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Business preferences in international investment policymaking. Does European business lobby for international investment agreements?

Robert Basedow

European University Institute
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Abstract

Does European business lobby for international investment agreements? In the public debate, international investment policymaking has become almost synonymous with a policy domain subject to an undue influence of business on policy outcomes. This paper argues that business preferences and lobbying have little effect on outcomes in international investment policy. The perceived beneficial effects of international investment agreements are small, distant and uncertain, which results in limited business lobbying. Instead, bureaucratic politics seems to decisively shape international investment policymaking in Europe. The paper confirms these hypotheses by means of a detailed assessment of German and EU international investment policymaking before and after the entry into force of the Treaty of Lisbon, in-depth case studies of major international investment negotiations and an evaluation of the changing design of European international investment agreements. It concludes with a discussion of the TTIP negotiations as an important outlier to the generally observed passivity of European business in this domain.

Keywords

Lobbying, business preferences, international investment agreements, European Union.

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I. Introduction

International investment policy has become synonymous in the public debate with a policy domain subject to undue business influence. The non-governmental organisation (NGO) Campact qualifies international investment policy and investor-state dispute settlement (ISDS) as a "*corporate system of unjustice*" (Campact, 2014). Corporate Europe Observatory (2014a), another Brussels-based NGO, suggests that ISDS is a product of "*business propaganda*" and has an excessive influence on policymakers. The German magazine Der Spiegel (2014) suggests that the planned ISDS provisions under the Transatlantic Trade and Investment Partnership meant a "*payday for the vultures*" of multinational business. Businesses would sue states over any kind of profit-reducing regulation, thus hollowing out democracy. These accounts share the assumption that businesses lobby and pressure policymakers into concluding international investment agreements (IIAs) with ISDS provisions despite their harmful impact on democracy and citizens. Through a scientific lens, these accounts stipulate that business preferences and lobbying (independent variable) account for the conclusion of IIAs with ISDS provisions (dependent variable).

Empirical research on the role of business preferences and lobbying in international investment policy and the conclusion of IIAs is rare. This lack of research is remarkable considering the economic importance and political salience of the topic. This article contributes to closing this research gap. It raises the research question of *the extent to which businesses hold preferences and lobby for the conclusion of IIAs with ISDS provisions in the European Union (EU)*. The article advances the argument that the role of business preferences and lobbying is generally overstated in the context of the EU and its Member States. Businesses take little interest in international investment policy and the conclusion of IIAs with ISDS due to their limited, uncertain and distant impacts. Theories of bureaucratic politics generally account for outcomes in international investment policymaking better. The vocal support of European business for TTIP, including its investment provisions, constitutes a remarkable outlier, which arguably reflects bureaucratic mobilisation of businesses rather than genuine interest. The study employs qualitative methods to empirically verify its claims. It draws on extensive press and literature research, field research in the form of a five-month internship in the Directorate-General for Trade of the European Commission, and 42 semi-structured anonymised interviews with international investment policymakers from the European Commission, the Member States and business representatives of national and European umbrella associations. Most of the interviews were carried out in 2012-2013, before the start of the heated TTIP debate.

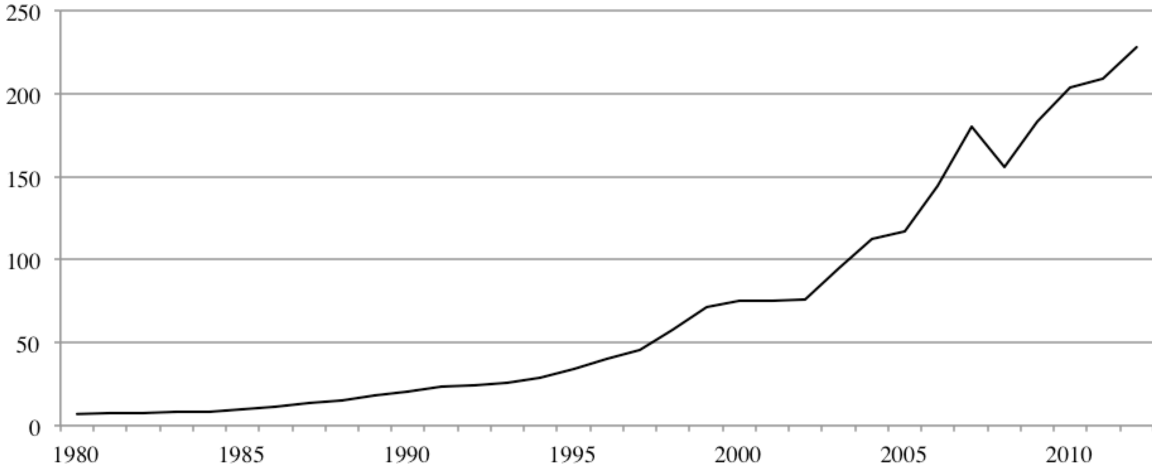
After an introduction to international investment policy for non-experts, the article briefly summarises studies analysing business influence on international investment policymaking and highlights their limitations. The fourth and fifth sections of the paper develop the theoretical arguments in greater detail and present empirical evidence. They assess the role of European business in international investment policymaking in the German and EU contexts, in the negotiations on the Energy Charter Treaty (ECT) and the Multilateral Agreement on Investment (MAI), and the evolving design of European IIAs to clarify the influence of European business on policy outcomes. The last sections conclude and discuss why European business, nonetheless, plays an active role in the policy debate on the investment provisions in the TTIP.

II. A brief introduction to international investment and the international investment regime

Since the 1980s, international investment has become the backbone of economic globalisation. Companies invest and establish production sites and affiliates abroad to take advantage of lower

production costs or to access new markets or scarce resources and expertise. International investment – or in more technical terms foreign direct investment (FDI) – is the glue of global value chains. The volume of global investment stocks has grown tenfold since 1990. While international investment used to be a minor economic phenomenon in western European and northern American economies, it has become a major force in the global economy. The rise of international investment is a consequence of technological innovations which lower communication and transportation costs, and of shifts toward more liberal foreign economic policies welcoming foreign investment.

Figure 1: World inward FDI stock in trillion US Dollars (1980-2012)



Source: UNCTAD (2016).

However, international investment may have positive and negative impacts on the home and host economies of international investors (Dunning, 2008; Navaretti and Venables, 2004). It may, *inter alia*, promote technology spill-overs, promote development and competitiveness, and offer consumers access to cheaper and better products and services. On the other hand, international investment may promote outsourcing, destroy jobs, and undermine national security through foreign control over strategic and sensitive economic sectors. States pursue international investment policies to maximise the benefits and to minimise the risks of international investment activity. States use various instruments to ensure that international investment increases national welfare, such as investment review mechanisms for foreign takeovers, investment promotion agencies, investment guarantee schemes for national investors going aboard, and finally international investment agreements (IIAs).

