The EU's international investment policy
The policy-making implications of unintended competence transfers

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Abstract: In 2009, the Treaty of Lisbon empowered the EU to pursue an international investment policy and to conclude international investment agreements. The EU's first steps in this policy domain have attracted considerable public attention. Analysts depict competing societal interests as the main forces shaping EU policy in this domain. This article scrutinises this widespread perception. It argues that competence struggles between the European Institutions and Member States, which still echo broad Member State opposition against the initial decision to empower the EU in this domain during the drafting of the Lisbon Treaty, play a similarly important role in shaping EU international investment policy. This article enhances our understanding of EU policy-making in a highly salient policy domain and theoretically contributes to research on European Integration in that shows that it matters for policy-making 'how' the EU received an underlying competence.

Key words: FDI, ISDS, Bilateral Investment Treaties, Integration Theory, Competence Struggles.

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Introduction

In 2009, the Treaty of Lisbon transferred the competence to regulate foreign direct investment (FDI) from the Member States to the European Union (EU) despite member state opposition (Basedow, 2017; Meunier, 2017; Niemann, 2012). Since then, the EU is by and large competent to pursue an international investment policy and to conclude international investment agreements (IIAs) (Dimopoulos, 2011). The purpose of international investment policy and IIAs is to ensure the protection of international investors against discrimination and expropriation in host countries (Bonnitcha et al., 2017). IIAs are historically the main instrument of international investment policy and contain substantive post-establishment treatment and protection standards as well as procedural investor-to-state dispute settlement (ISDS) provisions (ibid.). IIAs can take the form of classic bilateral investment treaties (BITs) or BIT-like investment chapters in free trade agreements (FTA). Before 2009, the Member States of the EU were competent and highly active in this policy domain. The Member States concluded some 1500 IIAs with third countries, which amounts to almost half of the 3400 IIAs in force worldwide (UNCTAD, 2020). Whereas some Member States concluded more than a hundred IIAs though, others showed little interest in this domain (ibid.). Since the competence transfer in 2009, the EU has launched twelve negotiations on IIAs with third countries (table 2) and adopted various unilateral measures in this policy domain (Reinisch, 2014; Schill, 2019).

The EU's first steps in this policy domain have attracted considerable public attention (De Bièvre and Poletti, 2016; Siles-Brügge and De Ville, 2016; Young, 2016). Politicians, non-governmental organisations (NGOs) and millions of citizens have decried the EU's approach to international investment policy and IIAs as a prime example of the EU's neoliberal business-friendly agenda. The Guardian labelled the planned investment protection provisions of the Transatlantic Trade and Investment Partnership (TTIP) as a '*full-frontal assault on democracy'* by '*rapacious corporation'* (Monbiot, 2013). The Spiegel, in turn, described the EU's efforts to negotiate IIAs and ISDS as '*pay day for the vultures of global business'* (Pauly et al., 2014). The societal movement 'Stop ISDS' – which groups together some 200 NGOs including Attac, Greenpeace and Friends of the Earth – considers the EU's pursuit of IIAs as a sell out to multinational business. The critique of the EU's approach to international investment policy, IIAs and notably ISDS resulted in mass demonstrations and petitions with millions of signatories, which ultimately triggered a reform debate among EU policy-makers on how to reconcile economic interests and concerns of civil society (European Commission, 2016). These observations seem to confirm societal theories of international political economy (Dür, 2008; Kim and Osgood, 2019) in that competing societal interests seem to account for complex policy-making dynamics and policy outcomes in EU international investment policy. The EU's pursuit of IIAs seems to echo economic interests and business demands, whereas its failure to ratify and decision to revisit its approach IIAs seem to reflect civil society demands.

This article scrutinises this perception. It does not challenge the fundamental premise that societal forces shape the EU's approach to international investment policy and IIAs. Yet, it cautions that a mono-causal explanation narrowly focused on societal interests overlooks a significant factor shaping EU policy in this domain – continuous competence struggles between the European Institutions and the Member States, which articulate the vocal opposition of several member states against the initial competence transfer under the Lisbon Treaty. The article draws on insights from the literature on informal and formal integration and governance (Farrell and Héritier, 2007; Scharpf, 2006; Stacey and Rittberger, 2003) to develop the argument that competence struggles – defined as disagreements over the allocation of competences between member state and EU bureaucracies rooted in ambiguous primary law (Farrell and Héritier, 2007, pp. 229–30) – affect outcomes in EU international investment policy. Competence struggles are seen to increase EU decision-making hurdles, to promote EU policy inertia and to entail unusual degrees of autonomous Member State actions that counteract EU policy objectives. The argument thus ties in with recent scholarship on international investment policy that highlights the importance of bureaucratic agency for political objectives and power maximisation (Chilton, 2016; Poulsen and Aisbett, 2016, 2013; St John, 2018). To substantiate the argument, the article analyses EU policy-making and Member State actions in international investment policy since the entry into force of the Lisbon Treaty. To increase the leverage of this explanation, the article further scrutinises the explanatory power of societal theories by assessing societal mobilisation patterns on EU international investment policy and IIAs.

