



**Research Institute of Economy, Trade and Industry (RIETI)**

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# **Recent trends and key issues in international investment agreements**

**Anna Joubin-Bret  
Senior Legal Advisor  
UNCTAD**

# **Global trends in International Investment Agreements (IIAs)**

# The role of IIAs

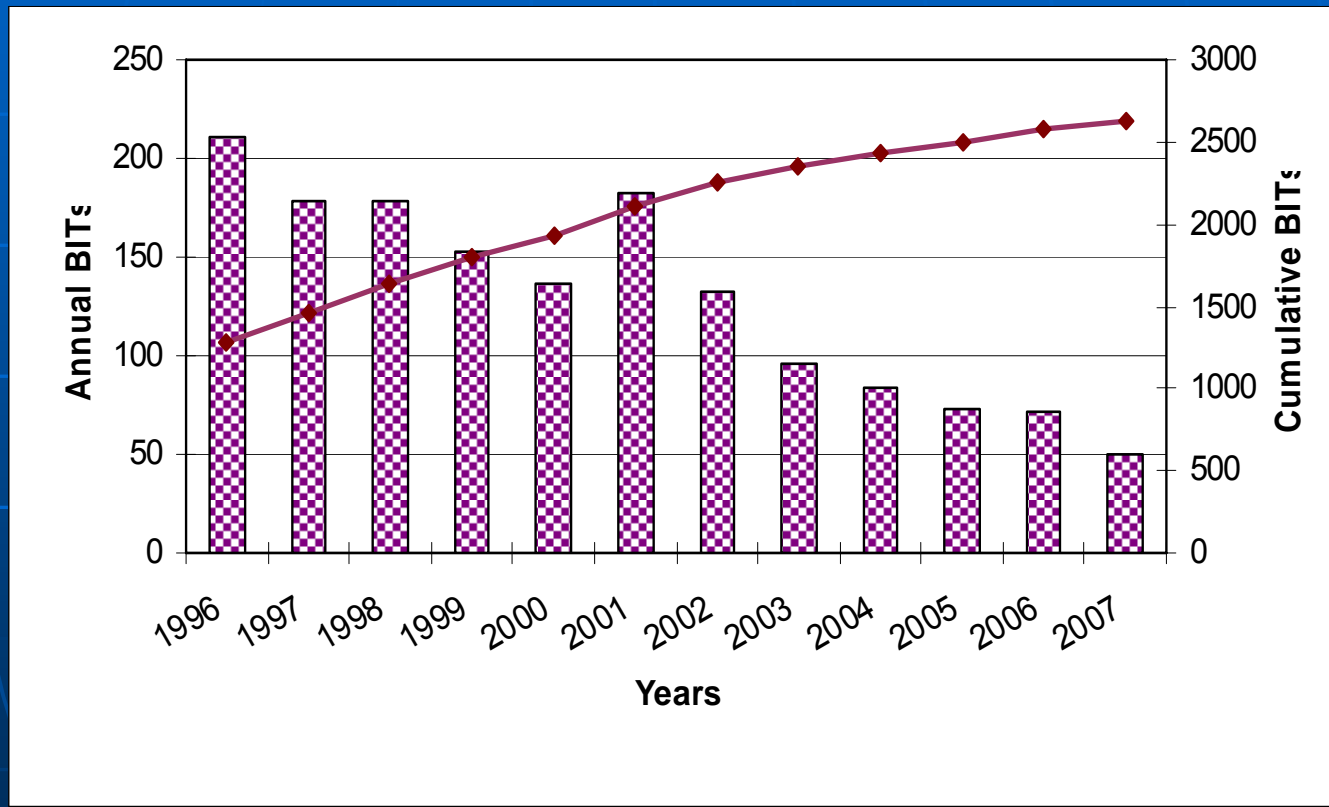
- Contribute to the creation of a stable, predictable and transparent regulatory framework for international investment
- Facilitate the coordination of investment relations (relations among international investors, host states, home states, domestic investors and other development stakeholders) through internationally agreed rights and obligations on:
  - Liberalization
  - Protection
  - Promotion of investment