IIAs are the most important and controversial tool in international investment policymaking today. They stand at the centre of the public debate and of this article. IIAs typically encompass three types of provisions: 1) post-establishment treatment standards; 2) investment protection provisions and dispute resolution mechanisms in the form of ISDS; and 3) investment liberalisation commitments. Investment liberalisation commitments remain, however, an exception. Only a small fraction of the approximately 3000 IIAs currently in force contain such commitments. The EU and its Member States have not included liberalisation commitments in their IIAs for legal reasons. Prior to the entry into force of the Lisbon Treaty, the relevant competences were scattered between the EU and its Members States. The conclusion of IIAs with liberalisation commitments would have required so-called mixed agreements, which would complicate the negotiation and ratification processes (Basedow, 2016a; Dimopoulos, 2011).

The purpose of IIAs is to overcome the so-called ‘mousetrap’ problem of international investment activity (Guzman, 1997; Elkmans et al. 2006). Most states want to attract foreign investors to boost

development, growth and employment. They signal to foreign investors that they offer an attractive, secure and predictable business and investment environment. However, host states are sovereign and cannot credibly commit vis-à-vis individuals or firms under their jurisdiction. Foreign investors may therefore fear that once they have sunk their capital, host states may retract, discriminate and expropriate without paying appropriate compensation. This uncertainty may cause a so-called 'hold-off' problem. In other words, in cases of doubt over the reliability of host states foreign investors may abstain from business projects and thereby impose economic opportunity costs on host and home states. In the 1950s, states therefore developed IIAs to address and overcome this 'hold-off' problem. Through IIAs under public international law, states commit vis-à-vis other states to treat foreign investors in line with minimum standards of the rule of law and to allow foreign investors to sue them through arbitration in the case of dispute. IIAs provide for the use of international arbitration as host state courts may be biased and politicised. IIAs thus create public international law commitments between sovereign states, which benefit investors and are enforceable by them. Today, some 3000 IIAs are in force. Most of these agreements are bilateral – hence they are also known as bilateral investment treaties (BITs) – and create a complex global investment regime. The EU Member States developed IIAs in the 1950s and have concluded some 1400 of them. Europe thus stands at the centre stage of the global investment regime.

III. A literature survey – What do we know about business lobbying for IIAs?

The role of business preferences and lobbying in international investment policy is under-researched in general, and in particular with regard to the conclusion of IIAs. Yackee (2009, 2010) conducted a survey of US companies with investments abroad and found that they were little informed about IIAs and hardly took IIAs into account when making international investment decisions. This finding implies that these US companies do not lobby for IIAs to enhance outward investment conditions. Chilton (2016) assesses the US policymaking process underlying the conclusion of IIAs. He finds that non-economic political motivations drive the US approach to IIAs. In a similar vein, Poulsen and Aisbett (2015) draw on a large-scale database to show that both political motivations and individual incentives for civil servants from developing countries are decisive forces behind the conclusion of IIAs. Poulsen (2015) assess why developing countries conclude IIAs. He finds that bounded rationality of governments rather than business lobbying accounts for the conclusion of IIAs. An extensive econometric literature, moreover, seeks to assess the extent to which IIAs affect international investment flows (Sauvant and Sachs, 2009; Hallward-Diremeier, 2013; Neumayer and Spess, 2005; Busse et al., 2010; Egger and Merlo, 2007; Colen et al., 2014; Blonigen and Piger, 2014; Stein and Daude, 2007). Its findings are mixed. The impact of IIAs seems to strongly depend on country dyads and the sectors assessed. These studies indirectly shed light on the role of business preferences and lobbying in the conclusion of IIAs. The often negligible impact of IIAs on international investment flows suggests that investors pay little attention to IIAs and are therefore unlikely to lobby for such agreements.

The scarce literature on the role of business preferences and lobbying in international investment policy is illuminating. However, it suffers from two limitations. First, it does not explain the reported marginal role of business in international investment policymaking. It merely shows that non-economic political considerations often dominate international investment policymaking. Second, the literature does not offer insights into the role of business preferences and lobbying in the EU context. Studies only discuss international investment policymaking in any detail in the US context. As the literature on varieties of capitalism suggests, the influence of business preferences on the

policymaking process and outcomes differs across countries (Hall and Soskice, 2001; Crouch, 2005). The European context thus merits attention. This article seeks to redress both of these shortcomings.

IV. The theoretical framework

A) Perceived economic effects, business lobbying and IIAs

Business-centred explanations of foreign economic policy outcomes work on the assumption that these policies affect business profits (Rogowski, 1989; Grossmann and Helpman, 1995; Hiscox, 2002; Lake, 2009; Frieden, 1991; Woll, 2008; Milner, 1999; De Bièvre and Dür, 2005; Dür 2007, 2008, 2012). By enabling or restricting imports and exports, foreign economic policies influence the supply and demand for goods and services in an economy. Importing increases the supply of a good or service, intensifies competition, pushes down prices and hurts domestic producers but benefits domestic consumers. Exporting, on the other hand, increases demand, pushes up prices, benefits domestic producers and harms local consumers. A decision by policymakers to pursue liberal or protectionist foreign economic policies thus redistributes welfare within society. Scholars of foreign economic policy assume that societal actors – namely businesses – are aware of the likely welfare impacts of foreign economic policies. Businesses are expected to lobby policymakers for their preferred policies to maximise their profits. To maximise their profits, export-competing businesses should favour liberal foreign economic policies, whereas import-competing businesses should favour protectionist policies. Policymakers, in turn, should be receptive to societal demands to increase their support and chances of re-election. They should adjust national foreign economic policy in line with dominant societal demands.

International investment policy – including IIAs encompassing post-establishment treatment standards and ISDS provisions – is primarily of a regulatory nature. In comparison to classic foreign economic policies and trade agreements, international investment policy and IIAs should only have a minimal impact on businesses. IIAs do not alter the overall level of openness of economies. Hence, they do not affect supply, demand, competition or the prices of goods and services. The limited impact of IIAs should translate into a lack of business preferences and lobbying activity.