The article makes two contributions. First and foremost, it enhances our understanding of the dynamics shaping EU policy-making and outcomes in one of the most salient policy domains of the last decade. Despite its salience, we have only a patchy understanding of the forces shaping EU policy in this domain. Secondly – and of a more theoretical nature – it shows that it does matter for EU policy-making *how* the EU has acquired an underlying legal competence. It thereby contributes to the literature on informal and formal integration and governance (Farrell and Héritier, 2007; Stacey, 2010; Stacey and Rittberger, 2003), which analyses when and how policy-making beyond codified Union competences arises, evolves and shapes formal integration through revisions of the European Treaties. European Integration is modelled as a continuous process of institutional change with episodes of *interregnum integration* in the form evolving policy-making practices and *'history-making integration'* through Treaty revisions (Stacey and Rittberger, 2003, p. 863). Yet, scholars assume a unidirectional causality and ignore that formal integration may also shape subsequent policy-making practices. This blind spot stems from the assumption that – apart from integration through jurisprudence (Sweet, 2004) – formal integration only occurs in the presence of a broad permissive consensus on EU involvement. This assumption, however, has become questionable with the EU's recourse to the Convention method to reform the European Treaties, which inter alia accounts for the EU's empowerment in the realm of international investment policy (Basedow, 2017; Meunier, 2017; Niemann, 2012). Risse and Kleine (2007) praise the Convention method as a means to increase the input legitimacy of the EU but ignore that the ensuing loss in Member State control over the competence allocation can have a detrimental effect on policy-making and output legitimacy. The remainder of the article proceeds as follows. It first discusses the theoretical argument and research design. It then produces empirical evidence and finally draws conclusions.

Analytical framework

What forces shape states' international investment policies and IIA programs? Most scholarship focuses on societal demands and notably economic interests. Some studies imply that international investors directly lobby governments to promote the conclusion of IIAs to enhance the protection of property rights and thereby to increase investment returns (Allee and Peinhardt, 2014; Neumayer, 2006; Swenson, 2005; Van Harten, 2007). Other studies, in turn, suggest that bureaucrats act as willing agents of investor interests (Elkins et al., 2006; Poulsen and Aisbett, 2016, 2013; St John, 2018) and proactively implement international investment policies and negotiate IIAs to help national firms invested abroad and to attract inward investments. Several studies indeed find that businesses are often unaware of IIAs and lean on bureaucrats to look after their interests (Cotula et al., 2016; Yackee, 2010). IIAs are unlike other international economic agreements, which create immediate business opportunities through enhanced market access or efficiency gains through regulatory alignment, in that they constitute a safety net to recover losses in case an investment faces discrimination and expropriation in a host country. Investors – much like policy-makers (Poulsen and Aisbett, 2013) – seem to be subject to bounded rationality as many discount risks of expropriation and benefits of ISDS. Bonnitcha, Poulsen and Waibel (Bonnitcha et al., 2017, pp. 192–193) thus note that "*... while employer organizations and individual firms played some role – particularly in the early years of the investment treaty regime – corporate* *interests were not the main drivers of the investment treaty movement during the twentieth century. This is in contrast with the trade regime…"*. Recently, studies on the transformative nature of global value chains (GVCs) for political mobilisation on foreign economic policy have, nonetheless, emphasised the heightened salience of investment regulation (Kim and Osgood, 2019, 2019; Kim, 2015). The rise of GVCs has fuelled a surge in global FDI flows and stocks and amplified the importance of international investment policy and IIAs for business operations, production location and trade patterns. Scholars thus assume that national economic and business interests are increasingly closely tied to these policies. Econometric research on the impact of international investment policy and IIAs, however, draws an ambiguous picture. Whereas some studies find a positive effect of the conclusion of IIAs on FDI flows and stocks (Busse et al., 2010; Büthe and Milner, 2014; Colen et al., 2014; Egger and Merlo, 2007), others find no or even negative effects (Aisbett, 2007; Blanton and Blanton, 2012; Hallward-Driemeier, 2003; UNCTAD, 2009). This is not to say that investor interests do not shape international investment policies and IIA programs. The discussion, nonetheless, points to a more nuanced relationship between commercial and investor interests and policy outcomes than often assumed.

In the last years, scholars have increasingly focused on the role of civil society and NGOs in shaping states' foreign economic policies including international investment policy (Dür and De Bièvre, 2007; Lechner, 2016; Young, 2016). The rise of GVCs has shifted the focus of foreign economic policy-making from classic trade barriers such as tariffs and quotas to non-tariff barriers (NTBs). NTBs typically take the form of regulatory heterogeneity across jurisdictions, which impose trade costs and inhibit traders to take full advantage of efficiency gains within GVCs. The removal of NTBs is intrusive as it interferes with public policies such as environmental, health and consumer protection, labour rights and data privacy. It is this intrusiveness of modern foreign economic policy that politically mobilises new actors like NGOs, civil society groups and citizens. These actors typically seek to counter-balance business demands and economic interests in foreign economic policy-making and to ring-fence public policies. International investment policy plays an important role in these new dynamics in that NGOs, civil society groups and citizens perceive IIAs with ISDS provisions as an instrument for multinational corporations to legally challenge public policies and regulations (Siles-Brügge and De Ville, 2016; Young, 2016). International investment policy and IIAs figure as instruments, which shift the political balance of power toward commercial and investor interests and thus trigger civil society resistance.

