# The European Union and Investment Protection Agreements
# –
# *Collective action problems and policy entrepreneurship*

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**Abstract:** In recent years, the European Union (EU) has been keenly negotiating investment protection agreements (IPAs) with investors-to-state dispute settlement (ISDS) provisions despite public opposition. The alleged benefits of the EU's new IPA program are of 'public good' nature. EU IPAs provide diffuse, uncertain, non-exclusive and non-rivalrous benefits to European business, the Member States and the EU. Collective action theory stipulates that public goods are undersupplied. Why then does the EU negotiate IPAs? In this article, I build on Olson's concept of public goods as 'by-products' to solve the puzzle. The concept stipulates that large groups can overcome collective action problems, if group members pursue private goods and produce public goods as 'by-product'. I accordingly argue and provide evidence that the European Commission carries the bulk of the political costs to develop and implement the new EU IPA program (public good) in order to consolidate the EU's young and contested competences in international investment regulations (private good). The article contributes to research on the diffusion of IPAs, EU foreign economic policy and the role of international bureaucracies in the provision of international public goods.

**Key words:** EU, ISDS, Bilateral Investment Treaties, lobbying, collective action, Commission entrepreneurship.

## I. Introduction

International investment protection has emerged as a highly sensitive issue in the international public and academic debate in recent years. Countries commit through investment protection agreements (IPAs) with investor-to-state dispute settlement (ISDS) provisions to abstain from expropriating foreign investors unless necessary for public policy purposes and against payment of fair and prompt compensation (Dolzer and Schreuer, 2012). ISDS provisions of IPAs enable foreign investors to use international arbitration – instead of domestic courts – to claim compensation for expropriations. IPAs may take the form of standalone agreements also known as bilateral investment Treaties (BITs). In recent years though, IPAs increasingly take the form of comprehensive trade and investment agreements such as the planned Transatlantic Trade and Investment Partnership (TTIP) or the Comprehensive Economic and Trade Agreement (CETA).

The EU started negotiating IPAs with ISDS provisions in 2011. While the Commission recently declared that it would rethink its investment protection strategy (Von der Burchard and Hanke, 2017), it remains formally committed to negotiations on investment protection and ISDS provisions with 13 countries (table 2). The EU's eagerness to negotiate IPAs – either as standalone or comprehensive trade and investment agreements – is remarkable in light of deep-rooted public concerns and broad opposition. Citizens, non-governmental organisation (NGOs), academics and media warn that investment protection and ISDS provisions may hinder the EU and the Member States to regulate in the public interest and hollow out European democracy. The alleged benefits of EU IPAs in the form greater investment activity and economic growth, on the other hand, are diffuse, uncertain, non-exclusive and non-rivalrous. EU IPAs thus qualify as public good. Collective action theory (Olson, 1965) stipulates that public goods are undersupplied. Beneficiaries – here European business, the Member States and the European Institutions – seek to free ride and shift the costs for the production of public goods to others. In short, collective action theory stipulates that policy actors should abstain from taking political action to develop and implement a EU IPA program. These observations trigger the question of *why the EU so keenly negotiates international agreements with investment protection and ISDS provisions*.

Chilton (2016), Poulsen and Aisbett (2016) suggest that developed economies such as the USA primarily use IPAs as foreign policy tool to strengthen relations with countries of strategic interest. Economic considerations play a secondary role. Geopolitical objectives, however, cannot account for the EU's recent eagerness to negotiate IPAs. The EU is notorious for failing to define and to act upon geopolitical interests. Other scholars suggest that business interests fuel IPA programs of developed economies (Allee and Peinhardt, 2010; Gus Van Harten, 2007; Neumayer, 2006; Swenson, 2009). The explanation echoes the critique of many citizens, NGOs and academics that the EU's eagerness to negotiate IPAs is a manifestation of undue business influence on politics. While intuitive at first sight, the explanation is misleading. Business may indeed mobilise and lobby for investment liberalisation provisions as they yield selective benefits for specific sectors and firms. Investment protection and ISDS provisions, on the other hand, supply as discussed above benefits of public good nature. Like European policy-makers, business should face collective action and free riding problems preventing it from forcefully lobbying for these provisions.

In this article, I advance an alternative explanation. I argue that the EU's new IPA program is best understood as the outcome of Commission entrepreneurship and bureaucratic competition over power (Allison and Halperin, 1972; Buchanan and Tullock, 1962). My explanation builds on Olson's (1965) concept of public goods as 'by-products'. The 'by-product' model stipulates that collective action can simultaneously yield selective benefits of private good nature as well as non-exclusive and non-rivalrous benefits of public good nature. Groups may thus overcome collective action problems, if group members internalise costs of public good provision so as to reap a private good. In accordance with the 'by-product' model, I argue that the European Commission advances the development and implementation of the EU's IPA program (public good) in order to consolidate the EU's young and contested competences in the regulation of foreign direct investment (private good). The by-product explanation takes up a long-forgotten aspect of Keohane's work on regime formation in the absence of hegemons (Keohane, 1984, p. 77). Keohane theoretically argued – yet failed to produce empirical evidence – that a group of rational and egoistic states can cooperate and produce public goods through conjoint production of private goods. This article finally provides empirical evidence to underpin Keohane's conclusion. The article furthermore speaks to theories of bureaucratic politics and public choice in that the Commission is shown to pursue public welfare maximisation in line with its liberal economic heuristics and organisational empowerment (Allison and Halperin, 1972; Buchanan and Tullock, 1962; Weber, 2002).

Qualitative methods provide the basis for the empirical testing of the 'by-product' explanation. The 'by-product' explanation implies a causal relationship between EU-internal competence struggles and the EU's eagerness to negotiate IPAs. I use analytical process tracing to reconstruct the interdependent policy debates on Union competences and IPA negotiations. The article assesses the time period from the entry into force of the Treaty of Lisbon in 2009 until mid-2017. The EU acquired the competence to regulate foreign direct investment (FDI) under the Treaty of Lisbon. In mid-2017, on the other hand, the Court of Justice of the European Union (CJEU) released Opinion 2/15 delimiting the distribution of competences in international investment policy (European Court of Justice, 2017). Opinion 2/15 – while recognising the EU's exclusive competence over investment protection – has far-ranging implications for EU policy-making on IPAs. It finds that ISDS provisions still come under shared competences and require mixed ratification. As mentioned above, the Commission recently announced to rethink its investment protection strategy in light of Opinion 2/15. It marks the start of a new chapter in EU international investment policy subject to future research. The analytical focus of the article lies in particular on Commission, Member States and business preferences and actions as key stakeholders. It equally pays attention to non-governmental organisations (NGOs), the European Parliament and third countries as actors potentially shaping the EU's approach to EU IPAs. The article builds on policy documents, press coverage and secondary literature as well as ethnographic insights from working in the Directorate-General (DG) Trade of the European Commission and 38 anonymised interviews with EU and Member State policy-makers and business representations carried out between 2011 and 2018.

The article is structured as following. It first surveys in more detail existing research on the motivation of states to negotiate IPAs. It consequently develops a new explanation rooted in collective action theory. The following section produces empirical evidence to test the 'by-product' explanation in two steps. First, it traces the intricate policy-making debates on EU IPAs and Union competences to show that Commission entrepreneurship decisively propelled the EU's eagerness to negotiate on investment protection and ISDS. Second, it then evaluates through interview data and policy documents to what extent Commission preferences and actions can be seen as independent from business and other domestic interests. The last section concludes and identifies theoretical and empirical contributions.

## II. Literature survey – Why do countries sign IPAs?

Why do countries negotiate IPAs provisions? Scholars have produced a number of explanations for countries' decision to pursue IPA negotiations. Most studies focus on developing countries. They suggest that developing countries negotiate IPAs to compete for inward investment, to strengthen foreign policy ties and in response to conditionality tied to development aid (Elkmans et al., 2006; Guzman, 1997; Poulsen and Aisbett, 2013; Simmons, 2014).[1] For the purpose of this study, research on the motivations of developed economies – like the EU – is more pertinent. Developing and developed economies hold structurally different interest in the global investment regime. Unlike most developing countries, developed economies are capital exporters and hold offensive rather than defensive interest in the global investment regime. Firms from developed economies are typically claimants, whereas developing countries are typically respondents in ISDS proceedings (UNCTAD, 2016). Despite the central role of developed economies in the diffusion of IPAs, research on the motivation of developed countries to negotiate IPAs is remarkably scarce. Studies identify three drivers of IPA programs – business lobbying, bureaucratic politics and geopolitics.

