

Asian Noodle Bowl of International Investment Agreements (IIAs)

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Issues

- Investment is as important as trade (in goods).
- Noodle bowl syndrome of investment is more serious than trade (in goods).
 - It is not the noodle bowl of FTAs, but that of IIAs that creates serious problems.
 - While a large emphasis on the noodle bowl of free trade agreements (FTAs), little attention has been paid on international investment agreement (IIAs).
 - Investor-state dispute (trade: state-state dispute).

Historical perspective

- Originally, the focus has been on investment protection (not investment liberalization). North-South IIAs.
- NAFTA (Chapter 11 Investment) in 1994 (protection + liberalization)
→ The explosion of IIAs
- As of now:
 - There are more than 3,000 IIAs.
 - There are more than 400 claims/cases based on IIAs.

Asia's IIAs

	World total	Asia total	Cross-regional	Intra-regional
Investment treaty	2,850+	1,194	1,048	146
Investment chapter under FTA	200+	61	40	21
Total	3,000+	1,255	1,088	167

Quantitative Analysis

	Total IIAs	BITs	FTAs with Investment		Total IIAs	BITs	FTAs with Investment
PRC	135	129	6	Kyrgyz Republic	28	28	0
Korea	97	92	5	Sri Lanka	28	28	0
India	84	83	3	Australia	28	23	5
Malaysia	70	67	3	Japan	27	18	9
Indonesia	64	63	1	Taipei,China	26	23	4
Viet Nam	59	58	1	Lao PDR	23	23	0
Singapore	53	41	12	Turkmenistan	23	23	0
Uzbekistan	49	49	0	Cambodia	21	21	0
Pakistan	48	46	2	Hong Kong, China	17	15	2
Azerbaijan	45	45	0	New Zealand	11	5	7
Mongolia	43	43	0	Brunei Darussalam	8	6	2
Kazakhstan	42	42	0	Myanmar	6	6	0
Thailand	41	39	2	Nepal	6	6	0
Armenia	36	36	0	Papua New Guinea	6	6	0
Philippines	36	35	1	Afghanistan	3	3	0
Tajikistan	31	31	0	Vanuatu	2	2	0
Bangladesh	29	29	0	Tonga	1	1	0
Georgia	29	29	0				

Intra-Asian IIAs

- PRC (30 intra-Asian IIAs): with almost all Asians (except Nepal)
- India (23 intra-Asian IIAs)
- Korea (22 intra-Asian IIAs)
- Viet Nam (21 intra-Asian IIAs)
- Indonesia (20 intra-Asian IIAs)
- Malaysia (19 intra-Asian IIAs)

Qualitative Analysis of Asian IIAs

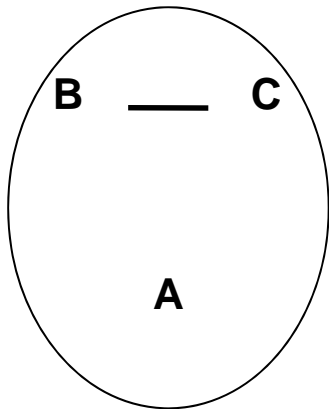
- Quality does matter!
- BITsel Index (project of Chinese University of Hong Kong)
 - Coverage: More than 1,500 BITs and more than 100 FTAs with investment chapter.
 - The 11 legal criteria that are used to review IIAs:
 - (1) the definition of investment;
 - (2) admission for foreign investment;
 - (3) national treatment;
 - (4) most favored nation;
 - (5) expropriation and indirect expropriation;
 - (6) fair and equitable treatment;
 - (7) transfer of investment-related funds out of the host state provision;
 - (8) non-economic standards;
 - (9) investor-state dispute mechanism;
 - (10) umbrella clause;
 - (11) temporal scope of application.
 - Indicator between 2.0 (liberal) and 1.0 (restrictive)