This article does not challenge the assumption that competing societal interests play an important role in shaping EU international investment policy and its IIA programmes. It does, however, advance the argument that competence struggles between the European Commission and the Member States following the entry into force of the Lisbon Treaty play a similarly important role in shaping the EU's international investment policy. They need to be taken into account to fully understand and explain the EU's policy choices in this domain. This article thus ties in with studies on international investment policy that highlight bureaucratic agency – not on behalf of investor interests as discussed above – but to advance non-economic political objectives and maximise bureaucratic power (Chilton, 2016; Poulsen and Aisbett, 2016; St John, 2018). The fluid multi-level governance system of EU foreign economic policy has spurred scholarly interest in competence questions. Most scholars seek to explain why the Member States 'informally' cooperate and delegate negotiating to the European Commission in areas beyond Union competence (Basedow, 2017; Billiet, 2006; Niemann, 2012; Young, 2002). Other scholars explore how Member State cooperation in areas within and beyond Union competence affects the EU's bargaining power vis-à-vis third countries (Da Conceição-Heldt and Meunier, 2014; Meunier, 2000; Meunier and Nicolaidis, 1999). Little attention, however, has been paid to how EU-internal competence struggles shape outcomes.

Scholars of informal and formal integration and governance offer helpful guidance in that regard (Farrell and Héritier, 2007; Stacey, 2010; Stacey and Rittberger, 2003). They model European Integration as a fluid process of institutional change that advances through evolving policy-making practices and formal Treaty revisions. They seek to understand *how* evolving policy-making practices and consequent competence struggles shape formal integration through Treaty revisions. Their work is of interest here in that it causally connects competence questions and policy outcomes. They model competence struggles as a manifestation of incomplete contracting (Farrell and Héritier, 2007, pp. 229–30). States are seen to conclude contracts to cooperate and realise Pareto-improvements. States cannot, however, anticipate all cooperative eventualities and must enter into contracts, which incompletely spell out rights and obligations of the contracting parties. Contracts thus carry the seed of conflict (Farrell and Héritier, 2007). Competence struggles in the EU are a manifestation of such incomplete contracting. They constitute disagreements between the Member States and the European Institutions over procedural aspects of policy-making ambiguously spelled out in European primary law. They occur if national and European bureaucrats seek to ring-fence or increase their respective powers and influence in policy-making and disagree about the legally prescribed and/or desirable involvement of the EU in policy-making in a specific domain. While these disagreements are *prima facie* about process, scholars of informal and formal integration and governance point to two causal pathways how they can affect policy substance:

First, competence struggles result in ambiguity and disagreement over decision-making rules at the EU level (Farrell and Héritier, 2007, p. 235; Stacey and Rittberger, 2003, p. 859). The Council of Ministers adopts most domestic measures and international agreements coming under Union competence through qualified majority as laid out in Articles 218 and 289 TFEU. Decision-making by qualified majority voting produces compromises within the mean of the political spectrum and cuts off extreme positions (Meunier, 2000; Meunier and Nicolaidis, 1999). In case of contested Union competence though, Member States typically insist on decision-making on the basis of special procedures, which typically require unanimous support among Member Stats so as to reflect the mixed legal nature of policy measures coming under shared or national competence. According to Scharpf (2006), unanimity requirements impact on policy substance in that they contribute to 'joint decision traps' and promote compromises reflecting the most conservative position in the political spectrum. As competence struggles are most likely to occur in areas where Member Stats and the European Institutions hold heterogonous preferences on policy substance, this lowest common denominator is likely to be close to or identical with the status quo. Competence struggles thus are conducive to policy inertia.

Second, competence struggles reflect ambiguity over the allocation of policy-making powers and may result in conflicting policy actions at the Member State and EU level (Farrell and Héritier, 2007, p. 231). Policy-making and actions are centralised at the EU level in domains of exclusive Union competence. The European Institutions elaborate, adopt and implement policies with limited individual Member State involvement. In case Member States question the EU's claim to competence though, they are likely to take action at the national level and to conclude international treaties directly with third countries. The European Institutions, on the other hand, are likely to insist on their competence and to push for EU policy action. Competence struggles thus carry the risk of overlapping policy-making at the Member State and EU level. Parallel and competing policy actions can yield synergies but also undermine each other. This phenomenon has been studied notably in EU external relations, where EU and Member State policies coexist (Bretherton and Vogler, 1999; Carbone, 2013; Da Conceição-Heldt and Meunier, 2014). Competence struggles, which lead to conflicting actions at the EU and Member States level, can thus significantly shape policy outcomes.

