world trade institute

nccr trade regulation
swiss national centre of competence in research

International Framework of Investment Law

Dr Rodrigo Polanco
Senior Lecturer and Researcher
World Trade Institute
November 2017

u b
UNIVERSITÄT BERN

Outline

- **Why people invest abroad?**
- **Treatment of Aliens under International Law**
  - Domestic Law
  - Diplomatic Protection
- **Treatment of Investors under International Law**
  - Historical Evolution of the Investment Law Regime

Why People Invest Abroad?

John Dunning

- **Natural resource seeking**
- **Market seeking**
- **Efficiency seeking**
- **Strategic asset seeking**

world trade institute

nccr trade regulation
swiss national centre of competence in research

Treatment of Aliens under International Law

UNIVERSITÄT BERN

Historical development of investment law

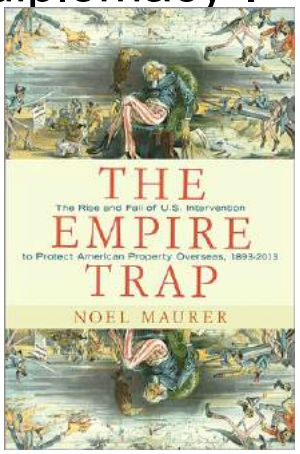
- From no rights to aliens – to limited rights (e.g. droit d'aubaine, personal statutes) – to equal rights (like nationals) – to more rights (than nationals).

- Traditional dispute settlement mechanisms: domestic courts or diplomatic protection (peaceful means and use of force – derived from medieval 'law of reprisals')

- Distrust on domestic courts that did not fit "civilized nations" standard – "unequal" or "capitulation" treaties.

- "Forceful" diplomatic protection: gunboat "diplomacy".

THE BIG STICK IN THE CARIBBEAN SEA



Historical development of investment law

- **The Monroe Doctrine** (1823): a U.S. foreign policy stating that further efforts by European nations to colonize land or interfere with states in North or South America would be viewed as acts of aggression, requiring U.S. Intervention. The author was the Secretary of State, John Quincy Adams.

- **Roosevelt Corollary** to the Monroe Doctrine (1904): asserting the right of the United States to intervene in Latin America in cases of "flagrant and chronic wrongdoing by a Latin American Nation" to pre-empt intervention by European creditors. This re-interpretation of the Monroe Doctrine went on to be a useful tool to take economic benefits by force when Latin nations failed to pay their debts to European and US banks and business interests. This was also referred to as the *Big Stick ideology*. E.g.: Panama's break with Colombia and the building of the Panama Canal, US naval intervention in the Dominican Republic, and involvement in Nicaragua between 1916-1933.

- **Good Neighbour Policy** (1933): The high period of gunboat diplomacy ended with the adoption of this policy by President Franklin D. Roosevelt (1933–1945)

Historical development of investment law

- Peaceful diplomatic protection:
  - American Revolution (1765-1783)
  - Mexican Revolution (1910-1920)
  - Russian Revolution (1917)

- Jay Treaty (1794) US and Great Britain – Article 6:
  - Established commissions of US and UK arbitrators to hear investor claims relating to American Revolutionary War
  - First modern instance of a mechanism for individual claims against a state

Whereas it is alleged by divers British Merchants and others His Majesty's Subjects, that Debts to a considerable amount which were bona fide contracted before the Peace, still remain owing to them by Citizens or Inhabitants of the United States, and that by the operation of various lawful Impediments since the Peace, not only the full recovery of the said Debts has been delayed, but also the Value and Security thereof, have been in several instances impaired and lessened, so that by the ordinary course of Judicial proceedings the British Creditors, cannot now obtain and actually have and receive full and adequate Compensation for the losses and damages which they have thereby sustained: It is agreed that in all such Cases where full Compensation for such losses and damages cannot, for whatever reason, be actually obtained had and received by the said Creditors in the ordinary course of Justice, The United States will make full and complete Compensation for the same to the said Creditors; But it is distinctly understood, that this provision is to extend to such losses only, as have been occasioned by the lawful impediments aforesaid, and is not to extend to losses occasioned by such Insolvency of the Debtors or other Causes as would equally have operated to produce such loss, if the said impediments had not existed, nor to such losses or damages as have been occasioned by the manifest delay or negligence, or willful omission of the Claimant.