Asian Countries' IIAs: Comparison

	PRC	Korea	India	Indonesia	Malaysia
BITsel number of IIAs	84	77	72	61	61
BITsel quality indicator: Average	1.58	1.75	1.82	1.57	1.62
Strongest treaty and coefficient	Germany 1.90	Vietnam 1.90	Switzerland, Mauritius 1.90	Germany 1.90	Saudi Arabia 1.81
Weakest treaty and coefficient	Bulgaria, Mexico, Colombia, Costa Rica 1.36	Indonesia 1.36	Mexico 1.63	Denmark 1.27	Lebanon 1.36
Coefficient of variation	0.31	0.23	0.20	0.30	0.29

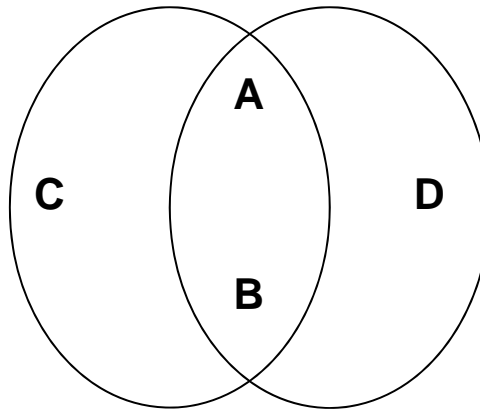
Noodle Bowls: Three Scenarios

Nested Agreements



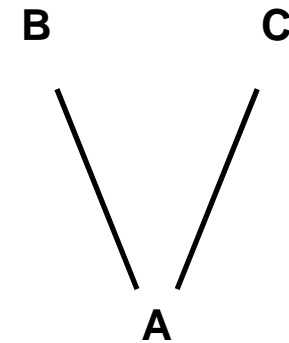
B-C bilateral
A-B-C trilateral

Overlapped Agreements



A-B-C trilateral
A-B-D trilateral

Intersected Agreements



A-B bilateral
A-C bilateral

Two Angles to Analyze Noodle Bowl Problems

- Two angles to consider the problems associated with Noodle bowl.
 - Treaty shopping: Best treaty is chosen!
What's the point of having different rules?
 - Unexpected use of agreement (use of agreement by unexpected party).

Nested Agreements (A-B-C versus B-C)

- In the case of trade in goods, this basically gives more options for traders.
- In the case of investment, one could similarly argue that having more options (of claim) is better. Is this really true?
 - Procedures: If procedures for ISDS are inconsistent, such may cause a problem (domestic, ICSID).
 - One treaty - “fork on the road”
 - Substance: The difference between substantive rules of nested IIAs would lead to uncertainty of applicable rules, at an early stage (before the decision on ISDS is made).

Intersected Agreement (A-B versus A-C)

- It is simply too natural that different rules are applicable to different economic relations. What's the problem?
- In the case of goods:
 - The risk of treaty shopping is not that serious, because of established ROOs (country A firm's use of B-C agreement is rare).
 - Unexpected usage of FTAs (leaky ROOs) is welfare enhancing.
- In the case of investment:
 - Treaty shopping problem is serious, because (1) the origin of investor is ambiguous; and (2) investors are "mobile".
 - MP case: HK-Australia BIT
 - Unexpected usage of provision leads to unexpected ISDS initiated by an unexpected party.

Policy Issues

- Investment under WTO?
- World Investment Organization? OECD-MAI?
- Region-wide investment agreement (not region wide trade agreement).
 - Separate investment issues from other (trade related) issues.

Conclusion

- It can be said that:
 - So many IIAs.
 - The quality of IIAs varies.
 - Noodle bowl of IIAs could be problematic.

Further information

- Chaisse and Hamanaka (2013) “Investment Version of Asian Noodle Bowl, *Forthcoming Working Paper on Regional Economic Integration*.”
- Hamanaka (2013) “A note on detecting biases in assessing the use of FTAs”, *Journal of Asian Economics* 29: pp 24-32.
- Hamanaka (2013) *Asian Free Trade Agreements and WTO Compatibility*, World Scientific International Economics Series 32.

