATS commitments (► DDA)**

# THE END



Source: Rudolf Adlung and Martin Molinuevo "Bilateralism in Services Trade: Is there Fire behind the (BIT-)Smoke?", *Journal of International Economic Law*, Vol. 11, No. 2, 2008