

London School of Economics and Political Science

The European Union's international investment policy

Explaining intensifying Member State cooperation in international investment regulation

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Abstract: The thesis seeks to explain the emergence of the EU's international investment policy since the 1980s. Building on theories of European Integration, it tests two ex ante hypotheses. Hypothesis H₁ builds on supranational thinking and stipulates that the Commission acted as policy entrepreneur and pushed for the communitarisation of international investment policy-making. Hypothesis H₂ builds on liberal intergovernmental thinking and stipulates that European business successfully lobbied the Member States for a communitarisation of international investment policy-making in order to ensure access to competitive state-of-the-art international investment agreements. To assess the validity of these hypotheses, the thesis traces throughout history and examines policy-making instances, which decisively shaped the EU's de facto and legal competences in international investment policy since the 1980s. It examines the EU's involvement in investment-related negotiations during the Uruguay Round, on the Energy Charter Treaty (ECT), on the Multilateral Agreement on Investment (MAI) and on Free Trade Agreements (FTAs) with Mexico and Chile. It, moreover, analyses EU-internal debates on the EU's legal competences in international investment regulation in the context of intergovernmental conferences on Treaty revisions and legal proceedings before the European Court of Justice.

The joined analysis of international and EU-internal negotiations suggests that supranational thinking and Commission entrepreneurship best describe the integration process leading to the emergence of the EU's international investment policy. The Commission acted as resourceful policy entrepreneur and used agenda setting, invoked the evolving trade agenda, fringe, implied and de facto competences, strategically used different international negotiating fora and legal review in order to consolidate the EU's role in international investment policy. Functional and power considerations fuelled the Commission's policy entrepreneurship. European business, on the other hand, was hardly informed, organised and interested in international investment policy-making. It did not seek to influence European or national policy-makers. The Member States, finally, occasionally favoured cooperating in certain international negotiating fora in order to maximise their bargaining power and to reach for the best possible deals with third countries. More often, however, they sought to contain the EU's involvement and competences in international investment policy.

The thesis makes an important empirical contribution to our knowledge of EU foreign economic policy. It is the first study to comprehensively document and to explain the EU's role in the global investment regime. It, moreover, contributes to the long-standing debate between supranational and intergovernmental accounts of European Integration. It challenges mainstream assumptions on the role of business in the international investment regime and global political economy and finally contributes to historical institutionalist research on endogenous agency-driven institutional change.

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All errors remain mine.

To my parents

List of abbreviations

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

GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GNS	Group for Negotiations on Services
IGC	Intergovernmental Conference
IIA	International Investment Agreement
IMF	International Monetary Fund
IPE	International Political Economy
IR	International Relations
ISDS	Investor-to-State Dispute Settlement
MAI	Multilateral Agreement on Investment
MEDEF	Mouvement des Entreprises de France
Mercosur	Mercado Común del Sur
MFN	Most Favoured Nation
MNE	Multinational Enterprise
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
OLI	Ownership-, Location-, Internalisation-specific advantages
R&D	Research and Development
Relex	External Relations
REIO	Regional Economic Integration Organisation
SFSRs	Soviet Federal Socialist Republics
SWF	Sovereign Wealth Fund
EC	Treaty establishing the European Communities
TEN-E	Trans-European Energy Networks Initiative
TFEU	Treaty on the Functioning of the European Union

TPA	Third Party Access
TPC	Trade Policy Committee ('113 Committee', '133 Committee')
TRIMs	Trade-Related Investment Measures
TRIPs	Trade-Related Intellectual Property
TTIP	Transatlantic Trade and Investment Partnership
TUAC	Trade Union Advisory Committee
UNCITRAL	United Nations Committee on International Trade Law
UNCTAD	United Nations Committee on Trade and Development
UNICE	Union des Industries de la Communauté Européenne
WTO	World Trade Organisation

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Chapter I – Introduction

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

While the two documents were hardly spectacular in purpose and content, they stirred furore among investment policy officials of the Member States. National investment policy officials, it seemed, had so far lived in denial, or indeed not known about, the new legal situation. During the following months, national investment policy officials publically accused the Commission of having surreptitiously usurped the competence to regulate international investment flows. They pointed out that many Member States had clearly opposed the extension of the CCP to FDI regulation during the relevant debates in the Convention on the Future of Europe (2002/2003) and the following Intergovernmental Conferences (IGCs) on the Constitutional and Lisbon Treaty. They, moreover, warned that the Commission lacked the necessary expertise to adequately represent and defend European

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

interests in the international investment regime. They pointed to the Commission's draft regulation on how to deal with existing Member State BITs as an example of the Commission's technical incompetence and disregard for the needs of European investors. They claimed that the proposed review process for Member State BITs would create legal uncertainty for European investors and thereby hinder investment activity. Some Member States such as Germany, France and the United Kingdom, furthermore, continued negotiating and signing BITs with third countries despite being arguably in breach of European law (UNCTAD, 2014a). The atmosphere between the Commission and the relevant national ministries was extraordinarily tense at this time. And even today – five years after the entry into force of the Lisbon Treaty and with the EU involved in major investment negotiations with countries like the USA, Canada and China – some Member States question the EU's competences in international investment policy. Debates in the Trade Policy Committee (TPC) between the Member States and the Commission regularly end with mutual accusations of ignorance and incompetence. It will only be a question of time before the Commission or some Member States will ask the European Court of Justice (ECJ) to examine the scope of the EU's new exclusive legal competence to regulate international investment flows.