# The network of International Investment Agreements (IIAs)

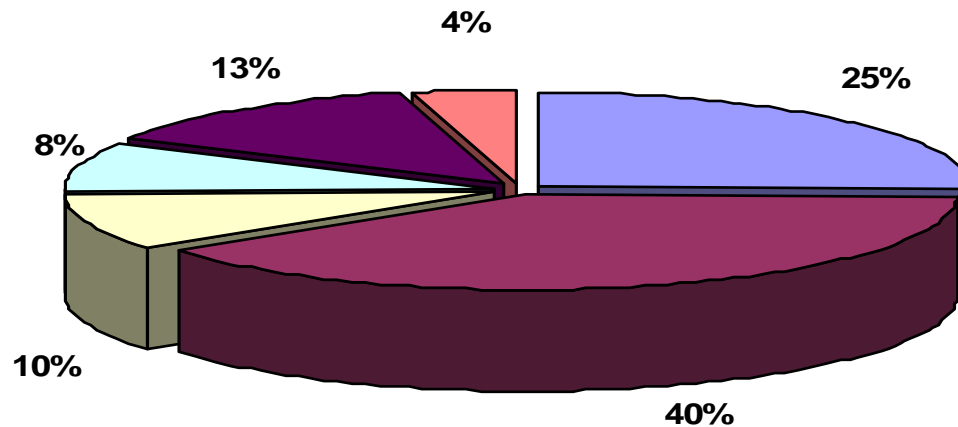
- Bilateral investment treaties (BITs)
- Free trade agreements / economic partnership agreements with investment provisions (FTAs/EPAs)
- Regional integration agreements (EU, EFTA, CARICOM, MERCOSUR, ASEAN)
- Multilateral agreements dealing with investment (GATS, TRIMs, TRIPs, MIGA)