- Post-establishment treatment standards under IIAs create a minimum level of treatment for international investors. Equivalent rights afforded under European and national law exceed the basic principles enshrined in IIAs. IIAs thus do not in principle affect the treatment, business operating profits or ultimately the welfare of foreign or domestic investors within the EU. However, post-establishment treatment standards aim at creating a safer and more predictable investment environment for European investors abroad. In the extra-EU context, IIAs may thus in principle have a positive impact on outward-oriented businesses by facilitating investment ventures abroad. Nevertheless, the evidence points to the contrary. Econometric research shows that the conclusion of IIAs does not affect investment flows between contracting parties even if the potential endogeneity of IIAs is controlled for (Sauvant and Sachs, 2009; Hallward-Diremeier, 2013; Neumeyer and Spess, 2005; Busse et al., 2010; Egger and Merlo, 2007; Colen et al., 2014). In fact, survey data suggest that businesses make their investment decisions on the basis of the overall business climate, their expected profits and so on (Yackee, 2010). IIAs do not play a role in investment decisions. The disregard for IIAs

implies that these agreements have only limited *perceived* positive impacts, which should translate into a lack of business lobbying.

- Investment protection provisions under IIAs allow foreign investors to seek compensation in the case of expropriation by host countries. However, when investors make an investment decision they generally do not know whether they may need access to ISDS at some point in the future, or whether their ISDS claim may succeed. Investors are also known to have an aversion to using ISDS provisions due to their harmful impact on relations with host countries. The use of ISDS is sometimes described as a 'nuclear option' as it eradicates the basis for any amicable cooperation between host governments and investors. Considering that the formation of preferences and in particular lobbying are resource-consuming, the aversion to the use of ISDS in combination with the high degree of uncertainty over the future potential benefits of IIAs with ISDS provisions should limit business interest and lobbying activity in this domain. The econometric research discussed above again backs this reasoning. It suggests that IIAs with ISDS provisions play only a marginal role in investment decisions (Sauvant and Sachs, 2009; Hallward-Diremeier, 2013; Neumeyer and Spess, 2005; Busse et al., 2010; Egger and Merlo, 2007; Colen et al., 2014; Yackee, 2009). Other considerations seem to be more important for businesses engaged in outward investment. If investment projects go ahead, investors typically consider the risk of expropriation to be minor or unavoidable in the face of significant profits. Put differently, the risk of expropriation is priced into the investment decision. Investment protection and ISDS provisions do not fundamentally affect it.

To conclude, European businesses are unlikely to hold strong preferences or to lobby for traditional IIAs encompassing post-establishment treatment and protection provisions. Such IIAs have limited, uncertain and at best distant *perceived* beneficial effects on businesses. The costs of forming preferences on complex matters of international investment law and the costs of lobbying policymakers seem to outweigh the potential gains for outward-oriented businesses.

B) Public choice, bureaucracies and IIAs

International investment policy and the conclusion of IIAs, I argue, should reflect the preferences and actions of bureaucrats rather than the preferences of and lobbying by European businesses. Max Weber (1922) was among the first to assess the role of bureaucrats in politics. In Weber's view, elected politicians articulate policy directions, while bureaucrats faithfully implement these policies. Nowadays, it is a commonplace that bureaucrats are not mere executors but indeed self-interested actors. They exert a strong influence on policy outcomes (Putnam, 1973). Bureaucrats hold technical expertise and vague mandates to promote 'public welfare' in their respective policy domains. They thereby enjoy a leeway to shape policies in line with their individual preferences. An extensive public choice literature seeks to identify the factors shaping bureaucrats' preferences and their strategies for putting them into action (see *inter alia* Niskanen, 1971; Putnam, 1973; Abbott, 2008; Buchanan and Tullock, 1962). Studies suggest that bureaucrats' preferences reflect paradigms and heuristic mind-sets – and individual welfare maximisation through career advancement and competence extension. In short, bureaucrats are likely to use their autonomy in policy development and implementation to do what they perceive to be '*the right thing'* and what benefits themselves and/or their agency.

In what follows, I argue that bureaucrats are the key actors shaping international investment policy, including the negotiation of IIAs with ISDS provisions. With the notable recent exception of the TTIP negotiations, the considerable degree of technicality and lack of societal interest and lobbying make

the domain largely irrelevant for politicians. This lack of politicisation and political oversight should increase the leeway for bureaucrats to shape international investment policy, including the conclusion of IIAs. In line with research on public choice and bureaucratic politics, international investment policy officials should pursue a threefold policy agenda. First, they should pursue and implement policies which through their heuristic lenses comply with their mandate and maximise social welfare. Their policy choices should comply with their professional 'ethos,' mission and causal beliefs. Second, bureaucracies are self-interested agencies and social hierarchies. Bureaucrats should pursue and implement policies which benefit their institution and please their superiors – be they more senior bureaucrats or the political leadership. Third – and closely related – bureaucrats should pursue and implement policies which further their individual welfare *inter alia* in the form of career prospects, better standing within their agency and greater competences.

V. Assessing European business preferences and lobbying in international investment policy

What follows focuses on international investment policymaking in 1) Germany before the entry into force of the Lisbon Treaty; and 2) in the European Union after the signing of the Lisbon Treaty. The Lisbon Treaty is of relevance because it transferred most investment-related competences from the Member States to the EU (Basedow, 2016a). Whereas the Member States were by and large competent to regulate international investment before the entry into force of the Lisbon Treaty in 2009, since then the EU has acquired this competence and role. The choice of Germany and the EU reflects a 'most likely' case study design. Germany accounts for 17% of the EU's outward FDI stocks, it 'invented' modern IIAs in the 1950s and it has signed some 140 IIAs – more than any other country in the world. The EU, on the other hand, is the world's biggest recipient and emitter of FDI (UNCTAD, 2016). If we expect business preferences and lobbying to play a decisive role in international investment policymaking and in the conclusion of IIAs, it should be observable in particular in these two 'extreme' cases. The following sections briefly assess the international investment policymaking process underlying the conclusion of IIAs in Germany and the EU with special attention being given to the role of business preferences and lobbying.

A) International investment policymaking in Germany prior to 2009

Policymaking setup: In Germany, the ministry of economics is in charge of international investment policymaking. A specialised division in the directorate for foreign economic policy deals with international investment policy. It oversees Germany's investment guarantee scheme, manages the investment review mechanism, takes care of Germany's investment arbitration proceedings and it used to negotiate IIAs with third countries. On behalf of the German government, the ministry signed IIAs, which were then ratified by the Bundestag. The Bundestag normally ratified IIAs without deliberation as a secondary agenda item. Since the entry into force of the Lisbon Treaty, the Member States have lost the legal competence to negotiate IIAs with third countries. Nonetheless, the division still plays a role in IIA negotiations by representing the German government in the 'investment configuration' of the Trade Policy Committee (TPC) of the EU's Council of Ministers. As will be discussed further below, the TPC liaises with the Directorate General for Trade of the European Commission, which administers trade and investment policy and leads negotiations with third countries.