The Member States' opposition to the extension of the CCP to FDI regulation is remarkable in the global scheme of things. It stands in contrast to the Member States' previous behaviour in this policy domain. The Member States temporarily empowered the EU on several occasions to participate in international investment negotiations since the 1980s. The Commission represented the Member States, for instance, in investment-related negotiations during the Uruguay Round of the General Agreement on Trade and Tariffs (GATT) and in the Doha Round of the World Trade Organisation (WTO). The Commission was also deeply involved in the most ambitious modern investment negotiations on the Energy Charter Treaty (ECT) and the Multilateral Agreement on Investment (MAI). Since the late 1990s, the Member States even empowered the Commission to seek the inclusion of investment

provisions into European Free Trade Agreements (FTAs). Hence, the EU has been playing an increasingly central role and acquiring so-called de facto competences in international investment policy since the 1980s. The term ‘de facto competences’ refers to the Member States agreeing on informal policy-making rules to jointly govern policy issues predominantly coming under Member State competences. De facto competences are thus tantamount to an informal ‘Brusselisation’ of policy-making (Woolcock, 2011, pp. 33–34).

The preceding discussion draws a conflicting and intriguing picture of the EU’s involvement in international investment regulation. The Member States, on the one hand, readily cooperated and temporarily empowered the EU to participate in major international investment negotiations. But on the other hand, the Member States – ultimately unsuccessfully – opposed the extension of the EU’s legal competences in this key domain of global economic governance. On the whole, these observations seem inconsistent with mainstream theories of the fields of European Integration and International Relations and trigger several questions. Why did the Member States readily cooperate and empower the EU to participate in international investment negotiations since the 1980s? And why did the Member States then oppose the extension of the EU’s legal competences in this domain? And finally, why did the Lisbon Treaty extend the EU’s exclusive competence to FDI regulation despite the reported opposition from Member States? The thesis seeks to answer these questions. The research objective of the study is to trace and to explain the emergence of the EU’s international investment policy from the EU’s first involvement in international investment negotiations in the 1980s until the entry into force of the Lisbon Treaty and the extension of the CCP to FDI regulation in 2009. The overarching research question of the study thus reads as follows:

Why did the EU acquire de facto and legal competences to regulate international investment flows since the 1980s?

Research on the EU's involvement in international investment policy is scarce and underdeveloped (Billiet, 2006; Meunier, 2013; Niemann, 2013, 2012; Young, 2001). As discussed in detail in Chapter III, the few existing studies neither provide fully convincing theoretical nor empirical accounts of the EU's involvement in this key domain of global economic governance. Drawing on European Integration, International Relations (IR) and International Political Economy (IPE) theories, the thesis explores two competing explanations for the gradual extension of the EU's de facto and legal competences in international investment regulation. Hypothesis H₁ builds on supranational thinking and stipulates that the Commission acted as policy entrepreneur using various strategies to advance a communitarisation of international investment policy-making. Hypothesis H₂, on the other hand, builds on liberal intergovernmental thinking. It stipulates that European business sought access to ambitious, state-of-the-art international investment agreements (IIAs) so as to better compete in the world economy and therefore lobbied the Member States to start cooperating and delegating international investment policy-making to the EU-level. The thesis thereby ties into the classic contestation between supranational and intergovernmental explanations of European Integration. Whereas supranational scholars assume that the Member States have lost at least partly control over European Integration to supranational agents like the Commission, scholars of intergovernmentalism insist that the Member States remain in full control of the integration process (Börzel, 2013; Rosamond, 2000; Wiener, 2009).

The thesis evaluates the validity of the hypotheses and thereby underlying theoretical accounts of European Integration on the basis of several in-case studies. The in-case studies are policy-making instances, which significantly shaped the EU's de facto and legal competences in international investment policy since the 1980s. The thesis primarily uses analytical process tracing in order to evaluate why and how the EU acquired de facto and legal competences. To that end, it draws on a considerable number of primary documents, extensive press and archival research, 41 anonymised research interviews, secondary

literature and insights from a five-month internship at the investment policy unit of the Directorate General for Trade in the European Commission and various informal encounters with Member State officials during meetings of the Trade Policy Committee (TPC). The thesis first analyses why the EU acquired de facto competences and was allowed to negotiate on investment disciplines in the context of the Uruguay and Doha Round, in negotiations on the ECT, MAI and FTAs with Mexico and Chile. On the other hand, the thesis examines whether Commission entrepreneurship or business and government preferences better account for the evolution of the EU's legal competences in the context of legal proceedings at the ECJ, IGCs and in the Convention on the Future of Europe. In order to increase the robustness of the findings, the thesis seeks to assess which factors shaped the BIT programs of the Member States. It analyses the content of 475 Member State, US and Canadian IIAs. It seeks to evaluate whether international regulatory competition and thereby, indirectly sectorial preferences and lobbying shaped Member States' BIT programmes prior to the Lisbon Treaty. The rationale is that if Member States' BIT programmes bore the traces of regulatory competition and business lobbying, one may assume that these factors also played a role in the emergence of the EU's international investment policy.

1.1 A brief outlook on the findings of the thesis

The empirical findings lend support to supranational thinking and hypothesis H₁. They challenge hypothesis H₂ and liberal intergovernmental thinking on European Integration. European business was mostly uninformed, unorganised, passive or divided over the benefits of a communitarisation of international investment policy-making. Except for the FTA negotiations with Mexico and Chile, when European business pushed policy-makers to reach for investment liberalisation commitments of NAFTA-parity, the thesis finds little evidence of decisive business involvement in the emergence of the EU's international investment policy.

The Member States were happy to cooperate in certain negotiating fora such as in the GATT/WTO or ECT negotiations in order to maximise bargaining power and to reach for better deals. Yet, the Member States also sought to contain the EU's involvement in international investment negotiations and regulation such as in the MAI and temporarily in FTA negotiations in order to protect their competences against a too ambitious and intrusive Commission. They vehemently opposed an extension of the EU's legal competences in this policy domain during ECJ proceedings, IGCs and the Convention on the Future of Europe. The Member States thus acted as brakemen rather than as motor behind the emergence of the EU's international investment policy.

