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THE EU IN THE GLOBAL INVESTMENT REGIME

**COMMISSION ENTREPRENEURSHIP, INCREMENTAL
INSTITUTIONAL CHANGE AND BUSINESS LETHARGY**

Johann Robert Basedow

The EU in the Global Investment Regime

The European Union (EU) has emerged as a key actor in the global investment regime since the 1980s. At the same time, international investment policy and agreements, which govern international investment liberalisation, treatment and protection through investor-to-state dispute settlement, have become increasingly contentious in the European public debate.

This book provides an accessible introduction to international investment policy and seeks to explain how the EU became an actor in the global investment regime. It offers a detailed analysis of the EU's participation in all major trade and investment negotiations since the 1980s and EU-internal competence debates to identify the causes behind the EU's growing role in this policy domain. Building on principal-agent and historical institutionalist models of incremental institutional change, the book shows that Commission entrepreneurship was instrumental in the emergence of the EU as a key actor in the global investment regime. It refutes business-centred liberal intergovernmental explanations, which suggest that business lobbying made the Member States accept the EU's growing role and competence in this domain. The book lends support to supranational and challenges intergovernmental thinking on European Integration.

This text will be of key interest to scholars, students and practitioners of European and regional integration, EU foreign relations, EU trade and international investment law, business lobbying, and more broadly to international political economy.

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Preface

This book traces and seeks to explain the EU's growing role in international investment policy and the global investment regime from the 1950s until 2017. It has benefited from the support and input of many people and institutions. I am particularly indebted to my PhD supervisor Stephen Woolcock for his guidance. I am grateful for critical and helpful feedback on the various drafts and elements of this book manuscript by Cornelia Woll, Angelos Dimopoulos and Bernard Hoekman. My research and the book manuscript have also benefited from the stimulating intellectual environments at the London School of Economics, the European University Institute, the Directorate General for Trade of the European Commission and the Organisation for Economic Co-operation and Development (OECD). I have discussed my research with many knowledgeable colleagues in these places, which has significantly helped me in developing and refining my thinking. Last but not least, I am deeply thankful for the support of my family and in particular of my parents. I dedicate this book to them.

All errors remain mine.

Abbreviations

ACP	African, Caribbean and Pacific Group of States
BDI	Bundesverband der Deutschen Industrie
BIAC	Business and Industry Advisory Committee
BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
CEFIC	European Chemical Industry Council
CEOE	Confederación Española de Organizaciones Empresariales
CETA	Comprehensive Economic and Trade Agreement
CIL	Customary International Law
CIME	Committee on Multinational Enterprise
CIS	Community of Independent States
CJEU	Court of Justice of the European Union
CMIT	Committee on Capital Movements and Invisible Transactions
Confindustria	Confederazione Generale dell'Industria Italiana
DIHK	Deutscher Industrie- und Handelskammertag
DG	Directorate General
ECFIN	Economic and Financial Affairs
ECJ	European Court of Justice (see CJEU)
ECSG	European Communities Services Group
ECT	Energy Charter Treaty
ESF	European Services Forum
EU	European Union
EUSFTA	European Union-Singapore Free Trade Agreement
FCN	Treaties of Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GNS	Group for Negotiations on Services
ICSID	International Centre for Settlement of Investment Disputes

IGC	Intergovernmental Conference
IIA	International Investment Agreement
IMF	International Monetary Fund
IPE	International Political Economy
IR	International Relations
ISDS	Investor-to-State Dispute Settlement
MAI	Multilateral Agreement on Investment
MEDEF	Mouvement des Entreprises de France
Mercosur	Mercado Común del Sur
MFN	Most-Favoured Nation
MNE	Multinational Enterprise
MPoI	Minimal Platform on Investment
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
OLI	Ownership-, Location-, Internalisation-specific advantages
R&D	Research and Development
Relex	External Relations
REIO	Regional Economic Integration Organisation
SFSRs	Soviet Federal Socialist Republics
SWF	Sovereign Wealth Fund
EC	Treaty establishing the European Communities
TEN-E	Trans-European Energy Networks Initiative
TFEU	Treaty on the Functioning of the European Union
TPA	Third Party Access
TPC	Trade Policy Committee ('113 Committee', '133 Committee')
TPP	Transpacific Partnership
TRIMs	Trade-Related Investment Measures
TRIPs	Trade-Related Intellectual Property
TTIP	Transatlantic Trade and Investment Partnership
TUAC	Trade Union Advisory Committee
UNCITRAL	United Nations Committee on International Trade Law
UNCTAD	United Nations Committee on Trade and Development
UNICE	Union des Industries de la Communauté Européenne
WTO	World Trade Organisation