[1] See Bonnitcha (2017), chapter 8, for a thorough review of the literature; see chapter 6 for an overview of econometric studies on the effects of IPAs on investment flows and vice versa.

Several studies advance the intuitively plausible explanation that business interests and lobbying are the key drivers of the IPA programs of developed economies (Allee and Peinhardt, 2010; Gus Van Harten, 2007; Neumayer, 2006; Swenson, 2009). The heated public debate on the EU's new IPA program echoes this argument (Corporate Europe Observatory, 2014; Monbiot, 2013). The explanation builds on the assumptions that business is the main stakeholder and has considerable resource, which it brings to bear to shape foreign economic policy and promote IPA negotiations. The explanation echoes societal theories of international political economy (Hiscox, 2002; Milner, 1999; Rogowski, 1989). To account for states' foreign economic policies, societal theories focus on economic interests and lobbying efforts of societal interest groups such as business associations.

Recent research points to the importance of political motivations behind IPA programs of developed economies. Chilton (2016) analyses the drivers of the IPA program of the US government. He finds that economic considerations rarely drive IPA negotiations between the USA and third countries. Business lobbying or the intent to enhance the protection of US investors abroad are of secondary importance. Chilton suggests that the US government negotiates IPAs to strengthen geopolitical relations with strategic partner countries. Poulsen and Aisbett (2013) come to similar conclusions. They find that bureaucratic and foreign policy considerations fuel the conclusion of IPAs. Following the same logic, Bonnitcha et al. (2017, pp. 189–190) report that the IPA programs of most developed economies are predominantly state-led.

The literature on the drivers of IPA programs of developed economies is illuminating. Business lobbying, foreign policy and geopolitical considerations are, however, unlikely to account for the EU's eagerness to negotiate IPAs. Foreign policy and geopolitical considerations shape EU foreign economic policy only in rare circumstances. Foreign policy and geopolitical motivations notably come to the fore when the EU deals with accession candidates and its neighbourhood. The EU is moreover committed to promoting non-economic issues such as Human Rights, sustainable development or environmental protection as part of its foreign economic policy. In reality, economic considerations, nonetheless, frequently override political motivations (Gstöhl and De Bièvre, 2018, pp. 188–203). The limited importance of foreign policy and geopolitical considerations reflects the intergovernmental setup of EU foreign policy-making and its marginal military capacity. The Member States hold veto rights and diverse foreign and geopolitical interests. The EU frequently fails to agree on and to act upon common geopolitical positions. EU foreign economic policy thus rarely serves as an instrument to promote common interests in international affairs.

Business-centred explanations, on the other hand, build on a flawed conception of the political economy of IPAs. Many observers implicitly equate IPAs with traditional Free Trade Agreements (FTAs). FTAs contain market access commitments, which have redistributive effects on society

(Hiscox, 2002; Milner, 1999; Rogowski, 1989). Greater economic openness, for instance, benefits export-competing actors, while it harms import-competing actors. FTAs thus have concentrated and predictable effects on society, sectors and firms, which trigger political mobilisation and lobbying activity. IPAs, in turn, have diffuse and unpredictable effects. They seek to ensure a minimum level of investment protection across economic sectors and Member States. The benefits of IPAs are non-rivalrous and non-exclusive. Through the lens of collective action theory, IPAs qualify as public good. Collective action theory suggests that public goods are undersupplied (Olson, 1965). Beneficiaries seek to free ride and to shift production costs for public goods to others. As all beneficiaries seek to free ride and to avoid contributing to the production costs, the public good is not produced in sufficient quantities. Olson notes in that regard that "*…if the members of a large group rationally seek to maximize their personal welfare, they will not act to advance their common or group objectives…*" (Olson, 1965, p. 3). In the political realm, the argument implies that investors are unlikely to invest resources to ensure the provision of a public good. In short, business lobbying for IPAs is unlikely.[2]

What is more, the benefits of IPAs are unpredictable. IPAs become only relevant and affect business operations[3] in case of an alleged expropriation and launch of an ISDS proceeding. The outcome of ISDS proceedings is, however, impossible to predict for investors. As Pelc (2017) observes, ISDS proceedings remarkably often fail to produce compensation for investors despite investors' full discretion to use this dispute resolution mechanism. UNCTAD data (2017) confirms that investors won only 27% of publically known ISDS proceedings and that the monetary awards significantly fell short of claimed damages. Investors are furthermore known to hold an aversion against using ISDS. ISDS is described as the '*nuclear option*' of dispute resolution. It erodes the working relationship with host states and forecloses future business projects in a host country.

## III. An alternative explanation – Collective action theory and Commission entrepreneurship

In this section, I develop an alternative explanation for the EU's eagerness to conclude IPAs rooted in collective action theory. The EU's new IPAs allegedly yield two types of non-exclusive and non-rivalrous benefits to the Member States and the EU as a whole. First, IPAs seek to promote

[2] An important caveat applies to law firms specialised in investment arbitration. A small number of law firms is highly active in investment arbitration and therefore enjoys concentrated and exclusive benefits under IPAs, which might trigger lobbying activity. This article only focuses on actual or potential investors for the sake of parsimony.

[3] IPAs have generally no immediate or predictable effect on business operations and profit margins. An exception arises in the German context. Germany conditions access of investors to public investment guarantee schemes on the existence of IPAs with host countries. It thereby seeks to limit the financial risks for taxpayers under national export and investment promotion programs. Access to state-backed investment guarantee schemes reduces financing costs of investment projects and affects business operations and profit margins. Bonnitcha et al (2017, p.186-187) accordingly report that German business has occasionally forcefully lobbied for the conclusion of specific IPAs.

international investment activity and economic prosperity by addressing the so-called hold-off problem (Dolzer and Schreuer, 2012; Guzman, 1997). States generally want to attract inward investment and therefore have an interest in promising foreign investors to treat them correctly. Once an investment is sunk in their jurisdiction, however, states have an interest in reneging on their promise, to expropriate and nationalise foreign investments. Sovereign states struggle to overcome this dynamic time inconsistency problem as they cannot credibly commit under national law to foreign private parties in their jurisdiction to refrain from expropriation. Foreign investors may consequently refrain from lucrative and save investment projects, which imposes opportunity costs on host countries in the form of foregone capital inflows, employment and spill-over effects. IPAs create enforceable public international law commitments to protect foreign investments and thereby resolve the hold-off problem. Under EU IPAs these benefit accrue to all covered investors and to all Member States. These benefits are not unique to EU IPAs; but they are typically a core motivation for states to negotiate such agreements and thus deserve mention here.

The EU's IPA program, moreover, resolves important inefficiencies in international investment policy-making. Prior to the entry into force of the Lisbon Treaty in 2009, the Member States were competent to conclude IPAs and pursued national IPA programs. The Member States had to individually negotiate 29 IPAs with a given partner country to reach the same coverage as one EU IPA resulting in a manifest waste of administrative resources. What is more, the EU's new IPA program enables the Member States to speak with a single voice and to maximise European bargaining power in investment negotiations and disputes with third countries. The EU's new IPA program also gradually re-establishes a level playing field among Member State economies and European investors. Whereas some Member States negotiated dense IPA networks, others have shown less active (figure 1) resulting in competitive distortions among European investors and Member State economies. The EU's IPA program should thus yield a number of efficiency gains.