The Commission, finally, acted as policy entrepreneur and persistently pushed for a consolidation of the EU's de facto and legal competences in international investment policy-making. It used its agenda setting powers, invoked the evolving trade agenda, fringe and implied competences, pointed out that the EU already held de facto competences in this domain, strategically used different international negotiating fora and had recourse to legal review in order to convince and to pressure the Member States into cooperating and delegating international investment policy-making to the EU-level. While the Commission's policy entrepreneurship worked fairly well in extending the EU's de facto competences in international negotiations, the Commission struggled for many years to attain an extension of the EU's legal competences. It was only due to the procedural particularities of the Convention on the Future of Europe that the Commission's policy entrepreneurship finally succeeded. The Convention method limited the control of Member State governments and notably technocrats over Treaty revisions and thereby facilitated Commission entrepreneurship and paved the way toward an extension of the CCP to FDI regulation. The Convention's end result – the Lisbon Treaty – finally provided the EU with a solid legal competence in international investment policy.

1.2 Empirical, methodological and theoretical contributions of the thesis

The thesis makes several contributions. The main contribution is of an empirical nature. It is the first study to comprehensively examine the EU's growing involvement in international investment regulation during the last three decades. Taking into consideration the considerable importance of international investment for modern economies as well as the growing political salience of the international investment regime and investment arbitration, this thesis indeed closes a remarkable gap in the literature. It thereby prepares the ground for future research and political debates on this ever more important domain of global economic governance.

The thesis, moreover, takes uncommon methodological paths. It jointly examines the EU's involvement in international investment negotiations and grand bargains in IGCs on Treaty revisions. Most political scientists deliberately seek to disentangle these policy-making spheres. IGCs function according to different rules than those of daily policy-making. Many scholars therefore analyse these spheres in separation in order to reduce 'noise' and allow for the development of more parsimonious theories of European Integration and international cooperation (Grieco, 1995; Moravcsik, 1998; Rosamond, 2000; Schmitter, 2009). The thesis, however, builds on two key assumptions, which rule out the analytical separation of daily policy-making and IGCs. First, temporary Member State cooperation in daily policy-making shapes the EU's legal competences. The exclusive analysis of IGCs is thus likely to blur the actual causalities shaping the EU's legal competences. Second, European Integration in foreign economic policy occurs and progresses most of the time through temporary, informal Member State cooperation in daily policy-making and not through grand intergovernmental bargains (Klein, 2013). So if the purpose of research is to understand why the Member States cooperate, it is misleading to exclusively focus on IGCs. This approach of the thesis indeed delivers a much richer and more diverse empirical and theoretical picture of the emergence of the EU's international investment policy than the narrow analytical focus of the standard approach could have delivered. As will become clear in the course of this thesis, the standard

approach would have produced incomplete and eventually erroneous explanations for the emergence of the EU's international investment policy. The thesis thus makes the plea to re-evaluate the benefits of theoretical parsimony vis-à-vis empirical depth. Parsimony is to be welcomed, but only if it allows formulating correct assumptions about reality.

The thesis makes four theoretical contributions to different literatures. First, the thesis contributes to the long-standing theoretical contestation between supranational and intergovernmental explanations of European Integration. Intergovernmentalists argue that the Member State governments hold full control over cooperation and integration in the EU. Cooperation and integration is always a state-led and state-serving process (Börzel, 2013, pp. 504–506; Moravcsik and Schimmelfennig, 2009; Rosamond, 2000, pp. 135–139). Supranationals – such as neofunctionalist and institutionalist scholars – claim that the Member State governments have at least partly lost control. Cooperation and integration may occur without government support or even in the face of government opposition (Börzel, 2013, pp. 504–505; Haas, 1958; Hoffmann, 1966; Lindberg, 1963; Rosamond, 2000, pp. 51–52). While this controversy may appear purely theoretical, it implicitly raises the question whether the EU resembles more a federation of sovereign states or a federal state. This thesis does not seek to take sides in this philosophical and political debate. But it lends support to the supranational camp and sheds new light on how supranational actors such as the Commission may promote integration despite Member State opposition. It demonstrates that Commission entrepreneurship decisively promoted the emergence of the EU's international investment policy despite Member State opposition and identifies several successful strategies of Commission entrepreneurship.

Second, the thesis challenges the mainstream assumption in IPE research that business – as main beneficiary of IIAs – decisively shapes international investment policy (see Gus Van Harten, 2007; Yackee, 2010). The thesis draws a striking picture of business lethargy in international investment policy. Business was uninformed, unorganised and uninterested

most of the time – notable exceptions were the negotiations on investment liberalisation with Mexico and Chile. Business afforded no attention to questions related to post-establishment treatment and protection provisions. These observations suggest that in particular old-fashioned BITs, which do not cover investment liberalisation, had only a limited perceived welfare impact and do not significantly affect investment decisions and the profitability of subsidiaries abroad. The thesis thereby ties into a growing econometric literature, which seeks to evaluate the impact of IIAs/BITs on investment flows, home and host economies. According to this literature, it remains unclear yet whether and when IIAs/BITs actually affect investment activities and economic growth (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). This finding raises question marks over the drivers and nature of today's international investment regime and more generally the role of business in shaping today's complex global political economy. Moreover, it has policy-making implications for the EU's future approach and content of IIAs.