For the purpose of ascertaining the amount of any such losses and damages, Five Commissioners shall be appointed and authorized to meet and act in manner following: Two of them shall be appointed by His Majesty, Two of them by the President of the United States by and with the advice and consent of the Senate thereof, and the fifth, by the unanimous voice of the other Four; and if they should not agree in such Choice, then the Commissioners named by the two parties shall respectively propose one person, and of the two names so proposed, one shall be drawn by Lot in the presence of the Four Original Commissioners.

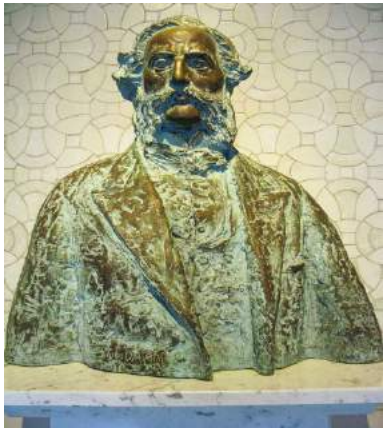
Historical development of investment law

- Customary international law on minimum standard of treatment. US-Mexico General Claims Commission:
  - **Neer Case** (1926): Paul Neer, was employed as superintendent of a mine in Guanacevi, State of Durango, Mexico. On November 16, 1924, about eight o'clock in the evening, when he and his wife were proceeding on horseback from the village of Guanacevi to their home in the neighborhood, they were stopped by a number of armed men who engaged Neer in a conversation, which Mrs. Neer did not understand, in the midst of which bullets seem to have been exchanged and Neer was killed. It is alleged that, on account of this killing, his wife and daughter, American citizens, sustained damages in the sum of $100,000.00; that the Mexican authorities showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits; and that therefore the Mexican Government ought to pay to the claimants the said amount.

"The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether this insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial."

Historical development of investment law

- Over 60 international claim commissions between 1840 and 1940
- Calvo's Work (1868):
  - "Calvo" Doctrine: aliens have no greater rights than those recognized to the citizens of the host country
  - "Calvo" Clause: domestic courts have a primary role in the settlement of foreign investment disputes. Diplomatic protection is rejected except in cases of denial of justice or evident violation of the principles of international law



Historical development of investment law

- Drago-Porter Convention (1907) makes use of force illegal for recovery of state debts where state refuses to arbitrate
- The Kellogg–Briand Pact (1928) General Treaty for Renunciation of War as an Instrument of National Policy
- Nationalization of American oil interests in Mexico (1938). Hull Rule on standard of compensation: "prompt, adequate and effective".
- Post WWII: Lump sum settlements and mixed arbitral tribunals: states have concluded over 200 lump sum agreements in the past 60 years
- Demise of ITO's Havana Charter (1948) and institutional separation of trade and investment
- UN Charter (1945) – Use of force restricted to UN Security Council and self-defense. Decolonization
- 1950s onwards: Oil concession arbitrations and debate on the internationalization of contract
- Abs (1957) and Shawcross (1958) Draft Convention
- 1959: Germany-Pakistan BIT (no ISDS)
- 1962: General Assembly Resolution on Permanent Sovereignty Over Natural Resources

Historical development of investment law

- 1965: Washington Convention/ICSID

We consider undesirable the resolution submitted to the Board of Governors, which recommends, and entrusts to the Boards of Directors of the Bank, the drafting of an international agreement to create a center for conciliation and arbitration to which foreign private investors could have recourse for the settlement of their disputes with governments of member countries, without necessarily having to exhaust the formalities and procedures of the national tribunals. It is believed that this would stimulate private investment in the underdeveloped economies.