**Collective action problems in EU investment policy-making**

The public good qualities of the EU's new IPA program imply that the Member States and European Institutions – much like European business – face a free riding problem (Olson, 1965). While the Member States and the European Institutions may agree that it is beneficial to pursue a EU IPA program, they should attempt to free ride as an optimal strategy to maximise individual welfare. To invest resources and political capital in developing and implementing a EU IPA program – notably when facing stiff public opposition – would be irrational since any economic and political gains would not be restricted to contributors. With all Member States and European Institutions following this reasoning and course of action, no EU IPA program should come about.

How then is it possible to account for the EU's new IPA program? Institutional economics posit that it is the core function of the state to create institutions – in the form of political organisations or policy programs – which help society overcome collective action problems through delegation, coercion, monitoring and alike (North, 1990). In the present case, the recent transfer of competences to regulate foreign direct investment from the Member States to the Union under Art. 207 TEFU may at first sight be considered as the establishment of such an institution. Basedow (2017) and Meunier (2017), however, find that the competence transfer was not a product of functional cost-benefit calculations but rather a procedural accident. More importantly though, the empowerment of the Union to regulate foreign direct investment does not resolve the collective action problem. The new Union competence merely implies that the Member States must *de jure* refrain from taking individual action; it does not create an obligation on the Member States and European Institutions to engage in collective action and to negotiate IPAs. As Héritier (2001) observes, European cooperation evolves through formal and informal processes. Changes to European primary law do not necessarily circumscribe and alter actual cooperation among Member States. In other words, the collective action problem persists and arises at the stage of breathing political life into a new contested inanimate legal competence of the EU.

Collective action theory points to two strategies for large groups to overcome collective action and free riding problems. So-called 'privileged groups' may internalise the costs for the supply of public goods (Olson, 1965, pp. 49–50). The explanation implies that the benefits flowing from public goods are unevenly distributed. Certain group members may reap sufficiently high individual benefits from the supply of a public good that it is rational for them to carry the costs despite other group members free riding. Residents for instance may be willing to pay for improvement works of their access road even though they may not exclude non-residents from using the road, because their individual gains from a better quality road outweigh all other considerations.

Group members may, moreover, provide a public good as by-product when seeking to reap a private good (Olson, 1965, pp. 132–135). The explanation hinges on the insight that collective action often yields benefits, which are of private as well as public good nature. Firms for instance may invest heavily in research and development to gain market share and raise profits. At the same time, firms' research and development activities may also propel the diffusion of new environmental-friendly technologies. The resulting positive effect on the environment in turn qualifies as public good. Such by-products facilitate collective action as public goods are supplied as by-product in passing.

**Commission entrepreneurship and conjoint production**

The EU's eagerness to negotiate IPAs, I argue, is best understood as such a by-product. The European Commission is preoccupied with consolidating the EU's young and contested legal competence in the regulation of foreign direct investment (private good) and therefore pushes within the EU for IPA negotiations with third countries (public good). The EU's emerging IPA program thus serves its primary purpose of promoting the Member States and EU's competitive position in the global investment regime and world economy; while it equally serves the Commission to turn a contested legal competence over the regulation of foreign direct investment into a broadly accepted political reality.

The 'by-product' explanation echoes theories of public choice, bureaucratic and EU politics. Scholarship on the role of modern bureaucracies suggests that bureaucracies exert distinct causal influence on policy outcomes (Allison and Halperin, 1972; Buchanan and Tullock, 1962; Weber, 2002). They are not mere executors of political decisions, but hold and pursue distinct preferences. The causal importance of bureaucracies is particularly prevalent in the study of the EU. The EU and notably the Commission are seen to be partly removed from electoral and political control, which increases the autonomy and causal influence of bureaucrats on policy outcomes (Follesdal and Hix, 2006; Pollack, 2003). Scharpf (2006) and Majone (1998) note that the EU's legitimacy indeed flows from its ability to effectively and efficiently address transnational market and policy failures. The EU's constitutional order thus hinges on 'output' rather than electoral 'input' legitimacy. It implicitly prescribes a pivotal role to bureaucrats in shaping policy outcomes.

Bureaucracies in principle hold and pursue two types of objectives – the maximisation of public welfare in accordance with organisation-specific heuristics; and the maximisation of organisational welfare through the expansion of bureaucratic resources and power (Allison and Halperin, 1972, p. 43). These assumptions again are widely shared in the study of EU politics. The Commission, on the one hand, is described as the guardian of the European Treaties advancing the Union's general interest (see Art. 17 TEU) (Hooghe, 2012; Kassim et al., 2013; Schafer, 2014). The Commission's conception of the Union's general interest is rooted in liberal economic heuristics. The EU is an economic integration and trade liberalisation project, which shapes the heuristics of Commission staff through self-selection and socialisation (Hooghe, 2012; Meunier and Nicolaidis, 1999, p. 498). On the other hand, the Commission is seen to favour the expansion of Union powers in particular in foreign economic relations. In comparison to allocative or distributive policies, foreign economic policy puts little strain on Commission resources yet promises to improve the provision of public goods in the form of removing competitive distortion on the Single Market (Eeckhout, 2011, pp. 25–27; Hooghe, 2012; Schafer, 2014).

**The supply side of the argument – Member State and societal interest groups**

The 'by-product' explanation has a demand and supply side. Commission entrepreneurship constitutes the demand side. The Commission pushes for particular policy outcomes to reap private goods. On the supply side, the Member States and societal actors enable Commission entrepreneurship to succeed. Putting in place new policy institutions – such as the EU IPA program – requires support from other actors in that it relies on cooperation. The importance of ensuring public endorsement is particularly manifest in the EU context. The EU is a *sui generis* supranational organisation, where decision-making on policies and institutions requires supermajorities or unanimity (Scharpf, 2006). The conceptualisation of IPAs as public goods implies that most Member States and societal interest groups should welcome Commission entrepreneurship. Commission entrepreneurship enables supply side actors to free ride and to enjoy the benefits of EU IPAs. Most Member States, the European Parliament and business should lend – silent or explicit – support to relevant Commission initiatives.

The 'by-product' explanation, nonetheless, does not imply that there is unanimous support among supply side actors. The 'by-product' model indeed suggests that actors provide public goods to reap excludable private goods. Private goods are contested in markets and politics. Actors compete over private goods. In this study, the Commission arguably carries the political costs for developing and implementing a EU IPA program inter alia to consolidate Union competences. National bureaucracies seek to protect competences and policies against EU encroachment, which should trigger contestation of Commission efforts notably from Member States with historically proactive IPA programs (figure 1). In a similar vein, the development and implementation of the EU IPA program is thought to gradually re-establish a level playing field among Member States and European business. It implies that some supply side actors win, whereas others lose from Commission entrepreneurship. In other words, Member States with dense IPA networks may be hesitant of a EU IPA program to preserve their competences and national competitive edge vis-à-vis other Member States.

**Testable implications**

The 'by-product' explanation for the EU's eagerness to conclude IPAs yields a number of observable implications, which allow for empirical verification.

1. The Commission initiates the development and implementation of the EU IPA program pointing European public interests but equally seeks to secure excludable benefits in the form of competence consolidation.
2. The Commission's pursuit of excludable benefits triggers opposition among some Member States, while others lend support to reap the public good benefits of an EU IPA program.
3. European business welcomes the Commission's efforts to negotiate IPAs but does not forcefully lobby for IPAs.

**Research strategy**

How to test the ‘by-product’ explanation? The article draws on qualitative methods to test the ‘by-product’ explanation. The research question, theoretical argument and small-n empirical universe of EU IPA negotiations (table 2) suggest the use of qualitative methods. I draw on analytical process tracing to reconstruct policy-making debates and decisions between 2009 and late 2017 (George and Bennett, 2005). The ‘by-product’ explanation implies a causal relationship between EU-internal competence struggles and the EU’s eagerness to negotiate IPAs. Hence, I monitor the preferences, actions and debates among the European Institutions, Member States and societal interest groups and third country preferences on the initiation of EU IPA negotiations and EU competences.

