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).
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

<table>
<thead>
<tr>
<th></th>
<th>World total</th>
<th>Asia total</th>
<th>Cross-regional</th>
<th>Intra-regional</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investment treaty</td>
<td>2,850+</td>
<td>1,194</td>
<td>1,048</td>
<td>146</td>
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<tr>
<td>Investment chapter under FTA</td>
<td>200+</td>
<td>61</td>
<td>40</td>
<td>21</td>
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<tr>
<td>Total</td>
<td>3,000+</td>
<td>1,255</td>
<td>1,088</td>
<td>167</td>
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</table>
## Quantitative Analysis

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

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