The perception of the German business community: The German business community was rarely in contact with the German government to discuss international investment policymaking and the conclusion of IIAs prior to the entry into force of the Lisbon Treaty. Two factors account for this

observed passivity of German business. First, the potential benefits of IIAs were perceived to be limited (Interviews with business representatives, 16 Feb. 2012). Companies and business associations have limited resources to develop preferences on issues beyond daily business operations and to lobby policymakers. Apart from big multinational companies with major public affairs and legal divisions, relatively few employees deal with questions of foreign economic policy in companies and business associations. Companies and business associations need to prioritise and to weigh the benefits and costs of lobbying policymakers on a particular policy issue. In comparison with other foreign economic policy issues – such as market access or the protection of intellectual property rights – international investment policy and IIAs were considered to be an issue of secondary importance for business operations and profits (Dür 2008, 2012). Unlike IIA provisions, enhancing market access or improving the protection of intellectual property rights abroad has an immediate effect on business operations and profits. The minor perceived positive impact of international investment policy and IIAs was reflected in a general lack of expertise among business representatives. As the issue was not considered a priority, the business representatives interviewed had a limited understanding of this policy domain.

Moreover, international investment policy and the conclusion of IIAs were seen as a proactive service which the German government should supply regardless of business demands and lobbying (Interviews with business representatives, 16 Feb. 2012). The business representatives did not deny that under certain (undesirable) circumstances international investment policy and IIAs could acquire importance and enable them to avoid significant losses on investments, but they expected the government to be proactive and to act in the interests of German businesses even in the absence of lobbying efforts. The relationship between the business community and the government was literally compared to a relationship between customers and attentive service providers. As German businesses were major taxpayers, the German government should be proactive, pursue business-friendly policies and only rely on business input in cases of doubt.

The perception of German bureaucrats: German bureaucrats by and large confirmed the statements of the business representatives. They reported having only rarely been in contact with business representatives. International investment policymaking and the conclusion of IIAs were predominantly a bureaucratic process. This bureaucratic process was shaped by the following considerations.

First and foremost, German bureaucrats implemented international investment policy and concluded IIAs in view of limiting the financial exposure of the German taxpayer under the state-backed investment guarantee scheme (Interviews with civil servants of the Ministry of Economics, 17 Feb. 2012, 17 Jun. 2012; Poulsen, 2010). Germany's international investment policy and IIA programme indeed formed an integral part of its investment guarantee scheme. Investment guarantee schemes address the so-called 'hold-off' problem in international investment activity. Businesses normally insure international investment projects against a number of commercial risks such as currency fluctuations. However, private insurers may not offer coverage against certain non-commercial risks such as civil war or expropriation. This lack of coverage of non-commercial risks may keep companies from lucrative and fairly safe investment projects. Such decisions to abstain from promising investment projects impose opportunity costs on businesses in the form of foregone profits and on national economies in the form of foregone growth and employment. State-backed investment guarantee schemes offer insurance against non-commercial risks to enable businesses to go ahead with lucrative and fairly safe investment projects. However, Germany typically conditions access to state-backed investment guarantees on the existence of an IIA with the host country. The underlying rationale is that in the case of expropriation the insured company can first seek compensation through ISDS. Only if the arbitration claim or its enforcement is unsuccessful may the state-backed investment

guarantee scheme have to cover losses. Therefore, in the German system IIAs were and are a tool to limit the financial exposure of the German taxpayer under investment guarantee schemes rather than a tool to strengthen businesses' rights vis-à-vis host countries. To identify new partner countries for IIAs, the German government monitored the geography and volume of German outward investment flows and requests for coverage under its investment guarantee scheme.

Germany's international investment policy and its conclusion of IIAs reflected further considerations. German bureaucrats underlined that they perceived it as their professional – and almost civic – duty to support German businesses in their international investment projects. A business-friendly investment environment should promote growth, employment and tax revenue and thus further Germany's general public interests. Nonetheless, the bureaucrats did not hide that on certain occasions the conclusion of IIAs also reflected more profane considerations. At times, they negotiated IIAs to please and to increase their visibility vis-à-vis senior civil servants and the political leadership (Interviews with civil servants of the Ministry of Economics, 17 Feb. 2012, 17 Jun. 2012). The signing of IIAs was often a welcome photo opportunity for travelling ministers or secretaries of state to signal to voters and businesses their commitment to advancing German interests abroad (Interviews with civil servants of the Ministry of Economics, 17 Feb. 2012, 17 Jun. 2012). The conclusion of IIAs thus also enhanced career opportunities and the visibility of the division dealing with international investment policy within the senior ranks of German government.

B) International investment policymaking in the EU after 2009

Policymaking setup: Until the entry into force of the Treaty of Lisbon on 1st December 2009, the Member States held the most relevant competences to regulate international investment flows and to conclude IIAs. On insistence of the European Commission (Basedow, 2016a, 2016b), the Lisbon Treaty finally extended the scope of the EU's exclusive competence under the Common Commercial Policy to the regulation of 'foreign direct investment' (FDI). It ended a competence struggle between the Commission and the Members States which had been simmering since the 1980s. The EU is now by and large in charge of international investment regulation and the conclusion of IIAs, whereas the Member States must refrain from individual actions (Dimopoulos, 2011).

The Commission is the key actor in the EU's new international investment policy. It holds the right to initiate investment policy measures and to negotiate IIAs with third countries. To that end, the Commission's Directorate-General for Trade proposes a draft measure or tables a draft mandate for IIA negotiations. The Council of Ministers and the European Parliament may then endorse and amend the measure or mandate by qualified majority. For the Council of Ministers, the 'investment configuration' of the TPC interacts with the Commission in the monitoring of IIA negotiations. National investment policy officials, who often managed national IIA programmes prior to 2009, sit on this committee. Their expertise makes them important counterweights to the Commission in this policy domain. For the European Parliament, the International Trade (INTA) Committee monitors and interacts with the Commission and the Council of Ministers. Before 2009, the European Parliament and the INTA Committee played only a marginal role in foreign economic policy. They have only gradually gained experience and managed to shape policy outcomes, notably in highly technical domains such as international investment regulation (Woolcock, 2011).