Special emphasis lies on the preferences and actions of the Commission, the Member States and major European business association. The Commission and the Member States are the key actors at the agenda-setting stage of international economic negotiations. According to Art. 218 TFEU, they jointly determine partner countries and agendas of negotiations. The European Parliament, on the other hand, intervenes in policy-making only at the ratification stage and is thus of secondary importance for this study (Van den Putte et al., 2015). While not directly involved in policy-making, business preferences and lobbying require special attention due to their potential indirect influence on Commission and Member State preferences and actions. The ‘by-product’ explanation necessitates establishing causal independence of Commission and Member State preferences and actions from business influence. Societal interest groups other than business – such as non-governmental organisations and trade union – are also monitored but are less likely to lobby for but rather against IPAs.

The analysis draws on a variety of data sources to reconstruct the policy process. It builds on 38 anonymous interviews with officials of the Commission, European Parliament and Member States as well as major European and Member State business association. I targeted lead officials administrating international investment policy and IPA negotiations in the Commission, European Parliament and Member State governments. With regard to business, I focused on major European and Member State business associations such BusinessEurope, European Services Forum, German Federation of Industries, MEDEF, Confindustria, CBI, CityUK, CEOE or Leviathan. These associations are national or European lead association. They are seen to represent and act for large business constituencies much like mass parties are seen to represent the interests of citizens. I selected business associations in view of achieving a representative sample. The interviewed business associations represent firms from old and new, big and small, capital-exporting and capital-importing Member States. Within associations, I interviewed staff formally in charge of investment protection and IPAs. The interviews were carried out between 2011 and 2018 in two rounds to attain representative results. A first round took place between 2011-2013 providing information on the formative stage of EU international investment policy. It was at this moment in time that the EU started becoming active, developing its approach to IPAs and selecting partner countries. A second round of interviews was carried out between 2017 and 2018. It gives insights into EU international investment policy-making in the wake of heated public debates on investment protection under TTIP and CETA.

Investment protection in general and the role of business interests and lobbying in particular are politically sensitive issues. Interview partners may misrepresent preferences, actions and influence of different actors. Hence, it is necessary to back up interview-based findings through policy documents, media reporting, text analysis and secondary literature. Policy documents comprise official communications, draft negotiating mandates, draft and final treaty texts, civil society meeting and industry consultation reports. I also draw on ethnographic insights from working for five months in the investment policy unit of the Commission's Directorate General for Trade in 2012 giving me first-hand insights into Commission-internal and Council debates.

The analysis follows a chronological order. I start tracing the policy-making debate and process with entrance into force of the Treaty of Lisbon and the empowerment of the EU in the regulation of foreign direct investment. I document initial debates and quarrels over the EU's competence and approach to IPAs between the Commission and the Member States as well as the adoption of first negotiating mandates in 2011. I then turn to debates on following IPA negotiations. My analysis ends with release of Opinion 2/15 in May 2017, which clarifies the scope of the EU's competences (European Court of Justice, 2017). Opinion 2/15 states that the protection of foreign direct investment comes under Union competences. ISDS provisions, which circumvent domestic courts, come however under shared competence and require mixed ratification. Commission President Juncker announced that the EU would temporarily pause IPA negotiations so as to reflect upon the EU's future approach to investment protection in light of high domestic ratification hurdles for IPAs. Opinion 2/15 marks the beginning of a new chapter in EU international investment policy.

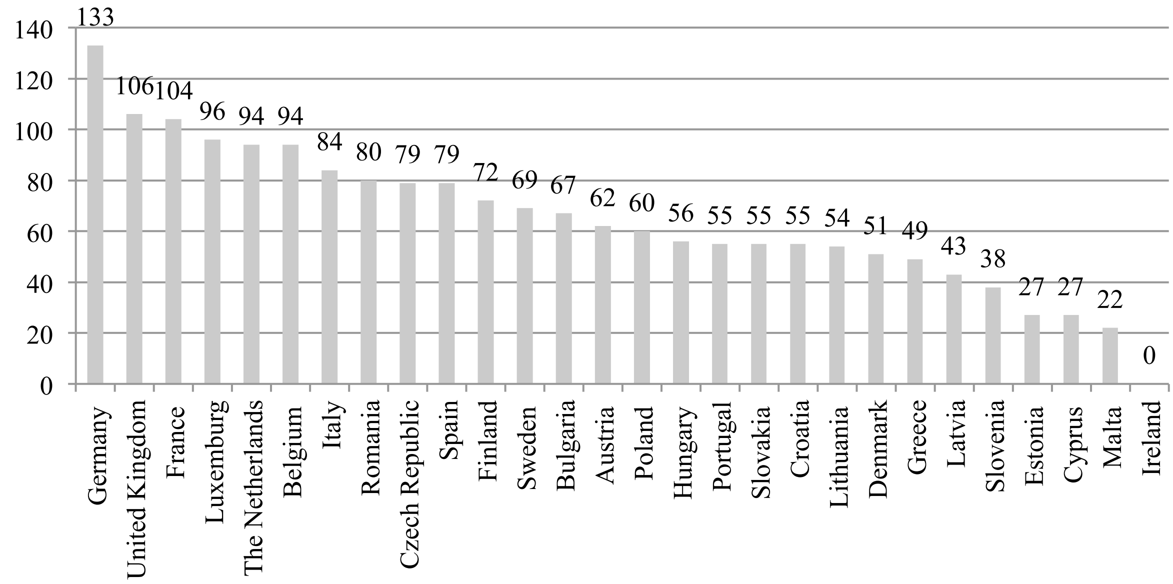
## III. Empirical assessment

### A contested new Union competence

The EU legally entered the stage of the global investment regime on 1 December 2009. After decades of competence struggles between the Commission and the Member States (see Basedow, 2017), Art. 206 and 207 TFEU extended the exclusive competence of the Union under the Common Commercial Policy to the regulation of foreign direct investment. It arguably marked a turning point. Prior to the entry into force of the Lisbon Treaty, the Member States had been in charge of investment protection and IPAs. They concluded some 1300 IPAs *inter se* and with third countries since the late 1950s.

Member States, however, exhibited diverging levels of proactivity in this realm. While some Member States were highly proactive and negotiated dense IPA networks, others remained passive (figure 1). The so-called 'big four' – Germany, the United Kingdom, France and the Netherlands – were the most important proponents of IPAs and key shapers of the global investment regime. They saw IPAs as a central element of their foreign economic policy and strategy to compete in the world economy.

**Figure 1: Member State IPAs in force**




Source: UNCTAD (2018).

In the weeks following the entry into force of the Treaty of Lisbon, the Commission took the initiative and started organising meetings with lead officials of the Member States to discuss and lay out its vision for a future EU IPA program (Reinisch, 2014). The Commission advanced the claim that the EU held an exclusive and comprehensive competence to regulate international investment flows and negotiate IPAs. Lead officials of several Member States – and in particular of the 'big four' – reacted with outrage. As Basedow (2017) and Meunier (2017) report, the Member States had not intended the competence transfer. Some Member State officials publically rebuked the Commission for having surreptitiously usurped competences (Basedow, 2017, p. 1). Member States, moreover, ignored or rejected the Commission's claim that the EU was now competent to negotiate IPAs. In particular Germany and the Netherlands contested the Commission's view that Art. 206 and 207 TFEU provided the EU with a sufficiently broad competence to conclude IPAs. They argued that the new Union competence referred to investment liberalisation and that investment protection and ISDS provisions remained under national competence (Reinisch, 2014, pp. 121–123). Many Member States continued negotiating and concluding IPAs arguably in defiance of European law (table 1) (UNCTAD, 2018). It became clear that the Court of Justice of the EU (CJEU) would have to clarify the distribution of Union and Member State competences in this policy domain (see European Court of Justice, 2017). In the months following the entry into force of the Treaty of Lisbon, it remained uncertain whether the EU would actually develop and implement an IPA program.

