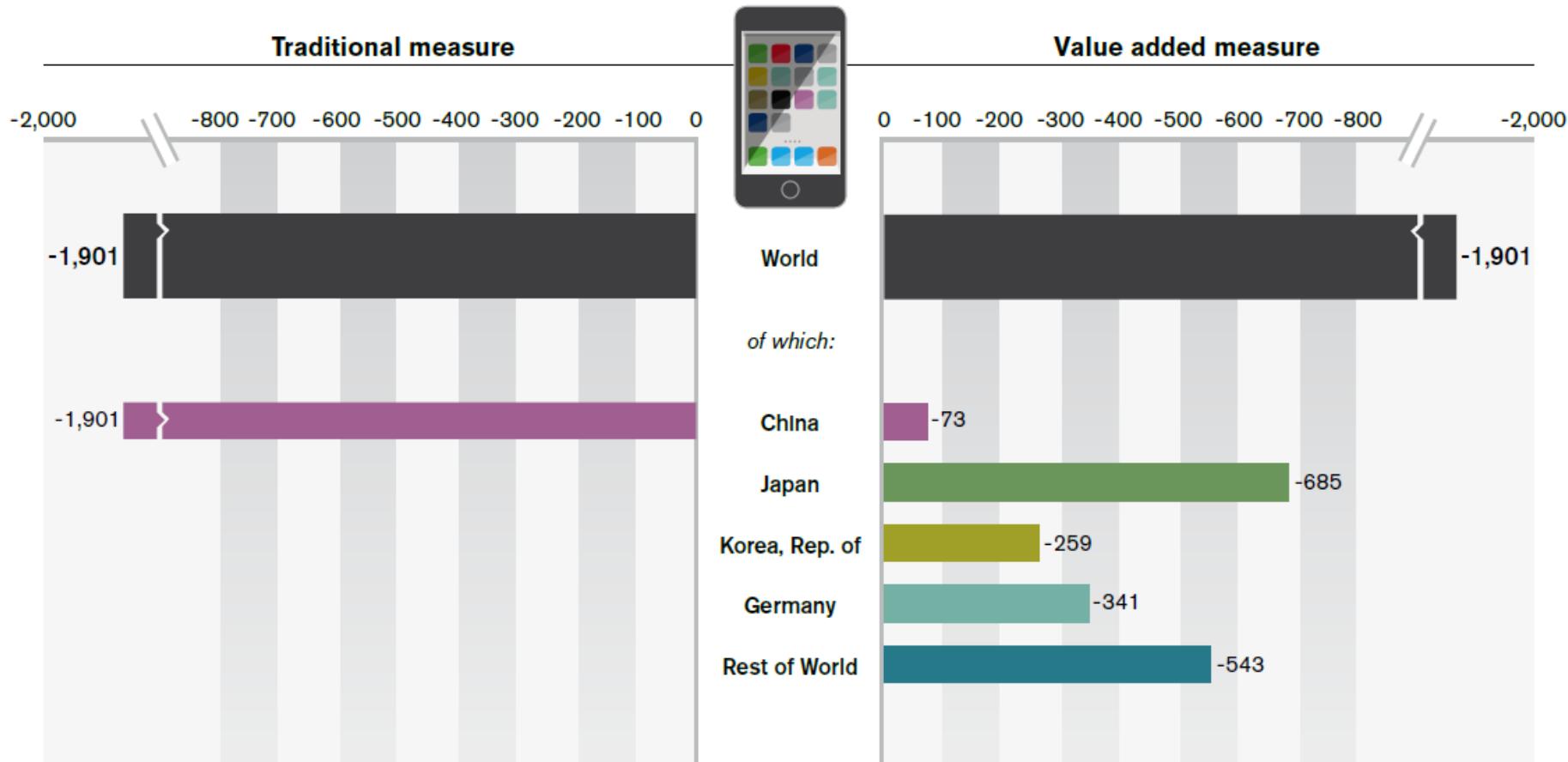


“Except for all the Others”: International Investment Agreements - Economic Contributions, Common Problems and Potential Improvements