The legal and constitutional systems of all Latin American countries that are members of the Bank offer the foreign investor at the present time the same rights and protection as their own nationals; they prohibit confiscation and discrimination and require that any expropriation on justifiable grounds of public interests shall be accompanied by fair compensation fixed, in the final resort, by the law courts.

The new system that has been suggested would give the foreign investor, by virtue of the fact that he is a foreigner, the right to sue a sovereign state outside its national territory, dispensing with the courts of law. This provision is contrary to the accepted legal principles of our countries and, de facto, would confer a privilege on the foreign investor, placing the nationals of the country concerned in a position of inferiority.

(Felix Ruiz, 1964. The No of Tokyo)

Historical development of investment law

- 1967: OECD Draft Convention on the Protection of Foreign Property
- 1968: BITS with consent to investor-state arbitration
- 1974: New International Economic Order/Charter of Economic Rights and Duties of States
- 1981: Algiers Accord – Iran-US Claims Tribunal established
- 1985: SPP v. Egypt (tourist complex at the pyramids): consent to arbitration based on offer in foreign investment domestic law: “arbitration without privity”. Award based on investment contract.
- 1987: 265 BITs
- 1990: AAPL v. Sri Lanka (company formed to cultivate and export shrimp to Japan): first investment treaty arbitration award. Compensation for losses suffered by as a consequence of an armed conflict or insurrection.

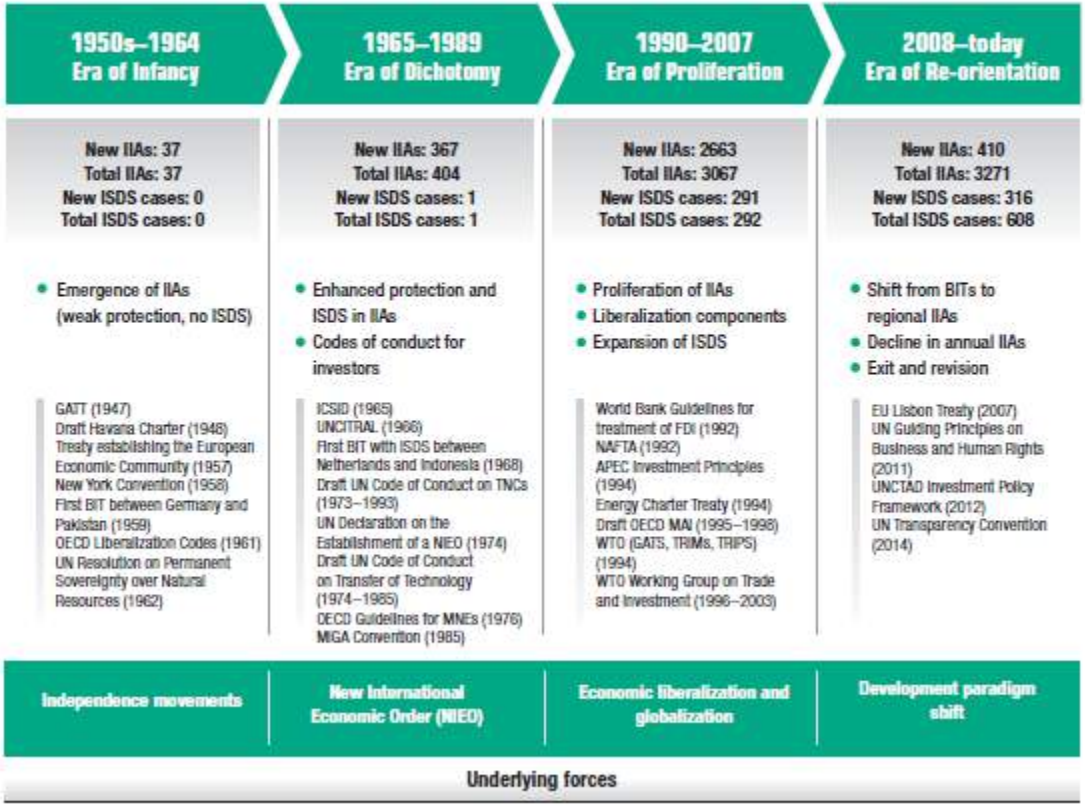
Historical development of investment law