Research design and hypotheses

How can one identify the causal significance of competence struggles and competing societal interests in EU international investment policy? This exercise is challenging due to problems of observational equivalence. Competence struggles should manifest themselves in cumbersome policy-making and humble outcomes. Yet, competing societal interests may result in similar observations. To overcome the challenge of observational equivalence, one must unpack the explanations to deduct testable hypotheses. The following paragraphs formulate three sets of hypotheses and counter-hypotheses to scrutinise the explanatory power of both explanations. The first two hypotheses seek to assess the impact of competence struggles on policy-making and outcomes. The third hypotheses, in turn, scrutinises the explanatory power of societal theories to account for EU policy-making and outcomes.

- **H_1:** If competence struggles are a defining force of EU international investment policy, procedural disagreements and CJEU jurisprudence should be prevalent, supplant substantive debates and complicate decision-making.
- **C_1:** Societal theories, in turn, predict stalled policy-making in response to substantive disagreement only. Competence questions, procedural disagreements and the CJEU should not play a central role in EU international investment policy-making.

- **H_2:** If competence struggles shape EU international investment policy, it should come to the fore through the Member States insisting on an active and direct involvement in this policy domain and conclusion of IIAs.
- **C_2:** If competing societal interests, however, predominantly shape EU policy, Member States should not aim for autonomous policy measures.

- **H_3:** If societal interests predominantly shape EU international investment policy, one should observe strong mobilisation and polarisation of both economic and civil society interests over international investment policy.
- **C_3:** If, however, mobilisation and polarisation are limited and one-sided, other forces such as competence struggles may account for stalling policy-making.

Table 1: Overview of hypotheses

	Competing societal interests	Competence struggles between European Institutions and Member States	Empirical findings
EU policy-making dynamics	Generally harmonious cooperation between the European Institutions and Member States; disagreements concern policy substance rather than process.	Generally conflictual policy-making dynamics; strong focus on procedural questions such as decision and ratification rules rather than policy substance.	Evidence points to prevalence of competence questions as source of disagreement and stalling policy-making.
Member State focus on taking autonomous policy action	Far-reaching centralisation at EU level to maximise efficiency and bargaining power; no Member State effort to regain direct role in policy-making.	Member States seek to take autonomous policy action at national level resulting in decentralised policy-making.	Evidence points to determined Member State efforts to take autonomous policy action despite EU's claim to exclusive Union competence.
Mobilisation patterns of societal interest groups	Strong persistent business interests pushing for IIAs as well as strong persistent civil society opposition lead to stalling EU policy-making.	No prediction on societal mobilisation patterns; yet if limited or one-sided mobilisation, other factors are likely to play greater role.	Evidence points to significant variation in mobilisation across IIA negotiations; and generally limited business interest.

Empirical analysis

1. EU policy-making and the prevalence of competence questions

The EU's claim to competence over international investment policy derives from Art. 206-7 TFEU as amended by the Treaty of Lisbon in 2009. These articles stipulate that the EU shall govern FDI as part of its Common Commercial Policy. The regulation of FDI is at the heart of international investment policy and IIAs. Hence, most scholars concluded that the Treaty of Lisbon transferred the competence over international investment policy and IIAs from the Member States to the EU (Dimopoulos, 2011; Reinisch, 2014). Meunier (2017) and Basedow (2017) report that the FDI references in Art. 206-7 TFEU have their roots in the Convention on the Future of Europe (2002-3), which drafted the core text of the Lisbon Treaty. The Convention counted 102 delegates from the European Institutions, Member State governments and parliaments and accession countries, which should democratically deliberate and decide on EU reforms. The FDI references were provisionally added to the Common Commercial Policy in April 2003 in a meeting of the Convention Praesidium, a small group of senior delegates overseeing the work of the Convention, in view of the rising importance of FDI for GVCs and world trade. This modification of the Common Commercial Policy had not been discussed in relevant working groups of the Convention. The Commission, which had sought to bring FDI regulation under Union competence for decades, welcomed it, whereas delegates of the German, French, British, Spanish, Belgian and Irish governments opposed these modifications. The opposing Member States happened to be major exporters and recipients of FDI with mostly tightly-knit IIA networks and sizeable bureaucracies for international investment policy. Their opposition was rooted in their superior competitiveness, bureaucratic self-preservation and sovereignty concerns. Convention delegates subsequently tabled thirty-one amendments requesting the deletion of the 'arbitrarily added' FDI reference yet without success. The Convention Praesidium decided that – in the interest of time – only the most important amendments could get discussed, which meant that the FDI references stayed in the final draft text. The following intergovernmental conferences, in turn, sought to change as little as possible in the Convention text to preserve its democratic legitimacy. As Meunier (2017, p. 593) concludes, historical accident, procedural particularities of the Convention method and Commission entrepreneurship meant that Member State opposition to the FDI references went unheard.