G24 Meeting
Colombo, Sri Lanka, 27 February 2018

Prof Michael Ewing-Chow
WTO Chair, National University of Singapore

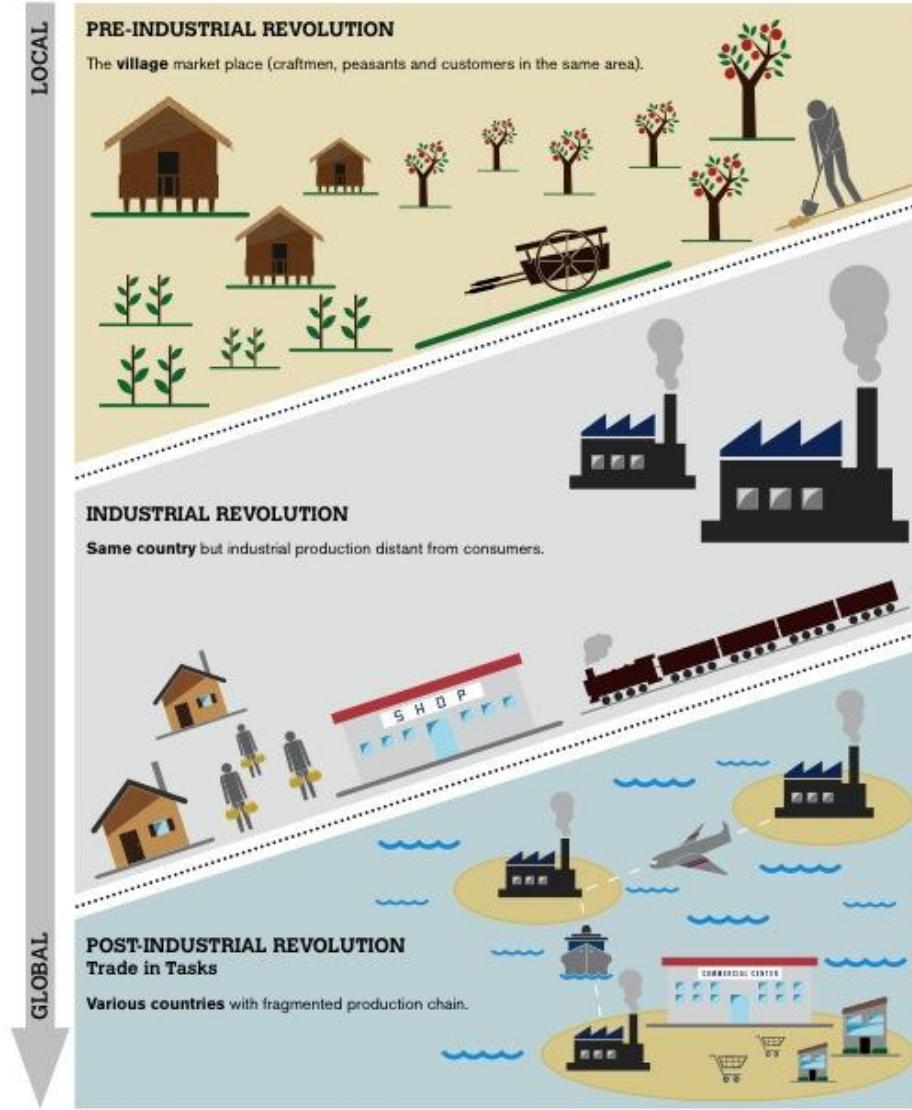
Made in the World



Source: Meng and Miroudot, based on Xing and Detert
(2010)

From Single Producer to Global Value Chains (GVC)

- Globalization, Technology and MNC Production Networks and Just In Time (JIT) manufacturing have changed trade patterns.
- Behind the border measures are more important to trade flows for both *goods and services*.
- The **Rule of Law** adds to the attractiveness of individual states and even of regions for this GVC growth.



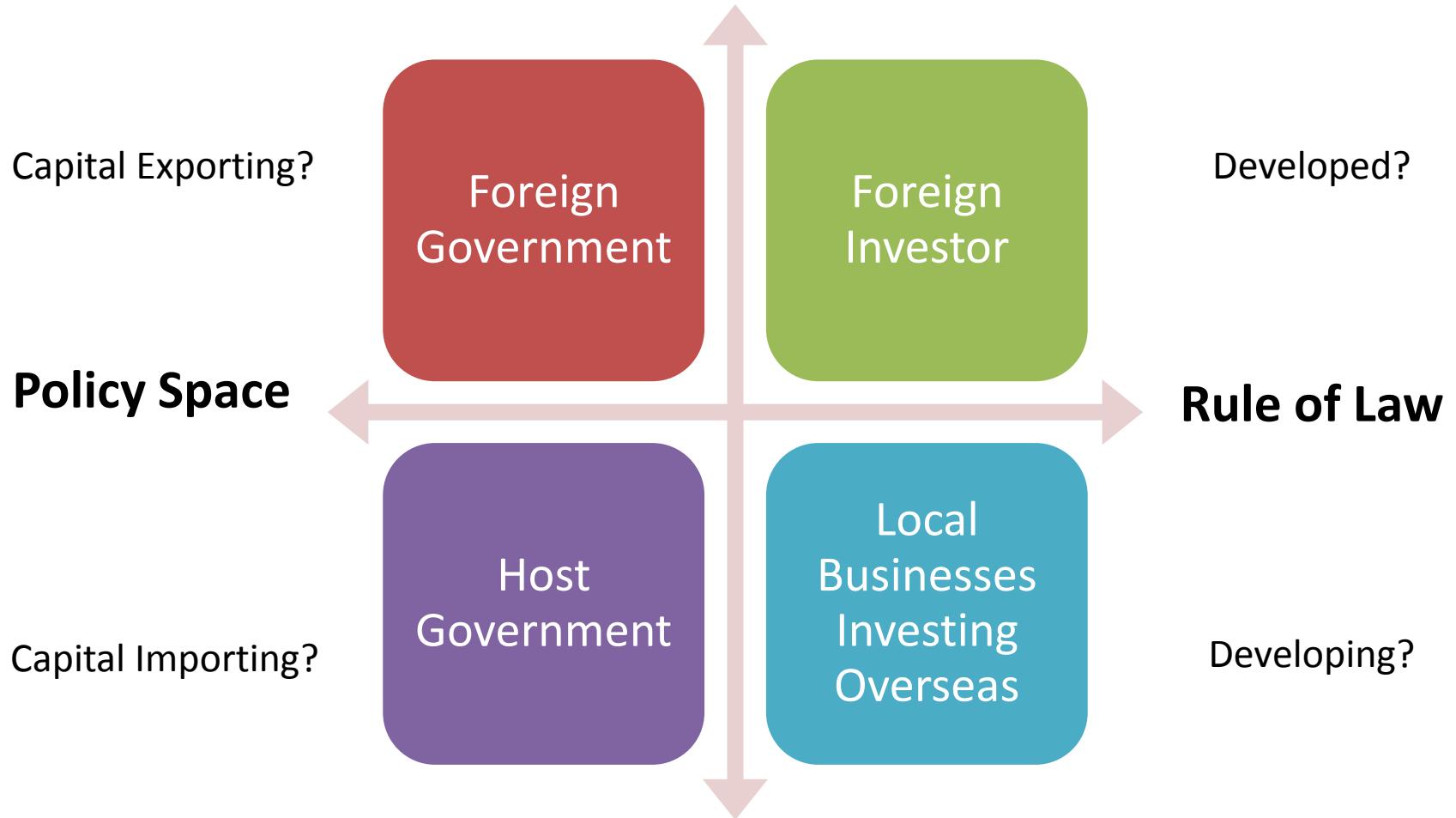
[Anti]Globalization Trends and FDI

1. The Gains of Free Trade are Oversold and Underappreciated.
2. Jobs are being lost (largely due to Technology).
3. Visible Immigration is increasing Xenophobia.

Cf.

1. Developing Countries are becoming Capital Exporters.
2. Outgoing Investors from Developing Countries also want Rule of Law and greater Certainty.
3. Subject to political considerations, all countries want FDI and are relatively origin neutral about FDI.