- 1992: World Bank Guidelines on the Treatment of Foreign Direct Investment
- 1992: NAFTA concluded
- 1998: Negotiations of MAI abandoned
- End of 1990s: 1857 BITs concluded
- First investment claims brought under Chapter Eleven of the North American Free Trade Agreement (NAFTA):
  - Ethyl v. Canada (1998): export and interprovincial trade ban prohibitions on MMT, a fuel additive
  - Azinian v. Mexico (1999): cancellation of a municipal waste concession
  - Metalclad v. Mexico (2000): closure of a hazardous waste site
  - S.D. Myers v. Canada (2000): export ban on PCB waste

Brief evolution of the investment regime

Evolution of the IIA regime

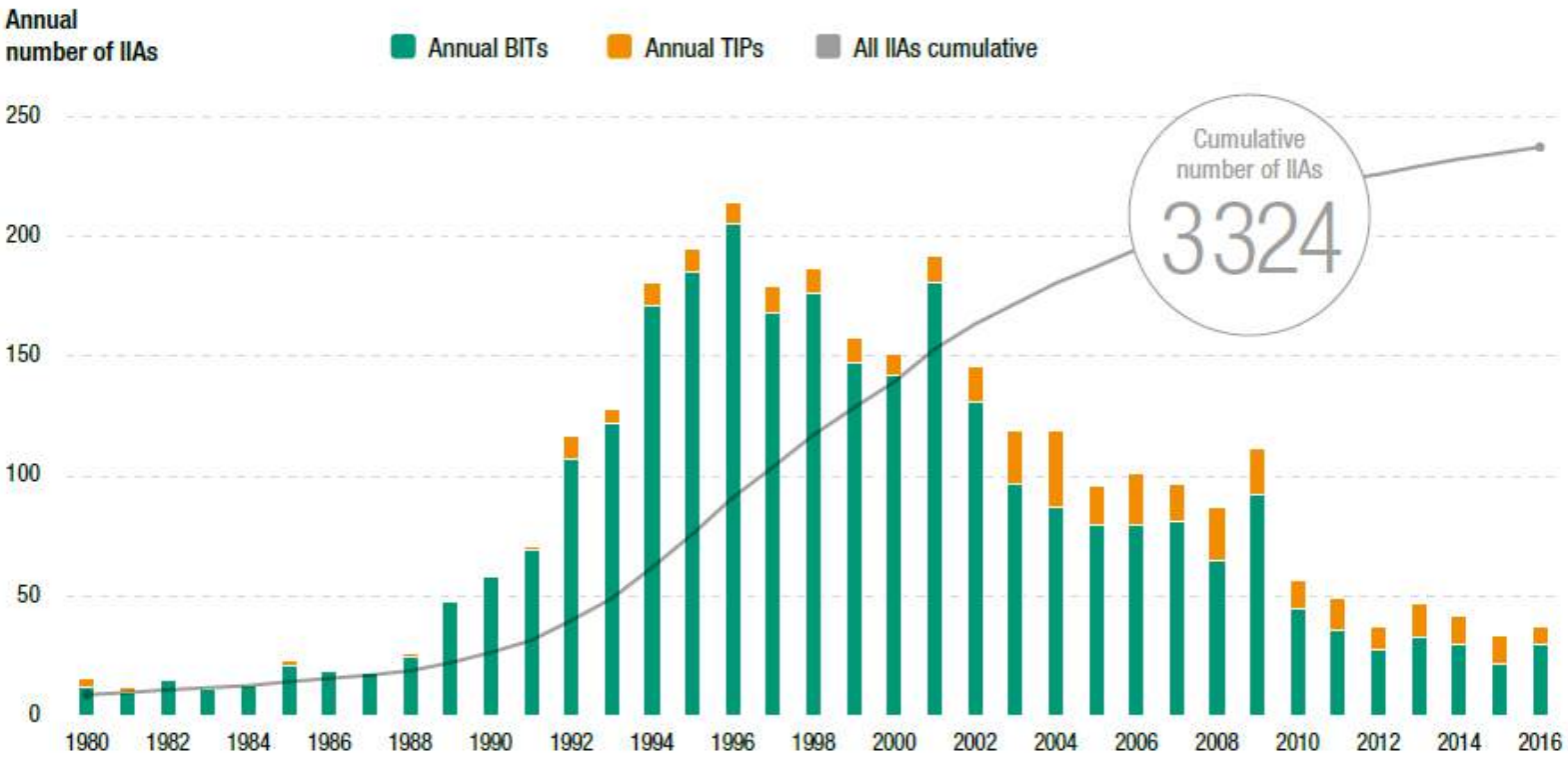
Figure IV.1. Evolution of the IIA regime