Member State opposition did not dissipate with the entry into force of the Treaty of Lisbon in 2009. In the aftermath of the competence transfer, several Member States challenged the European Commission's claim that the EU was now exclusively competent over international investment policy and IIAs. They stressed that the FDI reference only referred to investment liberalisation and maintained that the EU lacked the competence to deal with investment protection and ISDS, which however forms the core of international investment policy and IIAs (Reinisch, 2014, pp. 119–20). Many Member States indeed ignored the new Union competences, continued concluding BITs with third countries (UNCTAD, 2020) and refused to engage in meaningful debates with the Commission on policy substance. Hence, not substantive but procedural disagreements shaped and stalled policy-making on investment policy and IIAs. As Reinisch (2014, p. 119) states "*much time and effort was spent on both sides [the Commission and Member States] to claim and defend treaty-making powers as regards IIAs with third countries that may have prevented them to devote sufficient energy to the fashioning of a new investment policy of the Union*".

Nonetheless, all Member States slowly accepted that the EU now had in principle a role to play in international investment policy in the following two years. Several factors contributed to this shift in Member State preferences. First, the Commission subtly threatened critical Member States to launch infringement procedures against them and their IIAs unless they showed support for a proactive EU international investment policy and IIA programme. In 2009, the Commission had won infringement procedures before the CJEU against Austria, Denmark, Finland and Sweden, which consequently had to amend or terminate certain 'intra-EU' IIAs (Vis-Dunbar, 2009).[1] The Commission hinted at this success in its draft 'grandfathering' regulation, which foresaw a review procedure to check the compatibility of Member State IIAs with European law following the competence transfer (European Commission, 2010a). The Commission reportedly brokered a deal with critical Member States in that it dropped the review procedure from the draft regulation in exchange for political support for EU action in this policy domain (EU, 2012; Interview, DG Trade, 15 February 2018). Second, the Commission stepped up efforts to convince Member States of the benefits of an EU international investment policy (European Commission, 2010b). It emphasised that Member States' diverging efforts in building IIA networks had created an uneven playing field for EU investors and Member State economies, which EU IIAs would rectify. Finally, high-profile disputes between EU investors and host states made the Member States recognise the benefits of speaking with a single voice and bringing to bear the EU's economic power vis-à-vis third countries (BBC, 2012). In the slipstream of these developments, the EU's international investment policy and IIA program slowly gained momentum. In late 2010, the Member States expressed for the first time their general acceptance for EU involvement in this policy domain (Consilium, 2010). This led to first debates on policy content with the Commission and the European Parliament (European Parliament, 2011). The Commission, the European Parliament and the Member States disagreed over the desirable balance between states' right to regulate and investment protection under EU IIAs yet preferences converged over time (Calamita, 2012, pp. 303–312). It took the Council, nonetheless, two more years to provide the Commission with mandates to seek negotiations on IIAs with third countries. Since then, the Council approved twelve IIA negotiations in total (table 2). It needs mentioning that the EU's IIA partner countries are remarkably diverse in terms of FDI flows, growth potential and rule of law, which suggests that a complex mix of economic and non-economic considerations informs the EU's choice of partner countries.

Table 2: EU IIA negotiations

	Partner country	Type of agreement	Status quo	Negotiating period	Inward FDI flow (average 2013-18) in million USD	GDP growth in 2017	WJP Rule of Law index
1.	Canada	FTA	Provisionally applied	2009-2014	41.641	3.0%	0.81
2.	Chile	FTA	Paused	2017-today	13.928	1.4%	0.68
3.	China	BIT	In negotiation	2013-today	134.185	6.9%	0.49
4.	India	FTA	Paused	2007-today	41.063	7.1%	0.51
5.	Indonesia	FTA	In negotiation	2016-today	16.986	5.0%	0.52
6.	Japan	FTA	Pending application	2013-2017	10.609	1.7%	0.78
7.	Malaysia	FTA	Paused	2010-2012	9.957	3.9%	0.55
8.	Mexico	FTA	In negotiation	2016-today	32.002	2.0%	0.45

[1] The CJEU recently found in *Achmea v Slovakia* that intra-EU BITs are incompatible with the European legal order, which – under applause of the Commission – forced the Council of Ministers (2019) to announce the termination of intra-EU BITs (Basedow, 2020).

9.	Myanmar	BIT	Paused	2013-today	2.930	6.7%	0.42
10.	Singapore	FTA	Pending application	2010-2014	72.043	3.6%	0.80
11.	Vietnam	FTA	Pending application	2012-2016	12.640	6.8%	0.49
12.	USA	FTA	Paused	2013-today	334.009	2.2%	0.71

Note: WJP Rule of Law Index ranges from 0 (weak) to 1 (strong). Source: European Commission (2018); World Justice Project (2019); World Bank (2019); UNCTAD (2020).