Four Perspectives



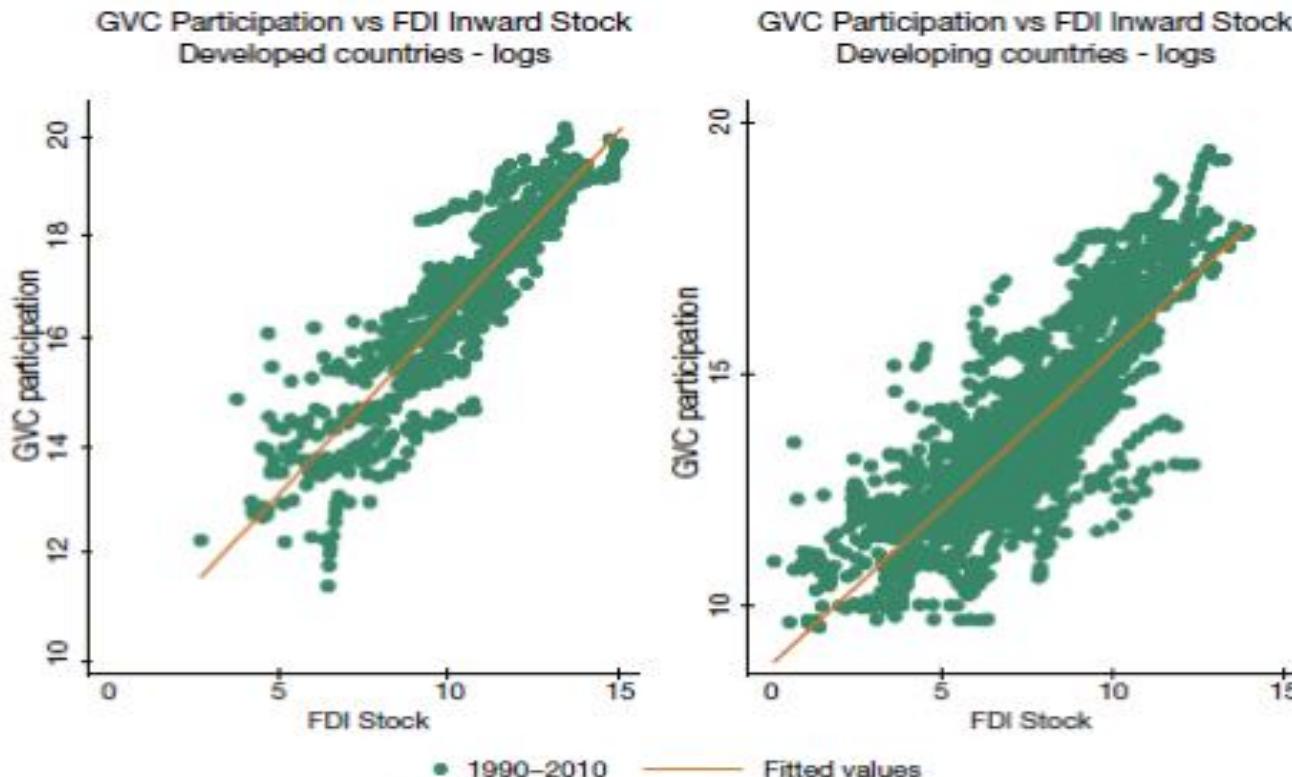
Drivers of Change for Developing Country IIAs



ASEAN and Asia Pacific IIAs



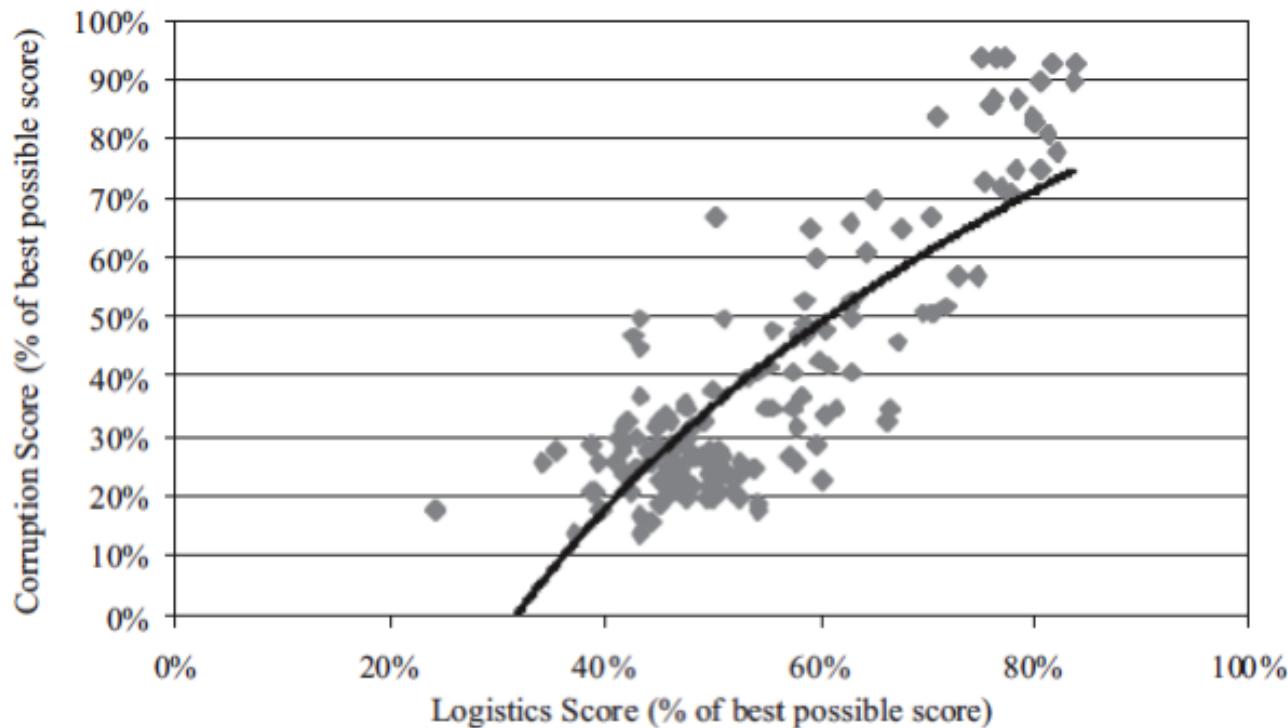
FDI and GVC Participation



Source: UNCTAD-Eora GVC Database, UNCTAD FDI Database, UNCTAD analysis.

Note: Data for 187 countries over 20 years. The regression of the annual GVC participation growth on the annual FDI inward (stock) growth yields a positive and significant correlation (at the 5 per cent level) both for developed and developing countries ($R^2 = 0.77$ and 0.44 , respectively). The correlation remains significant considering the two time periods 1990 - 2000 and 2001 - 2010 separately. Regressions use lagged (one year) inward FDI (stock) growth rates and include year fixed effects to account for unobserved heterogeneity.