Third, the thesis ties into historical institutionalist research on agency-driven endogenous institutional change. Historical institutionalists seek to explain institutional stability and change on the basis of concepts such as critical junctures and path dependence. For many years, scholars of historical institutionalism assumed that institutional change could only come about if development paths and social feedback processes break down due to exogenous shocks. Recently scholars have challenged this assumption and pointed to various sources of endogenous institutional change (Deeg, 2005; Mahoney and Thelen, 2010; Streeck and Thelen, 2005; Thelen, 2004). Streeck and Thelen (2005) as well as Thelen and Mahoney (2010), moreover, highlight that institutions are rules governing interactions affecting the power and welfare of social and political actors. Due to their distributive effects, institutions are subject to endogenous contestation and pressure for change. This thesis uncovers such an instance of endogenous agency-driven institutional change and identifies an intriguing strategy of change-oriented agents to force change upon stability-

oriented agents. It shows that the Commission (change-oriented agent) wanted to reform the CCP to extend its powers in international investment policy. As the Member States (stability-oriented agents) were unwilling to cease power, the Commission *inter alia* shaped the international trade agenda in the GATT/WTO and FTAs so as to then invoke the evolving trade agenda and to step up pressure on the Member States to cooperate and to delegate international investment policy-making to the EU-level. In more abstract terms, the thesis suggests that change-oriented agents may mobilise and shape the extra-institutional context in order to force institutional change on stability-oriented agents.

Finally, the thesis contributes to the literature on system and unit-level theories of IR and IPE. A core literature of IR and IPE suggests that the international system determines countries' foreign economic policies (Kindelberger, 1976; Krasner and Webb, 1989; Keohane, 1984). Several scholars argue along similar lines that the EU's foreign economic policy forms in response to systemic developments (Manger, 2009; Dür, 2007). This thesis demonstrates that the EU's growing role in international investment policy was indeed at the most fundamental level a reaction to changes in the global trade regime. It, however, shows that the Commission was instrumental in transmitting such systemic changes into the EU-internal policy-making debate and policy outcomes. The thesis thereby adds another 'causal' layer to the theoretical discussion. Systemic pressures do not automatically affect Member State and business preferences and strategies but may require agency to get transmitted into policy-making.

1.3 The structure of the thesis

The thesis is structured as follows. Chapter II provides an introduction to international investment and international investment policy. It summarises essential background information for the understanding of the research topic and the empirical chapters which follow. Chapter III lays the theoretical groundwork of the thesis. It discusses in more detail

the concepts of de facto and legal competences and how they relate to Member State cooperation. It reviews the theoretical literature on European Integration in general as well as the limited literature on the EU's growing role in international investment policy. Building on this review, it develops the two competing hypotheses on the emergence of the EU's international investment policy. Chapter IV turns to the empirical analysis. It examines the EU's involvement in investment-related negotiations during the Uruguay Round of the GATT (1986-1994). Chapter V shifts the analytical focus to the EU's role in investment-related negotiations on the ECT (1990-1998). Chapter VI analyses the EU's participation in the MAI negotiations (1995-1998) and the closely related but short-lived investment negotiations as part of the Singapore Issues in the Doha Round (1996-2003). Chapter VII examines how investment provisions made their way into European FTAs. The focus lies on the EU-Mexico negotiations (1996-1999) and EU-Chile negotiations (1999-2002), which marked the beginning of investment provisions in European FTAs. Chapter VIII analyses the EU-internal debates during legal proceedings, IGCs and the Convention on the Future of Europe, which shaped the EU's legal competences. Chapter IX takes a new direction. It conducts a large-n comparison of IIAs and BITs of Member States and third countries in order to evaluate to what extent international regulatory competition and underlying business lobbying shaped Member States' BIT programmes prior to the Lisbon Treaty. It concludes that regulatory competition and business lobbying are unlikely to have shaped Member State BIT approaches, which raises question marks over the importance of these factors in the emergence of the EU's international investment policy. Chapter X concludes. It discusses the empirical findings and theoretical implications and embeds the thesis in broader debates on the global political economy, the international investment regime and institutional change.

Chapter II – An introduction to international investment and its regime

This chapter introduces international investment and its regime. It seeks to provide background information which is useful for the comprehension of the following chapters. The chapter does not claim scientific originality and the expert reader may decide to skip it. The chapter first discusses definitions of international investment, its effects on economies, as well as states' policy instruments to deal with the phenomenon. It then traces the legal and economic history of the international investment regime. It concludes with a brief summary of the EU's legal competences in this domain.

2.1 Defining international investment

Many policy-makers, academics – and also this thesis – frequently use the layman's term 'international investment'. But what exactly is international investment? International investment is normally used in order to refer to the more technical concept of 'foreign direct investment' (FDI). The concept of FDI is mainly used in statistics, law and economics and carries similar yet slightly different meanings in these disciplines. The following sections briefly discuss the meanings of the concept in these fields for the sake of completeness. This thesis builds in the following chapters on a broad economic, rather than purely legalistic reading of the term international investment (see section 2.1.3).

2.1.1 International investment as a statistical concept

Central bankers and statisticians initially created the concept of FDI as a category of balance of payments statistics. These seek to quantify to what degree, and how, an economy is integrated into the world economy. Such statistics list capital stocks and capital flows related to long-term cross-border investments and production processes of multinational enterprises (MNEs) under the category 'FDI'. The category FDI comprises the initial investment² to establish, merge or buy an affiliated enterprise³ abroad as well as consequent bidirectional operational capital flows⁴ between the parent and affiliated enterprises. Although FDI has become a widely used term, there is no universally accepted detailed definition. The International Monetary Fund (IMF) and the Organisation for Economic Co-operation and Development (OECD) have sought to consolidate existing definitions of FDI in order to facilitate statistical data collection and comparisons, and policy-making debates, and to promote a harmonisation of national legislation on this matter. The official IMF and OECD definitions are by and large identical and state the following.