# **A. Bilateral Investment Treaties**

# The network of BITs continues to grow rapidly, there are now over 2500 BITs

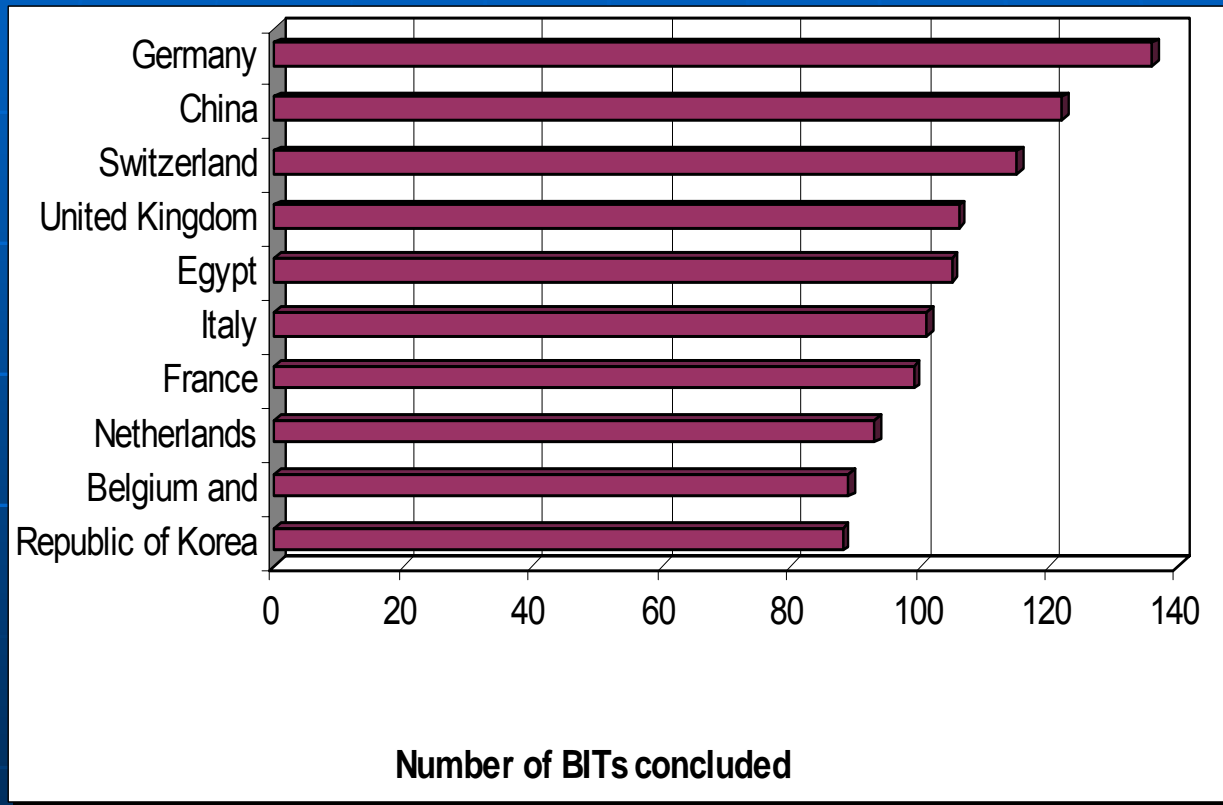


# BITs concluded by country group, end 2007



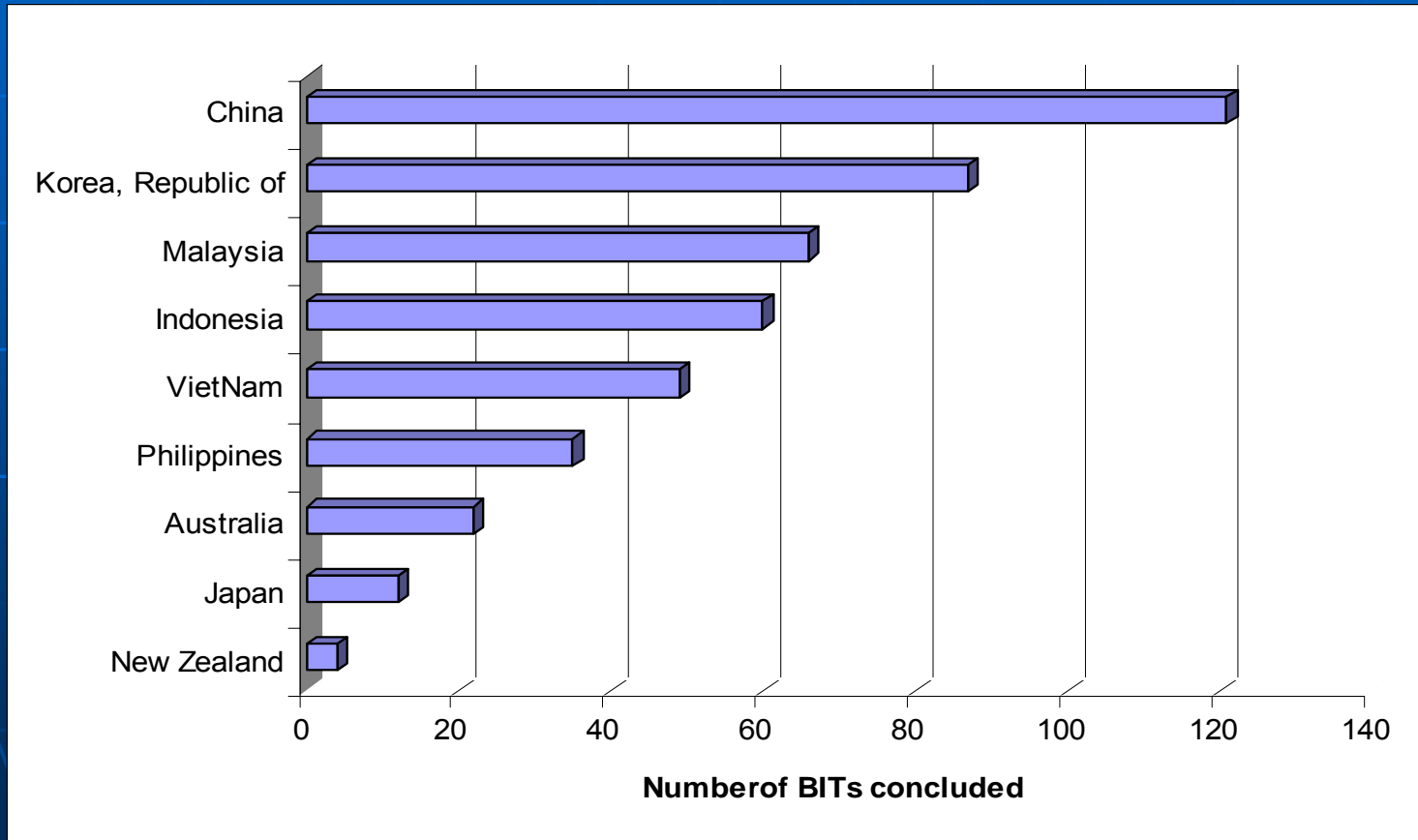
- Between developing countries
- Between developed and developing countries
- Between developing countries and countries of SEE&CIS
- Between developed countries
- Between developed and countries of SEE&CIS
- Between countries of SEE&CIS