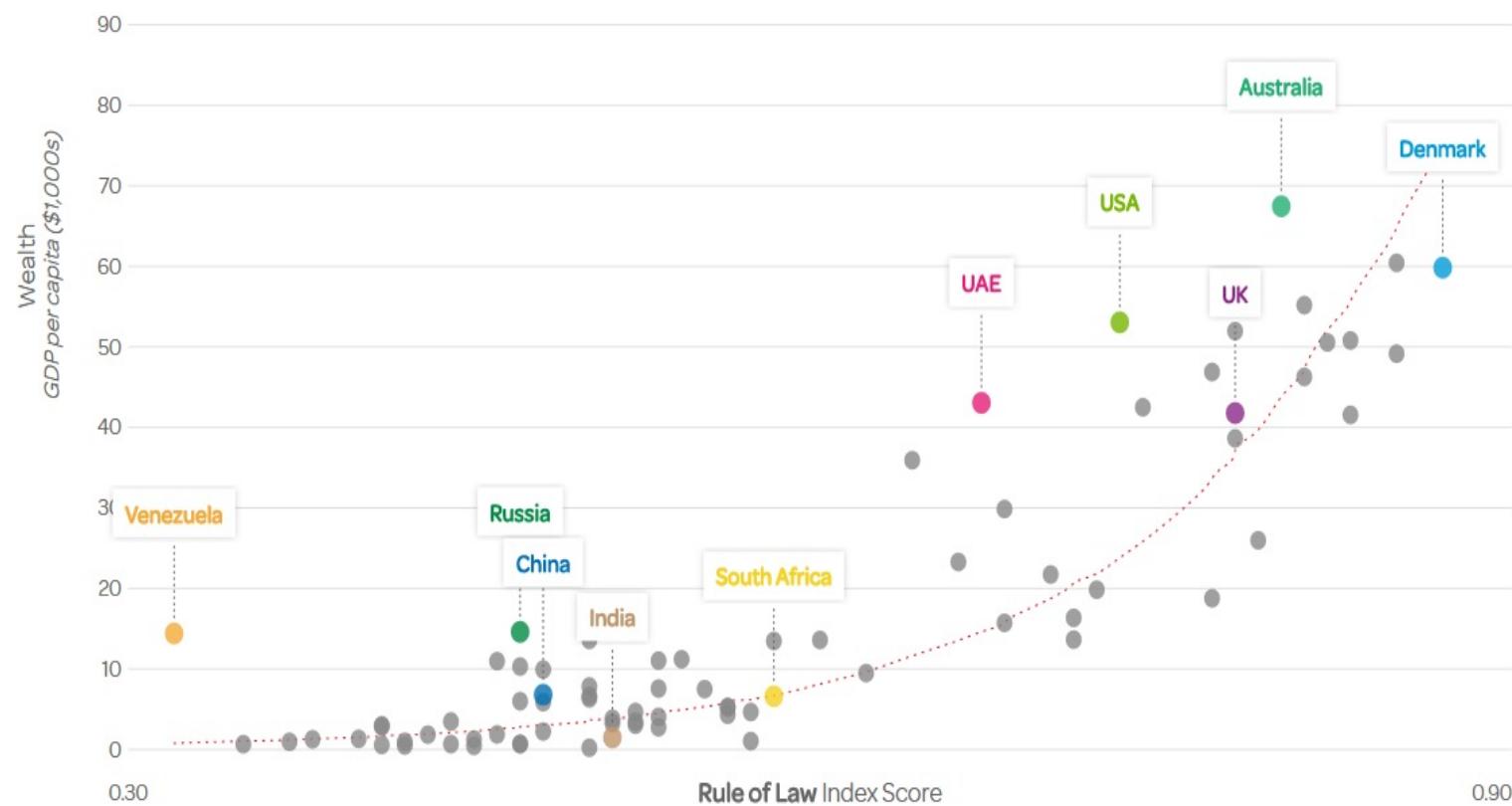
Relationship between Logistic Performance and Corruption



Source: World Bank and Turku School of Economics (Finland), Logistics Performance Index, <http://info.worldbank.org/etools/tradesurvey/modelb.asp>, and Transparency International, Corruption Perceptions Index, <http://www.transparency.org/>.

Note: Each point is a country's set of scores for both indices.

GDP and WJP Rule of Law (RoL) Index: Correlation but Causation(?)



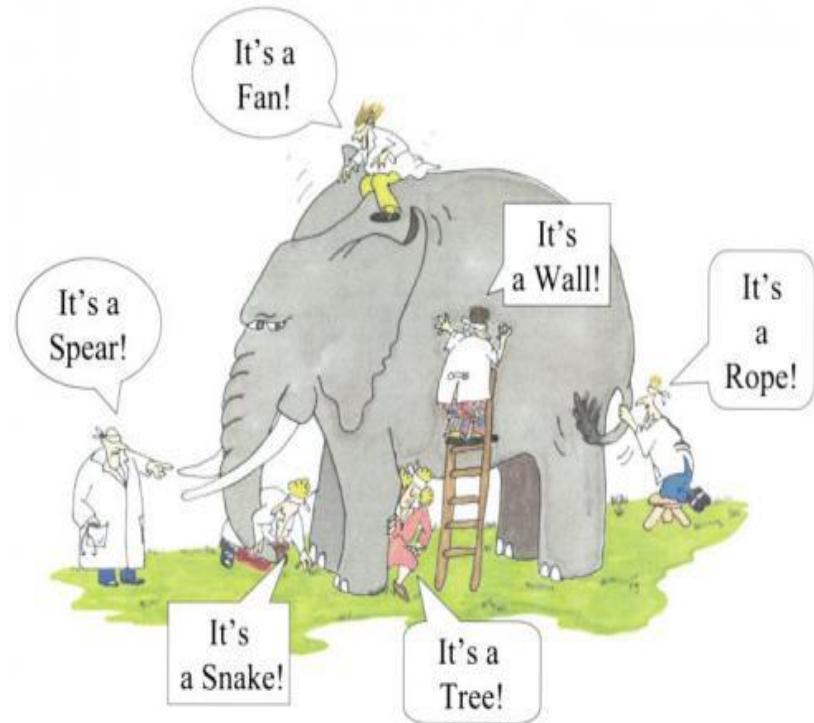
Source: Lexis Nexis RoL Impact Tracker 2017

World Justice Project

1. The government and its officials and agents as well as individuals and private entities are accountable under the law.
2. The laws are clear, publicized, stable and just, are applied evenly, and protect fundamental rights, including the security of persons and property.
3. The process by which the laws are enacted, administered and enforced is accessible, fair and efficient.
4. **Justice is delivered [in a] timely [manner] by competent, ethical, and independent representatives and neutrals** who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

Do IIAs contribute to the RoL?