“Direct investment is a category of cross-border investment associated with a resident in one economy having control or a significant degree of influence on the management of an enterprise that is resident in another economy.”

(IMF, 2009, p. 100)

According to the IMF and OECD definitions, the key characteristic of FDI is thus that the investor maintains a lasting economic relationship and exercises influence or control over the affiliated enterprise abroad. The OECD and IMF definitions state that a lasting relationship, influence and control can be assumed, if the investor holds 10% of equity share or voting

² This includes, for instance, the acquisition of real estate, licences or machinery and most other expenditures related to setting up or buying an affiliated enterprise abroad.

³ Three types of affiliated enterprises exist. First, *branches* belong 100% to the investor or parent company. Second, *subsidiaries* belong 99-50% to the investor. Finally, *associates* belong 49-10% to the investor.

⁴ This includes the repatriation of profits, disinvestment, re-investment, intra-firm loans, etc.

power in the policy-making of the affiliated enterprise (IMF, 2009, p. 100; OECD, 2008, pp. 17–18). In cases where an investor holds less than 10% of equity share or voting power, their investment might still qualify as *indirect* FDI. An investment qualifies as indirect FDI if the investor has an ‘effective voice’ in the management of the affiliated enterprise through staff or a seat on the board (etc.) (IMF, 2009, p. 100). Cross-border investments which do not fulfil these criteria, are considered as portfolio investments. These are typically short-term investments of a speculative nature. The investor does not exercise influence or control over the affiliated enterprise. The investor has a narrow focus on the short-term rate of return (Alvarez, 2009, p. 204; Johannsen, 2009, pp. 11–15; Jones, 2005, p. 5).

2.1.2 International investment as a legal concept

The distinction between FDI and portfolio investments might appear at first to be a statistical detail. It is, however, of importance for European policy-makers. Since the entry into force of the Lisbon Treaty in 2009, the regulation of FDI comes under the scope of the Common Commercial Policy (CCP) and exclusive Union competence. The regulation of portfolio investment, on the other hand, comes under shared competence between the EU and the Member States under articles 63-66 TFEU on the free movement of capital (Dimopoulos, 2011, pp. 78, 123; Krajewski, 2005, p. 112). Hence, the applicable European decision-making rules, policy-making objectives, the prerogatives of the Member States, the Commission and the European Parliament differ considerably between the two types of investment. It is thus important to define FDI under European law.

The European Treaties refer to the term FDI. They do not, however, define the term in any detail. The scope of the new Union competence under articles 206-207 TFEU is therefore a priori unclear. The European Court of Justice (ECJ) has, however, developed a binding definition of the term ‘direct investment’ and thereby indirectly of the term ‘foreign direct investment’ in its case law. FDI in the EU context should be understood as cross-border

direct investment between EU Member States and third countries instead of cross-border direct investment among EU Member States. The ECJ drew heavily on the above-mentioned OECD and IMF definitions as well as the nomenclature of the famous capital movements directive 88/361/EEC to that effect. The nomenclature states the following:

“[Direct investments are...] investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity.

This concept must therefore be understood in its widest sense.”

(European Communities, 1988, p. 11)

The ECJ clarified in its case law that an investment should be considered as direct investment under European law, if the investor holds a lasting interest and exercises control or influence over the enterprise abroad. Referring to the OECD and IMF definitions, the ECJ stated that a lasting relationship and control could generally be assumed, if the investor held at least 10% of equity shares and voting power in the policy-making of the affiliated firm (Johannsen, 2009, pp. 11–13). The ECJ qualified, however, that this was only a rule of thumb. So-called “golden share” rules for instance decouple ownership and influence on management decisions, which might increase or decrease the relative influence of an investor on the policy-making of an affiliated enterprise. The corporate law of host countries can decisively shape the degree of control of investors and hence affect the legal status of an investment (Johannsen, 2009, pp. 13–14). Furthermore, the ECJ stressed the IMF and OECD concepts of an *effective voice* and *indirect FDI* were valid in EU law. These concepts imply that an investment might still qualify as FDI in cases where the investor holds less than 10% of votes or shares, but dispose of other influence channels. The literature draws on a position paper of the EU and Member States on FDI tabled in 2002 at the World Trade Organisation in order to concretise possible influence channels. Accordingly, non-vote based influence

stems from representation on the board of the affiliated enterprise; participation in the decision-making; exchange of managerial staff; inter-company transactions; provisions of loans at lower than market rates (Johannsen, 2009, p. 14; WTO, 2002a, p. 4). The ECJ endorsed this argument in a series of recent judgements (Johannsen, 2009, pp. 14–15).

In summary, European law recognises an investment – comprising the initial investment and consequent operational capital flows – as FDI, if the investment establishes an economic link between a Member State and extra-EU third country and if the investor controls at least 10% of votes or equity shares or has an *effective voice* in the management of the affiliated enterprise. The legal interpretation of term FDI under European law is thus largely identical to globally recognised interpretations of the IMF and the OECD. It needs to be mentioned though that in particular the USA and Canada have started advancing a narrower definition of the term FDI in their IIAs. The Commission seems inclined to follow this trend in current negotiations. This development may soon also translate into an altered ECJ interpretation of the term.

2.1.3 International investment as an economic concept

The preceding paragraphs discussed statistical and legal definitions of FDI. These advance a simplistic view of FDI. Economists think of FDI as a much more complex phenomenon than the mere cross-border movement of capital. In economics, FDI designates the international investment and production activities of MNEs. The following paragraphs present the major economic theories of FDI, MNEs and international production.