1 Introduction

In June 2010, the European Commission published a communication and draft regulation dealing with international investment regulation (European Commission, 2010a, 2010b). The communication, entitled *Towards a Comprehensive European International Investment Policy*, underlined that the Treaty of Lisbon (2009) had extended the scope of the Common Commercial Policy (CCP) to the regulation of Foreign Direct Investment (FDI). The EU had thus undeniably become a key actor in the global investment regime. The communication discussed how the Commission envisaged using the European Union's (EU)¹ new exclusive competence in international investment policy to the benefit of Europe. The draft regulation, on the other hand, discussed how to deal with the Member States' regulatory legacy in the form of some 1,300 bilateral investment treaties (BITs). It proposed to review all Member State BITs in view of their legality and conformity to European law and policy objectives.

While the two documents were hardly spectacular in purpose and content, they stirred furore among investment policy officials of the Member States. National investment policy officials, it seemed, had so far lived in denial, or indeed not known about the new legal situation. During the following months, national investment policy officials publicly accused the Commission of having surreptitiously usurped the competence to regulate international investment flows. They pointed out that many Member States had clearly opposed the extension of the CCP to FDI regulation during the relevant debates in the Convention on the Future of Europe (2002/2003) and the following Intergovernmental Conferences (IGCs) on the Constitutional and Lisbon Treaties. They, moreover, warned that the Commission lacked the necessary expertise to adequately represent and defend European interests in the international investment regime. They pointed to the Commission's draft regulation on how to deal with existing Member State BITs as an example of the Commission's technical incompetence and disregard for the needs of European investors. They claimed that the proposed review process for Member State BITs would create legal uncertainty for European investors and thereby hinder investment activity. Some Member States such as Germany, France and the United Kingdom, furthermore, continued negotiating and signing BITs with third countries despite being arguably in breach of European law (UNCTAD, 2017). The atmosphere between the Commission and the relevant national ministries

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was extraordinarily tense at this time. And only in May 2017 – eight years after the entry into force of the Treaty of Lisbon and in the midst of finalising this book manuscript – did the Court of Justice of the European Union (CJEU) finally resolve the simmering competence dispute between the Commission and the Member States. In Opinion 2/15 (European Court of Justice, 2017), the CJEU clarified that the EU indeed largely holds the exclusive competence to enter into international agreements dealing with market access, post-establishment treatment and protection of FDI.

The Member States' opposition to the extension of the CCP to FDI regulation is remarkable in the global scheme of things. It stands in contrast to the Member States' previous behaviour in this policy domain, as they had temporarily empowered the EU on several occasions to participate in international investment negotiations since the 1980s. The Commission represented the Member States, for instance, in investment-related negotiations during the Uruguay Round of the General Agreement on Trade and Tariffs (GATT) and in the Doha Round of the World Trade Organisation (WTO). The Commission was also deeply involved in the most ambitious modern investment negotiations on the Energy Charter Treaty (ECT) and the Multilateral Agreement on Investment (MAI). Since the late 1990s, the Member States even empowered the Commission to seek the inclusion of investment provisions into European Free Trade Agreements (FTAs). Hence, the EU has been playing an increasingly central role and acquiring so-called *de facto* competences in international investment policy since the 1980s. The term '*de facto* competences' refers to the Member States agreeing on informal policymaking rules to jointly govern policy issues predominantly coming under Member State competences. *De facto* competences are thus tantamount to an informal 'Brus-selisation' of policymaking (Woolcock, 2011, pp. 33–34).