The perception of European business: Prior to the start of the heated TTIP debates, European business was rarely in contact with the European Commission or the European Parliament to discuss international investment policy and IIAs, despite ongoing major investment negotiations. Interviews

with national and European and sectoral and horizontal business associations based in Brussels indeed pointed to a remarkable lack of knowledge of international investment policy and IIAs (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). The limited expected potential benefits arising from international investment policy and IIAs are again key to this observation. Brussels-based representatives of national business associations such as the BDI (Germany), CBI (United Kingdom), CEOE (Spain), Confindustria (Italy), Leviathan (Poland) and MEDEF (France) stressed that they had limited resources to define their preferences and to lobby policymakers in foreign economic relations. In most associations, one policy officer had to deal with all questions of foreign economic policy. International investment policy and IIAs ranked low on the list of the policy priorities of their member companies. Classic foreign economic policy issues such as market access questions in the WTO and bilateral trade negotiations typically enjoyed much greater salience and thus stood at the centre of the associations' work and discussions with members and policymakers. Moreover, several business representatives stressed that their membership was heterogeneous. Many associations counted few major multinational enterprises but a high number of small and medium-sized companies, with limited investment activities among their members. The heterogeneous membership complicated formulating common preferences and lobbying strategies, notably on issues such as international investment policy and IIAs. European umbrella associations such as BusinessEurope and the European Services Forum (ESF) struggled with the same problems of limited resources and heterogeneous membership (Interviews with business representatives, BusinessEurope 26 Jan. 2012, ESF 25 Sept. 2013). They stressed that they did not have sufficient resources and found it hard to forge internal compromises on many issues such as IIAs. Lobbying for specific IIAs was uncommon.

The perception of the European Commission: Prior to the start of the TTIP debates, the European Commission was rarely in contact with business representatives to discuss international investment regulation and IIAs (Interviews with civil servants of DG Trade & Cabinet, 13 Jan. 2012, 18 Jan 2012, 18 Jul. 2012, 24 Jul. 2012, 27 Jul. 2012). In 2012, a senior Commission bureaucrat lamented that '*international investment policymaking felt like a blind flight*' removed from societal demands and debates (Interview with civil servant from DG Trade, 7 Jul. 2012). The lack of business lobbying or general public interest by the media, citizens, most Member States and the European Parliament indeed complicated the life of the Commission. Following the competence transfer under the Lisbon Treaty, the Commission sought to develop a new EU approach to international investment policy and IIAs (Interview with civil servant from DG Trade, 13 Jan. 2012; European Commission, 2010). In contrast to most of the old Member States, the EU was not only an emitter of outward investment but equally a major recipient of inward investment. Therefore, unlike many large old Member States, the EU had more nuanced and balanced interests. It had to strike a new balance under EU IIAs between ensuring the protection of European investors abroad (offensive) and protecting the right to regulate of capital-importing Member States in the light of future ISDS proceedings (defensive). However, the Commission's balancing endeavour was difficult. Only a handful of old Member States – in particular Austria, Germany, the Netherlands, France and Spain – took an interest in these efforts and vehemently opposed the Commission's plans. They wanted the Commission to uphold the so-called 'gold standard' of IIAs which put strong emphasis on the offensive interests of capital-exporting countries. The lack of public interest and lobbying made it difficult for the Commission to justify its new approach and to form a political alliance against particularly conservative Member States.

In the absence of business lobbying, three factors shaped the Commission's approach to international investment policy and IIAs. First, the Commission bureaucrats were guided by functional and social welfare considerations. They sought to develop an EU approach to international investment policy and

IIAs which structurally rebalanced the EU's offensive and defensive aims and served all Member States and citizens so as to maximise the EU's aggregate welfare. A similarly functionalist approach guided bureaucrats in the identification of potential partner countries for the EU's new IIA programme. In 2010, the Commission's communication "*Towards a Comprehensive European International Investment Policy"* (COM(2010)343) stressed that for the sake of policy rationalisation it would seek to include IIA-like provisions in on-going trade negotiations with Canada, Mercosur, India and Singapore. The Commission also announced it would assess the feasibility of IIAs with China and Russia as major yet difficult recipients of EU-outward investments. Second, after the entry into force of the Treaty of Lisbon the Commission was determined to consolidate its controversial competences in international investment policy. Throughout the policy debates following the entry into force of the Treaty, the Commission advanced an extensive reading of the EU's new competence over investment regulation, which antagonised many Member State governments. The EU's international investment policy of recent years shows traces of bureaucratic competition and has led to a request for the still-pending Opinion 2/15 regarding the scope of the EU's exclusive competences in this field (Basedow, 2016a, 2016b). Opinion 2/15 evaluates the scope of the EU's exclusive investment-related competences to conclude trade and investment agreements at the example of the EU-Singapore Free Trade Agreement. Finally, Commission bureaucrats used bureaucratic competition over international investment policymaking and the EU's IIA programme to increase their internal visibility and to advance their careers. The confrontation with the Member States increased the visibility and importance of working-level bureaucrats vis-à-vis the political leadership of the Commission, which was arguably conducive to their career development.

C) European business preferences and lobbying in major international investment negotiations

Business lobbying carries a negative connotation. It is often seen as having undue influence on policymaking and as a threat to democracy (Campact, 2014; Corporate Europe Observatory 2014a). While this view of lobbying is over-simplistic it nonetheless creates serious methodological challenges. Neither business representatives nor bureaucrats may faithfully report contacts with business actors and their influence on policy outcomes. The following section seeks to cross-validate the interview findings by means of complementary methods and data sources. It assesses the role of business lobbying in major international investment negotiations.

Since the 1980s, the EU and its Member States have been involved in several major international investment negotiations. In terms of geographical scope, breadth and ambition of commitments and volume of international investment activities covered, two international investment negotiations stand out: the negotiations on the Energy Charter Treaty (ECT) and the ultimately failed talks on the Multilateral Agreement on Investment (MAI) in the OECD. The following paragraphs briefly assess the preferences and lobbying of European businesses in these international investment negotiations. The negotiations constitute so-called 'most likely cases.' If European business preferences and lobbying affect policy outcomes, it should have become visible in these exceptionally ambitious and visible policymaking instances. However, assessment of the ECT and MAI negotiations suggests that European business was little interested and in part even opposed these investment negotiations.

The negotiations on the Energy Charter Treaty: The Energy Charter Treaty (ECT) is little known to the general public. It governs energy trade, transport and investment among 52 contracting states from western and eastern Europe and Eurasia. It contains *inter alia* provisions relating to post-establishment treatment standards and investment protection through ISDS. The content of the ECT is

equivalent to traditional IIAs and many of the most mediatised investment arbitrations[1] take place under it. The ECT was negotiated between 1990 and 1998. The EU proposed its creation in 1990 for two reasons. First, Western European policymakers wanted to stabilise the disintegrating Soviet Union through the integration of key economic sectors, increased trade and hard currency inflows into the crisis-riddled socialist economies. The ECT project echoed the rationale of western European integration of geopolitical appeasement and economic prosperity through economic integration (Konoplyanik, 1996: 156-157). Second, western European policymakers wanted to embed the emerging single market for energy into a broader regional market-based energy regime. Only if major transmission and supplier countries endorsed a market-based order for their energy sectors could the single market for energy ensure reliable access to affordable energy resources (European Commission, 1991).