# The top ten signatories of BITs in the world, end 2007





# Selected signatories of BITs from the region, end 2007

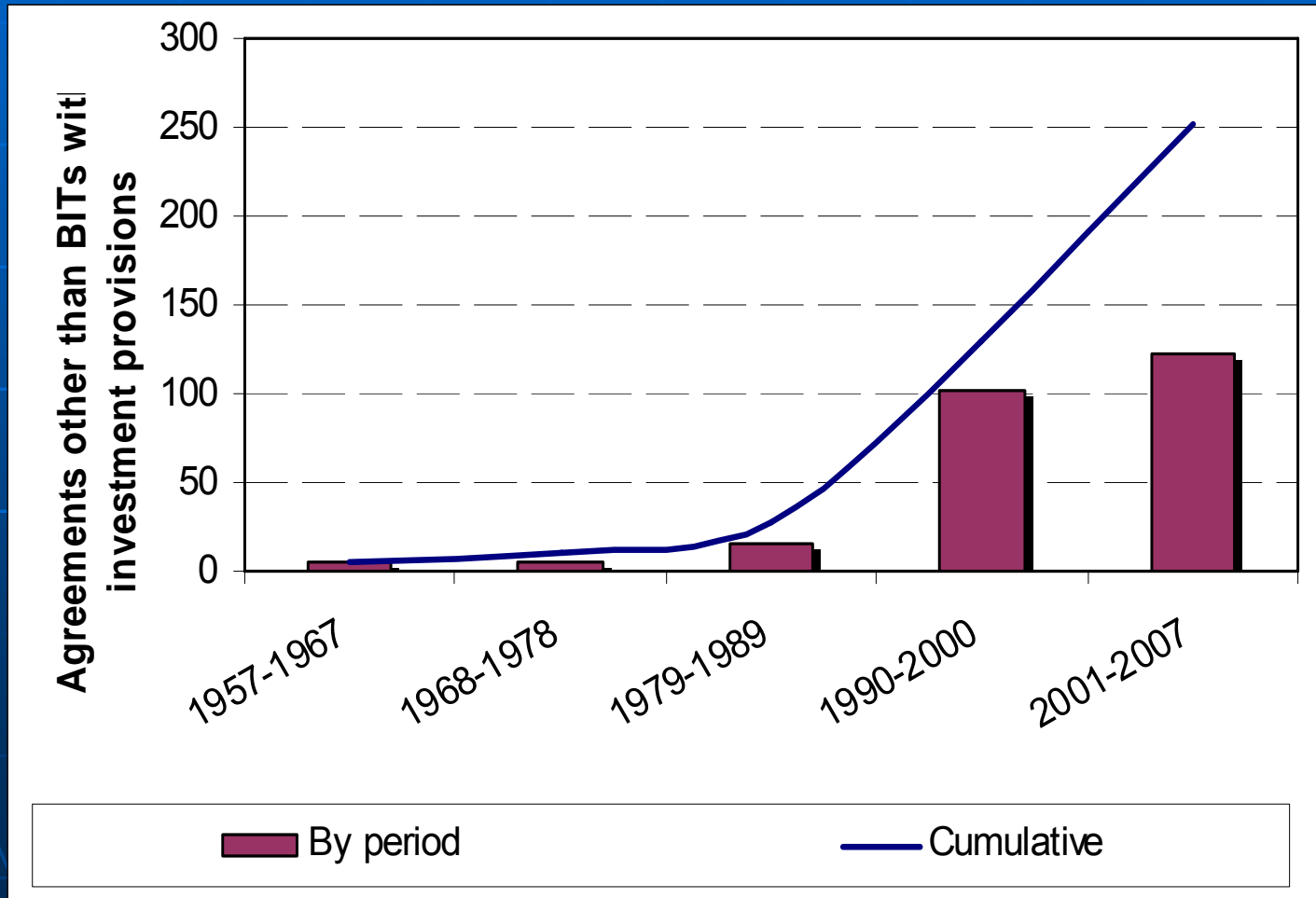


# **B. Free Trade Agreements**

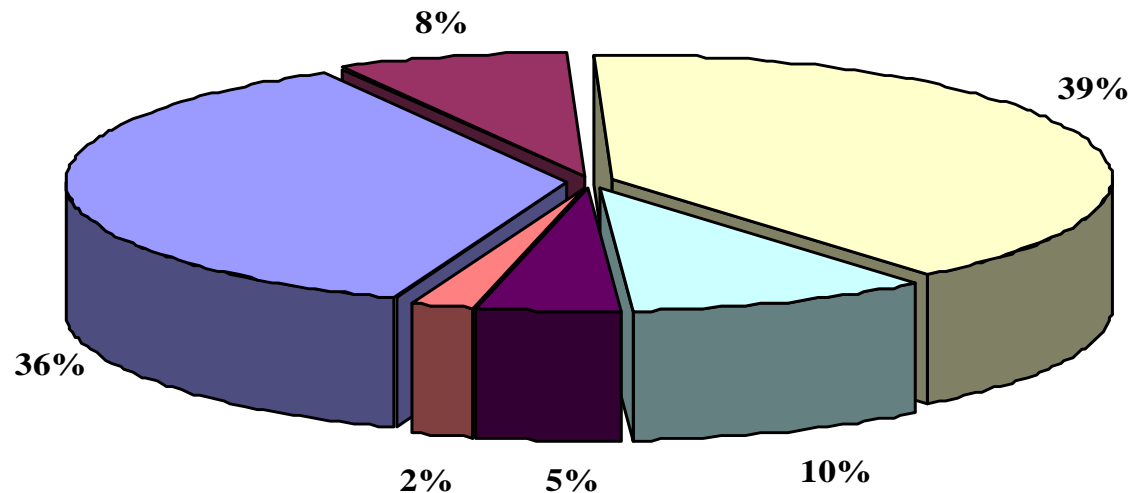
## B. Free Trade Agreements with Investment Chapters

- International investment rules are increasingly being formulated as part of agreements that encompass a broader range of issues (including trade, services, competition, intellectual property);
- 2 main types:
  - Investment liberalization only (EU EPAs)
  - Investment liberalization and protection (US, Can, Japan FTAs)
- Regional integration with investment disciplines: ASEAN investment liberalization and protection
- The total number of such economic agreements with investment provisions exceeded 250, as of end 2007.