The preceding discussion draws a conflicting and intriguing picture of the EU's involvement in international investment regulation. The Member States, on the one hand, cooperated and temporarily empowered the EU to participate in major international investment negotiations. But on the other hand, the Member States – ultimately unsuccessfully – opposed the extension of the EU's legal competences in this key domain of global economic governance. On the whole, these observations seem counterintuitive and inconsistent with mainstream theories of the fields of European Integration and International Relations and trigger several questions. Why did Member States readily cooperate and empower the EU to participate in international investment negotiations since the 1980s? And why did Member States then oppose the extension of the EU's legal competences in this domain? And, finally, why did the Lisbon Treaty extend the EU's exclusive competence to FDI regulation despite the reported opposition from Member States? Existing research on the EU's involvement in international investment policy is scarce (Billiet, 2006; Meunier, 2017; Niemann, 2013; Young, 2001). The few existing studies neither provide exhaustive theoretical nor empirical accounts. This book closes this research gap. The objective is to trace and to explain the emergence of the EU's international investment policy from the EU's first involvement in the global investment regime in the 1980s until the entry into

force of the Treaty of Lisbon and the extension of the CCP to FDI regulation in 2009. The overarching research question of the book thus reads as follows: *Why has the EU acquired de facto and legal competences to regulate international investment flows since the 1980s?*

1.1 The argument in a nutshell

The book argues that Commission entrepreneurship was the main driver behind the emergence of the EU's international investment policy. The book builds on principal-agent models and historical institutionalism to develop the argument. Principal-agent models help us understand why and how the Commission could acquire a central role in international investment negotiations since the 1980s despite the EU's limited competences and Member State hesitation (Da Conceição, 2010; da Conceição-Heldt and Meunier, 2014; Kerremans, 2004; Meunier, 2005; Pollack, 2003; Schmidt, 1998; Young, 2001). The Commission used its agency autonomy – for instance through agenda setting, the invoking of fringe and implied competences or international forum shopping – to consolidate its role in international investment negotiations. Historical institutionalism, in turn, offers a promising framework to explain how the EU's growing role in international investment negotiations affected formal integration and led to a comprehensive competence transfer under the Treaty of Lisbon (Büthe, 2016; Mahoney and Thelen, 2010; Stacey and Rittberger, 2003; Streeck and Thelen, 2005). Seen through a historical institutionalist lens, the Commission's short-term strategies to consolidate its role in international investment negotiations amounted to incremental agency-driven institutional change in the form of 'conversion' (re-interpretation of existing institutional rules), 'layering' (adding of new subordinate institutional rules) and 'drift' (change in the policy environment altering the effect of institutions). The Commission promoted for instance 'conversion' by invoking implied and fringe competences from adjacent policy domains to ensure its involvement in investment negotiations. The Commission, moreover, engaged in 'layering' when it had recourse to the CJEU to clarify the EU's legal competences and pushed for – at first sight – unrelated treaty changes to consolidate the EU's role in investment policy. Finally, the Commission fuelled institutional 'drift' when it pushed investment negotiations into policy fora such as the WTO or bilateral trade negotiations, where the EU conventionally speaks through the Commission with a single voice regardless of competence issues. The Commission's efforts gradually consolidated the EU's accepted role, extended relevant legal competences and ultimately reconfigured the preferences of key policymakers in favour of a comprehensive competences transfer. The combination of principal-agent models and historical institutionalism thus offers an illuminating analytical framework to understand how Commission autonomy and entrepreneurship in daily policymaking affect long-term formal integration.