European business was sceptical or hostile toward the ECT project. European utilities were the most active business players during the ECT negotiations. They opposed the ECT project outright (Padget, 1992; Wälde, 1996; Doré, 1996), seeing the ECT negotiations as a Commission attempt to finalise the single market for energy and to dismantle their mid- and downstream monopolies through the backdoor. In particular, the planned but ultimately scraped investment liberalisation commitments and provisions on 'third party access' to energy transmission networks preoccupied European utilities. The provisions directly challenged their natural monopolies in their respective markets. Other provisions such as investment treatment and protection clauses received little attention. European upstream energy companies, on the other hand, took some interest in the ECT negotiations and participated in consultations. However, they challenged the view of western policymakers that the ECT would enhance the business and investment climate in the disintegrating Soviet Union (Jenkins, 1996; Müller, 1991). They felt that the ECT was misguided activism by policy-makers who had little knowledge of the technicalities of the upstream energy sector and the business challenges in transforming socialist economies. Finally, energy consumers did not lobby in the ECT negotiations (Basedow, forthcoming). To conclude, European business preferences and lobbying cannot account for the creation of the ECT and its ambitious investment provisions.

The negotiations on the Multilateral Agreement on Investment: The negotiations on the Multilateral Agreement on Investment (MAI) in the OECD constituted the second highly ambitious international investment project of recent decades. The USA proposed negotiating a binding multilateral framework for global investment activities in the OECD as developing countries had previously blocked similar initiatives in the GATT (Henderson, 1999; Smythe 1998; Dymond, 1999). The US government hoped that the OECD members would find it easy to agree on state-of-the-art investment rules which developing and emerging economies would sign up to in order to remain competitive. The MAI negotiations started in 1995 but broke down without agreement due to substantive, procedural and institutional problems in 1998 (Basedow, 2016b). The negotiations focused on three areas: liberalisation commitments; post-establishment and protection standards; and finally provisions on investment arbitration.

Non-governmental organisations (NGOs) qualified and criticised the MAI project as a business-led neoliberal project (Corporate Europe Observatory, 1998; Smythe, 1998). However, this view strongly overstates the influence of business preferences and lobbying on the MAI project. Most accounts stress that the project was driven by technocrats rather than politicians or business leaders. In fact, a

[1] The arbitration proceeding *Vattenfall vs Germany II* regarding Germany's nuclear phase-out law is based on the ECT. In a similar vain, *Yukos Universal Limited (Isle of Man) vs Russia* was based on the ECT and led to a $50bn award.

lack of involvement of high-ranking politicians and business leaders is seen as one of the key factors behind the collapse of the MAI negotiations. Pierre Sauvé, then an OECD official, observed that "*…bureaucracies were proposing an agreement that the private sector in most countries was not necessarily calling for*" (as cited in Lawrence et al., 2006, p. 153). The US Council on International Business (USCIB) was reportedly the most outspoken supporter within the business community, yet observers doubted the authenticity of USCIB support. As the USCIB was led by former diplomats, its support was perceived at least partly as personal loyalty toward the US State Department and its 'pet project' (Lawrence et al., 2006). European business showed some – yet not wholehearted – support. At that time, it was primarily interested in an improvement in the business climate in formerly socialist and developing countries, which the MAI could not deliver (Woolcock, 1990; Interview, by telephone, 3 July 2013; Interview, by telephone, 17 June 2013). The lukewarm support of the business community became particularly apparent in 1997/1998 when negotiations ran into stalemate and NGOs mobilised civil society against the project. To overcome the crisis, technocrats called *inter alia* on the business community – arguably the main beneficiaries of the project – to show public support, but without much success (Graham, 2000, p. 49; Lawrence et al., 2006). The negotiations collapsed in autumn 1998 without agreement. To conclude, European business showed lukewarm support for the MAI project. It did not seek to decisively shape the negotiations.

D) European business preferences and lobbying and the evolving design of IIAs

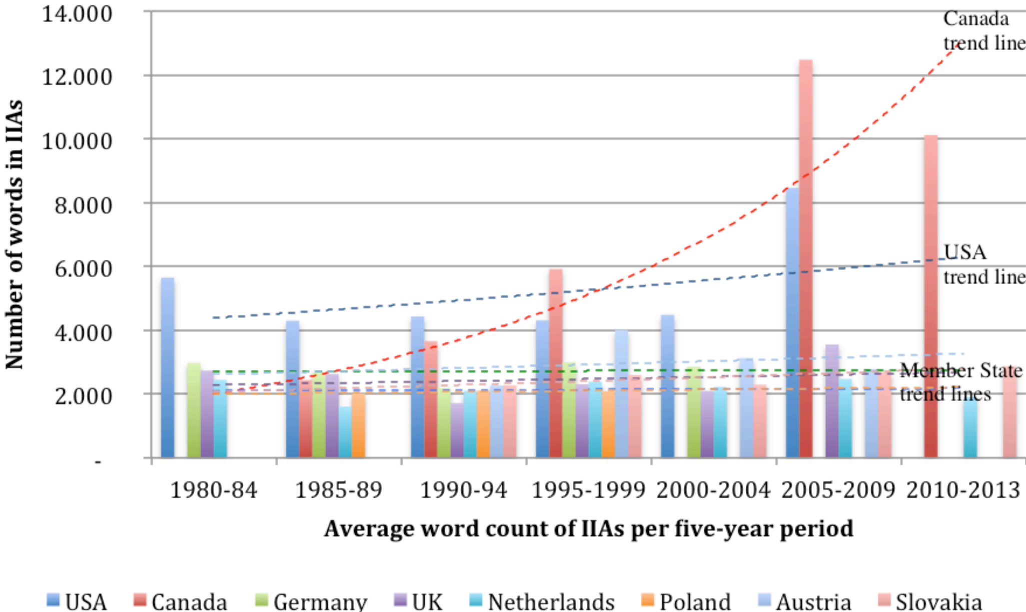
It is possible to shed additional light on the impact of business preferences and lobbying on international investment policy by assessing the evolving design of European IIAs. Some 3000 IIAs have been concluded worldwide over the last six decades. The Member States and the EU account for some 1400 of these. The design and content of European IIAs has changed over time. The texts have become longer and more precise in order to limit the interpretative leeway of arbitrators, to ring-fence states' right to regulate and to cut back investor rights and protection. European IIAs have thereby converged toward the so-called NAFTA approach. Findings suggest that even if business had tried to shape international investment policy and IIAs it was manifestly not very successful in influencing policy outcomes.