**Table 1: Member State IPAs signed after the entry into force of the Treaty of Lisbon**

| Member State | Third country | Date of signing | Date of entry into force |
|---|---|---|---|
| Austria | Kazakhstan | 12/1/2010 | 21/12/2012 |
| | Tajikistan | 15/12/2010 | 21/12/2012 |
| | Nigeria | 8/4/2013* | - |
| | Kirgizstan | 22/4/2016* | - |
| Belgium | Montenegro | 16/2/2010 | - |
| Cyprus | Jordan | 20/12/2009 | 19/7/2010 |
| | Albania | 5/8/2009 | 7/11/2011 |
| Czech Republic | Sri Lanka | 28/3/2011 | 15/6/2016 |
| | Azerbaijan | 17/5/2011 | 9/2/2012 |
| Denmark | Macedonia | 8/5/2015* | 30/6/2016 |
| Estonia | Azerbaijan | 7/4/2010 | - |
| | Jordan | 10/5/2010 | - |
| | Moldova | 18/6/2010 | 21/4/2011 |
| | Kazakhstan | 20/4/2011 | 26/8/2014 |
| France | Mauritius | 8/3/2010 | - |
| | Iraq | 31/10/2010 | - |
| | Colombia | 10/72014* | - |
| Germany | Pakistan | 1/12/2009 | - |
| | Congo | 22/11/2010 | - |
| | Iraq | 4/12/2010 | - |
| Greece | UAE | 6/5/2014* | 6/3/2016 |
| | Kuwait | 12/6/2014* | - |
| Hungary | Cambodia | 14/1/2016* | - |
| Latvia | India | 18/2/2010 | - |
| Lithuania | Macedonia | 8/3/2011 | 13/1/2012 |
| | India | 31/3/2011 | 1/12/2011 |
| | Mauretania | 22/9/2012* | - |
| Luxemburg | Montenegro | 16/2/2010 | - |
| | Iran | 14/12/2017* | - |
| Malta | Albania | 27/11/2011 | - |
| Netherlands | UAE | 26/11/2013* | - |
| Portugal | Congo | 4/6/2010 | - |
| | Senegal | 25/1/2011 | - |
| | DR Congo | 3/3/2011 | - |
| | UAE | 19/11/2011 | 4/7/2012 |
| Romania | Kazakhstan | 2/3/2010 | - |

| | | | |
|---|---|---|---|
| Slovakia | Vietnam | 17/12/2009 | 18/8/2011 |
| | Canada | 20/7/2010 | 14/3/2012 |
| Slovakia | Kenya | 14/12/2011 | - |
| | Iran | 19/1/2016* | 30/8/2017 |
| | UAE | 22/9/2016* | 5/2/2018 |
| Slovenia | India | 14/6/2011 | - |
| Spain | Haiti | 17/11/2012* | - |
| United Kingdom | Libya | 23/12/2009 | - |
| | Colombia | 17/3/2010 | 10/10/2014 |

NB: IPAs marked with a '*' were signed after the entry into force of Regulation No. 1219/2012, which provides for a case-specific re-authorisation of Member States. The signing of these IPAs may be lawful, if the Member States ensured prior authorisation. All other IPAs were signed in breach of Union law. Source: UNCTAD (2018).

**Commission communication and regulation**

Facing disinterest or outright opposition from the Member States, the Commission undertook further steps to assert Union competences and implement a EU IPA program. Six months after the entry into force of the Lisbon Treaty, the Commission released two important documents in June 2010 – a draft regulation on the so-called grandfathering of Member State IPAs and a communication outlining the Commission's vision for a EU IPA program. The draft regulation was a subtle threat and provocation of hostile Member States and in particular the 'big four'. It reiterated and emphasised the Commission's claim that the EU held the exclusive competence to negotiate IPAs. The communication, on the other hand, outlined the benefits of a EU IPA program for the Member States and the EU and identified first partner countries.

- **Draft regulation:** The draft regulation on the grandfathering of Member State IPAs advanced the claim that the EU had acquired the exclusive competence to negotiate IPAs (European Commission, 2010a). The Commission observed in an introductory note that the regulation was necessary as Member State IPAs had become unconstitutional from a EU law perspective. The competence transfer in principle outlawed Member State participation in IPAs, raised question marks over the continued validity and protection of investors under these IPAs. The draft regulation, as the Commission noted, sought to clarify Member States' IPA legacies and increase legal certainty for investors. The draft regulation foresaw a review of all Member State IPAs within five years. Unless the agreements breached EU law, the Commission would authorise Member States IPAs until a EU IPA would replace them in the future. The draft regulation moreover contained a so-called 'vendetta clause'. The 'vendetta clause' should allow the Commission to revoke the authorisation of specific Member State IPAs. The clause reflected the concern that Member States might seek to paralyse the EU's international investment policy and withhold negotiating mandates for EU IPAs in order to preserve their national IPA networks and competitive advantages.

Several Member States – and in particular Germany and the Netherlands – sharply criticised the draft regulation. The Dutch representative on the Trade Policy Committee of the Council of Ministers decried that the draft regulation "*…has the sole purpose of solidifying and expanding the powers of the European Commission…"* (Lavranos, 2013, p. 3). Several Member States rejected the Commission's claim that the EU was exclusively competent for investment protection and IPAs (Reinisch, 2014, pp. 119–121). They furthermore criticised that the draft regulation with its five-year review period and 'vendetta clause' did not eliminate but triggered legal insecurity for investors. They argued that Member State IPAs remained fully in force under public international law regardless of the competence transfer.

The Commission's argument that Member State IPAs had become unconstitutional, nonetheless, contained a subtle threat. It implied that the Commission could ask the CJEU to rule over the legality of these agreements, which could entail their forced termination. It was no idle threat. The Commission had asked the CJEU already in 2006 to assess the legality of capital movement clauses in Swedish and Austrian IPAs (Vis-Dunbar, 2009a). The CJEU ruled in 2009 that Swedish and Austrian IPAs indeed violated European law and ordered them to terminate or renegotiate these agreements. In 2008, the Commission moreover wrote a letter to Member States demanding them to terminate intra-EU IPAs (Vis-Dunbar, 2009b). It again argued that intra-EU IPAs were incompatible with the European legal order. Many Member States and in particular the 'big four' rejected the demand. The dispute over intra-EU IPAs nonetheless continued simmering until March 2018 when the CJEU (2018) ruled in *Slovak Republic v Achmea B.V.* that intra-EU IPAs were indeed illegal and effectively void under European law. In short, the draft regulation signalled to Member States that the Commission was prepared to resort to an aggressive legal strategy to get the Member States to cooperate and indeed recognise the EU's new competences.

- **Communication:** The communication laid out the Commission's vision and manifold advantages of an EU IPA program for the Member States and the EU as whole (European Commission, 2010b). First, the communication outlined the general benefits of international investment activity and IPAs for host and home economies. Second, it stressed the benefits of negotiating EU IPAs to re-establish a level playing field for European investors and Member State economies. The substance of Member State IPAs differed as well as the density of Member States' IPA networks. This situation distorted competition and unnecessarily harmed European interests in the world economy. Third, the communication underlined that the EU would seek to strike an adequate balance between investor rights and Member States' right to

> regulate and expropriate in the interest of public policy thereby acknowledging in particular the interests of capital-importing Central and Eastern European Member States. Fourth, it emphasised that the EU would seek negotiations on comprehensive investment agreements covering investment liberalisation and protection. Comprehensive investment agreements arguably deliver greater economic benefits than narrow IPAs. Prior to the entry into force of the Treaty of Lisbon, the Member States however could not negotiate comprehensive investment agreements, as investment liberalisation came predominantly under Union competence. Finally, the communication outlined two criteria for identifying partner countries for EU IPAs. The Lisbon Treaty, it suggested, provided the EU with a political mandate to pursue a comprehensive state-of-the-art foreign economic policy agenda. The EU should thus aim by default to include investment protection into on-going and future trade negotiations. The communication explicitly states that the EU should aim to put investment protection onto the agenda of on-going negotiations with Canada, India, Singapore and Mercosur (table 2). If comprehensive FTA negotiations were not desirable but investment relations intense, the EU should aim for standalone IPAs. The communication explicitly mentions China and Russia as potential partner countries.

