

**Johann Robert Basedow**

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**Article (Accepted version)  
(Refereed)**

**Original citation:**

Basedow, Robert (2016) *The European Union's new international investment policy: product of Commission entrepreneurship or business lobbying?* [European Foreign Affairs Review](#), 21 (4), pp. 469-491. ISSN 1384-6299

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Available in LSE Research Online: January 2018

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# The EU's new international investment policy – *Product of Commission entrepreneurship or business lobbying?*

Johann Robert Basedow<sup>1</sup>

**Abstract:** The article seeks to explain the emergence of the EU's international investment policy since the 1980s. The paper develops two competing explanations. It evaluates whether the Commission acted as policy entrepreneur to consolidate the EU's role in international investment policy or whether European business lobbied for the 'brusselisation' of international investment policy-making to ensure access to ambitious state-of-the-art international investment agreements. The article traces the EU's involvement in international investment policy through history. It examines policy-making instances, which shaped the EU's de facto competences in international investment negotiations and its legal competences under European law. It finds that Commission entrepreneurship promoted the EU's involvement in international investment negotiations and ultimately ensured due to the procedural particularities of the Convention on the Future of Europe the extension of the EU's legal competences. European business and the Member States did not promote the emergence of the EU's international investment policy.

## I. Introduction

In June 2010, the European Commission published a communication and draft regulation, which discussed the European Union's (EU)<sup>2</sup> new approach to international investment policy. The Commission explained that the entry into force of the Lisbon Treaty in December 2009 had extended the EU's exclusive competence under the Common Commercial Policy (CCP) to the regulation of foreign direct investment (FDI) and how it intended to use the new competences.<sup>3</sup> The documents were hardly spectacular in content, but stirred furore among investment policy officials of the Member States. National investment policy officials accused the Commission of having surreptitiously usurped the competence to regulate international investment flows. They pointed out that many Member States had 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 Treaty. Doubting the expertise of the Commission to handle this policy domain, some Member States even continued concluding bilateral investment treaties (BITs) with third countries despite being in breach of European law.<sup>4</sup>

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<sup>1</sup> Johann Robert Basedow is a Max Weber Fellow at the European University Institute. Email address for correspondence: [johann.basedow@eui.eu](mailto:johann.basedow@eui.eu)

<sup>2</sup> For the sake of simplicity, the article refers to the European Union's precursors such as the European Economic Community or the European Communities as EU.

<sup>3</sup> European Commission, *Towards a comprehensive European international investment policy*, COM(2010)343 (2010); European Commission, *Proposal for a regulation of the European Parliament and the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries*, COM(2010) 344 final (2010).

<sup>4</sup> UNCTAD, *Investment Instruments Online* (2016), <[http://www.unctadxi.org/templates/docsearch\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/docsearch____779.aspx)>.

The Member States' opposition against the extension of the CCP to FDI regulation stands in contrast to their previous behaviour in this policy domain. The Member States temporarily empowered the EU at several occasions to participate in international investment negotiations since the 1980s. The Commission for instance acted as the EU's single voice or negotiated alongside the Member States in investment-related negotiations in the GATT, WTO, OECD and on recent free trade agreements (FTAs). So the EU has been playing an increasingly important 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 policy-making rules to cooperate and jointly govern policy issues predominantly coming under Member State competences.<sup>5</sup>

The above discussion draws an intriguing picture of Member State cooperation and of the EU's involvement in international investment regulation. The Member States readily cooperated and temporarily empowered the Commission to negotiate on investment liberalisation, post-establishment treatment and investment protection with third countries. But on the other hand, the Member States – ultimately unsuccessfully – opposed the extension of the EU's legal competences in this domain. The article thus raises the following question: *Why did the EU gradually acquire de facto and legal competences to regulate international investment flows since the 1980s?*

## **II. The analytical framework**

Research on the EU's involvement in international investment regulation is rare. A small number of studies have examined the EU's involvement in investment-related negotiations in the WTO or OECD as well as the Convention debates on an extension of the CCP to FDI regulation.<sup>6</sup> They provide valuable insights, but do not offer comprehensive empirical and theoretical explanations for the emergence of the EU's international investment policy since the 1980s. The article closes this research gap. Building on supranational and liberal intergovernmental thinking on European Integration, it develops

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<sup>5</sup> S. Woolcock, *European Union economic diplomacy: the role of the EU in external economic relations*, (Ashgate, 2011): 33-34.

<sup>6</sup> S. Billiet, *From GATT to the WTO: The Internal Struggle for External Competences in the EU*, *JCMS* 44, 899–919 (2006); S. Meunier, *Integration by Stealth – How the European Union Gained Competence over Foreign Direct Investment*, *EUI Working Papers RSCAS* 2014/66 (2014); A. Niemann, *EU external trade and the Treaty of Lisbon: A revised neo-functionalist approach*, *J. of Contemporary European Research* 9, 634–658 (2013); A. Young, *Extending European Cooperation : The European Union and the "New" International Trade Agenda* (Manchester University Press, 2002).

two competing explanations for the EU's growing de facto and legal competences in international investment policy since the 1980s.

### **A supranational explanation – The Commission as resourceful policy entrepreneur**

Supranational theories<sup>7</sup> of European Integration claim Member States have partly lost control over integration. Supranational actors and integrative dynamics may force the Member States into cooperation and delegation in ever new policy areas. Supranational research has traditionally afforded special attention to the Commission as a policy entrepreneur promoting European Integration. The Commission is seen to push for integration for ideological, functional and power considerations and to use various strategies to make the Member States cooperate and delegate in new policy domains.<sup>8</sup>

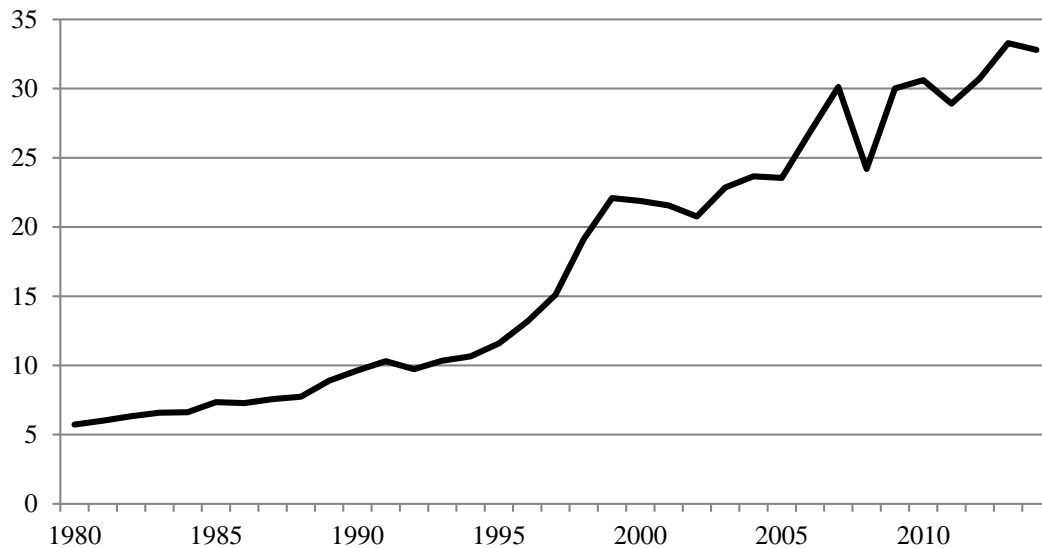
Building on the literature on Commission entrepreneurship and principal-agent models, the article assesses whether *the Commission acted as policy entrepreneur pushing for an extension of the EU's de facto and legal competences since the 1980s*. The Commission may have pushed for a communitarisation of international investment policy-making for functional and power consideration. It may have felt that the EU had to play a role in international investment policy to ensure regulatory coherence as investment and traditional trade substitute and complement each other. Taking into consideration that international investment (see figure 1) and its regulation (see figure 2) have become increasingly important phenomena of the global political economy since the 1980s, the Commission may have sought to consolidate its role and influence in this key domain of economic governance.