The book, moreover, argues that business preferences and lobbying cannot account for the emergence of the EU's international investment policy. It is widely assumed that European business preferences and lobbying decisively shape

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international investment policy and may account for the EU's growing role in this domain. The assumption builds on the intuitive reasoning that business is arguably the main stakeholder of international investment policy and should shape policy outcomes to maximise profits. With regard to the emergence of the EU's international investment policy, it is occasionally suggested that growing global competition over lucrative investment opportunities motivated European business to push for a communitarisation of international investment policymaking to maximise bargaining power in international negotiations. This reasoning, which reflects liberal intergovernmental thinking (Moravcsik, 1998), is flawed in two regards. First and foremost, businesses rarely take an interest in international investment policy. International investment policy and agreements – apart from investment liberalisation commitments – have minor, distant and uncertain economic effects on business operations and profits. International investment agreements (IIAs) seek to ensure a minimum level of investor treatment and protection abroad through access to investment arbitration. Businesses investing abroad, however, often discount or internalise the risk of future expropriation, are hesitant to use investment arbitration in case of a dispute with a host country and finally cannot know whether they might win an arbitration case. Investors have won not even a third of known investment arbitration proceedings (UNCTAD, 2014a, p. 10). Businesses thus perceive the benefits of pushing for IIAs as minor, uncertain and distant, while the costs of forming preferences and lobbying policymakers are immediate and substantial. The political economy of international investment policy thus differs significantly from classic trade policy, which redistributes welfare within society through market liberalisation/protection and thereby triggers forceful lobbying (Hiscox, 2002; Krugman et al., 2014; Milner, 1999; Rogowski, 1989; Viner, 1950). More importantly for this study, businesses presumably would only take an interest and lobby for changing the institutional setup of international investment policymaking within the EU, if it affects policy substance and alters the earlier identified economic effects on businesses. The communitarisation of international investment policy, however, is unlikely to have such effects. While it has for instance been argued that the integration of international investment policy increases Europe's bargaining power in international investment policy, it is important to note that IIAs have always been fairly standardised and are becoming even more similar in content (Alschner, 2013; Alvarez, 2009; Dolzer and Schreuer, 2012; Mills, 2011; Salacuse, 2010). Bargaining power is of limited importance in international investment negotiations. It follows that European business should not have held strong preferences or lobbied for the integration of international investment policy.

The book empirically confirms the twofold argument through qualitative in-depth case studies, analysing all concluded international investment negotiations since the 1980s, where the EU participated despite missing legal competences. It focuses on investment-related negotiations during the Uruguay Round (1986–1994); the negotiations on the ECT (1990–1998); the failed negotiations on the MAI at the OECD (1995–1998); the short-lived investment negotiations of the Doha Round; and finally negotiations with Mexico and Chile on the EU's first comprehensive preferential trade agreements (PTAs) to encompass investment provisions (1997–2003) (Figure 1.1). The book assesses for each case study why the EU was allowed

Figure 1.1 A chronology of the emergence of the EU's international investment policy (1980–2017)

to participate in the first place; and what actors and factors shaped the EU's engagement in these fora. Turning to the evolution of the EU's legal competences, the book assesses the long-standing discussions between the Member States and the Commission over the EU's role in international investment regulation as part of IGCs and CJEU proceedings. The assessment covers an extensive time period between the 1950s and 2017. It builds on 42 anonymised interviews with policymakers and business leaders, press and archival research, primary documents and secondary literature.

1.2 Theoretical, empirical and policy contributions

The contributions of this book are of empirical, theoretical and policy nature. First and foremost, it closes an empirical gap in the literature and covers in detail the EU's role in the global investment regime and underlying integration dynamics. Political scientists have only in passing, and for short policymaking instances, assessed the EU's role in international investment policy (Billiet, 2006; Manger, 2009; Meunier, 2017; Niemann, 2013; Young, 2001). These studies do not offer a comprehensive empirical or analytical picture of the EU's role in the global investment regime. Legal scholars, on the other hand, have paid significantly more attention to the EU's role in international investment regulation (Baetens, 2015; Bischoff, 2011; Dimopoulos, 2011; Eilmansberger, 2009; Hoffmeister and Ünüvar, 2012; Kleinheisterkamp, 2014; Poulsen et al., 2015; Reinisch, 2013). They focus, however, on legal questions and do not explain the EU's growing role in this policy domain.