- OECD Pohl (2018) no evidence of positive or negative impact on RoL.
- It really depends on which IIA?
- Which aspect of RoL?
- Some evidence of change of domestic law and institutions to be more transparent and certain.
- Some concern about chilling effect on public protection regulation.
- Some concern about diversity and public participation in adjudication.



Governance at All Levels

- International
- Regional
- National
- Local
- Investment rules provide incentives to all levels to have better governance and a way for all levels to negotiate with each other

Integration through the Rule of Law: Elements of Legalization

Goldstein, Kahler, Keohane, and Slaughter:

1. **Obligation** refers to international actors being legally bound by legal rules and procedures, whether international or domestic.
2. **Precision** means that these rules and procedures define rights and obligations in unambiguous ways.
3. **Delegation** relates to the grant of authority to third parties, such as courts, arbitrators, and administrative bodies, to interpret and apply rules during dispute settlement.

Value of Legalization

- Baldwin: East Asian regionalism is “a mess” in that while there is a high level of regional division of labour in the production process, there has been limited legalisation of the process.
- This has resulted in a business environment which is less transparent and less certain than that of Europe but one which is no less productive.
- However, Dieter suggests that the production of automobiles and electronics in East Asia is relatively integrated in practice but it faces protectionism and inconsistent governmental policies.

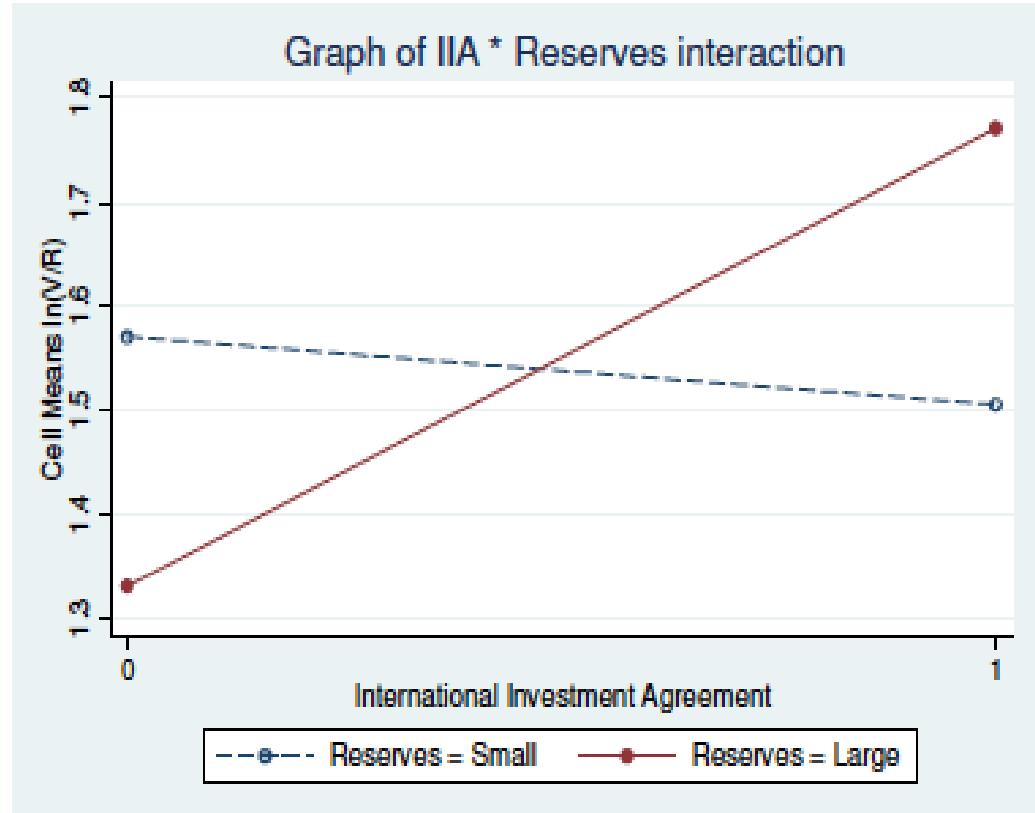
Arbitration and the Rule of Law

International Arbitration provides MNCs with greater confidence that:

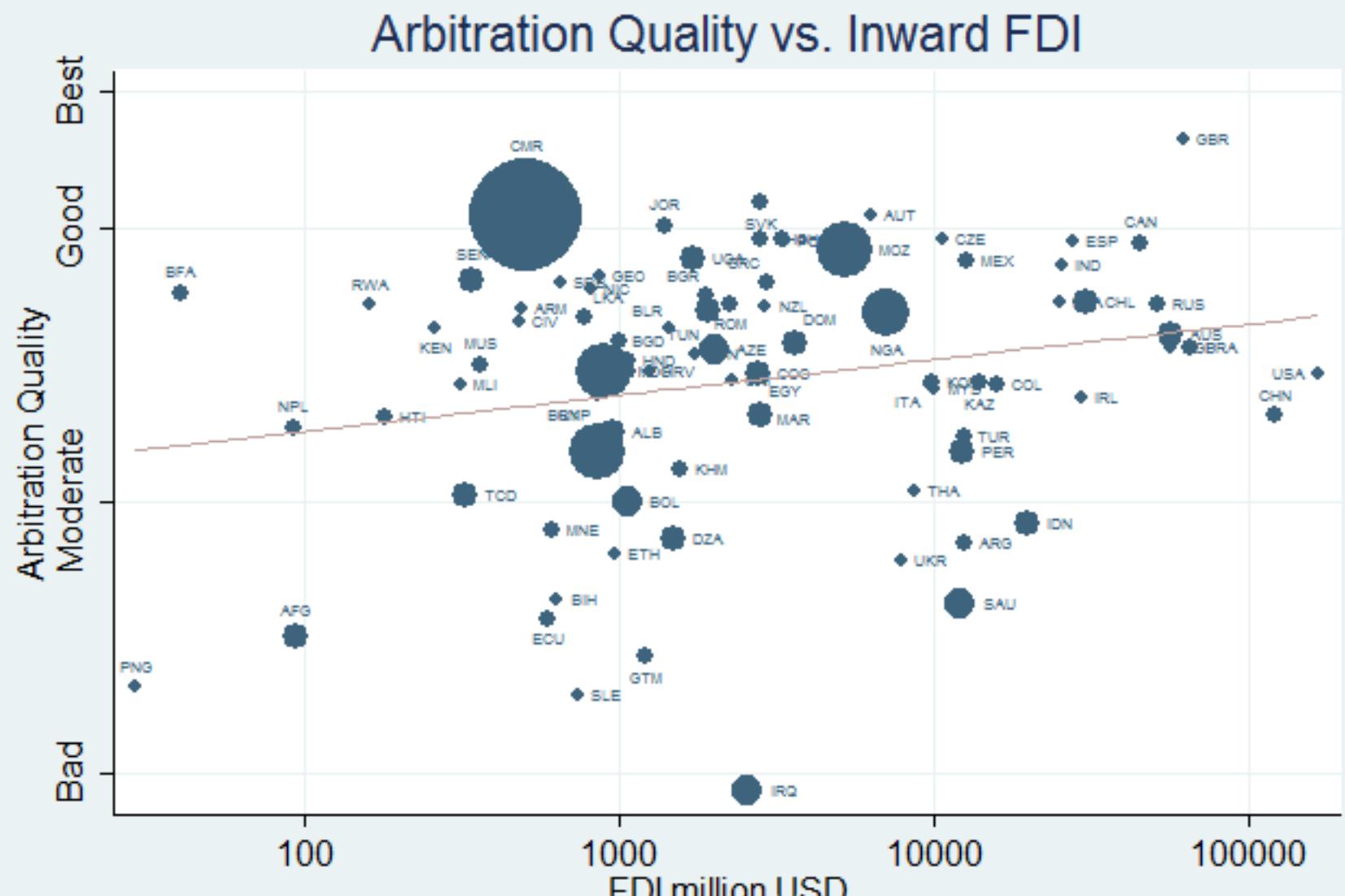
1. Disputes can be efficiently settled;
2. That awards can be enforced across many jurisdictions; and
3. That bargains and agreements can be made to stick.