### **Figure 1: World Inward FDI stock as Percentage of World GDP (1980-2014)**

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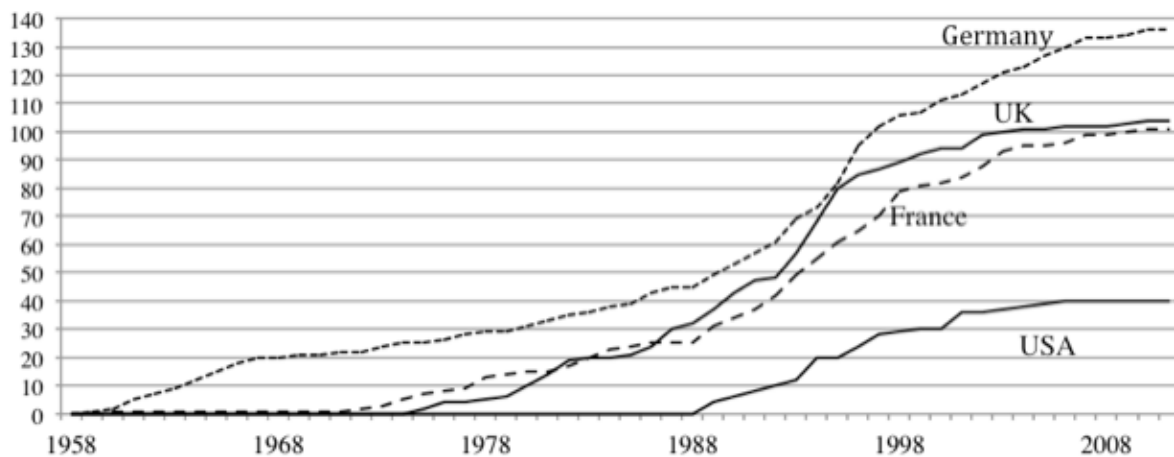
<sup>7</sup> See in particular E. Haas, *The Uniting of Europe: Political, Social and Economic Forces, 1950-1957*. (Stevens, 1958).

<sup>8</sup> C. Woll, *The Road to External Representation: the Commission's Activism in International Air Transport*, JEPP 13:1, 52-69 (2006); H. Kassim et al., *The Commission in the of the 21st Century*, (OUP 2008); M. Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (OUP, 2003).



Source: UNCTAD (2016).

**Figure 2: Number of ratified BITs of leading capital-exporting countries (1958-2012)**



Source: UNCTAD (2016), author's own calculations.

The literature suggests that Commission may use three strategies to promote its policy and institutional agenda. First, the Commission holds agenda setting powers to advance its substantive and institutional policy agenda.<sup>9</sup> It has the monopoly to initiate trade measures in daily policy-making, to draft negotiating mandates, to inform the Member States about developments in the global political economy and to brief the Member States in intergovernmental conferences on advisable Treaty revisions. These prerogatives allow the Commission to largely frame policy debates and to influence the formation of Member State preferences in daily policy-making and IGCs for instance regarding the communitarisation of international investment policy.

<sup>9</sup> For that and the following see Pollack *supra* n. 8, T. Delreux & B. Kerremans, *How Agents Control Principals*. IIEB Working Paper 28 (2008). E. Da Conceição-Heldt, *Delegation of Power and Agency losses in EU trade policy*, EUI Working Papers 18 (2009).

The Commission may, moreover, bring to bear legal fringe, implied and de facto competences in foreign economic relations to pressure the Member States in daily policy-making to cooperate and to delegate policy-making to the EU-level on issues beyond the Union's legal competences.<sup>10</sup> The concept of fringe competences refers to competences, which are necessary nonetheless not central to the regulation of an issue area. The concept of implied competences refers to the so-called *ERTA Doctrine*. If the EU holds the legal competence and regulates an issue area within the EU, the EU automatically holds a legal external competence for the sake of regulatory coherence. The concept of de facto competences refers to the informal brusselisation of policy-making. It may create precedence and require the continued involvement of the EU in an issue area for the sake of regulatory coherence.

Finally, the Commission may strategically use the evolving trade agenda and international negotiating fora to shape Member State preferences on cooperation and to consolidate the EU's role in issue areas beyond the CCP.<sup>11</sup> The Member States conventionally speak through the Commission with a single voice on all negotiating items in the GATT/WTO and FTA negotiations to maximise their bargaining power and to procure optimal deals. Hence, the evolving agenda rather than the EU-internal distribution of competences practically determines Member State cooperation and the EU's de facto competences. The Commission may exploit this division of labour and push for negotiations on issues beyond the EU's legal competences in these fora to consolidate the EU's de facto competences. The EU, however, does not speak in all negotiating fora with a single voice. In some fora, the Member States continue to speak on their own behalf on issues beyond Union competences. The Commission may seek to contain discussions in such fora and instead push them into international fora where the Commission traditionally acts as a single voice.

### **A liberal intergovernmental explanation – European business lobbies for a EU international investment policy**

Intergovernmental thinking on European Integration rejects the assumption that supranational actors such as the Commission may promote integration despite Member State opposition. Integration is seen as a state-serving and state-led process. The most prominent exponent of this school is Moravcsik's liberal intergovernmentalism.<sup>12</sup> Moravcsik argues that business lobbying and geopolitical considerations shape Member State preferences on integration, which then enter into negotiations on the substantive scope of integration as well as on the institutionalisation of integration in new policy domains. As Young observes, most research on EU foreign economic policy implicitly endorses a liberal inter-

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<sup>10</sup> Young *supra* n. 6; M. Elsig, *The EU's Common Commercial Policy: Institutions, Interests and Ideas* (Ashgate, 2002).

<sup>11</sup> Young *supra* n. 6; Billiet *supra* n. 6.

<sup>12</sup> A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press, 1998).

governmental logic even though the Moravcsik's theory seeks to explain Treaty revisions.<sup>13</sup> Business is seen to lobby for foreign economic policy vis-à-vis Member State governments, which then engage in intergovernmental negotiations to determine the EU's aggregate position. As business lobbying does not take into account the complex distribution of legal competences within the EU, business may push for cooperation beyond the CCP and promote informal integration.