The communication showed less controversial than the draft regulation. On the one hand, the communication appealed to the core believes of governments that IPAs and international investment activity were generally beneficial for home and host countries. Most Member States had indeed signed IPAs for this very reason (figure 1). On the other hand, the communication conveyed to a majority of Member States that they stood to gain from a EU IPA program as it would re-establish a level playing field and enable Europe to negotiate with a single voice state-of-the-art investment agreements. In short, the communication left little doubt that a EU IPA program would produce important benefits of public good nature.

**Modifying existing mandates**

In mid-2010, a majority of Member States was generally sympathetic but showed little proactive support for the Commission's plans. A powerful and vocal minority of Member States, however, continued challenging the Commission's claim to competences and plans for a proactive EU IPA program. In spring 2011, the political situation started shifting. In April, the European Parliament (2011) adopted a resolution in support of the Commission's plans for a proactive EU IPA program. And in September 2011, the Council of Ministers – almost two years after the competence transfer – updated on request of the Commission the mandates for on-going FTA negotiations with Canada, Singapore and India (Bilaterals.org, 2011). The Council officially tasked the Commission to seek negotiations on investment protection provisions as suggested in the Commission's communication of June 2010.

What led the Council to finally seek investment protection negotiations? It is important to emphasise here that the initiative to extend the negotiating agendas came from the EU. Canada and Singapore welcomed the EU's new interest in investment protection, but had not forcefully pushed for such provisions. India, on the other hand, was sceptical of negotiating on investment protection provisions and indeed terminated all its IPAs with third countries in 2016 (Bilaterals.org, 2018). Two dynamics fuelled the Council decision. First, a majority of Member States finally endorsed the Commission's argument that Art. 206 and 207 TFEU had given the EU a political mandate to pursue a comprehensive trade and investment policy agenda; and that a EU IPA program would benefit them by re-establishing a level playing field among European economies and businesses. Second, the Commission reportedly brokered a deal over the grandfathering regulation with the Council of Ministers (Interview, DG Trade, 15 February 2018). The Commission agreed to drop particularly controversial provisions such as the review of Member State IPAs and the 'vendetta clause' from the regulation (EU, 2012), which in particular the 'big four' had opposed to protect their IPA networks. In exchange sceptical Member States such as Germany and the Netherlands gave their consent to modify the mandates for on-going negotiations. The consent to modify the mandates, nonetheless, did not prejudge the competence question. It merely provided an ad hoc legal basis for political action. It was clear that the CJEU would have to ultimately assess the scope of exclusive Union competences in the realm of international investment policy (see Opinion 2/15; European Court of Justice, 2017).

**Table 2: EU IPA projects**

| | Partner country | Type of agreement | Status quo | Timing |
|---|---|---|---|---|
| 1. | Canada* | PTA | Provisionally applied | 2009-2014 |
| 2. | Chile | PTA | In negotiation | 2018-today |
| 3. | China* | IIA | In negotiation | 2013-today |
| 4. | India* | PTA | In negotiation | 2007-today |
| 5. | Indonesia | PTA | In negotiation | 2016-today |
| 6. | Japan | PTA | Pending | 2013-2017 |
| 7. | Malaysia | PTA | Paused | 2010-2012 |
| 8. | Mexico | PTA | In negotiation | 2018-today |
| 9. | Myanmar | IIA | In negotiation | 2013-today |
| 10. | Singapore* | PTA | Pending | 2010-2014 |
| 11. | Vietnam | PTA | Pending | 2012-2016 |
| 12. | USA | PTA | Paused | 2013-today |

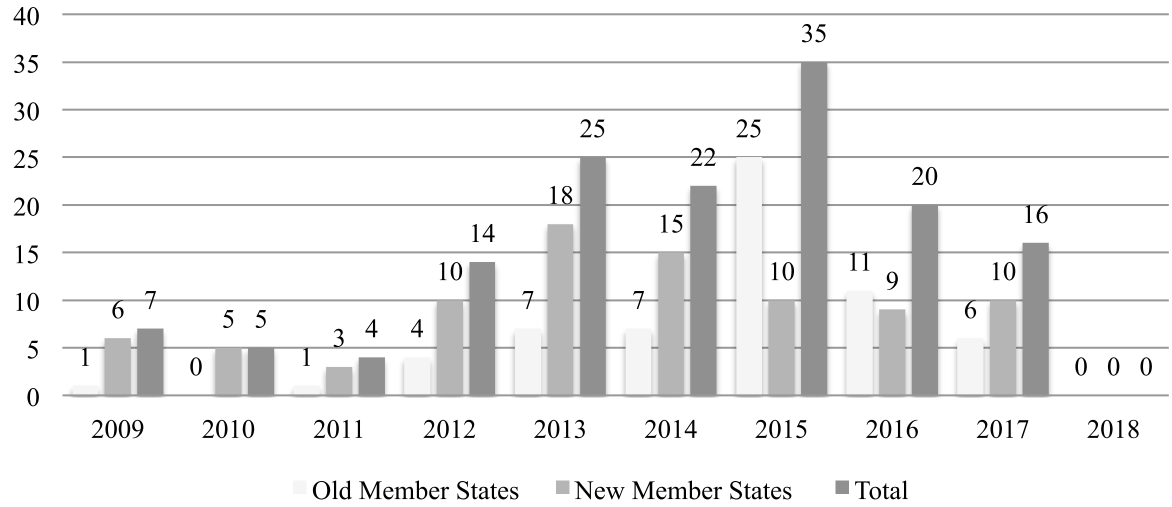
Countries with a '*' were mentioned in COM(2010)343 prior to any formal deliberations as potential partner countries of IIAs and PTAs. Source: European Commission (2018).

**Systemic developments in support of Commission entrepreneurship**

In 2012, systemic developments further facilitated the Commission's efforts to build support in the Council of Ministers for EU international investment policy and IPA program. Argentina nationalised YPF, a subsidiary of the Spanish oil company Repsol, without paying appropriate compensation (BBC, 2012). Argentina allegedly breached the IPA with Spain. The YPF expropriation changed Member States preferences and cooperative dynamics between the Council of Ministers and the Commission. The Member States realised the benefits of speaking with a single voice in investment disputes. They rallied behind Spain and called on the Commission to exert pressure on Argentina to pay effective compensation inter alia through the withdrawal of tariff concessions (Interview, DG Trade, 27 Jul. 2012). While debates between the Council and the Commission had often evolved around the simmering competence dispute prior to the Repsol expropriation, the incidence created an unseen degree of political unity and smoothened debates about IPA mandates and negotiations.

A second systemic development facilitated European cooperation. Commission and Member State preferences on investment protection and ISDS provisions started converging in response to a surge of high-profile investment arbitration cases against Member States. Prior to 2012, hesitant Member States – such as Germany or the Netherlands – had sought to contain Commission efforts to develop and implement a EU IPA program inter alia due to concerns that the Commission might agree with third countries on lower investment protection standards than enshrined in national IPAs (Lavranos, 2014; Peterson, 2011). Disagreements over policy substance hindered Commission entrepreneurship (Reinisch, 2014). In May 2012, the energy company Vattenfall launched an arbitration case against Germany under the European Energy Charter Treaty (Bernasconi-Osterwalder and Hoffmann, 2012). Vattenfall, which operates nuclear power plants in Germany, seeks compensation of €4.7 billion for losses accruing from Germany's decision to phase out nuclear energy generation in the wake of the Fukushima incident. The Vattenfall case is not the first case against a Member State (figure 2). It is, however, the first high-profile case against an old big Member State. Most new small Member States had been facing investment arbitration claims since the 1990s, but cases against old big Member States had been rare, of limited financial volume and typically unsuccessful. The launch of *Vattenfall v Germany (II)* case was a watershed for many Member States in their thinking on investment protection and ISDS. In the following years, investors filed more than a hundred new arbitration cases against Member States. And unlike in previous decades, old big Member States – such as Spain and Italy – accounted for almost half of these claims (UNCTAD, 2018). Substantive policy preferences of Member States and the Commission started converging. Member States did not fundamentally turn away from investment protection and IPAs but started supporting a more balanced approach to investment protection and ISDS. These developments inter alia led to the Commission's proposal of a multilateral investment court system to replace ad hoc arbitration (European Commission, 2016).