IIA Premium for Big Oil Investors

- For firms with large reserves, the presence of an IIA increases their willingness to pay for foreign petroleum assets by **43%**.
- For firms with small reserves, however, there is a small but insignificant negative effect.



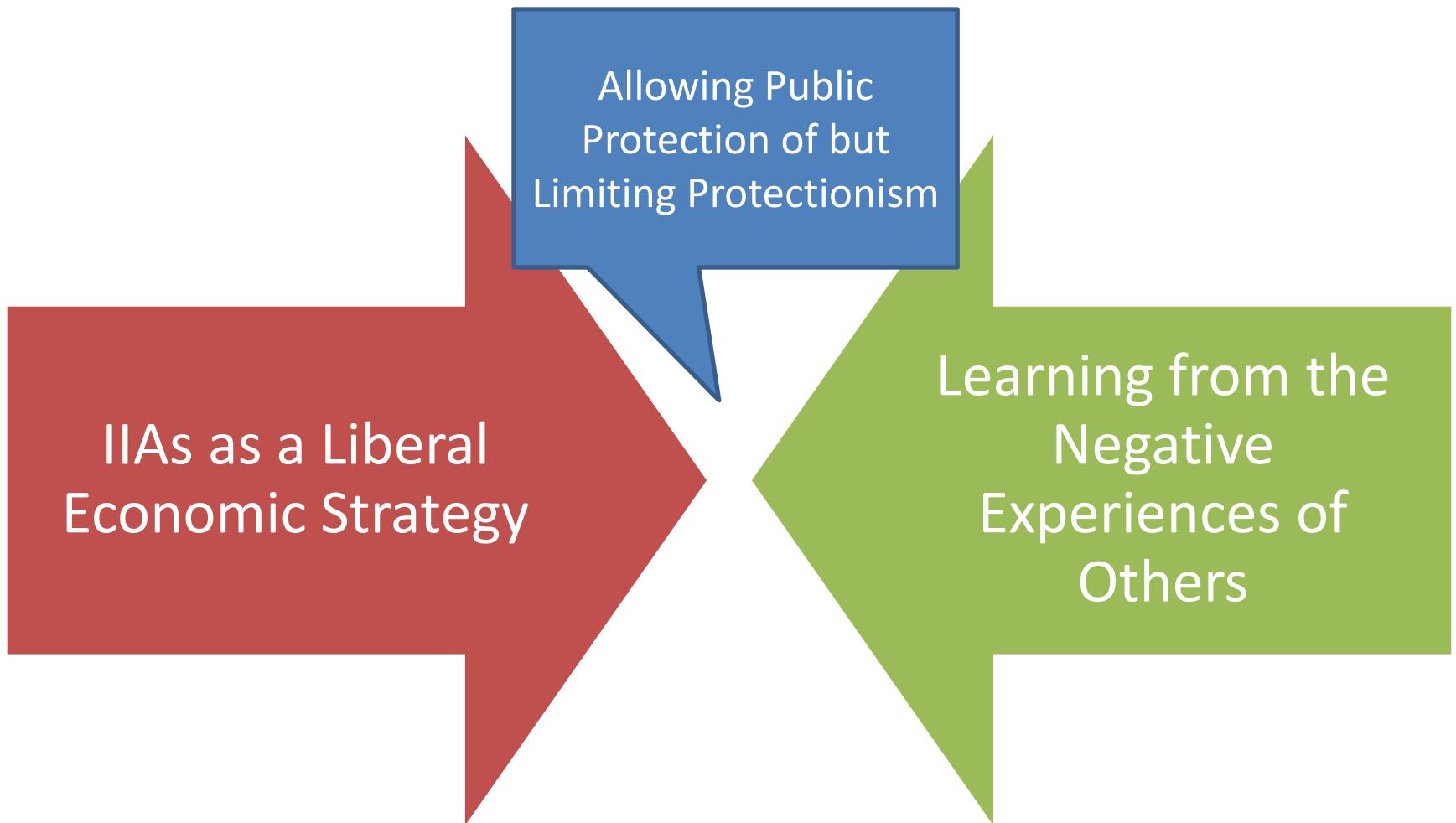
Jandhyala & Weiner 2014



Types of Foreign Direct Investments

- Market Seeking
 - Resource Seeking
 - Efficiency Seeking – GVCs
 - Strategic or Capability Seeking
-
- Long term
 - Short term

Managing Policy Space



Managing Policy Space

- Asian States want to promote the perception of the Rule of Law to encourage FDI, GVCs and trade.
- However, they recognize the limitations of their developing administrative processes and want to limit their exposure and maximise their policy space.
- This can be seen in the ACIA and other ASEAN IIAs drafting of:
 1. Transparency for Approval of Investments
 2. Regulatory Measures and Indirect Expropriation / FET
 3. Incorporation of General Exceptions

Strategy for Reforming IIAs

- **Blueprint** - How do you want Visitors and Stakeholders to use it?
- Unfortunately, a lot of reforms are reactive rather than reflective. Driven by the experience of being a defendant.
- That is like designing a building without entry points for people so that there will never be any liability for an injury but it will not be a very useful building.
- Alternatively, you can **design so that risk are reduced but are also “weighed and balanced” so that usage and risk are managed.**



The Entrance is
on the internet

How to Reform IIAs?