Building on liberal intergovernmental thinking, the article assesses whether *European business lobbied for the communitarization of international investment policy to ensure access to state-of-the-art IIAs*. Research suggests that business preferences and lobbying efforts seek to maximise welfare i.e. income.<sup>14</sup> It has been suggested that prior to the Lisbon Treaty, the distribution of competences between the EU and the Member States was suboptimal imposing opportunity costs on European investors. Neither the EU nor the Member States were individually competent to conclude state-of-the-art IIAs and FTAs with investment chapters of NAFTA-parity comprising investment liberalisation, post-establishment and protection provisions. Instead the EU occasionally conducted negotiations on investment liberalisation as part of FTAs, whereas some Member States concluded BITs providing for different levels of investment post-establishment treatment and protection. This situation arguably created an opaque legal environment difficult to use for European investors. The decentralised policy-making, moreover, arguably undermined the EU's ability to use its bargaining power vis-à-vis third countries so as to reach for ambitious liberalisation, post-establishment treatment and protection provisions. Hence, European business arguably suffered from worse international investment conditions than competitors from other OECD economies undermining its competitiveness and profitability abroad. European business may thus have pushed for a communitarisation of international investment policy-making to maximise welfare. Policy publications implicitly echo such assumption.<sup>15</sup> Building on investment statistics, lobbying for a communitarisation of international investment policy-making should have primarily come from businesses active in financial, professional and information technology services as well as from manufacturers of chemical products and motor vehicles (see figure 3) domiciled in the United Kingdom, Germany, France and the Netherlands (see figure 4).

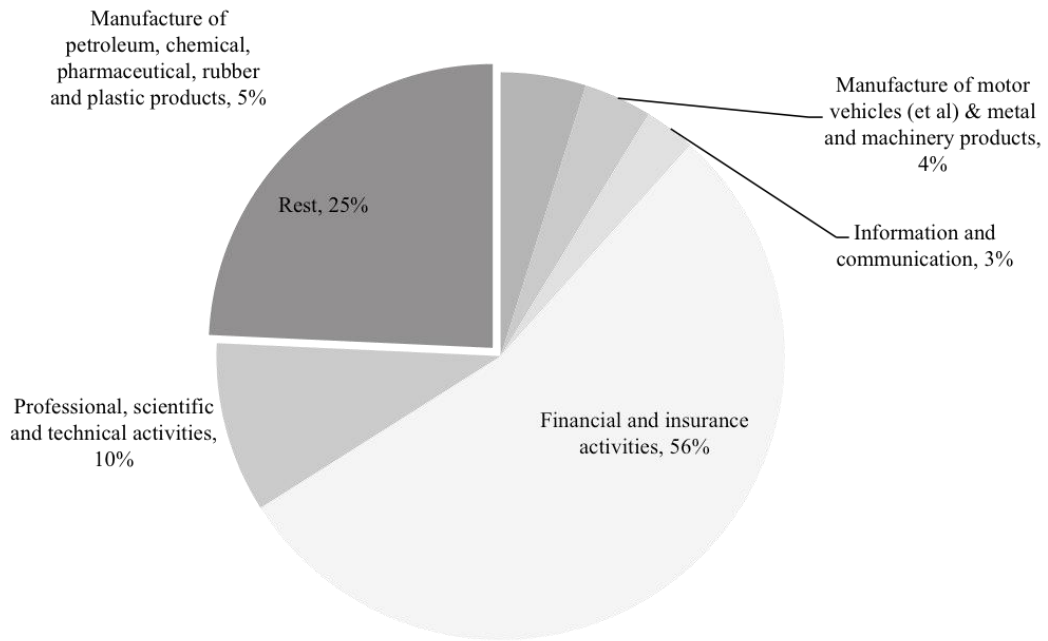
### **Figure 3: Extra-EU outward FDI stocks by industry (selection) in 2012**

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<sup>13</sup> Young *supra* n. 6.

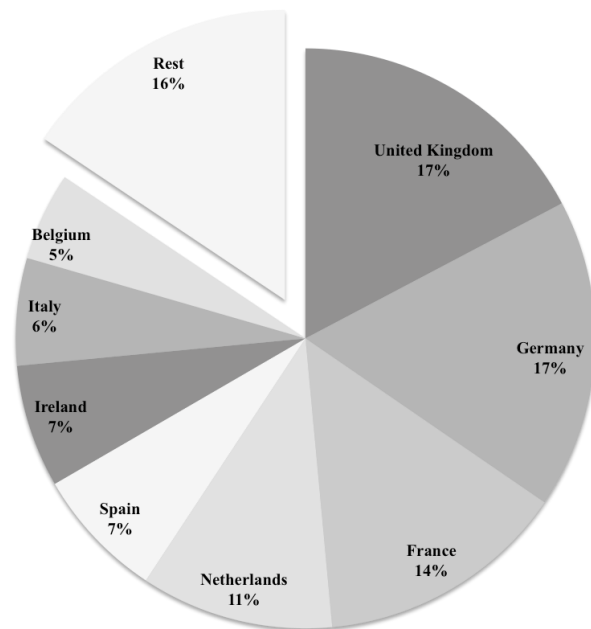
<sup>14</sup> R. Rogowski, *Commerce and coalitions : how trade affects domestic political alignments* (Princeton University Press, 1989); M. Hiscox, *International trade and political conflict : commerce, coalitions, and mobility* (Princeton University Press, 2002); C. Woll, *Firm Interests: How Governments Shape Business Lobbying on Global Trade*, Cornell University Press (2008); G. Grossman and E. Helpman, Protection for Sale, *American Economic Review* 84:4 (1994): 833-850.

<sup>15</sup> BusinessEurope, *Business Europe Priorities for External Competitiveness 2010 – 2014: Building on Global Europe*, (2010); European Commission, *A level-playing field for Direct Investment world-wide*, COM(95)42 (1995).



Source: Eurostat (2016).

**Figure 4: Member States' outward FDI stocks as percentage of EU total in 2014**



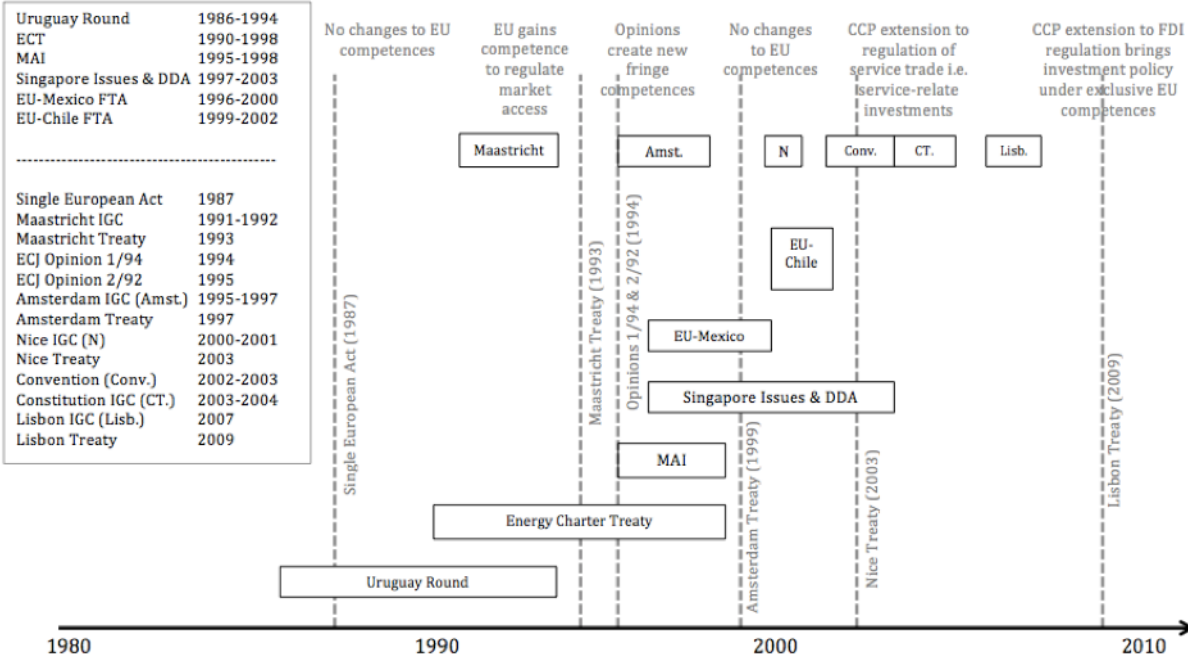
Source: UNCTAD (2016).



