

# Regional Integration Efforts

**Is there scope to simplify the Asian Noodle Bowl of IIAs?**

7<sup>th</sup> Asia-Pacific FDI Network

2-3 November, 2017

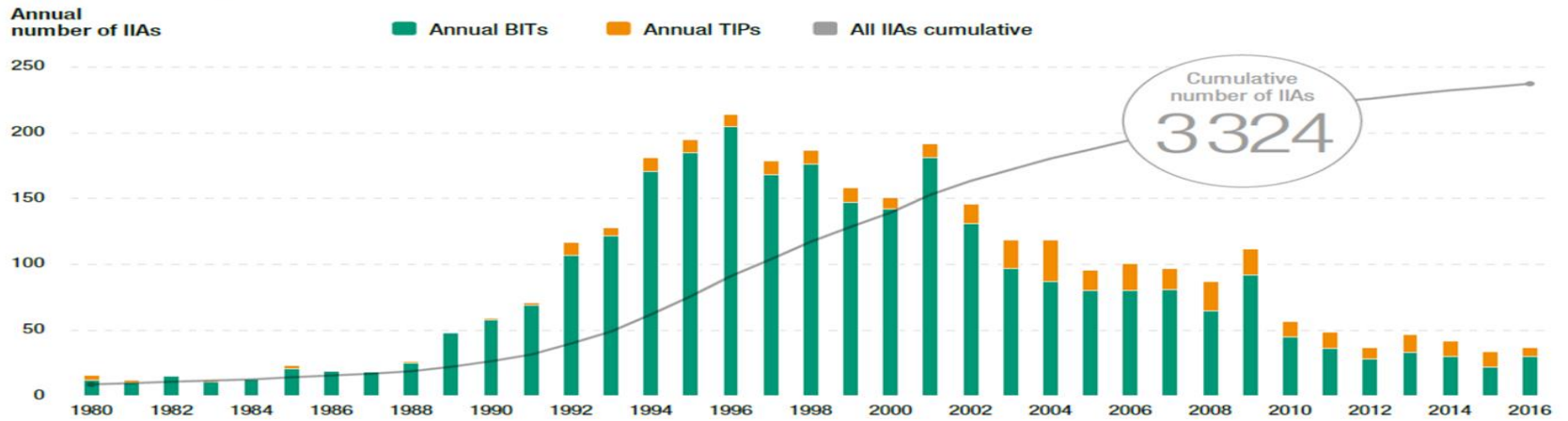
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# Issues

- Noodle bowl syndrome (Bhagwati 1995): Abuse of Agreements
- The problem is more serious in investment than trade (in goods).
  - Goods: No spaghetti bowl in the sense of In the recent literature on Asian FTAs, the problem has been “non-use”
    - Not “non-use” but “abuse” should be the problem.
  - Little attention has been paid on international investment agreement (IIAs); but problems seem to be serious.
    - Much more IIAs than FTAs
    - Investor-state dispute (trade: state-state dispute).
    - The IIA landscape in Asia rapidly changing
      - Old BITs, TPP, RCEP, US-China BIT
    - Various types of IIAs

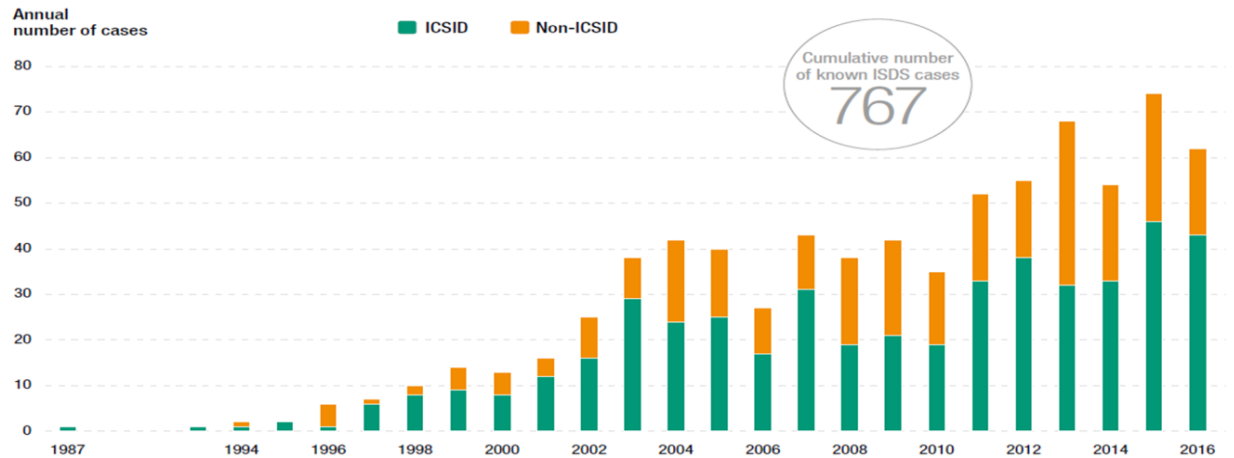
# Trend of IIAs and ISDS

**Figure III.11. | Trends in IIAs signed, 1980–2016**



Source: ©UNCTAD, IIA Navigator.