**Figure 2: ISDS claims initiated against EU Member States per year**




Source: UNCTAD (2018).

**Adoption of new comprehensive mandates**

Systemic developments and the modification of existing negotiating mandates in 2011 were decisive steps in the development and implementation of a EU IPA program. In particular the modification of existing mandates set a policy precedent. In the following years, the EU opened FTA negotiations with a number of third countries: Vietnam (2012), Japan (2013), USA (2013), Indonesia (2016), Chile (2018) and Mexico (2018). In accordance with its line of argument that the Treaty of Lisbon had given the EU a political mandate to pursue a broad trade and investment agenda, the Commission by default proposed to seek negotiations on investment protection and ISDS provisions, which the Council of Ministers supported. The leaked draft mandate for TTIP, which the Commission submitted to the Council of the European Union in early 2013, is revealing of the Commission's priorities (Council of the European Union, 2013). The Commission treated TTIP as a standard-setting exercise for the global economy, which would define the EU's approach to future trade and investment agreements. The draft mandate states the EU shall aim for high levels of investment protection in accordance with Member State practices; yet without prejudice of the EU and Member States' right to regulate in the public interest; and establish a level playing field for Member State economies and investors.

Third countries showed limited interest and did not decisively push for negotiations on investment protection and ISDS provisions. The EU reportedly acted as *demandeur* in this field. Only the USA was equally interested in investment protection and ISDS provisions. The US interest reflected, on the one hand, the intent to set through TTIP a global standard for trade and investment agreements and governance and, on the other, actual concerns over the insufficient level of investment protection in certain Central and Eastern European Member States.

The Commission, moreover, successfully proposed the opening of standalone IPA negotiations with China (2013) and Myanmar (2013). While the opening of IPA negotiations with Myanmar was meant to support political reforms in the country (Interview, DG Trade, 15 February 2018), the proposal to negotiate a standalone IPA with China can be traced back to Commission's communication of June 2010 (European Commission, 2010b). The choice of a standalone IPA constituted a compromise proposal. China had been pushing for FTA negotiations for years. The Member States, however, were unwilling to consider an FTA expecting it to result in a surge of the EU's trade deficit with China. A comprehensive IPA with protection and liberalisation provisions though promised to open up the yet protected Chinese service sectors for European investors while replacing 26 vastly different Member State IPAs with a uniform framework for investment protection (European Commission, 2013). The primary focus of European policy-makers and business lies on investment liberalisation. Investment protection and ISDS provisions are best understood as accessory elements (table 3).

**Establishing causal independence – Business, civil society and Commission entrepreneurship**

The preceding sections produced evidence that the Commission played a central role in developing and implementing the EU's IPA program. The question remains, however, to what extent Commission preferences and actions are causally independent from business and societal demands. Interview data, minutes of civil society meetings and results of public consultations paint a homogenous picture. Commission entrepreneurship for a EU IPA program appears to be causally independent from domestic interests. European business showed little interest in IPAs. Societal interest groups – such as NGOs or trade unions – were mostly opposed to IPAs.

Representatives of European business reported to have been rarely in contact with the European Institutions to discuss international investment policy (Interviews with business representatives, BDI 16 Feb. 2012, BusinessEurope 26 Jan. 2012, Leviathan 4 Sept. 2013, MEDEF 3 Oct. 2013, ESF 25 Sept. 2013, CBI 26 Sept. 2013, Confindustria 27 Sept. 2013, CityUK 2 Apr. 2014). Interviewees identified a number of reasons for the lack of business interest and lobbying. The stated reasons confirm the prevalence of collective action problems and uncertainty over IPA benefits. First, representatives of European and national business associations stressed that their associations have diverse memberships, which results in high transaction costs for preference aggregation. Association have limited resources available. They need to carefully prioritise when to consult internally to define common positions and to approach policy-makers. The considerable technicality of IPAs – in comparison to for instance tariffs – increases informational costs at the members level and ultimately aggregation costs at the association level. Second, representatives of business associations stressed that the benefits accruing from IPAs tend to be small, unpredictable and concentrated on a few members. Hence, member businesses rarely take an interest in IPAs. Most businesses, moreover, have a short-term planning focus and tend to ignore operational risks arising in the mid- and long-run such as expropriation. One business representative (BDI, 16 Feb. 2012) cautioned that this does not mean that IPAs are irrelevant; but that government should provide IPAs without lobbying efforts. Business is a taxpayer and has many interests. Governments should proactively look after business needs without expecting explicit demands.

European Commission officials confirmed statements of representatives of business associations. European business association rarely seek to discuss international investment policy and IPAs with the DG Trade (working level) or the Cabinet of the Trade Commissioner (political level) (Interviews with civil servants of DG Trade & Cabinet, 15 Feb. 2018, 13 Jan. 2012, 18 Jan 2012, 18 Jul. 2012, 24 Jul. 2012, 27 Jul. 2012). In 2012, a senior Commission official (7 Jun. 2012) lamented that "*international investment policymaking felt like a blind flight"* removed from societal demands and debates. The lack of business interest and demands made it difficult for the Commission to develop the EU's international investment policy and IPA program and to defend vis-à-vis hesitant Member States in the Council of Ministers. Another official reported that societal interest and lobbying only grew after the start of the TTIP negotiations in 2013 (Cabinet, 15 Feb. 2018). Yet, the heated public debate did not lead to more business lobbying; but primarily intensified lobbying from critical NGOs demanding the stop of IPA negotiations.

For the sake of completeness and cross-validation, it is helpful to assess the perceptions of Member State officials and staff of the European Parliament. Member State officials sitting on the Trade Policy Committee (TPC) echoed statements of Commission officials and business representatives (15 Feb. 2018; 13 Feb. 2018; 26 Jan. 2012; 17 Feb. 2012; 17 Jun. 2013; 3 Jul. 2013). Business associations rarely seek discussions on investment protection and IPAs to shape EU policy-making. Member State officials reported that the silence of business was not new. Even when the Member States were in charge of negotiating IPAs with third countries prior to the entry into force of the Treaty of Lisbon (2009), business representatives rarely sought discussions on IPAs. Member State officials mentioned three reasons for starting IPA negotiations with third countries in the absence of business demands. First, some Member States negotiated IPAs in response to business applications to state-backed investment guarantees (see footnote n4; Basedow, 2017; Poulsen, 2010). Second, Member States negotiated IPAs to provide travelling politicians with a 'photo opportunity' (Chilton, 2016; Poulsen and Aisbett, 2016). Finally, Member States negotiated IPAs on request of third countries. Countries going through political, economic and geopolitical transition often seek the conclusion of IPAs to attract capital and reintegrate into the world economy.

Finally, staff of the European Parliament working for the International Trade Committee (INTA) also confirmed that business representatives rarely seek discussions over international investment policy and IPAs (19 Jan. 2018; 7 Feb. 2018). Instead critical actors – such as NGOs, trade unions or citizens – seem to shape the debate in general and in the European Parliament in particular. Staff suggested that European business refrains from lobbying members of the European Parliament, because the European Parliament is seen as 'hostile territory' and as little receptive due to public opposition against IPAs. Staff cautioned that the European Parliament only has the right to assent to trade and investment agreements under the Treaty of Lisbon. The Parliament's influence during the agenda-setting phase and actual negotiations remains limited in comparison to the Council of Ministers and the Commission, which results in less lobbying from interested European business.

Insights from policy documents – such as minutes of civil society meetings between the Commission and interested stakeholder or results of public consultations – support interview-based findings. The Commission conducts public consultations in preparation and during international negotiations to gather information on societal demands and concerns. The target group of consultations is typically European business. Civil society actors and individuals, however, are frequently permitted to submit responses and have become more active over the years. The methodology, timing and reporting on public consultations varies across negotiations, which complicates comparisons across consultations. Nonetheless, consultation results (table 3) for negotiations covering investment protection and ISDS provisions paint a fairly homogenous picture. Business respondents rarely mention investment protection and ISDS provisions as a priority of international negotiations. In most cases, business respondents share their views on investment protection as the Commission specifically requests information on this matter. Non-business respondents mostly criticise plans to negotiate investment protection and ISDS provisions.