**Methodology**

The remainder of the article tests the two explanations by examining those policy-making instance (see figure 5), which decisively shaped the EU’s de facto and legal competences since the 1980s: investment related negotiations in the Uruguay Round, on the Energy Charter Treaty (ECT), the Multi-lateral Agreement on Investment (MAI), the Doha Round, FTA negotiations with Mexico and Chile. It finally assesses debates during the Convention on the Future of Europe (2002/2003), which led to the extension of the EU’s legal competence under the CCP to FDI regulation. The article builds on archival and press research, 42 interviews and academic publications.

**Figure 5: Chronology of the emergence of the EU’s international investment policy**



**III. The EU as an emerging actor in international investment policy**

**III.1 The Uruguay Round**

The EU got first involved in international investment regulation during the Uruguay Round (1986-1994) of the GATT. The sub-negotiations on the General Agreement on Trade in Services (GATS) and on the Agreement on Trade-Related Investment Measures (TRIMs) had a bearing on investment liberalisation and post-establishment treatment standards. The EU’s ability to speak with a single voice and to play an important role in investment-related negotiations of the Uruguay Round reflected Commission entrepreneurship through agenda setting and pedagogical campaigning for the opportunities of a new comprehensive GATT round vis-à-vis the Member States. European business showed no interest in investment-related negotiations.

**Commission preferences:** The Commission was sceptical when in the early 1980s the USA started campaigning for a comprehensive new GATT round covering investment and service talks.<sup>16</sup> By the mid-1980s, the Commission, however, realised that a new round was likely to complement its Single Market Program and to benefit the European economy. The Commission consequently used its agenda setting powers to build support among the Member States and European business for a comprehensive GATT round. It reiterated that the EU was the world leader in export of services and outward investments. It called on the Member States and European business to study the effects of a multilateral liberalisation of services and investment.

**Business preferences:** European business – except for the LOTIS Committee representing service providers from the City of London – was little receptive to the Commission’s campaigning and remained passive throughout these debates.<sup>17</sup> Most concerned companies had not explored the impact of a multilateral liberalisation of services and investments on their operations and did not have relevant lobbying structures for these issues. This hardly changed during the core negotiations.

**Member State preferences:** A critical mass of Member States slowly endorsed the idea of a new comprehensive GATT round despite the lack of business interest.<sup>18</sup> In the early 1980s, most Member States except for the United Kingdom rejected the US proposal, because of its implications for the Common Agricultural Policy. Due to the Commission’s campaigning France, Germany, the Netherlands and Belgium came to the conclusion that their economies would benefit and started supporting the US proposal in the mid-1980s. It shifted the balance of power in the Council of Minister from opposition to support for a new round and toward acceptance for services and investment negotiations.

**Agreeing on Commission mandate:** In September 1986, the GATT parties convened in Punta Del Este to launch the so-called Uruguay Round. The Member States and the Commission had to adopt a mandate and take a decision on the representation modalities for the *new trade issues* such as investment. On invitation of the Commission, the Member States’ trade ministers convened on the fringes of the GATT ministerial meeting.<sup>19</sup> The Commission pled for the economic opportunities of the new round. It left no doubt that it would negotiate – as customary – on all negotiating items. The Commis-

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<sup>16</sup> For this and the following see H. Paemen & A. Bensch, *From the GATT to the WTO : the European Community in the Uruguay Round, Studies in social and economic history* (Leuven University Press, 1995): 33-34; P. Cheeseright, *World Trade News: Gatt consensus may soon emerge on code for trade in services*, Financial Times 4, (24 October 1983). Agence Europe, *Vice-President of the European Commission, Mr Tugendhat, has announced the Commission’s intention of proposing a stand-still on new restrictions on services business to be followed by a gradual unfreezing of the international services trade* (4 November 1983).

<sup>17</sup> Agence Europe *supra* n. 16; C. Tyler, *World Trade News: New move to boost trade in services*, Financial Times 3 (18 April 1983); Interviews with Commission and Member State officials (11.10.2013, 25.9.2013).

<sup>18</sup> For this and the following: Paemen & Bensch *supra* n. 16, 34-35; Interviews with Commission and Member State officials (17.06.2013 24.9.2013, 11.10.2013).

<sup>19</sup> Paemen & Bensch *supra* n. 16, 56.

sion had always propagated a teleological interpretation of the EU's legal competences under the CCP, which implied that the EU was legally competent to deal with all issues subject to GATT negotiations. The Member States tacitly agreed that it was in everybody's best interest if the Commission acted as single voice to maximise bargaining power. While they empowered the Commission to negotiate on services and investment, they emphasised that *new trade issues* primarily came under national competence.<sup>20</sup> The minutes of the Council session state that "...the decision does not prejudge the question of the competence of the Community or the Member States on particular issues".<sup>21</sup>

The EU subsequently spoke through the Commission with a single voice in the GATS and TRIMs negotiations. The Member States became wholeheartedly interested in the GATS negotiations and pushed for an ambitious agreement to unlock foreign markets for European service providers. Neither the Commission, nor the Member States, nor business, however, took an interest in the TRIMs negotiations.<sup>22</sup> The narrow mandate of these negotiations promised little economic gains and the Member State could not agree on a common position in this domain due to diverging TRIMs practices at home. In 1994, the EU and the Member States jointly signed the WTO Agreement including the GATS and TRIMs Agreements. To conclude, Commission entrepreneurship through agenda setting and pedagogical campaigning vis-à-vis the Member States rather than business lobbying accounts for the EU's involvement in investment-related negotiations during the Uruguay Round.

### III.2 The Energy Charter Treaty

The EU further established itself as an actor in the international investment regime during the negotiations on the ECT between 1990 and 1994. The ECT created a pan-European energy community.<sup>23</sup> Fifty-two countries – including the EU and its Member States – are signatories of the ECT. It resembles to traditional BITs. It inter alia contains soft-law provisions on investment liberalisation, binding post-establishment treatment and provides for investor-to-state dispute settlement (ISDS). The EU spoke through the Commission with a single voice and held extensive de facto competences across all areas of international investment policy. The EU and Commission's central role and de facto competences reflected Member State preferences and Commission entrepreneurship through agenda setting and invoking of fringe and de facto competences. European business was uninterested or opposed to the ECT project.

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<sup>20</sup> Court of Justice of the European Union, Opinion 1/94, *Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property - Article 228 (6) of the EC Treaty* [1994] ECR I-5267; Interviews with Commission and Member State officials, 24.9.2013, 11.10.2013, 17.6.2013.

<sup>21</sup> As cited in Paemen & Bensch *supra* n. 16, 56.

<sup>22</sup> For this and the following see Paemen & Bensch *supra* n. 16; J. Croome, *Reshaping the world trading system: a history of the Uruguay Round* (World Trade Organization, 1995)

<sup>23</sup> For this and the following see J. Doré, *Negotiating the Energy Charter Treaty*, in T. Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International, 1996): 137–155.