The book, moreover, makes three theoretical contributions. First, it develops an innovative model of Commission entrepreneurship based on principal-agent models and historical institutionalism. It theoretically links the Commission's influence on daily policymaking to long-term, incremental institutional change. In other words, it conceptually connects informal integration in daily policymaking to formal integration through treaty revisions. The book thus breaks with an established research tradition in European studies. Many studies either assess daily policymaking; or analyse intergovernmental negotiations on treaty revisions (Moravcsik, 1998; Pollack, 2003; Rosamond, 2000). The analytical separation of informal and formal integration allows for theoretical parsimony. Informal integration and daily policymaking are subject to different dynamics than formal integration through IGC and treaty revisions. The differences between informal and formal integration create 'noise' hindering the development of theoretically elegant explanations. The drawback of this research approach, however, is that informal and formal integration are often interconnected and mutually condition each other (Bickerton et al., 2015; Bütte, 2016; Pierson, 1994, 2004). In foreign economic policy, informal integration in the form of ad hoc cooperation and delegation typically precede formal integration through treaty revisions (Elsig, 2002; Niemann, 2013). Formal integration indeed is often the outcome of prior informal integration. It is crucial to

understand the drivers of informal integration to explain formal integration in this policy domain. This rationale informs the research design and analytical framework developed in Chapter 2.

This book's second theoretical contribution relates to liberal intergovernmental thinking. It challenges liberal intergovernmentalism in two regards (Börzel, 2013; Moravcsik, 1998; Moravcsik and Schimmelfennig, 2009; Rosamond, 2000; Wiener, 2009). First, liberal intergovernmentalism views integration as only occurring if (major) Member States benefit and push for it. The book makes the empirical and theoretical argument that European Integration occurred in international investment policy despite hesitation by (major) Member States. Second, liberal intergovernmentalism assumes that business preferences and lobbying decisively shape Member State preferences and ultimately European Integration outcomes. Business was mostly disengaged from international investment policy and held no strong preferences regarding the institutional setup of international investment policymaking in the complex multilevel governance system of the EU. Indeed, in many cases, the institutional policymaking setup has only limited complex substantive implications and economic effects on businesses. Businesses thus face weak incentives to invest resources in costly preference formation and lobbying. Hence, it may be necessary to reconsider the role of business preferences and lobbying in liberal intergovernmentalism. Business preferences and lobbying may be an important driver with regard to policies related to the development of the Single Market and with direct implications for business operations and profits, but policies which are more removed from markets and daily business operations are unlikely to be subject to strong business preferences and lobbying.

This book's third theoretical contribution relates to societal theories of foreign economic policy. This book scrutinises the burgeoning literature on business preferences and lobbying patterns (Dür, 2008; Eckhardt, 2015; Frieden, 1991; Grossmann and Helpman, 1995; Hiscox, 2002; Krugman et al., 2014; Rogowski, 1989; Woll, 2008; Woll and Artigas, 2007). Studies argue that businesses form preferences as a function of the expected impacts of foreign economic policies on profits. Businesses would consequently lobby policymakers for profit-maximising options. To determine the impacts of foreign economic policies on business profits, most studies build on Vinerian economics. Liberal foreign economic policies should increase the profits of export-competing firms and sectors, whereas protectionist foreign economic policies should benefit import-competing firms and sectors. However, foreign economic policy – and international trade – have evolved significantly during the last decades (Eckhardt, 2015; Young, 2016). In the past, foreign economic policy dealt with classic on-the-border market access barriers such as tariffs and quotas. The imposition or removal of these barriers had direct and well-understood effects on import and export competition and business profits. The formation of business preferences and lobbying patterns were therefore straightforward. Nowadays, foreign economic policy increasingly focuses on