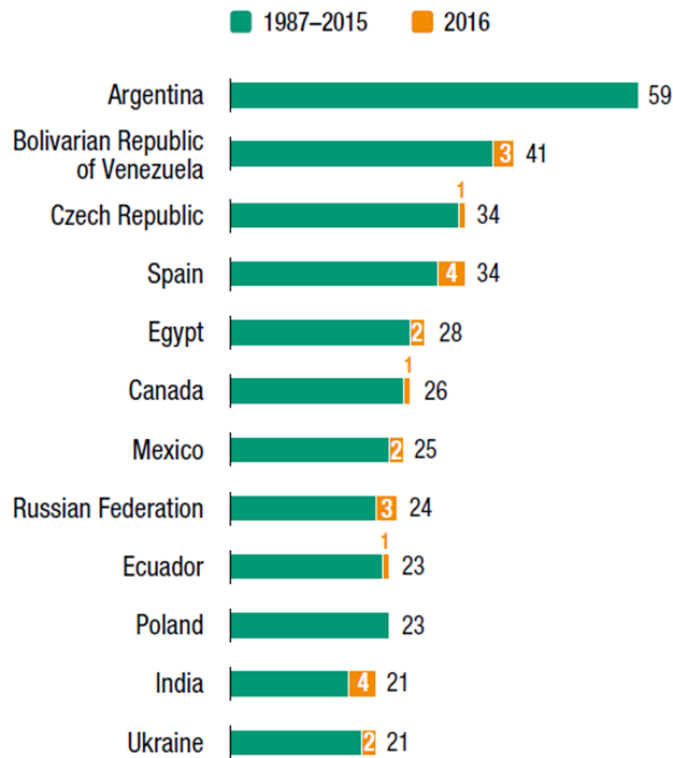
**Figure III.12. | Trends in known treaty-based ISDS cases, 1987–2016**



Source: ©UNCTAD, ISDS Navigator.

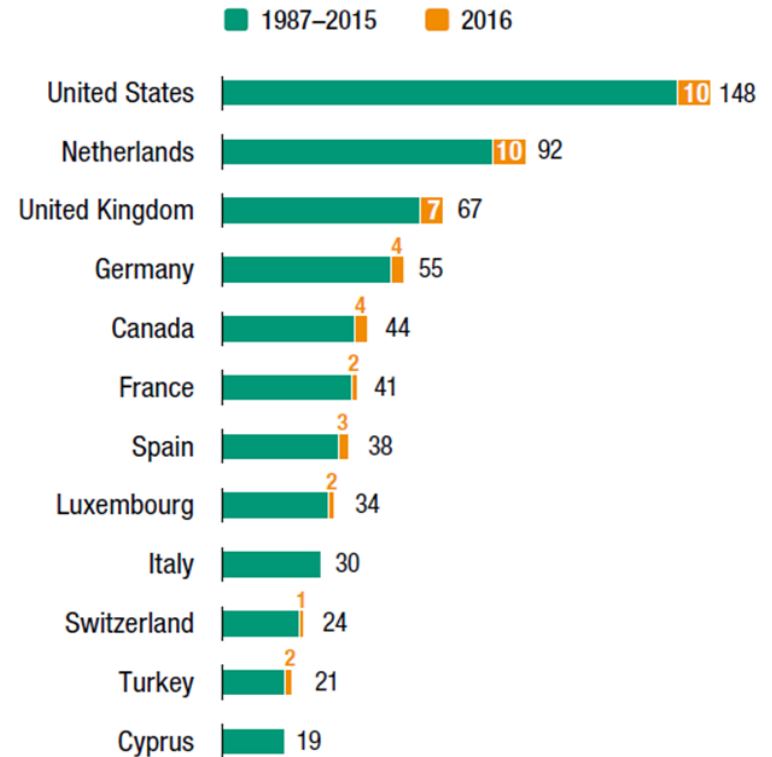
# ISDS

**Figure III.13.** Most frequent respondent States, 1987–2016 (Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

**Figure III.14.** Most frequent home States of claimants, 1987–2016 (Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

# Various Types of IIAs

- Investment treaties vs FTA investment chapters
  - Which one? Both? Investment treaty becomes investment chapter?
  - Investment treaties: Protection vs protection + liberalization
  - Investment Chapter: Usually, P+L
    - GATS style service liberalization + investment chapter
    - Negative list approach (non conforming measures); investment in service sector is covered by investment chapter.
  - Difference: (i) MFN; (ii) investment treaties expire, but FTAs do not.
    - 19 Terminated BITs (2016/1-2017/4 [2017 WIR])
      - Indonesia (11); India (7); Replacement (2; e.g. Japan-Mongolia)
- Investment protection alone vs investment liberalization.
- Bilateral or plurilateral (3 or more parties)
- Regional or extraregional (cross-regional)