**Member State preferences:** The Member States immediately agreed to cooperate and to entrust the Commission to administer the ECT project, when the Dutch Prime Minister Ruud Lubbers first proposed to the European Council in summer 1990 to negotiate a pan-European energy community with the Soviet Union and its satellite states.<sup>24</sup> The socialist countries were in bad need of capital, modern technology and knowhow to reinvigorate their economies, whereas the EU and its Member States needed access to reliable and affordable energy. The ECT promised to contribute to the stabilisation of the EU's eastern neighbourhood. The Member States' decisions to cooperate and to put the Commission in charge of the ECT project reflected geopolitical considerations.<sup>25</sup> The Member States wanted to label the ECT as a EU project and speak with a single voice vis-à-vis the faltering Soviet super power to increase bargaining power. They, moreover, perceived the ECT as a unique project, which was not going to set precedence.

**Commission preferences:** The Commission managed to further consolidate its role through agenda setting and the invoking of de facto competences during the negotiations.<sup>26</sup> The Commission initially managed the project in the background. The Council Presidency acted as lead negotiator with occasional interventions from the Member State and the Commission. As the negotiations progressed, the Commission took over the role as lead negotiator including in investment-related negotiations. The Commission was highly motivated, proactive and capable during the core negotiations. It sought to prove itself as a broker in international affairs beyond GATT negotiations. It tabled treaty drafts and conceived compromise proposals, which were decisive for the conclusion of the ECT negotiations.<sup>27</sup> It provided the EU delegation with technical expertise, institutional memory and administrative resources, which the rotating Council Presidency could not provide. Hence, the Member States' respect for the Commission grew and they entrusted the Commission to act as their single voice. The Commission moreover successfully pointed out that it should play a prime role in the ECT project to ensure regulatory coherence with the emerging Single Market for energy. The ECT was the external relations component of this milestone project of the Commission. The Commission sought to fuse monopolistic energy markets of the Member States into a competitive Single Market and to embed this new market into a similarly organised regional energy regime so as to ensure its smooth functioning.<sup>28</sup>

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<sup>24</sup> For this and the following see Doré *supra* n. 23.

<sup>25</sup> *ibid.*; Interviews with national and Commission officials (18.1.2012, 17.6.2013).

<sup>26</sup> Interviews with Commission and Norwegian negotiators (19.10.2011, 4.2.2014); Doré *supra* n. 23.

<sup>27</sup> See European Commission, *The European Energy Charter: fresh impetus from the European Community*, COM(93)542 (1993); Agence Europe, *Progress on Energy Charter* (6 July 1993).

<sup>28</sup> European Commission, *European Energy Charter*, COM(91)36 (1991); S. Padget, *The Single European Energy Market: The Politics of Realization*. JCMS 30, 53–76 (1992).

**Business preferences:** European business mostly lobbied against the ECT project. European utilities saw the ECT project as a Commission-led attack on their down- and mid-stream monopolies.<sup>29</sup> They publically challenged the Commission's technical expertise and feasibility of its reform proposals. Upstream energy companies showed some interest, but doubted that the ECT could improve the business climate in the Soviet Union. Energy consumers largely ignored the ECT project. Nevertheless, the negotiations came to a successful end in December 1994. The EU acceded to the ECT as fully-fledged party, which remains until today the only veritable IIA with ISDS provisions it entered into.

### III.3 From the MAI negotiations to the Doha Round

The consolidation of the EU's role in international investment policy continued in the negotiations on the MAI in the OECD. The USA started pushing for the MAI negotiations in the OECD in the early 1990s.<sup>30</sup> The USA took the view that as developing countries were blocking the creation of investment disciplines in the GATT, developed nations should agree on state-of-the-art disciplines in the OECD. These disciplines would set a global standard. After initial hesitation, OECD members launched the MAI negotiations in the May 1995, which collapsed without agreement in 1998. The Member States and the Commission jointly took part in the MAI negotiations. The Commission ensured the EU's participation by pointing to its legal fringe competences. Lobbying by European business and Member State preferences cannot account for the EU's involvement in the MAI negotiations.

**Member State preferences:** The Commission proposed to act as the Member States' single voice in the MAI negotiations even though the Member States conventionally spoke on their own behalf in the OECD on issues beyond the EU's legal competences. The Member States, however, rejected the proposal.<sup>31</sup> They sought to keep the Commission at bay after its attempt in Opinion 1/94 (1994) to reverse through means of legal review the outcome of the Maastricht IGC (1991-1992), where the Member States had rejected the Commission's demand to recognise the EU's exclusive legal competence over all areas of foreign economic policy.<sup>32</sup> The Member States felt that the Commission had betrayed the gentlemen's agreement of the Uruguay Round and ECT, which stipulated that the Commission would deal with the *new trade issues* but not challenge the Member States' claim to legal competence. The EU's legal fringe competences nonetheless ensured the EU's involvement in the MAI negotiations.<sup>33</sup> Several agenda items came under shared or exclusive legal competence of the EU. As the MAI negoti-

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<sup>29</sup> For this and the following see Doré *supra* n. 23; Wälde, T., 1996. *International investment under the 1994 Energy Charter Treaty*, in: T. Wälde (ed), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International, 1996): 251–320

<sup>30</sup> D. Henderson, *The MAI affair: a story and its lessons* (Royal Institute of International Affairs, 1999).

<sup>31</sup> Council of Ministers, 7118/95 *Limite GATT 97 Ecofin 68* (15 May 1995).

<sup>32</sup> Court of Justice of the European Union *supra* n. 20;

<sup>33</sup> P. Koutrakos, *EU international relations law, Modern studies in European law* (Hart, 2015): 40-48; W. Dymond, 'The MAI: A sad and melancholy tale' in F. Hampson et al (eds) *A Big League Player? Canada among Nations* (Oxford University Press, 2008): 28; Interview with Commission official (18.1.2012)

ations were not organised according to the EU-internal distribution of legal competences, the Member States had to accept the Commission's participation in all sub-formations of the MAI negotiations.

**Business preferences:** European business showed limited interest in the MAI project.<sup>34</sup> It cannot account for the EU's involvement in this forum. European business adopted a supportive stance vis-à-vis the MAI project but remained passive in policy-making debates. Observers wondered whether business support was authentic or rather a favour to bureaucracies. European business felt that the MAI project tackled irrelevant investment barriers in investment-friendly economies. Its lukewarm support for the MAI project hinged on the hope that the MAI would at some point get multilateralised. Pierre Sauv , then official at the OECD's Trade Directorate, commented that "... *bureaucracies were proposing an agreement that the private sector in most countries was not necessarily calling for*".<sup>35</sup>

**Commission preferences:** The Commission's efforts to consolidate its role in the MAI negotiations continued during the core negotiations. Like in the ECT negotiations, it tried to use agenda setting and its expertise to extend its influence but without success. Cooperation between the Member States and the Commission remained arduous.<sup>36</sup> The Member States rejected Commission attempts to develop joint positions on issues beyond Union competence. British, Dutch, French and German officials coordinated their national positions on issues such ISDS under deliberate exclusion of the Commission.<sup>37</sup> The Commission had always been sceptical of the MAI project for functional and power considerations. The tense atmosphere in the EU-internal delegation made that the Commission lose interest. To consolidate the EU's involvement in international investment policy, it started shaping the international trade agenda and engaged in forum shopping. Put differently, the Commission started campaigning within the EU and among third countries to continue work on multilateral investment disciplines in the WTO.<sup>38</sup> It was obvious that the Commission favoured the WTO for power considerations. The Commission wanted to get rid of the Member States and act as the EU's single voice as customary in the WTO.<sup>39</sup> Publically, it argued that only WTO-based negotiations could enhance the global investment climate. The Commission's campaigning was partly successful. In 1996, the WTO ministerial meeting in Singapore decided on recommendation of the Commission to establish an investment working

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<sup>34</sup> R. Z. Lawrence, C. Devereaux, M. Watkins, *The Multilateral Agreement on Investment, in: Case Studies in Us Trade Negotiation, Volume 1: Making the Rules* (Institute for International Economics, 2006): 153.