Source: UNCTAD.
Note: Years in parentheses relate to the adoption and/or signature of the instrument in question.

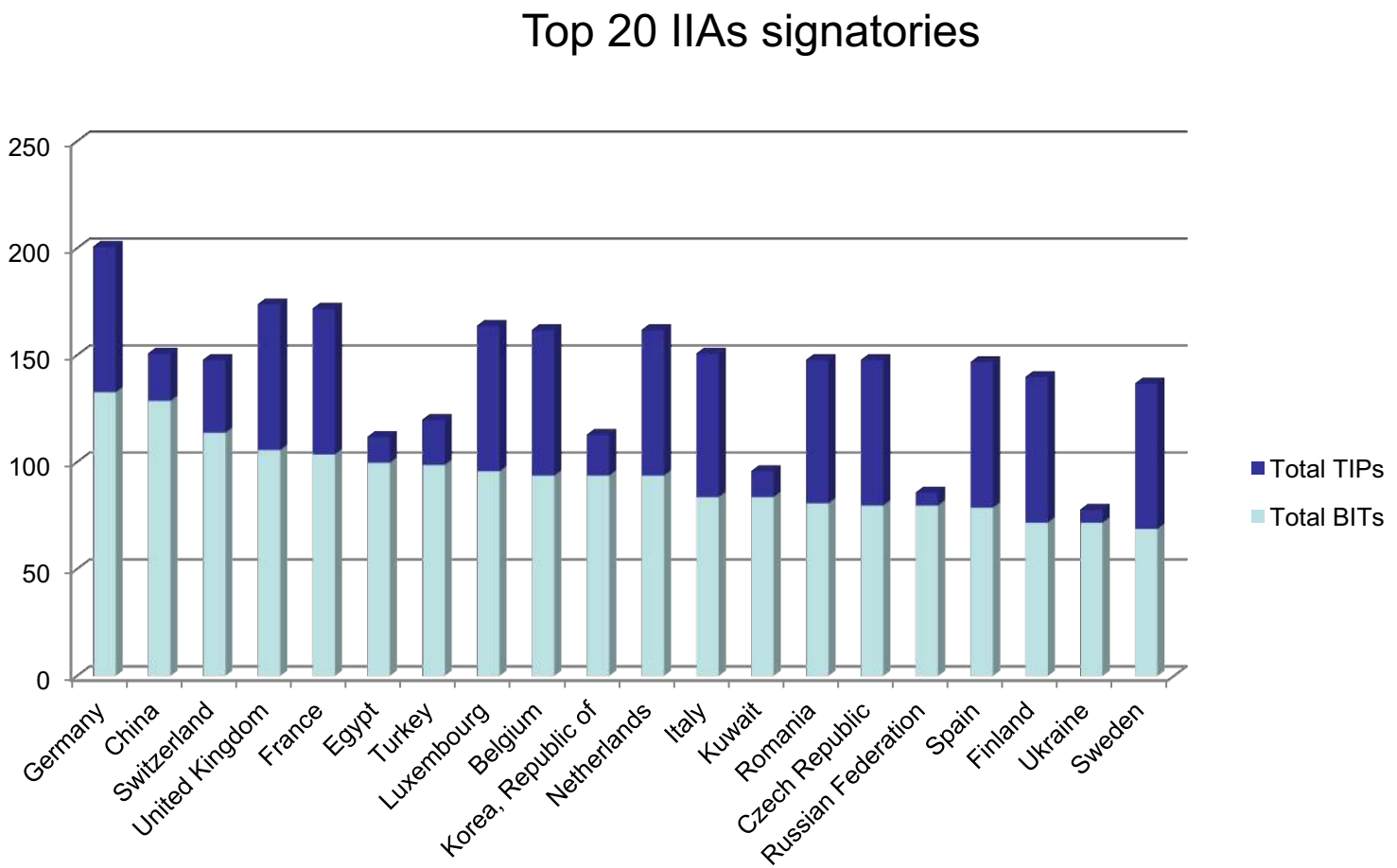