The understanding of FDI as financial capital – dominant in the above-discussed statistical and legal definitions – has its roots in the convenient measurability of capital as well as neo-classical theories on international trade. Neo-classical theories like the Heckscher-Ohlin Theorem seek to explain international trade patterns through diverging factor endowments of

national economies. From a neo-classical perspective, MNEs represent vehicles of excess capital leaving capital-rich economies for capital-scarce ones in order to increase rates of return for capital. Scholars increasingly questioned this understanding of MNEs and FDI during the 1960s. They found that the bulk of FDI was exchanged between economies with comparable factor endowments. Capital invested abroad could not have yielded superior rates of return than domestically invested capital. Hence, neo-classical theories of trade failed to account for the increasing number of MNEs, international production chains and the rising volume of FDI among industrialised economies since World War II (Jones, 2005, p. 7).

In the 1960s, scholars started investigating this theoretical puzzle and sought to explain the diffusion of MNEs and growth of FDI flows. They found that firms turned into MNEs in order to get access to cheap input factors or new consumer markets, and to exploit firm-specific technological and managerial expertise as well as intellectual property rights. In the scholarly debate, FDI turned from mere financial excess capital into a more comprehensive concept encompassing immeasurable and intangible assets like managerial know-how, intellectual property rights, patents, licences or access to transnational distribution, sales and financial networks. It became clear that MNEs and FDI played a central role in the diffusion of economic and technological progress (Jones, 2005, pp. 7–8).

John Dunning's so-called *OLI* framework outlines this new view of MNEs and FDI. It seeks to explain why and when firms become MNEs and start placing FDI abroad. Dunning identified in his *OLI* framework three categories of factors, which condition the transformation of a firm into a MNE (Dunning, 2008, 1981). First, firms need to hold *ownership-specific* advantages, which give it a competitive edge over other firms in a potential host economy. Ownership-specific advantages can be technological and managerial expertise, economies of scale or intellectual property rights (etc.). Second, firms must identify a *location-specific* advantage in a potential host economy in order to expand abroad

and invest there. Location-specific advantages might be the geographical position of a country, good infrastructure, a cheap input like labour, scarce raw materials, high trade barriers or membership in a regional economic integration organisation, or treaties like the EU, EFTA or NAFTA. Finally, firms must perceive the *internalisation* of business activities abroad as preferable to arm's-length contractual relations via markets. Factors influencing the choice between internalisation and market-based coordination might be the insufficient protection of intellectual property rights, patents, licences or high costs and scarce information for identifying partner firms. If the firm finds ownership-specific, location-specific and internalisation advantages, it is likely to turn into a MNE and to place FDI abroad (Jones, 2005, p. 12).

Table 2.1 Overview of OLI framework

Advantages	Examples for OLI advantages
Ownership-specific	Economies of scale, intellectual property rights, patents, technological expertise, managerial expertise, transnational sales and production networks, access to cheap capital, etc.
Location-specific	Raw materials, cheap input factors, market size, jumping trade barriers, geographical location, etc.
Internalisation	State of rule of law and enforcement, reputation concerns, lack of adequate local partner firms, etc.

Dunning's model seeks to explain why firms turn into MNEs and place FDI abroad. But FDI can take different forms. Horizontal FDI seeks to replicate the entire parent company abroad. Vertical FDI replicates or 'offshores' only certain production steps abroad. A second order question is therefore: what determines the organisational form of FDI? The question is of importance, because vertical and horizontal FDI have different side effects on the home and host economies of MNEs (Navaretti and Venables, 2004, p. 39). Scholars have identified three factors, which arguably determine the organisational form of FDI. First, plant-level economies of scale determine whether a firm is likely to concentrate or disperse production processes. If plant-level economies of scale are high, firms should concentrate production processes in few places with low input factor prices. Hence, firms are likely to engage in

vertical FDI. If plant-level economies of scale are low, firms should replicate their entire production process in several places. Firms should thus engage in horizontal FDI. Second, trade costs – including transport, customs, licensing, etc. – determine how far firms should engage in intra-firm trade or produce locally. High trade costs should foster horizontal FDI, whereas low trade costs should trigger vertical FDI. Finally, the factor endowment of involved economies should influence the choice between vertical and horizontal FDI. MNE activities between countries with comparable factor endowments should promote horizontal FDI. MNE activities between differently endowed countries should trigger vertical FDI (Navaretti and Venables, 2004, pp. 30–35).

The preceding discussion has implicitly pointed to four motivations underlying FDI flows and MNE activities. Depending on the underlying motivation, FDI is likely to have different effects on home and host countries. First, many firms place FDI abroad in order to access scarce resources, like petrol, gold or diamonds. Such *resource-seeking* FDI drove most early MNE activities. Second, firms often place FDI abroad in order to access strategic assets like innovative technology, know-how or acquire an advantageous position in a newly emerging sectoral market. Such *strategic asset-seeking* FDI is likely to help firms in maintaining a competitive edge. It normally takes the form of mergers and acquisitions instead of green field investments. Third, many firms establish affiliated enterprises abroad in order to access consumer markets. The literature refers to this as *market-seeking* FDI. Firms engaging in market-seeking FDI often consider a regional presence as important for acquiring new clients or seek to circumvent high trade barriers. Finally, many firms engage in *efficiency-seeking* FDI. They establish affiliated firms abroad in order to have access to cheaper input like labour (Dunning, 2008).

In conclusion, FDI is not mere capital crossing borders. It is a much more complex phenomenon. It encompasses, besides capital, many other – often immeasurable and intangible – business assets. In the following chapters, this thesis will build on a broad,

economic rather than narrow understanding of international investment and FDI. MNEs and FDI thus promote the diffusion of economic and technological innovation. Moreover, FDI complements and substitutes for traditional trade flows. And like traditional trade flows, MNE activities and FDI flows affect their host and home economies in positive and negative ways. As discussed in detail below, these negative and positive externalities of FDI are ultimately the reason why states pursue international investment policies. The following paragraphs discuss the negative and positive externalities on host and home economies in detail.