<sup>35</sup> Ibid.

<sup>36</sup> Interviews with national, Commission and OECD officials (24.9.2013, 17.6.2013, 18.1.2012).

<sup>37</sup> Interview with Commission official (18.1.2012).

<sup>38</sup> For this and the following see E. Graham, *Fighting the wrong enemy: antiglobal activities and multinational enterprises* (Institute for International Economics, 2000): 23-25.

<sup>39</sup> P. Muchlinski, *The rise and fall of the Multilateral Agreement on Investment: Where now?* The international lawyer 34, 1033–1053 (2000).

group.<sup>40</sup> The Commission consequently adopted an increasingly adversarial negotiating style in the MAI talks. Its behaviour put further strain on the MAI negotiations, which were already grinding to a halt in late 1997 due to substantive disagreements and an anti-MAI campaign of non-governmental organisations.<sup>41</sup> It was in this situation that a peculiar alliance between the United States Trade Representative (USTR) and the Commission formed. The USTR was in charge of international investment policy, but had to follow the lead of the State Department in the US delegation to the MAI negotiations. The USTR felt that the State Department was intruding in its competence domain. The USTR – like the Commission – favoured ending the MAI negotiations.<sup>42</sup> The USTR seized the opportunity when public pressure mounted in France to withdraw from the MAI negotiations. In autumn 1998, the French Prime Minister Lionel Jospin commissioned his Minister of Economics Dominique Strauss-Kahn to meet USTR Charlene Barshefsky to evaluate whether a French withdrawal and consequent collapse of the MAI negotiations would deteriorate US-French relations. Barshefsky assured Strauss-Kahn that a French withdrawal would not cause frictions despite the State Department’s on-going attempts to conclude the MAI negotiations.<sup>43</sup> France withdrew on 14 October 1998 and backed the Commission’s demand to shift multilateral investment negotiations to the WTO. The Commission adopted a welcoming stance. Only a few days after the French withdrawal, Commissioner for trade Leon Brittan addressed the European Parliament and noted that “...*I have always taken the view that the WTO is the best long-term home for this work for which the MAI has already provided valuable signposts...*” (Brittan, 1998).<sup>44</sup>

**Shifting multilateral negotiations to the WTO:** Following the collapse of the MAI negotiations, the Commission went to great lengths to upgrade debates in the WTO investment working group to proper negotiations as part of the Doha Round, which started in 2000. The Commission now acted as customary in the WTO as single voice and motor of the negotiations. The investment negotiations in the WTO were, however, fairly short-lived. They collapsed in 2003 due to opposition from developing countries.<sup>45</sup> As shown below, the Commission’s success to put investment back onto the WTO negotiating agenda was, nonetheless, of paramount importance for the further consolidation of the EU’s de facto and legal competences.

#### III.4 Investment provisions in FTA negotiations

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<sup>40</sup> S. Woolcock, *The Singapore Issues in Cancun - A Failed Negotiation Ploy or a Litmus Test for Global Governance?* Intereconomics 38, 249–255 (2003).

<sup>41</sup> Interview with Member State official (3.7.2013).

<sup>42</sup> Graham *supra* n. 38; Interviews with Member State, US and OECD official (1.10.12, 3.7.2013).

<sup>43</sup> Ibid.

<sup>44</sup> L. Brittan, *The Rt Hon Sir Leon Brittan QC Vice-President of the European Commission Declaration: MAI European Parliament Plenary Session Strasbourg, 20 October 1998*, SPEECH/98/212 (1998).

<sup>45</sup> Woolcock *supra* n. 40.

The Commission acted for the first time as single voice in bilateral investment negotiations in the context of the FTA negotiations with Mexico and Chile.<sup>46</sup> While the two negotiations took place almost at the same time, the Member States vetoed the inclusion of far-reaching investment disciplines in the EU-Mexico FTA (1996-2000) in the last minute but then accepted their inclusion in the EU-Chile FTA (1999-2002). Commission entrepreneurship through agenda setting and the strategic use of the international trade agenda accounts for the differential outcomes of these negotiations.

**Competitive pressures:** Both FTA projects reflected increasing systemic pressures. The initiation of the EU-Mexico negotiations was a reaction to the entry into force of NAFTA, whereas the EU-Chile negotiations sought to pre-empt an announced US-Chile FTA.<sup>47</sup> European business grew worried that the US FTAs would erode its market share abroad and asked policy-makers for mitigation.<sup>48</sup> The Commission Spain, the United Kingdom, Germany and Portugal were receptive and pressed for the conclusion of FTAs of NAFTA-parity. As US FTAs and NAFTA contain investment chapters covering market access, post-establishment treatment and investment protection, the Commission proposed to the Council of Ministers in its draft mandates to hold negotiations on market access and post-establishment treatment provisions.<sup>49</sup> The Council approved the Commission's draft mandates.

**The Member States have second thoughts in the EU-Mexico negotiations:** The EU-Mexico negotiations started in October 1996. The Commission and Mexico did not negotiate on a specific investment chapter, but dealt with investment-related questions under the services trade and capital movements chapters. By the 8<sup>th</sup> round of the negotiations in summer 1999, the Commission had agreed with Mexico to comprehensively liberalise service-related investments on the basis of a negative list and to entirely free capital movements.<sup>50</sup> One Commission official commented that the draft FTA de facto contained a “*sexy investment chapter better than NAFTA*”.<sup>51</sup> By the 9<sup>th</sup> round, however, France suddenly threatened to veto the FTA unless the Commission dropped most investment-related provisions.<sup>52</sup> France argued that the Commission was intruding into domains of Member State competence and was light-headedly giving away the EU's bargaining chips for the Doha Round. The French veto was rooted in its aversion to free trade and competence transfers. France built a broad alliance in the

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<sup>46</sup> For this and the following see M. Manger, *Investing in protection: the politics of preferential trade agreements between north and south* (Cambridge University Press, 2009).

<sup>47</sup> Ibid.; A. Dür, *EU Trade Policy as Protection for Exporters: The Agreements with Mexico and Chile*. JCMS 45, 833–855 (2007).

<sup>48</sup> Ibid.

<sup>49</sup> Interview with Commission official (24.7.2012).

<sup>50</sup> G. Harding, *Obstacles remain to EU-Mexico trade deal*, European Voice (7 October 1999).

<sup>51</sup> As cited in Manger *supra* n. 46, 119.

<sup>52</sup> Interview with Commission official (25.9.2013).



Council.<sup>53</sup> To save the EU-Mexico negotiations from collapse, the Commission gave into French demands. It, nevertheless, convinced the Council to accept a standstill clause for services trade, modified capital movement provisions and a special chapter on financial services, which reflected the lobbying efforts of European banks to procure NAFTA-parity.<sup>54</sup> The EU and Mexico finally signed the FTA in March 2000.