Trends in IIAs signed

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



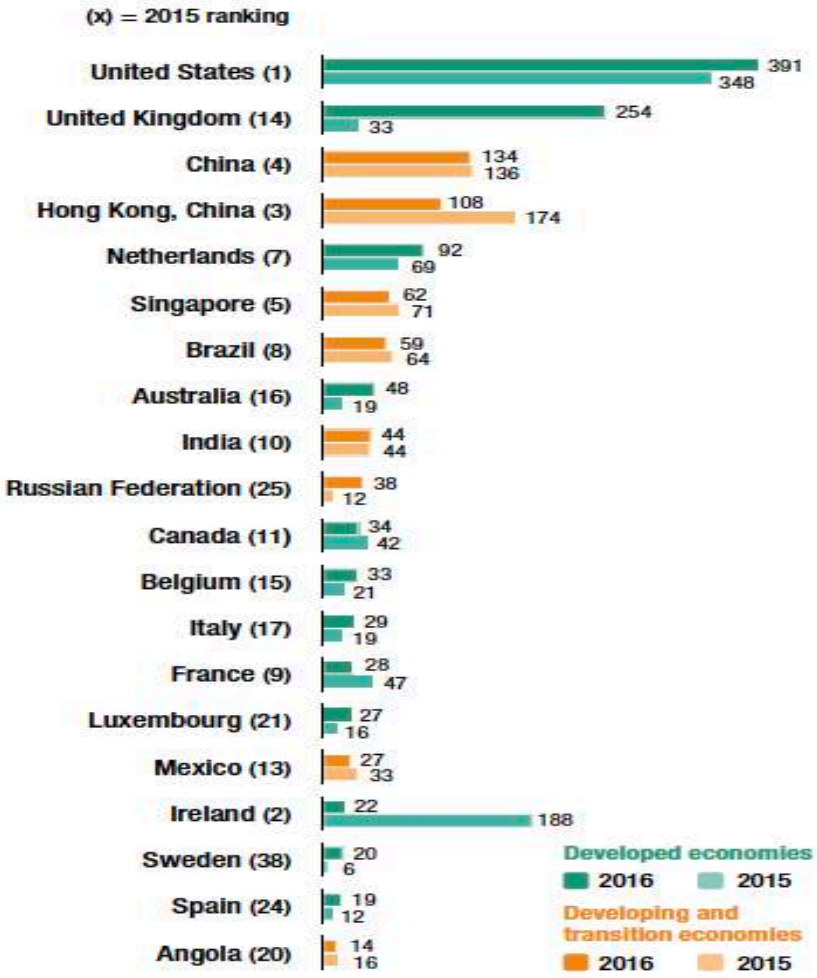
Source: ©UNCTAD, IIA Navigator.