Despite these advances, competence struggles continued simmering. For one, the Council of Ministers adopted a regulation to manage the EU's conduct in future ISDS proceedings in 2014 (EU, 2014) yet several Member States – in a rather unique step – put on record that they did not consider the EU to be competent on matters of investment protection and ISDS (Votewatch.eu, 2019). In 2015, finally, first EU IIAs approached the ratification stage. Several Member States consequently insisted on a 'mixed' ratification by the EU and Member States so as to acknowledge their competences over investment protection and ISDS. The European Commission and Parliament, in turn, rejected this claim. They insisted that the EU was competent to ratify these agreements without participation of the Member States. The Commission thus asked the CJEU to assess this question on the basis of the EU-Singapore FTA. In 2017, the CJEU ruled in Opinion 2/15 that the EU-Singapore FTA had to undergo mixed ratification (European Court of Justice, 2017). It found that the EU was competent in all domains covered under the FTA with two exceptions (Cremona, 2018, p. 236). First, the EU only held a shared competence over the regulation of so-called portfolio investments. Second, the EU was exclusively competent over investment protection yet held only a shared competence with regard to ISDS provisions.

Opinion 2/15 has far-reaching implications for EU international investment policy and IIAs. It creates a 'joint decision trap', which generates "…*suboptimal policy outcomes resulting either in blockage or in inefficient lowest common denominator compromises*…" (Scharpf, 2006, p. 848). Indeed, Opinion 2/15 implies that neither the EU nor individual Member States can individually pursue international investment policy and negotiate IIAs with third countries but need to cooperate and to adopt policy measures on the basis of unanimity. The 'joint decision trap' affects policy outcomes in several regards. First, it stalls EU international investment policy. Following the publication of Opinion 2/15, the Commission initially paused all ratification procedures and reflected on how to proceed. Since the launch of the TTIP negotiation in 2013, ISDS and IIAs have become highly controversial issues in the European public and do not command unanimous support across Member States and European Institutions. In the light of civil society opposition, Opinion 2/15 significantly complicates ratification and 'delays' the EU's international investment policy. Indeed, the EU has not ratified a single IIA with ISDS provisions since 2009, which seems to confirm Scharpf's prediction of blockage.[2] Second, the Commission – in cooperation with the Council and third countries – consequently announced to adjust the legal architecture of IIAs. It plans to extract all provisions coming under shared or national competence from the main treaties and isolated them in secondary treaties. This legal architecture seeks to ensure that the core of FTAs and IIAs can enter into force through Union ratification even if Member States fail to ratify secondary treaties. Third, Opinion 2/15 amplified the EU's efforts to reform IIAs and ISDS. Due to civil society opposition against ISDS under TTIP and CETA, the Commission, European Parliament and Member States launched a reform of conventional ISDS in 2015. In the light

[2] In 1994, the EU and the Member States acceded to the Energy Charter Treaty, which contains ISDS (Basedow, 2020).

of Opinion 2/15 of 2017, the Commission understood that only a drastically reformed dispute settlement mechanism would stand a chance to survive mixed ratification. The Commission thus proposed to create a multilateral investment court under the umbrella of the United Nations to replace conventional investment arbitration in EU IIAs (European Commission, 2016). This proposal now constitutes the cornerstone of the EU's approach to international investment policy and IIAs. In 2017, finally, Belgium further escalated these competence discussions in asking the CJEU in Opinion 1/17 to assess the compatibility of such novel dispute settlement mechanisms with the European legal order (European Court of Justice, 2019). The CJEU gave an affirmative answer but set narrow limits on the set-up of compatible dispute settlement mechanisms of EU IIAs. In sum, competence struggles are highly prevalent in EU policy-making and – in conjunction with civil society discontent – decisively shape policy outcomes.

2. Member States and autonomous policy measures

The preceding section discussed how competence struggles shaped and slowed down policy-making at the EU level. This section turns the analytical focus to policy-making at the Member State level to shed an additional light on the significance of competence struggles as a force shaping international investment policy. International investment policy falls under the Common Commercial Policy and thus by and large under exclusive Union competence. Eeckhout suggests that the EU "*…wholly replace[s] the individual Member States…*" (2011, p. 3) and "*… the Member States ha[ve] no right to enter into international commitments…"* (2011, p. 74) in domains of exclusive competence. The Member States indeed play no individual and direct role anymore in trade policy. They do not set their own tariffs, conduct anti-dumping investigations or conclude FTAs with third countries. All policy-making is delegated to the EU level. If, however, Member States question an exclusive Union competence, they may adopt unilateral measures and negotiate treaties with third countries, which can affect policy outcomes in concerned domains.

The Member States indeed continue to play an unusually central role despite the EU's exclusive competence in international investment policy. For one, a majority of Member States disregarded the competence transfer and continued negotiating, concluding and ratifying BITs with third countries in the months following the entry into force of the Lisbon Treaty. In total, they negotiated 45 BITs in breach of European primary law after the entry into force of the Lisbon Treaty (UNCTAD, 2020). Member State defiance of Union competence and autonomous action affected policy content in that it delayed and complicated debates on the cast of the EU's international investment policy and IIA program. Member States pursued their needs in direct negotiations with third countries and for months ignored Commission efforts to develop an EU policy. In that regard, the Member States also undermined the EU's ability to speak with a single voice and to coherently represent European interests in the international investment regime (Da Conceição-Heldt and Meunier, 2014; Meunier and Nicolaidis, 1999).