# Over 250 trade agreements with investment provisions by end 2007



# Trade agreements with investment provisions by country group, end 2007

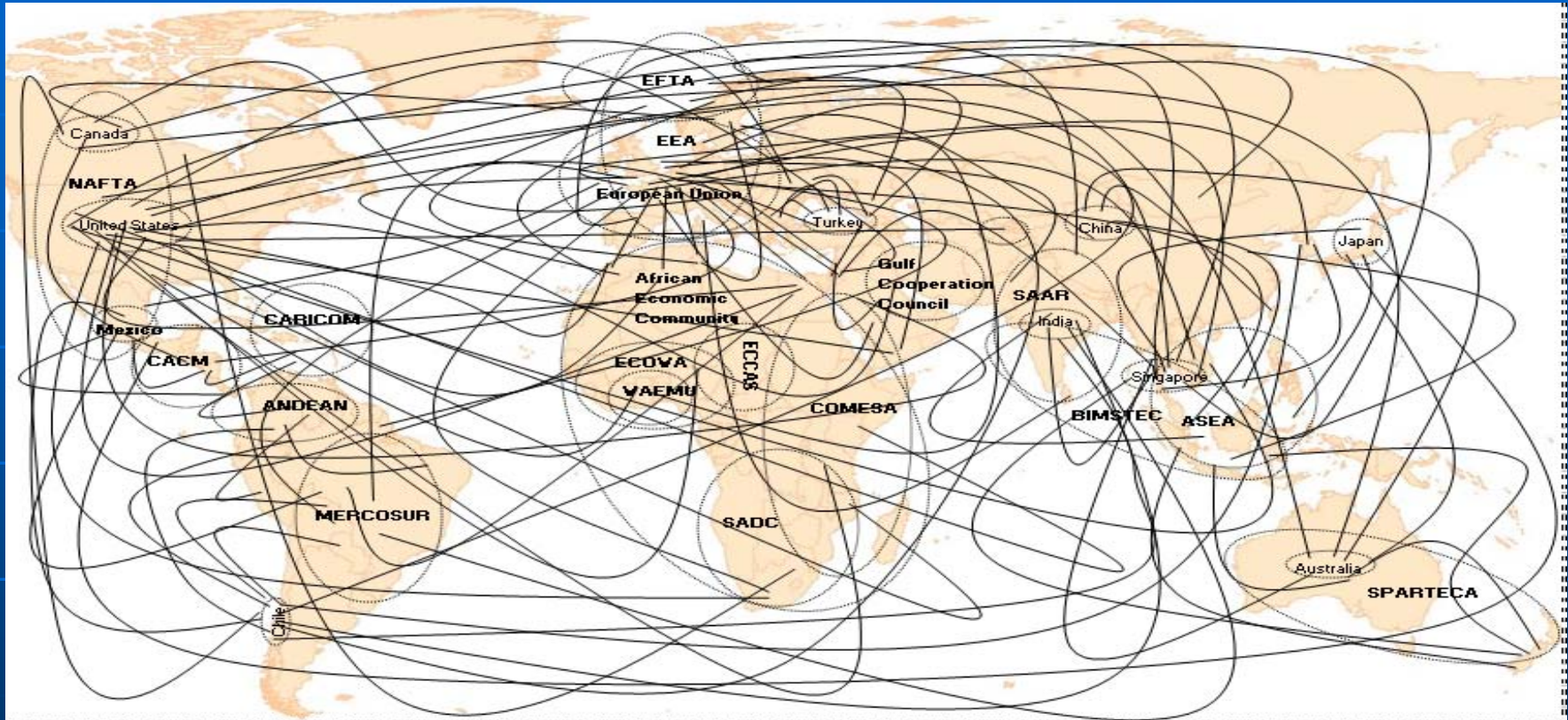


- South-South
- North-North
- North-South
- North-transition economies
- Transition economies-transition economies
- South-transition economies

# Recent FTAs with investment chapters

- Free Trade Agreement between the United States of America and Peru
- Free Trade Agreement between the United States of America and Colombia (not ratified)
- Free Trade Agreement between Singapore and Panama
- Association Agreement between the European Community and Albania
- Economic Partnership Agreement between Japan and Philippines
- Economic Partnership Agreement between Japan and Chile
- Economic Partnership Agreement between Japan and Thailand
- Free Trade Agreement between the United States and the Republic of Korea