In the 1980s and 1990s – the heyday of IIA negotiations – the Member States concluded an old-fashioned type of IIAs. While not identical, these IIAs are very similar in substance and even wording. The so-called Dutch and German 'gold standard' IIAs are the most famous and illustrative exponents of this type of IIA (Dolzer and Schreuer, 2012; Alschner, 2013). These old-fashioned IIAs are short. They count only 8 to 10 pages (see Figure 2). They contain vague treatment and protection standards which the contracting states commit to afford to foreign investors. Proponents and critics alike emphasise that these old-fashioned agreements are very business friendly. They barely define the investments and investors covered and the treatment and protection standards afforded. This considerable leeway for arbitrators to interpret these agreements results in low hurdles for establishing a breach of states' commitments vis-à-vis foreign investors. Old-fashioned IIAs thereby create high levels of investment protection. Critiques warn that old-fashioned IIAs endanger states' ability to regulate, render outcomes of investment arbitration hard to predict and create considerable financial risks for taxpayers (Dolzer and Schreuer, 2012; Reinisch, 2013).

Concerns over the vague language in vintage IIAs started mounting in the 1990s. In particular, the USA – followed by Canada – began developing more precise language on investment treatment and protection based on their Friendship, Commerce and Navigation Treaties (see Figure 2) (Alschner, 2013; Gaukrodger, 2017). The objective was to clarify host states' obligations and rights vis-à-vis

foreign investors through more precise language, to limit taxpayers' financial risks and to make the use of ISDS more predictable by limiting the interpretative leeway for arbitrators. The conclusion of the North American Free Trade Agreement (NAFTA) between the USA, Canada and Mexico arguably marked the beginning of this development trajectory. Chapter 11 of NAFTA is equivalent to a standalone IIA in terms of substance. It contains provisions regarding post-establishment treatment and protection of foreign investors. It is more detailed than old-fashioned European IIAs and the US model BIT of 1984. While this model BIT – much like European IIAs – counted only 8 pages, NAFTA Chapter 11 already comprises some 20 pages. The more precise language enshrined in NAFTA Chapter 11 defines in greater detail *inter alia* which foreign-owned assets do or do not qualify as investments governed and protected by the agreement. The US model BITs of 2004 and 2012 continue along this development trajectory. They count more than 40 pages and define in significant detail *inter alia* the crucial minimum treatment standard of 'fair and equitable treatment.' The 'fair and equitable treatment' standard is among the most frequently invoked treatment and protection standards in investment arbitration proceedings and therefore a cornerstone of IIAs (Gaukrodger, 2017; UNCTAD, 2012). While old-fashioned IIAs only make brief mention of the obligation of the contracting states to afford 'fair and equitable treatment' to foreign investors, the new type of IIAs delimits the exact meaning of the obligation over several paragraphs. The rationale is to prevent arbitrators from interpreting the standard as a 'stabilisation' obligation, making it impossible for host states to change regulations, legislation, tax policies and the like, affecting business profits without facing potentially costly arbitration awards. The so-called NAFTA approach thereby strengthens state rights while arguably lowering the level of investment protection (Gaukrodger, 2017; Reinisch, 2013: 28-29).

Figure 2: Average word count of BITs of selected countries per five-year period with trend lines



Source: UNCTAD (2014), author's calculations.

The IIAs recently negotiated between the EU and third countries in many regards emulate the NAFTA approach. Recent European IIAs have become longer and are more precise than old-fashioned ones. The occasionally decried '*NAFTA-contamination'* (Peterson, 2011) of European IIAs is most visible with regard to the definition of the investments covered and the central 'fair and equitable treatment'

standard. While old-fashioned European IIAs typically contain an open-ended definition of the investments and investors covered, recent European IIAs such as Comprehensive Trade and Economic Agreement (CETA) with Canada and the EU-Singapore Free Trade Agreement (EUSFTA) follow the NAFTA approach by providing a conclusive list of investments and investors covered (Henckels, 2016; Titi, 2015). In a similar vein, recent EU IIAs depart from the old-fashioned IIA approach by providing a detailed and quasi-exhaustive definition of the 'fair and equitable treatment' standard. Rather than making a brief mention of the standard, in NAFTA-like fashion they enumerate the features of state measures violating the 'fair and equitable treatment' standard. Policymakers thereby intend to limit the leeway of arbitrators to prevent an overly-investor-friendly interpretation of the standard and to ring-fence states' right to regulate (Henckels, 2016; Titi, 2015; Lavranos, 2014). One expert even laments that the narrow wording enshrined in CETA risks hollowing out the standard and may make it impossible for investors to invoke it (Lavranos, 2014). To conclude, the design and content of European IIAs have evolved over time. They have cut back on investor rights and strengthened state rights. This finding challenges the assumption that business preferences and lobbying decisively shape international investment policy.

V. Why are the TTIP negotiations different?

The empirical assessment above has shown that in the European context business preferences and lobbying are not the central driver and shaper of international investment policy and IIAs. Bureaucratic dynamics and state interests better account for policy outcomes. European business is nonetheless strongly involved in the current heated debates on TTIP and lobbies for an ambitious investment chapter. How can one explain this outlying observation?

Theoretical work on the formation of business preferences offers a likely explanation (DiMaggio and Powel, 1991; Hall and Soskice, 2001; Woll, 2006, 2008; Wildavsky, 1987). Scholars have pointed out that a bottom-up approach to modelling business-state relations is over-simplistic. Policymaking is a highly complex and technical process in many domains. Non-state actors – including businesses – often struggle to understand their interests, to develop concrete preferences on policies and therefore to lobby policymakers. Scholars suggest that the institutional environment and regular interactions between governments and businesses create paradigms, disseminate information, shape cost-benefit perceptions and may thereby decisively shape preferences and lobbying (Hall and Soskice, 2001). Woll (2008) argues with regard to business preferences and lobbying in EU foreign economic policy. She argues that interactions between businesses and governments are circular – rather than unidirectional – relationships. Governments and businesses mutually construct their preferences on policy issues. She suggests that businesses struggle to understand how modern foreign economic policies affect their operations. Whereas classic trade policy measures like tariffs have well-known efficiency and redistributive effects, modern foreign economic policy measures – such as post-establishment treatment and investment protection clauses – have uncertain complex impacts. Businesses may fail to follow potentially important policy debates, and may not develop preferences or lobby policy-makers. Instead, governments, which stand at the centre of foreign economic policy debates, often need to approach national business communities, provide initial information and ask for business views on the issues discussed. Governments – intentionally or unintentionally – thus provide initial information and heuristic frameworks for businesses to interpret their policy environment, to develop preferences and to lobby. At times, governments exploit their influence to shape business preferences and lobbying activity in line with their bureaucratic policy agenda.