IIAs signed


Top 20 IIAs signatories
250
200
150
100
50
0
Germany
China
Switzerland
United Kingdom
France
Egypt
Turkey
Luxembourg
Belgium
Korea, Republic of
Netherlands
Italy
Kuwait
Romania
Czech Republic
Russian Federation
Spain
Finland
Ukraine
Sweden
Total TIPs
Total BITs

Top 20 FDI recipients

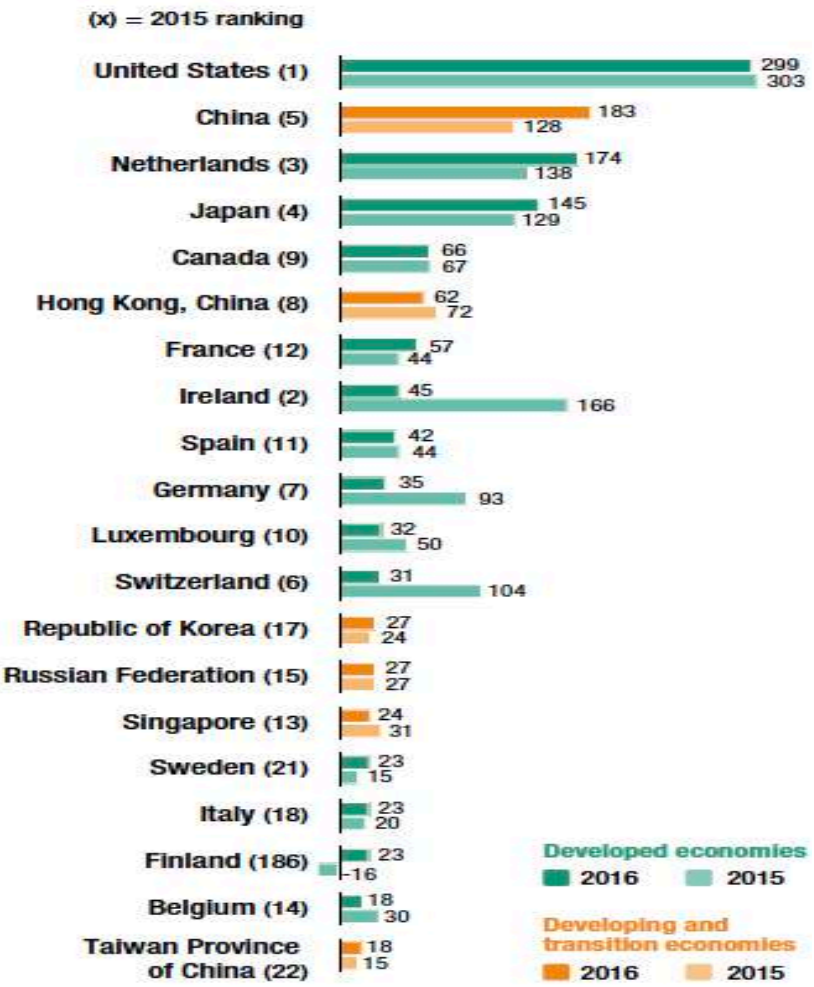
Figure I.11. FDI inflows, top 20 host economies, 2015 and 2016 (Billions of dollars)



Source: ©UNCTAD, FDI/MNE database (www.unctad.org/fdistatistics).