# Multiple overlapping FTAs with investment provisions



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

# **Recent developments in investor-State dispute settlement**

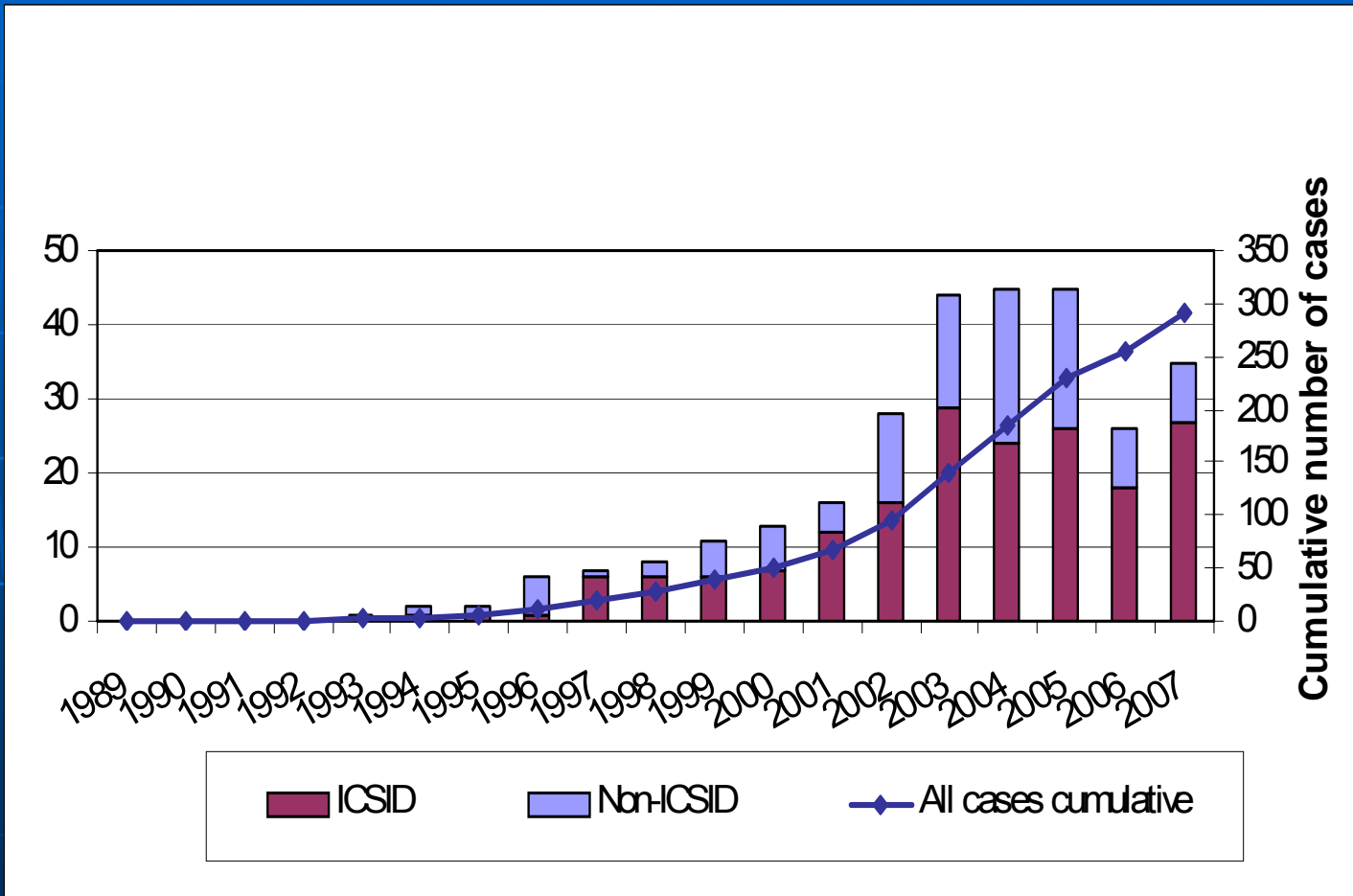


# The increase in IIAs has been paralleled by an increase in investor-State disputes

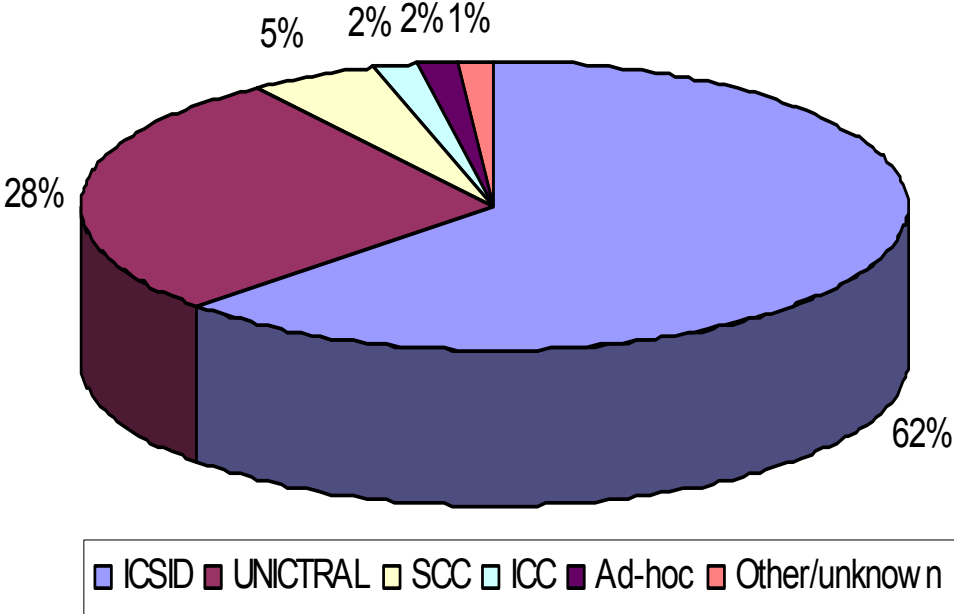