**Commission entrepreneurship ensures investment provisions in the EU-Chile FTA:** The EU-Chile negotiations started in late 1999 – shortly before the clash between France and the Commission in the EU-Mexico negotiations. The EU-Chile negotiations progressed quickly. Chile was eager to sign a FTA with the EU so that most negotiating ‘hick-ups’ had EU-internal origins.<sup>55</sup> In 2001, the Swedish Council Presidency and the Commission arrived at the conclusion that they needed to devise a strategy to avoid another clash over investment-related provisions in the Council of Ministers.<sup>56</sup> Business was no driving force behind this initiative. They started touring Member State capitals to build trust. They invoked the evolving trade agenda in the WTO and explained to national administrations that the EU could not press for negotiations on investment and services in the Doha Round if the Member States blocked the inclusion of such commitments into FTAs. FTAs should reach for WTO+.<sup>57</sup> The interesting twist to the observation is that the Commission had spared no efforts to put investment back on the WTO agenda. The argument worked particularly well with France, which had withdrawn from the MAI negotiations advocating the continuation of investment negotiations in the WTO. In the end, the Member States even accepted to negotiate on investment liberalisation beyond service sectors. The EU-Chile FTA, which was signed in November 2002, became the EU’s first FTA with a dedicated chapter on investment liberalisation and post-establishment treatment commitments for services and non-services sectors. All following EU FTAs contain similar provisions.<sup>59</sup> The analysis demonstrates that Commission entrepreneurship through agenda setting and the strategic shaping and use of the international trade agenda was instrumental in extending the EU’s de facto competences in international investment policy to FTA negotiations.

### III.5 From the Convention to the Lisbon Treaty

The preceding section traced the EU’s involvement in investment-related negotiations since the 1980s. The following section evaluates the debate on the EU’s legal competences in international investment

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<sup>53</sup> Ibid.

<sup>54</sup> Manger *supra* n. 46, 119.

<sup>55</sup> Ibid.

<sup>56</sup> Interview with Member State official (26 Januray 2012).

<sup>57</sup> Ibid., K. Heydon, S. Woolcock, *The rise of bilateralism: comparing American, European and Asian approaches to preferential trade agreements* (United Nations University Press, 2009): 112.

<sup>59</sup> See European Commission, *Minimum platform on investment for EU FTAs – Provisions on establishment in template for a Title on "Establishment, trade in services and e-commerce"* (D(2006)9219) (28 July 2006).

policy during the Convention on the Future of Europe (2002-2003). It constitutes the final stage in the emergence of the EU's international investment policy. It shows that Commission entrepreneurship through agenda setting, invoking of de facto competences and the international trade agenda in combination with the procedural particularities of the Convention led to the extension of the EU's legal competences.

**A brief history of the EU-internal struggles over legal competences:** Before analysing the Convention it is necessary to briefly mention that discussions on an extension of the CCP to international investment regulation started already in the late 1980s.<sup>60</sup> In the early 1990s the Commission demanded the European Court of Justice in Opinions 1/94 and 2/92 to acknowledge the EU's extensive legal competences under the CCP to inter alia regulate international investment. The Commission, moreover, also demanded the Member States during the IGCs on the Maastricht Treaty (1991-1992), the Amsterdam Treaty (1995-1997) and the Nice Treaty (2000-2001) to reform the CCP and to formalise the EU's competences in international investment regulation.<sup>61</sup> It underlined that the EU already held de facto competences in these domains and that the CCP should mirror the evolving agenda of GATT and FTA negotiations to ensure the effective representation of European interests. The Member States and the ECJ rejected these demands, while European business was little interested.<sup>62</sup> The creation of an external capital regime under the capital movements chapter of the Maastricht Treaty (1993) and the extension of the CCP to services trade (2003) nevertheless unintentionally provided the EU with legal fringe competences in international investment regulation.<sup>63</sup>

**The Convention method:** The Convention on the Future of Europe (2002-2003) finally brought the breakthrough for the Commission's persistent attempts to bring international investment policy under exclusive Union competence. The Convention was a reaction to the failures of the Amsterdam and Nice IGCs to reform the EU in view of the upcoming Eastern Enlargement (2004, 2007). The Convention method should limit the role of technocrats and bring together democratically legitimised generalist politicians to openly discuss sensible reforms.<sup>65</sup> European and national parliaments, governments of the member States and accession countries as well as the European Commission sent 102 delegates to the Convention to draft the Constitutional Treaty. A small Praesidium of 12 delegates chaired by Valérie Giscard d'Estaing oversaw the Convention.

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<sup>60</sup> R. Basedow, A legal history of the EU's international investment policy, *Journal of World Investment and Trade* (forthcoming).

<sup>61</sup> See for instance L. Johannsen, *Die Kompetenz der Europäischen Union für ausländische Direktinvestitionen nach dem Vertrag von Lissabon*, Beiträge zum Transnationalem Wirtschaftsrecht 90 (2009).

<sup>62</sup> Basedow *supra* n. 60.

<sup>63</sup> Koutrakos *supra* n. 33.

<sup>65</sup> For this and the following see European Convention, *The European Convention*, <<http://european-convention.eu.int>> (2003).

**The Commission renews its plea for an extension of the CCP:** In the beginning, the delegates met in 11 issue-specific working groups to discuss reforms. Working group VII on external relations was in charge of the CCP. As it was the time of the Iraq War, the delegates of Working Group VII mostly discussed the European foreign and defence policy. The CCP was an issue of secondary importance. Pascal Lamy, Commissioner for Trade, sought to convince the working group on 15 October 2002 to modernise the CCP.<sup>66</sup> He underlined that the EU was involved and held de facto competences in FTA and WTO negotiations on *new trade issues* such as investment. He recommended accordingly extending policy-making by qualified majority under the CCP in order to ensure the effective representation of the EU in the WTO and FTA negotiations. He did not mention that the Commission had spared no efforts to put investment disciplines onto the agenda of the WTO and FTAs. The working group recommended in its report to the Convention Praesidium of December 2002 to extend qualified majority voting under the CCP to all aspects of services trade and intellectual property rights. It remained silent on investment.<sup>67</sup>

**The Praesidium follows the Commission's long-standing plea for an extension of the CCP:** The Praesidium met on 23 April 2003 to transpose the recommendations of working group VII into a draft chapter on external relations. The Praesidium's draft text reflected the recommendations of the working group but also proposed bringing 'FDI' regulation under the scope of the CCP. Reiterating the Commission's arguments, the Praesidium explained that FDI and trade were intrinsically linked.<sup>68</sup> The Irish Praesidium member John Bruton reportedly had pleaded that an extension of qualified majority voting to 'FDI' regulation was necessary to ensure the effective representation of the EU in the WTO and in FTA negotiations. The representative of the Commission, Michel Barnier, and Valéry Giscard d'Estaing strongly supported the proposal and convinced other Praesidium members.<sup>69</sup> It has been speculated that the Commission had previously approached certain Praesidium members to reemphasise the issue in the policy debate as 'neutral' actors. Taking into consideration that Burton's home country is the only Member State not having any BITs with third countries, this suspicion seems not that far-fetched.<sup>70</sup> In a similar vein, lawyers are puzzled that the Praesidium opted for the impractically

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<sup>66</sup> European Convention, *Intervention de M. Pascal Lamy, membre de la Commission Européenne, lors de la réunion du groupe de travail VII, le 15 octobre 2002 (working group VII - working document 10)* (2002).