- Strategy – What do you want to achieve?
- Domestic – What systems are you working with and do you need to improve them?
- International – What obligations do you have and do you need to refine them?
- Dispute Settlement – What problems do you see and using a cost-benefit analysis do you want ISDS, a Court, an Appellate Mechanism etc?

Free IIA Legal Reform Tools Available

- UNCTAD World Investment Report (particularly 2015)
- UNCTAD Roadmap
- UNCTAD Investment Policy Hub (to compare with other IIAs)
- While at the end of the day, you may engage experts to advise you about IIA reform, only the state can fully own the project.
- The development of domestic expertise is important.

Conclusion

- The Rule of Law and better IIAs are needed more than ever to improve governance.
- We need to Manage Policy Space but also fill that Space with Good Policies.
- We need a Strategy for Investment Policy before beginning a Reform Project.
- There are ways to Refine and Reform IIAs and many resources to use to do so.

Consider the Counterfactuals

Many forms of Government have been tried...
[n]o one pretends that democracy is perfect
or all-wise. Indeed it has been said that
democracy is the worst form of Government
except for all those other forms.

- Winston Churchill, House of Commons, 11 November 1947

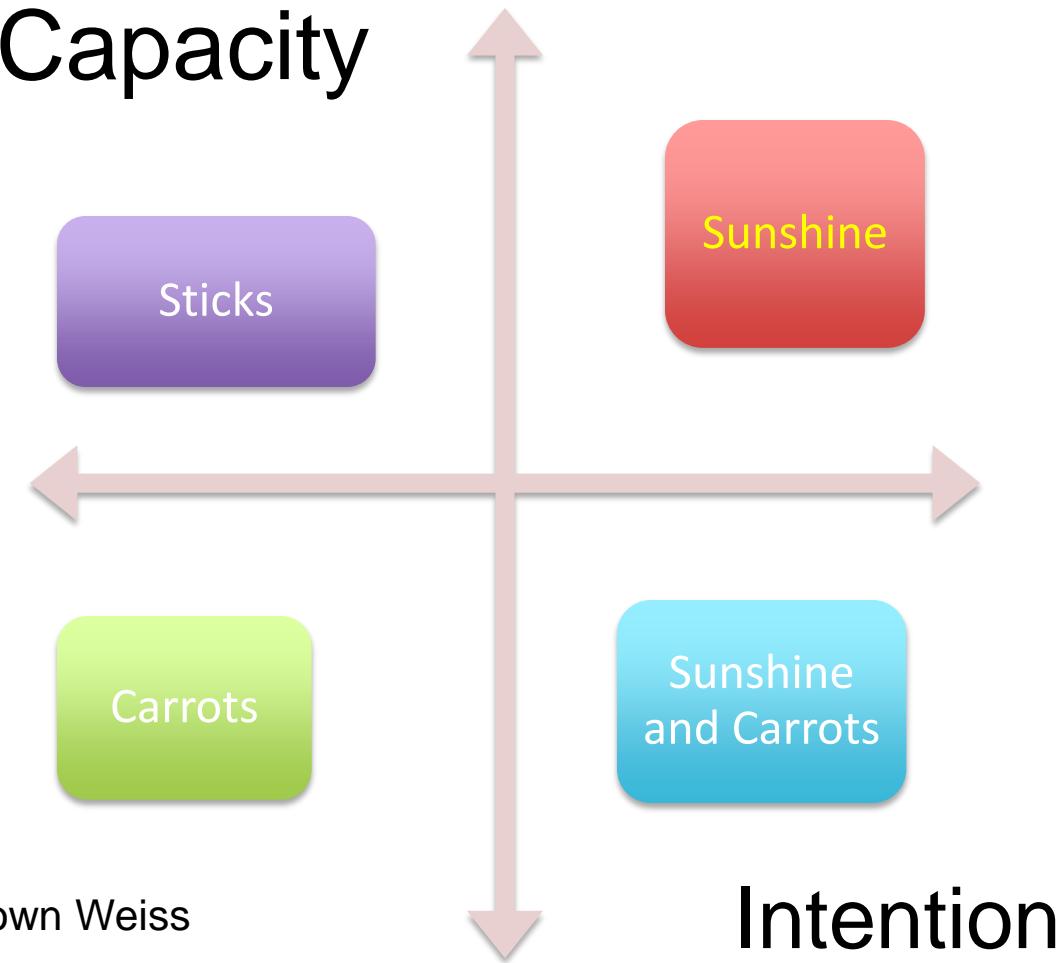
SOME ALTERNATIVES

What are the Alternatives?

1. Domestic courts? (may in some cases not be trusted by investors)
 2. Investor seeks specific exception from the regulation? (not transparent to the public)
 3. Investor attempts to change governmental policy? (not transparent to the public)
 4. Option of *ad hoc* negotiation for Commercial Arbitration on a contract to contract basis.
-
- Jandhyala and Weiner (2014) have shown that MNCs pay a significantly higher price (an IIA premium) for petroleum assets that are IIA protected over those that are not.
 - Paniagua (2017) suggests that the signing of the NY Convention and presence of International Arbitration has a positive effect on bringing in FDI.