→ The cumulative number of treaty-based cases reached over 290 known claims by end 2007.

→ While the awards rendered in these proceedings have helped to clarify the meaning and content of individual treaty provisions, some contradictory decisions have also created uncertainty.

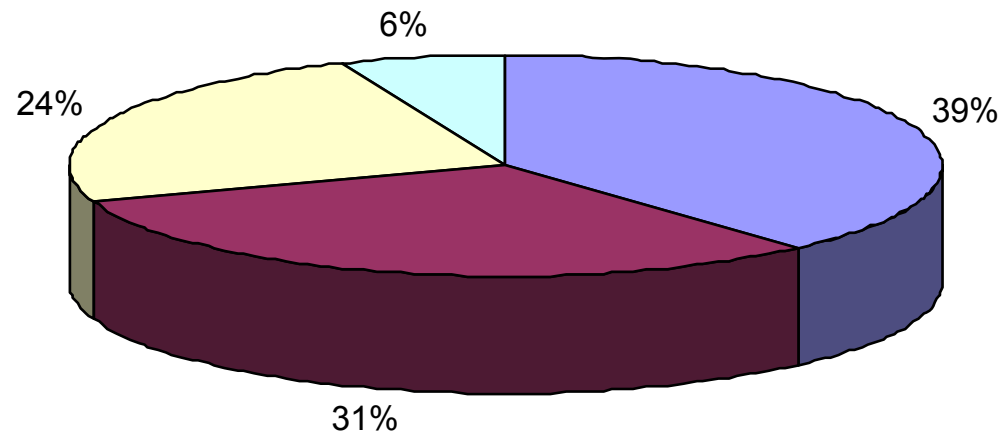
# Known investment treaty arbitrations (cumulative and newly instituted cases, 1987-2007)