2.2 The economic and political impact of foreign direct investment on states

FDI flows and MNE activities have always been the subjects of lively policy debates and populist rhetoric. The reason behind the interest of the general public in FDI and MNE activities is that they are not neutral on home and host countries. FDI and MNE activities have manifold positive as well as negative economic and political effects on countries. The following section first briefly discusses the positive and negative effects of outward FDI on the home countries of investing MNEs. The section then examines the negative and positive effects of inward FDI on the host countries, which welcome foreign MNEs.

Outward FDI has several positive effects on home countries. Outward FDI should increase the competitiveness and productivity of the investing MNEs. MNEs investing abroad face the choice of whether to invest abroad, invest at home or to save capital. Econometric research suggests that FDI normally yields higher returns than forced domestic investment or saving. The more efficient use of MNEs' capital increases their productivity and competitiveness. Furthermore, the productivity and competitiveness gains are likely to spill over to domestic suppliers and competitors and lastly to the entire home economy. Outward FDI has, moreover, two positive effects on factor markets. On the one hand, outward FDI

should promote the upgrading of domestic labour toward higher value-adding activities. It normally increases MNEs' demand in headquarter services like management, research and development (R&D), legal affairs or accounting. On the other hand, outward FDI often unlocks new supply markets. It thereby reduces the costs for input factors like labour, capital, land or natural resources. Access to cheaper input factors again increases productivity and competitiveness while lowering consumer prices (Navaretti and Venables, 2004, pp. 39–48; Sunesen et al., 2010, pp. 5–11).

Outward FDI has also several negative effects on home countries. Most importantly, outward FDI is often equated with the offshoring of production. Re-imports of goods and services substitute for national production, which is seen to lead to higher unemployment. It needs to be mentioned here, however, that economic research on the impact of outward FDI on overall unemployment finds no significant correlation. Rather, demand for skilled workers increases in home economies, while demand for unskilled workers decreases. In the absence of corrective welfare policies, outward FDI thus increases social inequality. Moreover, outward FDI should increase the price of capital in home countries thereby potentially reducing GDP growth rates. Finally, outward FDI might in certain cases reduce the competitiveness of a country due to exports of innovative technologies and managerial skills (Dunning, 2008; Sunesen et al., 2010, p. 5).

Turning now to inward FDI, it has several positive effects on host countries. Inward FDI should increase labour demand and employment rates. As inward FDI is a capital inflow, it should lower capital prices and increase GDP growth rates. Inward FDI should also promote the diffusion of new technologies and skills to affiliated enterprises, suppliers and the rest of the economy. Research furthermore suggests that MNEs pay, on average, higher wages and provide better working conditions than domestic firms. Inward FDI should also enhance the host economies' access to international markets through MNEs' sales and distribution networks. Regarding product markets, inward FDI should increase competition, lower

consumer prices and generally increase consumer welfare (Dunning, 2008; Lipsey, 2002, pp. 17–40).

Inward FDI also has negative effects on host countries. It can increase prices on factor markets thereby hampering national economic development and growth. MNEs generally dispose of greater capital reserves and purchasing power than domestic competitors. The presence of MNEs – notably in developing countries – might thus push domestic competitors out of the market. The literature labels this undesired effect of inward FDI as a ‘crowding out’ of factor markets. Inward FDI might also threaten countries’ national security (BDI, 2008). Inward FDI into defence industries, public services⁵ or strategic economic sectors⁶ often triggers concerns about the underlying objectives and reliability of foreign investors. These concerns have become particularly salient since state-owned enterprises (SOEs) and sovereign wealth funds (SWF) from emerging markets have become potent international investors. Many countries – and most EU Member States – therefore maintain so-called national security screening mechanisms so as to evaluate, condition or prohibit foreign investments in sensitive economic sectors. It remains to be seen how the EU will deal with investment screening following the extension of the CCP to FDI regulation.

In conclusion, FDI flows have a multitude of positive and negative effects on the involved countries. History and research suggest that FDI is neither exclusively good, nor exclusively bad for home and host countries. The impact of FDI on home and host countries depends on the volume, purpose and type of FDI. Resource- and strategic-asset-seeking FDI often yield limited benefits for host countries, whereas market- and efficiency-seeking FDI can promote their economic growth and development. On the other hand, efficiency-seeking FDI can have negative labour market impacts on home countries, whereas resource-, market- and

⁵ Under European law the term public services typically comprises telecommunications, postal services, transport services, education, emergency services and hospitals as well as water and energy supply.

⁶ Countries consider different sectors as strategic or sensitive. Typical sectors, however, are extractive and mining industries, aviation and high-tech industries as well as financial services.

strategic-asset-seeking FDI should foster growth in the home countries of MNEs. The volume, purpose and type of FDI generated by economies depend on three variables – countries' resource endowment, their factor endowment and, finally, national investment-related policies (Dunning, 2008; Velde, 2006). Countries cannot influence their resource or factor endowments in the short or medium term. They can, however, pursue international investment policies, which maximise positive effects while minimising negative effects of FDI flows and MNE activities. International investment policy is therefore a key instrument of states in mitigating the effects of economic globalisation on society.

2.3 International investment policy – objectives and policy instruments

Countries seek to minimise negative effects while maximising positive effects of FDI flows and MNE activities. This broad objective by and large translates into the following structural preferences nowadays. Developed and capital-abundant developed countries normally seek to promote outward and inward FDI flows. Developing and capital-scarce countries normally want to attract FDI inflows. Which policy tools do states have at their disposal to pursue these objectives? The following paragraphs present the main investment policy tools, which European governments have traditionally been using in order to influence FDI flows and MNE activities: investment guarantees, diplomatic protection and support for national investors abroad, and finally international investment agreements. It needs to be mentioned here that it is difficult to delimit investment policy from other policies. The business activities of MNEs typically touch upon a wide range of economic regulations and public policies like environmental, social or health policies. All these policies might potentially affect investment decisions. It is nevertheless evident that governments cannot and must not adjust all their policies to their investment policy objectives.

