FTA Investment Chapter and Sustainable Investment

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Investment Liberalization

- Trade liberalization vs investment liberalization
  - Goods (trade) come and go; investment stays.
- Long-term perspectives
  - FDI becomes part of national economy
  - Very difficult to “close” investment
  - Domestic reform
    - Simply signing a large number of IIAs does not help
    - Reform of investment law and signing of IIAs
    - Attracting service FDI could be more challenging
  - FTA/BIT as a commitment and signaling mechanism
- Investment is source of:
  - Technology
  - Knowledge
  - Finance
Stability of External Funds

Figure I.12. External sources of finance for developing economies, 2007–2016 (Billions of dollars)

Source: ©UNCTAD, based on data from IMF (for portfolio and other investment), from the UNCTAD FDI/MNE database (for FDI inflows), from the Organization for Economic Cooperation and Development (for ODA) and from the World Bank (for remittances).

Note: Other investment includes loans among non-affiliated enterprises.
FDI Exporters and Importers

- Who is FDI importer/exporter?
  - China: FDI exporter
  - All countries start to attract FDI; even countries like the US and Japan
    - Investment-human capital nexus
Service FDI

• Growing trend of services FDI
  – Traditionally, Resources and Manufacturing
    • Note: some data problem, service activities, not sector.
  – “Minor” service (health, environment etc): huge potential.
Service Trade and Investment

• Service FDI is critical to GVC
  – Service is input to GVC (transport; finance)
  – Service is input to service GVC
  – Digital Economy: E-value chains
  – Huge implication to domestic sectors/people

• Different Approaches?
  – Goods/manufacturing: incentives
    • Countries compete over foreign investments
    • SEZ
  – Services
    • Regulations; foreign investment sometimes unwelcome.
    • Universal services
Various IIAs in Asia

• BITs
  – Traditionally, protection only
  – With Western capital exporters

• GATS type FTA
  – investment chapter + GATS style service chapter (positive list)
  – Four modes; 1 cross-border; 2 consumption abroad; 3 commercial presence; 4 movement of natural persons

• NAFTA type FTA
  – Investment chapter (no service chapter)
Various Ages of IIAs: The Older, the Better?

• The older, the better?
  – “Best” treaty would be the oldest one.
  – Old treaties tend to include imprecise rules/terms/provisions.
MFN in IIAs

• Basic idea: All shall be treated equally
• MFN in trade and investment
  – Trade
    • MFN tariff for WTO Members
    • Tariff preference can be eliminated by lowered MFN tariff
  – Investment
    • The “best” agreement (no “World Investment Organization”)
    • With MFN, better provisions/languages can be imported.

• Scope of MFN in IIAs
  – Substance vs procedural
  – Pre-establishment vs post-establishment
  – FTA investment chapter vs BITs (REIO exception)

• Two potential problems:
  – Languages in IIAs are highly mobile by MFN provisions, which makes the interpretation of IIAs complicated.
  – “Broad”/”Unclear” MFN
MFN: Old and New

• TPP, Article 9.5
  – Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

• 1989 China-Japan BIT, Article 3
  – The treatment accorded by either Contracting Party within its territory to nationals and companies of the other Contracting Party with respect to investments, returns and business activities in connection with the investment shall not be less favourable than that accorded to nationals and companies of any third country
Mobility of Investors

- Investors move to seek best protection
- PM case
  - Not US-Australia FTA investment chapter, which excludes ISDS
  - HK-Australia BIT
- The use of “best” IIA by unexpected parties could be problematic
  - Unexpected use of IIA → ISDS initiated by an unexpected party; More options (of claim)
    - Goods: established concept of ROO (country A firm’s use of B-C agreement is rare).
  - Unexpected use is likely, because (1) the origin of investor is ambiguous; and (2) investors are “mobile”.
Possible Solutions of IIA Noodle Bowl

• Reform of old BITs
• The noodle bowl problems become serious because two “factors” are mobile:
  – Investors: Investors change location to be best protected by the IIA.
  – Provisions: Provisions in IIAs can be “imported” using MFN
• Solutions
  – Control the mobility of two mobile factors
    • Scope of investors
    • Scope of MFN in IIAs
  – Enhance the mobility of “another” factor.
    • “Membership”. Open membership for IIA.
      – If non-member can join, there is no need to use a third party’s IIA.
• If countries can be moved (accession), there is no need to move languages/companies.
  – What if US-China BIT has accession clause?
  – What if accession to TPP investment chapter alone is possible?