In 2012, the Member States, furthermore, remarkably secured the right to request from the EU their re-empowerment to directly negotiate IIAs with third countries. Art. 7 of the so-called 'grandfathering' regulation (EU, 2012) foresees the possibility that the EU authorises Member States to engage in direct IIA negotiations with third countries, if it does not interfere with European policy objectives. While the possibility of re-empowerment of Member States could be seen as a subsidiarity measure, it is unique in a domain of exclusive Union competence. Member States are normally barred from taking action under the Common Commercial Policy to avoid competitive distortions in the Single Market. The re-empowerment clause is reportedly part of above-mentioned deal between the Commission and the Member States. Critical Member States agreed to increase political support for EU action and notably

IIA negotiations in exchange for the Commission to drop the review procedure of Member State IIAs and to accept a re-empowerment mechanism as part of the 'grandfathering regulation' (Interview, DG Trade, 15 February 2018). The re-empowerment mechanism has been used several times notably with regard to Iran. Former US President Barack Obama's Nuclear Deal (2015) created new yet risky investment opportunities for Western firms in Iran. The EU, however, refrained from negotiating an IIA inter alia due to civil society resistance. Yet, several Member States gained authorisation to negotiate IIAs with Iran (UNCTAD, 2020). In sum, this section highlights that competence struggles affect policy-making through an exceptionally strong involvement of Member Stats in EU international investment policy – a domain of exclusive Union competence.

3. Patterns of societal mobilisation

This section shifts the analytical focus. Instead of evaluating the significance of competence struggles as a factor shaping EU international investment policy, it scrutinises the explanatory power of societal theories. It builds on three distinct data sources and methods to measure societal mobilisation. First, it evaluates the results of the Commission's public consultations on IIAs. These consultations are online surveys open to stakeholders to share their views on policy initiatives. Second, it assesses protocols of the Commission's civil society dialogue meetings between 2009 and 2018. These meetings give opportunity to civil society and businesses to engage in a discussion with the Commission. Third, it builds on supporting interviews with representatives of business associations, EU policy-makers and Member State policy-makers to scope societal mobilisation and lobbying activity beyond consultations and civil society dialogues. It is important to underline that measuring societal mobilisation does not necessarily provide information on its influence on policy outcomes. Yet, mobilisation may be considered as a necessary condition for societal influence on policy.

The Commission's consultations draw a complex picture of societal mobilisation (table 3). Excluding the TTIP consultations of 2014, which received an exceptional number of approximately 150.000 submissions, the Commission in total recorded 491 submissions to its various surveys on FTAs and IIAs. The consultation results report significant variation in expressed support and opposition to IIAs, investment protection and ISDS. It implies that the lack of expressed interest in some consultations reflects indeed low interest and mobilisation rather than a failure of consultations to capture the demands of stakeholders. Overall, business showed fairly limited interest in IIAs, investment protection and ISDS provisions. Apart from the first TTIP consultations of 2012, business did not vocally push for investment protection and ISDS provisions. Civil society, on the other hand, generally opposed to IIAs, investment protection and ISDS provisions in its submissions. Civil society opposition, however, also varied across negotiations.

Table 3: Overview of results of public consultations on EU IIAs

Agreement consulted upon	Overall no. of submissions	Main positions on investment protection and ISDS
EU-Australia	84	7% of respondents indicated that investment protection in Australia is a concern. Only one respondent (academic) suggested that there is need for investment protection and ISDS provisions.
EU-Canada	n/a	n/a
EU-Chile	31	One respondent (European Services Forum) suggested that there is need for investment protection and ISDS provisions.

EU-China	57	While investment protection is generally a concern in China, 60% of respondents stated that they would not consider using ISDS against China due to expected negative repercussions.
EU-India	n/a	n/a
EU-Indonesia	n/a	n/a
EU-Japan	87	Demands for the removal of investment barriers feature prominently in business submissions; only one submission (BusinessEurope) calls for negotiations on investment protection provisions.
EU-Malaysia	n/a	n/a
EU-Mexico	80	93% of respondents indicated that they either see no need or hold no opinion on whether European investments are secure in Mexico. 7% indicated that European investments are insufficiently protected implying the need for investment protection and ISDS provisions.
EU-Myanmar	19	Most respondents are critical of IIAs and ISDS; Business respondents are mostly agnostic about the benefits of investment protection and ISDS; Only the European Services Forum pleads for investment protection and ISDS provisions.
EU-New Zealand	84	4% of respondents indicated that investment protection in New Zealand is a concern. Only one respondent (academic) suggested the need for investment protection and ISDS provisions.
EU-USA (2012)	48	32% of respondents voiced support for investment protection and ISDS provisions.
EU-USA (2014)	149.399	99% of submissions came from individuals. Most submissions are highly critical of investment protection and ISDS. Only 0.05% of submissions came from respondents with investments abroad.
EU-Vietnam	n/a	n/a

Note: The Commission did not conduct consultations for some negotiations or results are not available. Source: (European Commission, 2019a).