IMPROVING THE MANAGEMENT OF INVESTMENT DISPUTES

Methods for Compliance



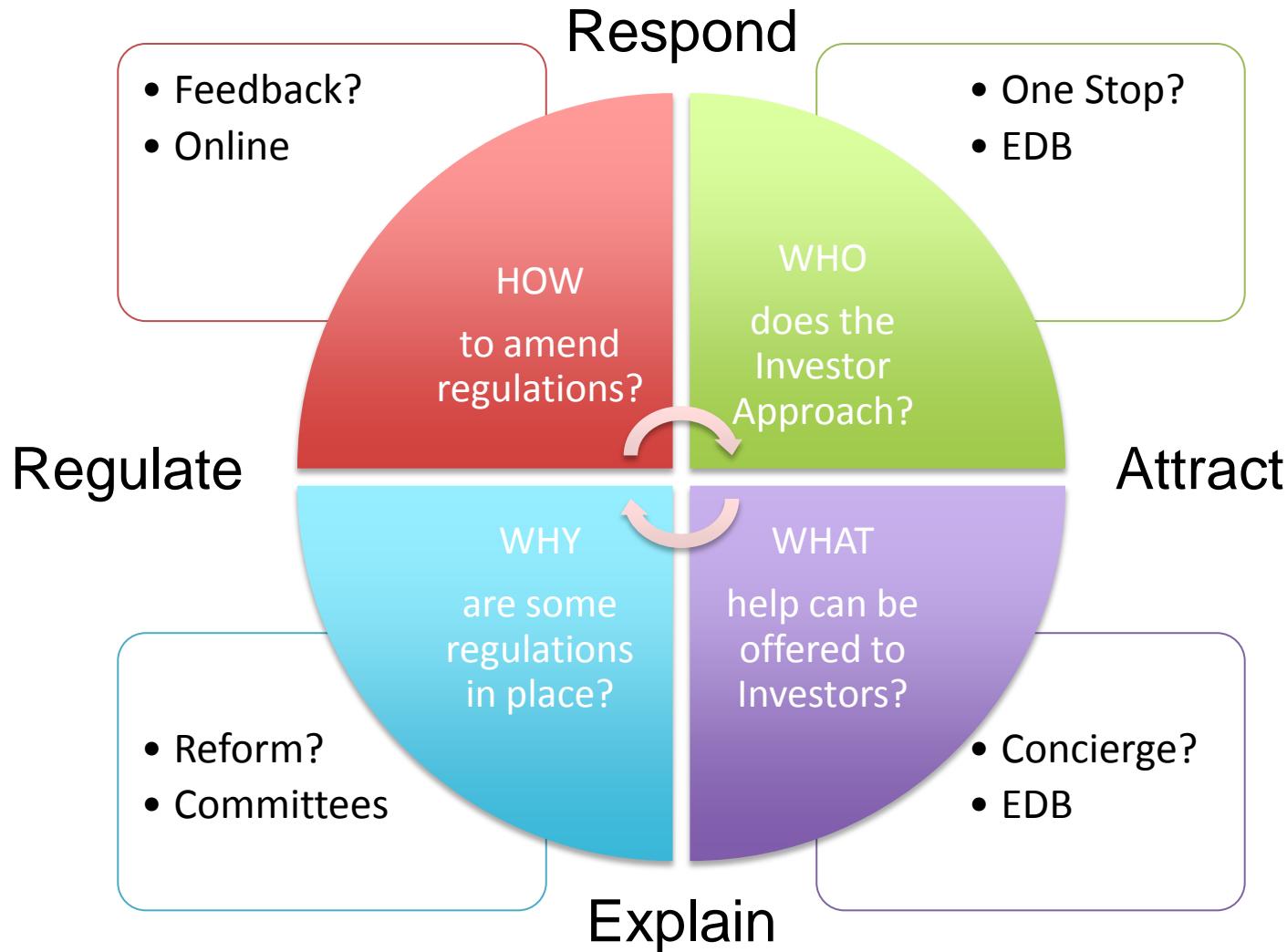
Jacobson & Brown Weiss
(2000)

Intention

Preventing the Escalation of Disputes

- Office of the Foreign Investment Ombudsman (Korea)
 - Within the Korea Trade-Investment Promotion Agency
 - Independent and accountable solely to the Prime Minister
 - Scope: taxation, investment procedures and incentives, customs and tariffs, finance, labor, insurance, visa, etc.
- International Investment Disputes State Coordination and Response System (Peru)
 - Requires cooperation among all government agencies;
 - Imposes accountability on the agency which has triggered the dispute (bearing any costs of the process and award against the State)
 - See also Roberto Echandi's work at the World Bank

Investor Centric Process



RECENT TRENDS IN IIA

Investment cases against ASEAN states 1981-2016

No.	Country	Number of known cases (since 1981)
1.	Indonesia	9
2.	Vietnam	7
3.	Philippines	4
4.	Malaysia	2
5.	Lao	2
6.	Cambodia	1
7.	Thailand	1
8.	Myanmar	1
TOTAL		27

Overview of the ASEAN Cases

- Most of the cases have involved BITs not FTAs Investment.
- 80% of the cases in ASEAN have been filed or litigated in the last five years – but this is not an Argentina situation.
- Only two of the cases have resulted in awards against the host state – *Amco v Indonesia* (1990) and *Walter Bau v Thailand* (2009).
- The *Sanum v Laos* award (2013) was set aside by the Singapore High Court (2015) but reversed on appeal to the Singapore Court of Appeal (2016).
- Some cases were settled – *Cemex v Indonesia*, *Trinh Vinh Binh v Vietnam*, and *SGS v Philippines*.
- However, a number of new cases are potentially pending against Indonesia and the Philippines.
- No publicly known cases have been filed against Singapore and Brunei.

Trend 1: ISDS or No ISDS?

- Canada and EU have suggested an International Investment Court.
- Some Asian states have suggested IIAs with “exhaustion of local remedies” (i.e. completing the domestic court route) before going on to international investment arbitration – India and Indonesia for example.
- However, both Indonesia and India have accepted direct ISDS – Indonesia in 2009 with ACIA and India in 2014 with India ASEAN IIA.
- Despite Australia’s concern, the TPP includes ISDS (but suspended at the moment).

Trend 2: Refinement of IIAs

- Most recent IIAs (ASEAN IIAs and TPP) include refinements for the definition of:
 - MFN (non-application to dispute settlement)
 - MFN (exclusion in Singapore-EU FTA and ASEAN India IIA)
 - Indirect expropriation
 - Fair and Equitable Treatment
- General Exceptions – all ASEAN IIAs include them but TPP does not (but includes other exceptions).
- Refinement of ISDS procedures for preliminary questions, transparency of proceedings and joint interpretation of text by IIA parties.

Trend 3: FTAs v BITs, SD Clauses and Carve Outs

- Not just Investment Protection but Investment Facilitation and Liberalization (including MA).
- Incorporation of statements about sustainable development – particularly environmental and social concerns (hortatory or actually effective?).
- Increasing use of reservations and carve-outs like Australia's tobacco control ISDS carve out and Singapore's tax measures taken for actual physical space public policy objectives. (TPP)