**Table 3: Overview of results of public consultations on EU trade and investment agreements in chronological order**[4]

| Agreement consulted upon | Overall no. of submissions | Main positions on investment protection and ISDS |
|---|---|---|
| EU-Canada | n/a | n/a |
| EU-Malaysia | n/a | n/a |
| EU-India | n/a | n/a |
| EU-Singapore | n/a | No demands for investment protection and ISDS were reported. |

[4] NB: Several consultation reports are not in the public domain. What is more, reporting on results differs across consultations.

| | | |
|---|---|---|
| EU-Vietnam | n/a | n/a |
| EU-China | 57 | 60% of respondents stated that they would not consider using ISDS against China due to expected negative repercussions. |
| EU-Myanmar | 19 | Most respondents are critical of IPAs and ISDS; Business respondents are mostly agnostic about the benefits of investment protection and ISDS; Only the European Services Forum pleads for ISDS. |
| EU-USA (2012 consultation as part of transatlantic business dialogue) | 48 | 32% of submissions voiced support for investment protection and ISDS under TTIP. |
| EU-USA (2014 online consultations on ISDS) | 149.399 | 99% of submissions came from individuals. Most submissions were highly critical of investment protection and ISDS. Only 0.05% of submissions came from respondents with investments abroad. |
| 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-Indonesia | n/a | n/a |
| EU-Chile | 31 | Only one submission (European Services Forum) suggests that there is need for investment protection provisions. |
| EU-Mexico | 80 | 93% of respondents indicated that they either saw no need or held no opinion on whether European investments are save in Mexico. 7% indicated that European investments were insufficiently protected implying need for investment protection provisions. |

Source: European Commission (2018a).

A notable outlier are the consultations on TTIP. In 2012, the Commission conducted consultations to delimit the agenda of the TTIP negotiations as part of the transatlantic business dialogue. While business respondents rarely voice demands for investment protection and ISDS provisions in other consultations, 32% of respondents called on the Commission to seek negotiations on investment protection and ISDS provisions. In 2014 – in response to the public outcry against TTIP and its investment protection provisions – the Commission conducted targeted online consultations focusing on investment protection and ISDS (European Commission, 2015). The Commission received almost 150.000 responses mostly from citizens and NGOs. The overwhelming majority of these submissions was highly critical of investment protection and ISDS provisions. Public opposition, on the one hand, and business support for investment protection and ISDS provisions, on the other, were exceptional in the context of TTIP consultations. While intriguing and in need of investigation, it exceeds the scope of this article to assess and explain in detail societal mobilisation over investment protection in the context of the failed TTIP negotiations.

In addition to consultations, the Commission regularly organises so-called civil society dialogue meetings to inform and discuss foreign economic policies with interested stakeholders. Civil society dialogue meetings are a discussion platform open to business and civil society organisations. While no official statistics are available, meeting minutes suggest that a majority of participants are NGOs and alike and a minority come from the business community. In civil society dialogue meetings, the Commission typically debriefs participants on recent developments in foreign economic policy and negotiations and gives the opportunity to comment and raise questions. Investment protection, ISDS and IPAs were regularly subject of discussions in these meetings (table 4). The large majority of comments and questions from participants were sceptical of investment protection and ISDS. NGOs voiced concerns that IPAs and investment protection provisions could entail a regulatory freeze and undermine democracy. Business associations only very rarely expressed support for IPAs, investment protection and ISDS provisions. These statements were typically vague and underspecified.

**Table 4: Overview of civil society dialogue meetings**

| Year | Civil society dialogue meetings | No. of meetings touching on investment protection | No. of meetings with critical mention of investment protection | No. of meeting with positive mention of investment protection |
|---|---|---|---|---|
| 2009 | 37 | 0 | 0 | 0 |
| 2010 | 26 | 6 | 0 | 0 |
| 2011 | 21 | 6 | 3 | 1 |
| 2012 | 21 | 6 | 4 | 0 |
| 2013 | 21 | 4 | 4 | 0 |
| 2014 | 14 | 6 | 5 | 1 |
| 2015 | 18 | 4 | 2 | 0 |
| 2016 | 18 | 3 | 0 | 0 |
| 2017 | 23 | 4 | 2 | 0 |

Source: European Commission (2018b); counting of critical/positive mention focuses on explicit/implicit normative statements or questions of civil society dialogue participants; mere informative statements or questions not counted.

## IV. Conclusion and outlook

The article seeks to explain why the EU keenly negotiates IPAs. IPAs provide non-exclusive and non-rivalrous benefits to business, Member States and the EU as a whole. The public good nature of IPAs should in principle result in collective action problems and an undersupply of IPAs. To account for the EU's eagerness to negotiate IPAs, I build on collective action theory and in particular on the 'by-product' model (Olson, 1965). The 'by-product' model stipulates that policy measures may simultaneously provide benefits of public and private good nature. It follows that policy actors may internalise the costs of public good provision to reap benefits of private good nature. The public good is thus a 'by-product'. The article advanced the theoretical argument and produced empirical evidence that the Commission acted as policy entrepreneur and internalised the political costs to develop and implement a EU IPA program – despite Member State and public hesitation – to consolidate the Union's young and contested competence over international investment regulation. The EU's recent eagerness to negotiate IPAs is thus best understood as an intentional 'by-product' of Commission efforts to finalise the controversial transfer of competences over FDI regulation to the EU.

The article sheds a new light on why states conclude IPAs. It suggests that the EU's IPA program reflects to a large extent bureaucratic competition over power between the Commission and the Member States. Existing research has identified numerous dynamics – international economic competition, geopolitics, coercion, business pressure, bounded rationality, individual welfare maximisation of diplomats and alike (see Bonnitcha et al., 2017) – fuelling the IPA programs of developing and developed economies. Bureaucratic competition, however, has been overlooked so far. Bureaucratic power struggles are a prevalent feature of EU policy-making due to its complex multilevel governance structure. The explanation nonetheless promises to be of appeal beyond the EU context. Bureaucratic competition is a frequent occurrence in big administrations including in the USA (Allison and Halperin, 1972). It constitutes a reasonable direction of enquiry in other national settings.

This article also fills a gap in the literature on EU foreign economic policy. Research on the EU's role in international investment regulation mostly accounts for the recent empowerment of the EU in this domain (Basedow, 2017; Meunier, 2017). It does not, however, explain EU international investment policy outcomes such as its eagerness to negotiate IPAs. This article identifies the actors, preferences and actions and puts them into relation to policy outcomes. It provides insights of functional and political relevance. Few European policies have shown as controversial as investment protection in the European public debate in recent years. What is more, the EU is the biggest recipient and emitter of FDI. Europe's prosperity hinges to a large extent on FDI and related global supply chain trade. A better understanding of how and why the EU negotiates IPAs is thus of academic and public interest. A note of caution is necessary though. I have argued that Commission efforts to consolidate young and contested Union competences have strongly shaped EU international investment policy in recent. As acceptance for the EU's new central role in this domain grows inter alia in response to Opinion 2/15, the causal significance of bureaucratic competition shrinks and other dynamics may become dominant.

Last but not least, the article also introduces collective action theory (Olson, 1965) to the academic debate on investment protection and IPAs. The article evidences that collective action theory is a valuable framework to analyse preferences, actions and outcomes in international investment policy-making in the EU and beyond. It provides a parsimonious explanation for the counterintuitive passive role of business and widely observed proactive role of government bureaucracies in investment protection (Bonnitcha et al., 2017; Chilton, 2016; Poulsen and Aisbett, 2016). It is indeed remarkable that collective action theory has been absent from the academic debate on international investment protection and IPAs so far. What is more, the 'by-product model' promises to be a helpful analytical tool to account for interstate cooperation in the face of collective action problems (Keohane, 1984, p. 77). Accounting for the provision of global public goods is central research topic in International Relations and International Political Economy. The application of Olson's 'by-product' model to international organisations as self-interested sponsors of global public good production and cooperation constitutes a promising direction for research.

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