The circular model of business-government relations may explain business activism in international investment policy in the context of the TTIP negotiations. It implies that the European business lobbying observed *inter alia* for an IIA-like investment chapter under TTIP may be the result of bureaucratic mobilisation of European business. Indeed, the launch of the TTIP negotiations in 2013 reflected both – bureaucratic politics and business lobbying (De Bièvre and Polleti, 2016; Siles-Brügge and De Ville, 2016; Young, 2016). Certain companies and sectors – such as carmakers, pharmaceutical producers and food industries – strongly lobbied for a transatlantic trade agreement to lower the remaining tariffs and non-tariff barriers (Corporate Europe Observatory, 2014b). However, the European Commission was also eager to negotiate TTIP in order to prove itself as a broker in global affairs. The Commission strongly pushed for the TTIP negotiations in EU-internal debates with the Member States and the European Parliament, arguing that TTIP would counterbalance TPP, ensure a level playing field for European firms in the important US market and allow Europeans together with the USA to define the rules of global trade governance for the next decades (Interview with former civil servant of DG Trade; 24 Sept. 2014; Basedow, 2014).

The inclusion of investment provisions in the TTIP negotiations was a result of a combination of bureaucratic and business preferences. The US business community reportedly showed interest in a comprehensive investment chapter with ISDS provisions. It sought to improve market access and the legal environment in eastern and southern Member States with a mixed track record in the rule of law. European business may have looked kindly on the idea of including an ambitious investment chapter in the TTIP but did not proactively push for such a chapter. On the European side, the Commission was reportedly a key advocate of a comprehensive investment chapter with ISDS provisions (Interviews with civil servants of DG Trade, 24 Sept. 2014; 25 Jul. 2012). While the USA has a highly developed rule of law and an effective court system limiting the added value of ISDS provisions from a European perspective, the Commission stressed that TTIP should set a precedent for future trade and investment agreements with third countries with less developed legal systems (Poulsen et al., 2015; Baetens, 2015). The inclusion of an ambitious investment chapter in the TTIP was thus primarily of strategic importance. Beyond these considerations, the Commission also manifestly sought to consolidate the EU's newly gained and still controversial competences in international investment policy (Interviews with civil servants of DG Trade, 24 Sept. 2014; 25 Jul. 2012). By including investment provisions in the TTIP negotiations, the Commission could prove itself as Europe's negotiator for investment provisions in highly visible and mediatised negotiations.

Soon after the launch of the negotiations in 2013, opposition to the TTIP started mounting in Europe. NGOs, trade unions, media and politicians started harshly criticising the project (Bauer, 2013). The 'Stop TTIP' initiative quickly gained broad popular support in Europe. It focused on a few key issues such as food hygiene regulation ('chlorine chicken') and ISDS to mobilise citizens. While prior to the TTIP negotiations most people had never heard of ISDS, it became one of the most widely discussed policy issues in the public debate in Europe. The pending investment arbitration proceeding *Vattenfall AB (Sweden) et al. vs Germany (II)* regarding Germany's nuclear phase-out provided an ideal focal point for the public debate and opposition against ISDS and TTIP (ECT, 2015). The investment chapter envisaged, with its standard ISDS clauses, thus became one of the decisive and most divisive components in the political struggle over TTIP. Confronted with broad societal opposition, the European Commission called on the Member States to reconfirm their political commitment to the TTIP project and reportedly also asked European businesses – as key stakeholders – to assume responsibility in the public debate by showing support for the project (Politico, 2016; Corporate Europe Observatory, 2014b). The sudden and exceptionally vocal support of European business for IIA-like provisions on post-establishment treatment, protection and ISDS under the TTIP indeed points to such reverse lobbying. It will raise eyebrows that European business had hardly ever taken an

interest in international investment policy and the conclusion of IIAs yet it suddenly showed vocal support for – of all things – negotiations with one of the most highly developed and secure legal systems in the world. The assumption that business support for international investment provisions under TTIP may be the result of bureaucratic mobilisation becomes more credible considering that European business shows little interest in such provisions in other ongoing negotiations with India, China, Malaysia, Mercosur, Myanmar and Japan. The rule of law and the investment climate are worse in most of these countries yet European business remains largely silent on the need for post-establishment treatment, protection and ISDS provisions. To conclude, while European business indeed shows vocal support for an IIA-like investment chapter under TTIP, this remarkable and sudden interest may stem from bureaucratic mobilisation.

VI. Conclusion and policy implications

This study has raised the question of whether European business lobbies on international investment policy and more precisely on IIAs. On the basis of interviews with policymakers and business representatives, assessments of major investment negotiations and the evolution of the content of IIAs, it has found that business rarely holds preferences or lobbies in this domain. The limited, uncertain, distant and little understood potential benefits that IIAs may offer explain the high degree of business lethargy. The study has suggested that bureaucratic politics and state interests are the main factors shaping international investment policy and IIA programmes. It has also addressed the question of why European businesses nonetheless forcefully lobby for investment provisions under the TTIP. Drawing on recent theoretical work on the formation of business preferences and lobbying, it has suggested that the remarkable role of business in this particular policymaking instance may be the result of bureaucratic mobilisation.

The study makes several contributions. First, it ties into a literature which critically evaluates the role of non-state actors in policymaking (Lake, 2009; Woll, 2008; Young, 2016). More specifically, the findings caution that the widely-held assumption that business preferences and lobbying are the main factors shaping policy outcomes in foreign economic policy may be misleading. Foreign economic policy is less about market access and increasingly about highly technical issues. Business may struggle to understand how measures and agreements affect their operations and profits. Hence, it may be necessary to fundamentally rethink business-government relations in this policy domain. It must be emphasised, however, that this study has focused on the preferences and lobbying of actual European investors – in other words businesses with actual investments abroad. It deliberately ignores the role of law firms involved in investment arbitration. Investment arbitration is an extremely lucrative domain of legal practice. Unlike investors, law firms may hold strong preferences and lobby policy-makers over IIAs with low thresholds for arbitration proceedings with an eye to generating business opportunities. The preferences, lobbying and influence of law firms constitute an intriguing and important domain for future research. Second, the findings have important policy implications (Poulsen et al., 2015; Baetens, 2015). Conservative policymakers occasionally argue that the rebalancing of state and investor rights under IIAs may have detrimental effects on international investment activity, growth, employment and prosperity. The study has suggested that business takes little interest in IIAs. It is therefore unlikely that a rebalancing of state and investor rights under IIAs may have a significant impact on our economies. Policymakers therefore enjoy greater leeway in the reform of IIAs than is often expected. The study thereby ties into a growing econometric literature which critically evaluates the macroeconomic effects of IIAs. Rather than focusing on investor preferences and reactions, European policymakers should reassess the extent to which IIAs strike an

adequate balance between the public interest in encouraging outward investments and the protection of taxpayers under national investment guarantee schemes.

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