The analysis of the Commission's civil society dialogue meetings suggests similar mobilisation patterns. Between 2009 and 2018, the Commission organised 218 meetings in Brussels to discuss foreign economic policy with stakeholders (European Commission, 2019b). IIAs, investment protection and ISDS provisions were discussed in 42 meetings. In many meetings, the Commission merely briefed participants on policy developments. Participants did not raise questions or comment. In twenty-one meetings, participants voiced critical comments on IIAs, investment protection and ISDS provisions. In two meetings, participants showed support for IIAs, investment protection and ISDS provisions. These observations point to fairly persistent civil society opposition but limited business interest.

Interview data resonates with above findings. Representatives of European business associations interviewed between 2012 and 2018 reported that investment protection, ISDS and IIAs were rarely at the heart of lobbying efforts (BDI 16.2.2012 & 12.12.2018, BusinessEurope 26.1.2012, Leviathan 4.9.2013, MEDEF 3.10.2013, ESF 25.9.2013, CBI 26.9.2013, Confindustria 27.9.2013, CityUK 2.4.2014). Many of them stressed that business had limited lobbying resources and needed to prioritise foreign economic issues of significance for daily business operations. IIAs, investment protection and

ISDS provisions – unlike investment liberalisation – yield only indirect, distant and uncertain benefits for firms. It needs mentioning that these interviews do not capture lobbying of firms for IIAs. It may well be that individual firms push for IIAs in bilateral meetings with policy-makers. Nonetheless, the finding that business welcomes IIAs but does not push for them echoes existing research (Bonnitcha et al., 2017, pp. 192–193; Chilton, 2016; Cotula et al., 2016; Poulsen and Aisbett, 2016; Yackee, 2010).

Interviewed policy-makers, moreover, report mostly lobbying from civil society groups. Commission officials stated that business rarely sought discussions on investment protection and ISDS provisions (15.2.2018, 13.1.2012, 18.1.2012, 18.7.2012, 24.7.2012, 27.7.2012). A senior official (7.6.2012) lamented in 2012 that "*international investment policymaking felt like a blind flight"* removed from societal demands and debates. A Cabinet official (15.2.2018) added in 2018 that societal interest intensified with the TTIP negotiations underway (2013-16), which however primarily resulted in civil society groups lobbying against IIAs. Staff of the European Parliament's International Trade Committee made similar statements (19.1.2018; 7.2.2018). Business representatives and firms rarely sought contact with the committee and parliamentarians to discuss IIAs, investment protection and ISDS provisions. Mostly civil society groups sought to raise awareness for the dangers of IIAs. Finally, national officials sitting on the investment configuration of the Trade Policy Committee of the Council of Ministers reported marginal lobbying from national business communities (15.2.2018; 13.2.2018; 26.1.2012; 17.2.2012; 17.6.2013; 3.7.2013). These observations suggest that societal interests may play a more limited role in shaping EU policy than is widely assumed.

Conclusion

This article sharpens our understanding of the forces shaping the EU's international investment policy as one of the most debated EU policies of the last decade. Whereas most analysts suggest that competing societal interests are the main factors shaping the EU's policy in this domain, this article shows that competence struggles between the Member States and the European Institutions play a similarly significant role. Competence struggles slowed down the development of an EU international investment policy and led to unusually strong Member State involvement in this domain of exclusive Union competence. They further increased ratification hurdles, account to some extent for the EU's failure to ratify finalised IIAs and amplified the EU's efforts to reform ISDS. A narrow focus on competing societal interests is insufficient to account for policy outcomes. The article further records fairly persistent opposition of civil society groups against IIAs, investment protection and ISDS provisions. Business support, on the other hand, seems weaker than anticipated. In sum, bureaucratic and institutionalist dynamics play an important – yet often overlooked – role in EU international investment policy

From a theoretical perspective, the article draws attention to the importance of *how* the EU acquires a legal competence over a policy domain for subsequent policy-making. Several Member States were unwilling to accept European cooperation in international investment policy. The particularities of the drafting process of the Lisbon Treaty, nonetheless, led to the empowerment of the EU. As this article shows, the lack of a solid 'permissive consensus' among Member States on European cooperation has been overshadowing EU policy-making since 2009. This finding underlines that it matters *how* the EU acquires a competence. Theories of European Integration ignore this question in that they build on the implicit assumption that competence transfers only occur, if Member States and/or societal interest groups favour – or at least do not actively oppose – cooperation (Farrell and Héritier, 2007; Haas, 1958; Moravcsik, 1998; Stacey, 2010; Stacey and Rittberger, 2003). The EU's turn to the Convention method to increase its input legitimacy, however, diminishes Member State control over Treaty revisions. Hence, unintended competence transfers may occur and spill-over into subsequent EU policy-making in the form of heterogeneous preferences, unclear decision-making rules and competing policy action. It may hamper efficiency, effectiveness and – contrary to Risse and Kleine's (2007) assessment of the Convention method – ultimately diminish the EU's legitimacy in terms of output. This study thus complements the literature notably on formal and informal European Integration and governance (Farrell and Héritier, 2007; Stacey, 2010; Stacey and Rittberger, 2003) in that it links Treaty revisions and consequent policy-making dynamics.

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