# Historical Perspective

- Originally, the focus has been on investment protection. North-South agreements.
- NAFTA (Chapter 11 Investment) in 1994 (protection + liberalization)
  - The explosion of IIAs.
- As of now:
  - There are more than 3,300 IIAs in the world; more than 1,000 IIAs in Asia.
  - There are more than 400 claims/cases based on IIAs.
- In Asia
  - BITs between Asia and Western industrial country.
  - Intra-regional FTA with investment chapter (GATS style + investment chapter).
  - Plurilateral FTA with investment chapter involving both developed and developing countries: ACIA, TPP, RCEP, CJK... 6

# Quality Varies

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

# China-Japan IIA Relationship

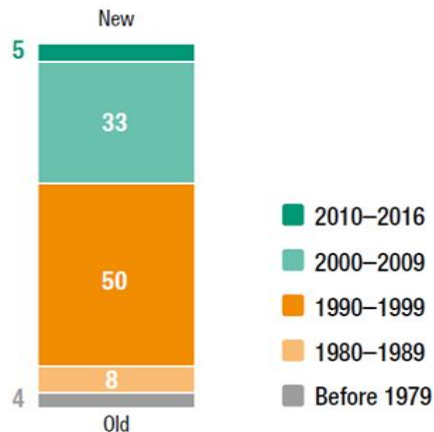
- China-Japan BIT in 1989 (no renegotiation unlike C-K BIT in 1992/2007)
- CJK Trilateral Investment Treaty (TIT)
  - Joint study started in 2003; negotiation started in 2007 and concluded in 2012.
  - Pre-establishment not covered. Limited coverage of PR.
  - For Japan, not ideal but better than the 1989 BIT.
- CJK FTA
  - Negotiation started in 2012.
  - Investment chapter is critical elements
    - China: Done deal. Emphasis on development, WTO TRIM.
    - Japan: CJK TIT+ is necessary. Negative list. Longer list of prohibited PR.
- RCEP among ASEAN+6, another IIA including China and Japan.
  - Original idea: China's East Asian FTA (EAFTA) among ASEAN+3 <goods centric> and Japan's Comprehensive Economic Partnership in East Asia (CEPEA) <investment centric>.
- TPP: China may join?
  - Basically, NAFTA style, but building upon post-NAFTA US experiences.
  - Investment chapter covering services; No GATS style service commitment
  - Negative list; Non-conforming measures.



# The Older, the Better?

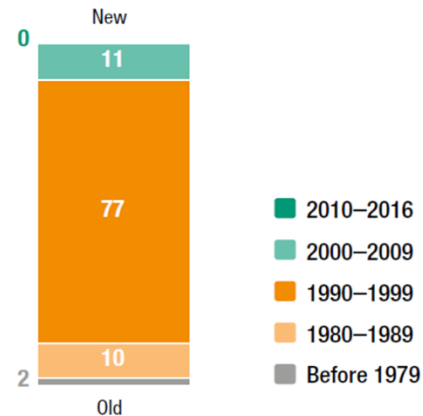
- The more options, the better?
  - Treaty shopping: Best treaty is chosen!
- Which of is the best?
  - The older, the better?
    - “Best” treaty would be the oldest one.
    - Old treaties tend to include imprecise rules/terms/provisions.

Figure III.19. Age of IIAs: share of IIAs in force, by year of signature (Per cent)



Source: ©UNCTAD, IIA Navigator.

Figure III.22. IIAs invoked in known treaty-based ISDS cases, by IIA year of signature (Per cent)



Source: ©UNCTAD, ISDS Navigator.

# (Ab)use of the Best IIA?

- Unexpected use of “best” IIA could be problematic.
  - Unexpected use of IIA → ISDS initiated by an unexpected party; More options (of claim).
    - Goods: Unexpected use of preference; More options for traders.
  - Unexpected use is likely, because (1) the origin of investor is ambiguous; and (2) investors are “mobile”.
    - PM case: HK-Australia BIT.
    - Goods: ROOs (country A firm’s use of B-C agreement is rare).
- The “best” rules may be imported by MFN clause, unexpectedly.

# MFN in IIAs

- 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.
- Languages in IIAs are highly mobile by MFN provisions, which makes the interpretation of IIAs complicated.
- Scope of MFN in IIAs
  - Substance vs procedural
  - Pre-establishment vs post-establishment
  - FTA investment chapter vs BITs (REIO exception)
- “Broad”/“Unclear” MFN

# Example of MFN

- 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

# Possible Solutions

- 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?