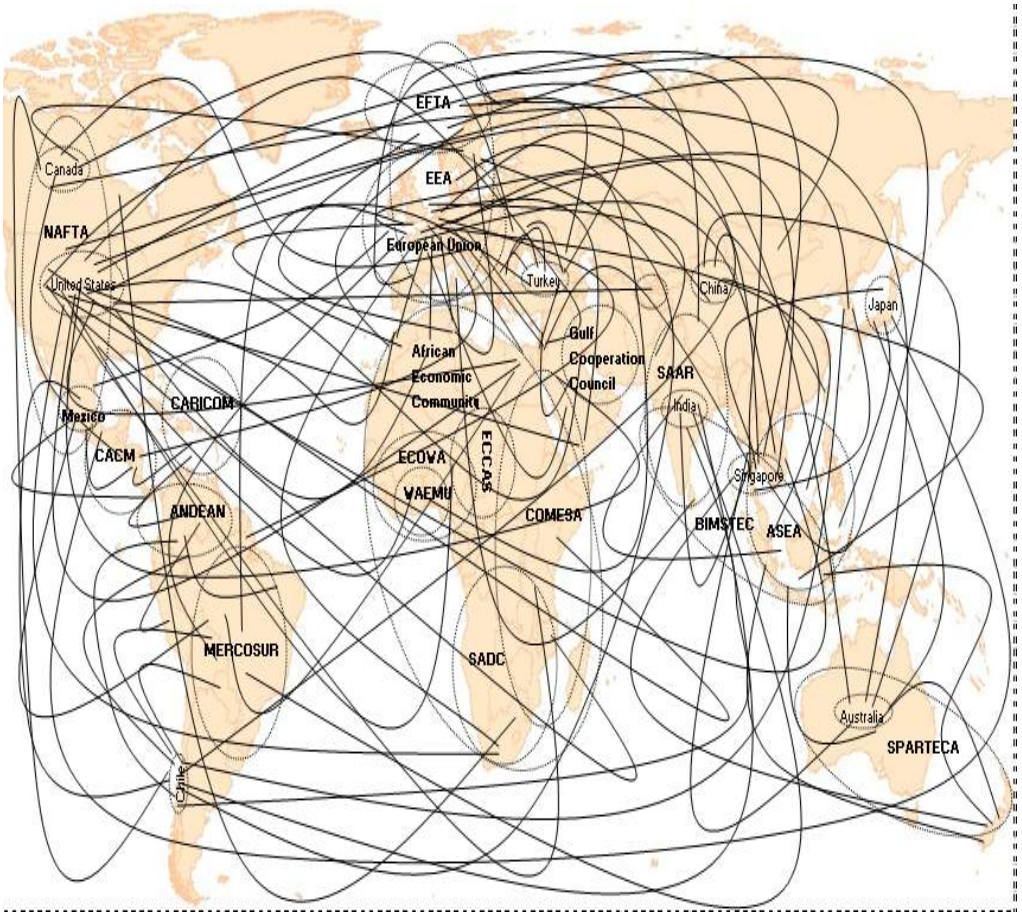
Top 20 FDI home economies

Figure I.14. FDI outflows, top 20 home economie 2015 and 2016 (Billions of dollars)



Source: ©UNCTAD, FDI/MNE database (www.unctad.org/fdistatistics).

Overlap of IIAs



Today IIAs proliferate at all levels, constituting a complex system of multi-layered and multi-faceted investment rules

More a lasagna than an spaghetti bowl…

world trade institute

nccr trade regulation
swiss national centre of competence in research

The investment lasagna…

UNIVERSITÄT BERN

The multi-layered legal framework

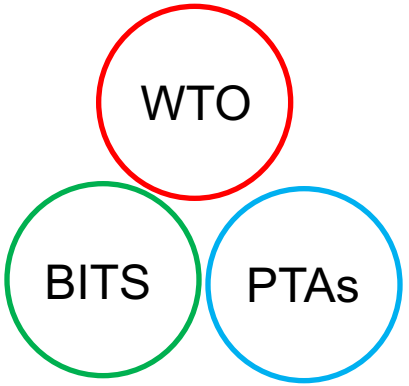
- **National level**
  - Specific laws applicable to foreign investment
  - Domestic regulatory framework
- **Bilateral level**
  - Bilateral Investment Treaties (BITs)
- **Regional and Plurilateral level**
  - Investment Chapters in Preferential Trade Agreements (PTAs).
  - Energy Charter Treaty
- **Multilateral level**
  - Applicable rules in the WTO Agreements
  - Other institutions

Challenge: to foster normative coherence

- De facto «overlap»
- Agreements apply to the same matter
  - GATS mode 3 & BITs applying to investment in services
  - TRIMS performance requirements
  - TRIPs
  - ASCMs, incentives
- Agreements contain analogous obligations which lead to similar results
  - GATS Art.VI. Domestic regulation & FET in BITs
- Explicit interaction in treaty text
  - Incorporation of other Agreements (GATT)
  - Reaffirmation of commitments (GATS)
  - Observe other agreements (TRIMs)

Effects:

- Reinforcement
- Expansion-complement
- Contradiction



world trade institute

nccr trade regulation
swiss national centre of competence in research

Questions?

rodrigo.polanco@wti.org

u b

UNIVERSITÄT BERN