# Disputes by Forum of arbitration:

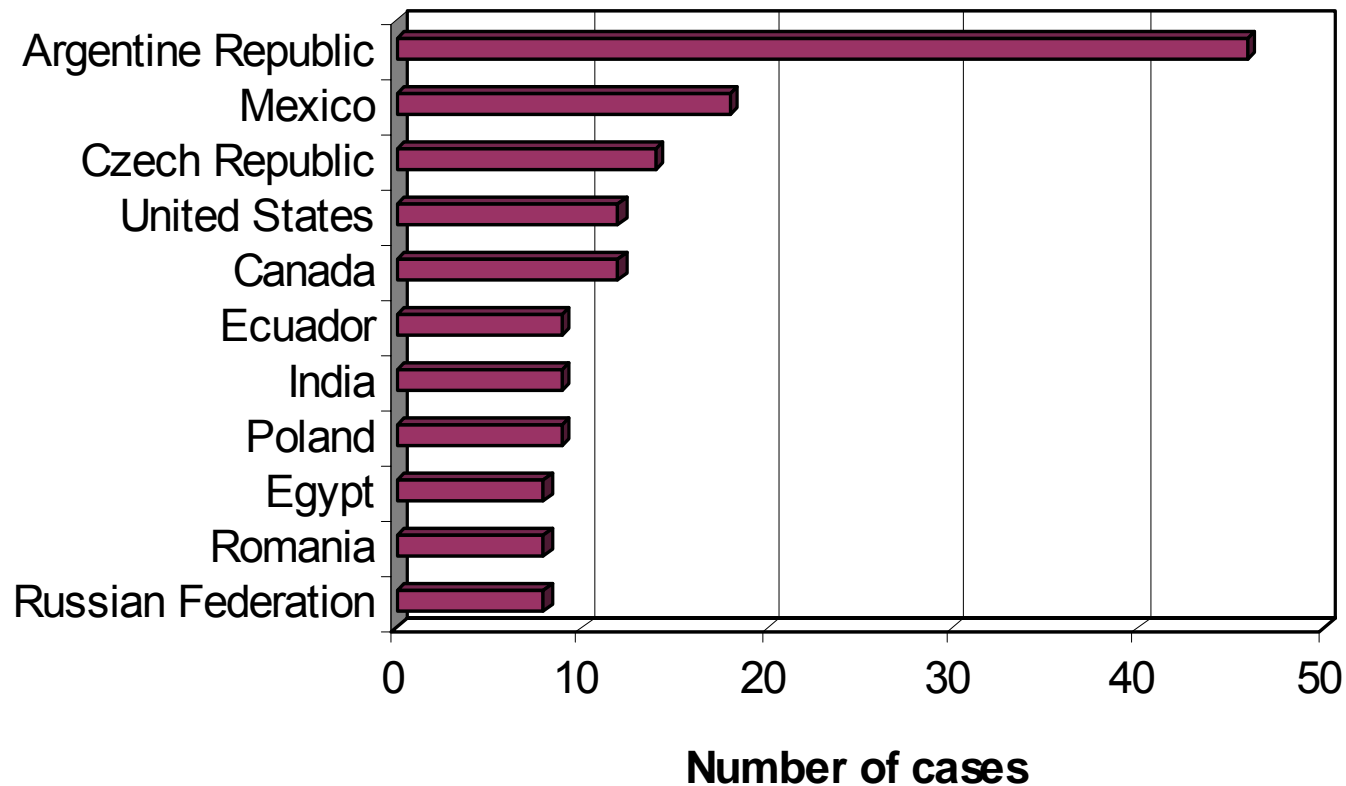


# Sectors involved in known investment treaty arbitration



■ Tertiary sector ■ Secondary sector ■ Primary sector ■ Unknown

# Known investment treaty claims, by defendants (December 2007)



# ISDS mechanism: concerns

- Increasing use of ISDS mechanism
- High costs involved in conducting procedures
- Arbitration awards can involve huge sums
- Potential impact on country's reputation as investment location
- Impact on the country's right to regulate
- Possible to address in future investment treaties but what about the existing network ? What about the MFN provision ?

# **Key issues and systemic implications in international investment agreements**

# Policy coherence

Because of the:

- Increasingly complicated network of IIAs
- Overlapping commitments at the national (State contracts, procurement), bilateral, regional levels on investment protection and liberalization
- South-South cooperation: net capital importing countries becoming capital exporters
- Different interpretations of treaty provisions by arbitration tribunals
- Evolution of international investment law

The maintenance of policy coherence becomes a major challenge for countries (whether developing or developed).



# Policy coherence – two facets

- First, coherence needs to be ensured between different IIAs, including State Contracts to which host countries are a party; sometimes, this may even be a concern with regard to different provisions of the same IIA.
- Second, coherence has to be established between the obligations arising from these IIAs and investment contracts, on the one hand, and the development policy of the host country, on the other hand. Policy space and flexibility issue.

# Pro-active vs. Sit-back-and-wait approach

- Pro-active: Review of commitments, active monitoring of the IIA network, adapt model agreements, active control of the State over ISDS, coordination, re-negotiation of old agreements
- Wait and see: great majority of countries. EU countries: Admission model is not challenged ? Balance of costs/benefits (Mexico's approach). China's approach

# Pro-active approach vs. sit back and wait

- In ISDS:
  - Countries in Latin America are walking away from ICSID. Inconsistent approach: denouncing ICSID but not BITs (Bolivia/Ecuador)
  - Countries getting under pressure: South Africa
  - Countries restricting the access to ISDS: United States/Canada

# Re-thinking investment relations

- BITs are historically dated. Are they still reflecting the state of play of investment relations ?
- Yes: expro is still an issue, FET is more and more an issue, new players also want protection, renewed protectionism
- No: tension between regulating and protecting foreign investment, strengthening of the rule of law, new players feel the tension even more
- Developing and developed countries are more and more in the same boat

# IIAs – a tool for development ?

The uncertainties about the scope and content of rights and obligations and the undesired effects it might have may jeopardize the coherence of a host country's development policies.

→ It becomes more difficult to use IIAs as a tool for achieving certain development goals, if the multitude of devices deriving from them head into different directions.

→ For instance, a policy of selected intervention vis-à-vis foreign investors might be undermined by the combined effect of granting establishment rights in individual IIAs and the application of the MFN clause, which could have the effect of opening the sector concerned to any foreign investor.

# SUMMARY

Fairy tale conclusion: Sleeping beauty has been kissed and turned into an ugly toad or are we all playing the sorcerer's apprentice ?

In any event:

Negotiating, concluding, and implementing the "right" IIAs, and coping with an increasingly complex hodgepodge of agreements represents a major challenge for all countries, in particular developing countries.

This underlines the importance of capacity-building and technical cooperation.

**UNCTAD can lend a helpful hand.**

Thank you