<sup>67</sup> European Convention, *Final report of working group VII on external action (CONV 459/02)* (2002).

<sup>68</sup> European Convention, *Draft articles on external action in the Constitutional Treaty (CONV 685/03)* (2003): 53-55.

<sup>69</sup> Interview with Convention participant (12.10.2011); J. Ceysens, *Towards a common foreign investment policy? Foreign investment in the European Constitution*, *Legal issues of economic integration* 32 (2005): 273.

<sup>70</sup> UNCTAD, *International investment Treaty Navigator* (2016), <<http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/100#iaInnerMenu>>.

narrow term 'FDI' rather than 'international investment'.<sup>71</sup> One may recall that the Commission had unsuccessfully proposed to extend the CCP to FDI regulation in search for a compromise with sceptical Member States during the IGC on the Treaty of Amsterdam.<sup>72</sup>

**Member State preferences:** A powerful alliance of Member States encompassing the United Kingdom, France, Germany, Ireland and Spain opposed the Praesidium's proposal to extend the CCP to FDI regulation.<sup>73</sup> Their delegates and representatives of national and the European Parliament tabled 31 amendments<sup>74</sup> in the plenary session on the external relations chapter demanding the deletion of the FDI reference. The delegates of the Member States criticised that the regulation of FDI should remain under national competence, rejected the assumption that trade and investment were interdependent or pointed out that FDI regulation partly came under the Treaty chapter on capital movements.<sup>75</sup>

Overall the delegates tabled ca. 1000 amendments regarding the external relations chapter.<sup>76</sup> As it was impossible to discuss all amendments, the Praesidium asked delegates to only table one amendment each.<sup>77</sup> Unlike in normal IGCs composed by technocrats, the delegates were politicians aspiring to establish a European federal state. They were unwilling to spend their limited political capital in this historic moment on banal issues such as an FDI reference and hardly understood the implication of the FDI reference for international investment policy-making. The limited access of technocrats to Convention debates in combination with the Commission's agenda setting in the open and eventually behind the scenes thus led to the extension of the CCP to FDI regulation in the draft treaty.

**Business preferences:** European business was divided and little involved in these debates. On 28 February 2002, the European umbrella federation UNICE stated in a position paper the following:

*"In the context of the next intergovernmental conference, UNICE strongly supports an extension of qualified majority voting to issues of major importance to business, such as international negotiations and agreements on services, intellectual property rights and foreign direct investment."*<sup>79</sup>

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<sup>71</sup> International investment policy as implemented through international investment agreements is not limited to the regulation of FDI but encompasses inter alia portfolio investments, intellectual property rights and brands. The new Union competence is of insufficient breadth to conclude standard international investment policy.

<sup>72</sup> European Commission, *Report on the Operation of the Treaty on the European Union*, SEC (95) 731 final (1995): 1-7, 57-58.

<sup>73</sup> For this and the following see European Convention, *Proposed amendments to the text of the articles of the Treaty establishing a Constitution for Europe - Common Commercial Policy* (2003), <<http://european-convention.eu.int/EN/amendments/amendments3dd9.html?content=866&lang=EN>>.

<sup>74</sup> Counting includes repeatedly tabled amendments.

<sup>75</sup> European Convention *supra* n. 73; Interview with Convention participant (12.10.2011).

<sup>76</sup> European Convention *supra* n. 73.

<sup>77</sup> Interview with Convention participant (12.10.2011).

<sup>79</sup> UNICE, *Commission White Paper on European Governance - UNICE position* (2002).

Other major national business federation like the British CBI and the German BDI were critical of an extension of the CCP to FDI regulation.<sup>80</sup> The French MEDEF, Spanish CEOE, Italian CONFINDUSTRIA or Polish LEVIATHAN or the European Services Forum were, moreover, generally supportive of an effective CCP, but did not lobby for such a reform. A UNICE staff member confirmed that the CCP was indeed an issue of secondary importance.<sup>81</sup>

**The intergovernmental conferences:** The Member States convened for an IGC between July 2003 and June 2004 to finalise the text of the Constitutional Treaty. The consensus was to change as little as possible in the democratically legitimised draft treaty. The Member States primarily bargained over issues of high politics like the distribution of votes in the Council of Ministers. The CCP received little attention.<sup>82</sup> Ireland, Portugal, France and Germany remained critical of the FDI reference and ensured the inclusion of a clause providing for the unanimous adoption of FDI-related measures.<sup>83</sup> The Constitutional Treaty was signed on 29 October 2004. Its ratification failed due to negative outcomes of referenda in the Netherlands and France in 2005. In 2007, the Member States convened for another IGC to agree on a slimmed-down version of the Constitutional Treaty, which is known today as the Lisbon Treaty. As the Member States intended to preserve as much as possible of the Constitutional Treaty, they decided not to reopen discussions on the CCP. The Lisbon Treaty entered into force on 1 December 2009 and provides the EU with firm legal competences in international investment policy.

## V. Conclusion

In conclusion, supranational thinking depicts more accurately the dynamics leading to the emergence of the EU's international investment policy since the 1980s than liberal intergovernmental thinking. The Commission persistently used agenda setting, invoked implied and fringe competences, shaped and used the international trade agenda so as to have the Member States accept the EU's involvement in international investment negotiations. It used similar strategies and pointed to the EU's involvement in international investment negotiations to convince the Member States to accept an extension of the EU's legal competences under the CCP. It was, however, only during the Convention on the Future of

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<sup>80</sup> BDI, *Positionspapier: Internationale Investitionsförderverträge - Position der Deutschen Industrie zum Übergang der Kompetenzen auf die Europäische Union* (2010); CBI, *Delivering a more competitive Europe: the CBI's view of the convention on the future of Europe* (not dated); C. Tietje, *Gastbeitrag - Europa springt ein*, *Frankfurter Allgemeine Zeitung* (29 January 2009).

<sup>81</sup> Interviews with business representatives (16.2.2012, 26.1.2012, 4.9.2013, 3.10.2013, 25.9.2013, 27.9.2013, 27.9.2013).

<sup>82</sup> Interview with Convention participant (12.10.2011).

<sup>83</sup> G. Krenzler and C. Pitschas, *Die Gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrags – ein Schritt in die richtige Richtung*, *Recht der Internationalen Wirtschaft* 51, 801–811 (2005).

Europe, whose procedural rules and composition limited influence of Member State technocrats that the Commission finally succeeded in procuring a FDI extension. European business was mostly uninterested, divided or ambivalent regarding the EU's role in international investment policy. The Member States, finally, occasionally favoured cooperation to maximise their bargaining power but primarily sought to contain the EU's involvement in international investment policy and an extension of its legal competences.

The article makes an empirical contribution. It comprehensively traces and explains the EU's growing role in international investment policy. Second, it contributes to research on the Commission as policy entrepreneur. It sheds further light on the strategies of the Commission to extend Union competences even in the face of Member State opposition. Third, the article challenges the mainstream assumption that business decisively shapes international investment policy. European business hardly ever lobbied policy-makers in this domain. In line with a growing econometric literature<sup>84</sup>, it thereby raises question marks over the impact of IIAs on business operations.

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<sup>84</sup> See for instance L. Colen, D. Persyn and A. Guariso, *What Type of FDI is Attracted by Bilateral Investment Treaties*, LICOS Discussion Paper 346/2014 (2014); E. Neumayer and L. Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 *World Development* (2005).