complex regulatory issues. It seeks to remove regulatory hurdles and frictions through various instruments of regulatory cooperation and harmonisation (Basedow and Kauffmann, 2016; OECD, 2017). IIAs, for instance, seek to create a minimum level of property protection across borders. The rise of regulatory foreign economic policy has two distinct effects on the formation of business preferences and lobbying patterns. First, regulatory foreign economic policy may have only limited and distant economic effects on business operations and profits. Businesses, therefore, may face weak incentives to form preferences and to lobby for specific policy outcomes. Second, businesses may struggle to understand whether and how complex regulatory foreign economic policy measures affect their operations and profits, and therefore whether they should lobby policymakers. The empirical chapters of this book produce ample evidence of such complexity-induced business lethargy. Preference formation and lobbying have become more complex and difficult to model. This development may increase the causal importance of trade bureaucrats in policy outcomes. They provide businesses with initial information and explanation of policies and thereby shape business perceptions, preferences and lobbying (Woll, 2008; Woll and Artigas, 2007). To conclude, additional research on the formation of business preferences and lobbying patterns in modern regulatory foreign economic policy is needed.

Finally, the book makes a policy contribution. It ties in with debates on reforming IIAs and investor-to-state dispute settlement. Its findings imply that states may strengthen states' right to regulate under IIAs without risking a significant decline in international investment activities and related economic opportunity costs. Many policymakers, media, non-governmental organisations and citizens increasingly worry that IIAs and traditional investor-to-state dispute settlement mechanisms overly constrain states' right to regulate and impose potentially significant financial risks on taxpayers. Demands to reform IIAs and investor-to-state dispute settlement are multiplying (Baetens, 2015; Mestral and Lévesque, 2013; Poulsen et al., 2015). Many proposals foresee more precise language on treatment and protection standards, higher hurdles for the launch of investment arbitration and more transparent arbitration proceedings. Critics have warned that such proposals undermine investment protection and ultimately lead to a decline in international investment activities, foregone growth and development opportunities (Lavranos, 2013; Peterson, 2011; Reinisch, 2013). The findings of the book show that European business rarely takes an interest in international investment policy. Economic research on the impact – or rather non-impact – of IIAs on investment decisions and flows by and large confirms these findings (Blonigen and Piger, 2014; Busse et al., 2010; Colen et al., 2014; Egger and Merlo, 2007; Hallward-Driemeier, 2003; Neumayer and Spess, 2005; UNCTAD, 2014b). Most European businesses seem little aware and knowledgeable of international investment policy. It seems unlikely that European businesses would react to a reform of IIAs by reducing their international investment activities. The costs of reforming IIAs may thus be lower than suggested in the policy debate.

1.3 The structure of the book

The book is structured as follows. Chapter 2 develops in detail the theoretical argument and lays the analytical-theoretical foundations for the empirical chapters. Chapter 3 introduces the non-expert reader to international investment and its regime. It defines international investment, discusses economic and political impacts of international investment activities on home and host economies, and identifies the tools and purposes of international investment policy and its historical roots. Chapter 4 provides an overview of the EU's legal competences in international investment policy and identifies the key actors and their preferences in international investment policy. Chapter 5 turns to the empirical analysis and examines the EU's involvement in investment-related negotiations during the Uruguay Round of the GATT (1986–1994). Chapter 6 shifts the analytical focus to the EU's role in investment-related negotiations on the ECT (1990–1998). Chapter 7 analyses the EU's participation in the MAI negotiations (1995–1998) and the closely related but short-lived investment negotiations as part of the Singapore Issues in the Doha Round (1996–2003). Chapter 8 examines how investment provisions made their way into European FTAs. The focus lies on the EU-Mexico negotiations (1996–1999) and EU-Chile negotiations (1999–2002), which marked the beginning of investment provisions in European PTAs. Chapter 9 examines the EU-internal debates during legal proceedings, IGCs and the Convention on the Future of Europe, which shaped the EU's legal competences. Chapter 10 concludes and discusses the empirical findings and theoretical implications of this study.

Note

- 1 For the sake of simplicity this book uses the term European Union/EU in order to refer to precursor organisations like the European Economic Communities (EEC) or the European Communities (EC). It does not assume that these organisations had the same political, economic and legal properties as today's EU.

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