2.3.1 Investment guarantees

Most investors seek insurance for investment projects abroad. Many commercial and natural risks can be covered through private insurance companies. So-called non-commercial risks, however, are not normally insurable through private insurance companies. Non-commercial risks are, for instance, riots, civil war, terrorism, currency risks, expropriation through host state authorities or breaches of contracts and non-honouring of sovereign financial obligations (MIGA, 2011). The limited availability of insurance coverage might prevent promising investment projects abroad despite a low likelihood that a non-commercial risk materialises. The limited availability of insurance coverage for non-commercial risks is seen to diminish economic activity and to slow down economic growth.

Investment guarantees seek to correct this alleged market failure. Investment guarantees are state-backed schemes, which insure investors against non-commercial risks. They thereby seek to support the realisation of generally promising investment projects abroad. Investment guarantees are thus a policy instrument to promote outward FDI. Most EU Member States have investment guarantee schemes in place so as to support the internationalisation of national business. In order to prevent an unfair distortion of international competition through such schemes, the members of the World Bank Group as well as of the OECD have formulated common guidelines regarding the allocation of state-backed investment guarantees (OECD, 2011). The guidelines *inter alia* stipulate that investment guarantee schemes must be self-supporting in order to prevent an international race of subsidies. Since the 1970s, the EU has been transposing the OECD guidelines into binding EU legislation under the CCP.

2.3.2 Diplomatic intervention and technical support for investors

Diplomatic intervention and technical support constitute soft policy instruments to promote inward and outward investment (Kaufmann-Kohler, 2013). Many states have created

specialised agencies, which provide information to national investors going abroad as well as foreign investors entering their economy.⁷ These agencies inform about important regulations, the general investment climate and possibilities for cooperation with local enterprises. Moreover, most states use their diplomatic representations and ties so as to help national business abroad as well as to attract foreign business. Diplomatic support can be effective in communicating the problems of investors to host country governments. It might also help to mitigate discriminating and protectionist government policies and anti-competitive behaviour of state-owned enterprises. Diplomatic protection and support is a particularly important investment policy instrument in host countries with an underdeveloped rule of law and strong state intervention in markets.

2.3.3 International investment agreements

International investment agreements (IIAs) are the most important investment policy instrument today. Most IIAs are bilateral and therefore also called bilateral investment treaties (BITs). Both terms are largely synonymous. Approximately 3,500 IIAs between more than 150 states have been concluded to date (Mills, 2011, p. 472; UNCTAD, 2014a). IIAs are treaties of public international law between two or more states. In these agreements, states typically commit to grant investors from the other contracting state(s): 1) certain market access rights, 2) post-establishment treatment standards as well as 3) protection and compensation standards within their territory. IIAs are thus interstate agreements which create rights for private third parties. Capital-exporting developed countries traditionally conclude such agreements with capital-importing developing states. The former seek to promote outward FDI, while the latter hope to attract inward FDI (Dolzer and Schreuer, 2012; Dolzer and Stevens, 1995).

⁷ See Ubifrance, Trade and Invest Germany, etc.

IAs allegedly address a key problem in the political economy of international investment activities. The literature refers to it as the *mousetrap problem* or *dynamic inconsistency problem* (Elkmans et al., 2006; Guzman, 1997, p. 658). Foreign investors are in a position of force vis-à-vis potential host states before investing, because most states seek to attract inward FDI. Foreign investors become, however, vulnerable to host state pressure once the investment is made, as it is normally impossible to recover invested capital and resources without major losses. It follows that prior to the placement of an investment, host states have a strong incentive to signal to potential foreign investors that they are reliable business partners⁸ and provide stable economic and regulatory environments. Once an investment is placed, host states have an incentive to renege on prior commitments and to redistribute the risks, burdens and benefits arising from an investment project. Such state behaviour can take the form of direct expropriation or creeping regulatory expropriation⁹ of foreign investors. Even if host states have no intention of engaging in expropriation or creeping expropriation, they cannot credibly commit this to foreign investors. States are sovereign and cannot credibly bind themselves vis-à-vis private actors located in their jurisdiction. Foreign investors therefore face considerable legal uncertainty when investing abroad. They have to evaluate the investment environment and prospects of their project merely on the basis of a host country's reputation and past behaviour. So as to enhance legal certainty for foreign investors, states have started committing to their peers i.e. other sovereign states to adequately treat and protect their investors. IAs thereby arguably enhance legal certainty for investors and stimulate international investment activity.

The effectiveness of IAs is disputed. It is uncontroversial that IAs enhance the legal certainty for foreign investors notably in countries with a weak rule of law. It is, however,

⁸ Investors enter into business relationships with host states for instance in joint venture agreements with state enterprises, under licensing agreements for the extraction of natural resources or as providers of public services.

⁹ If governments renege on their prior commitments and/or introduce new costly regulations, it may undermine business plans and reduce the investment value and profitability of projects. Lawyers call this phenomenon creeping expropriation. Creeping expropriation is today more common than direct, abrupt expropriation.

open to discussion whether IIAs actually foster international investment activity. Research suggests that IIAs with investment liberalisation commitments have a robust impact on the volume and direction of international investment flows. The matter, however, become more complicated with traditional BITs, which contain only post-establishment treatment and protection clauses. While some studies stipulate that BITs have only marginal effects on investment activity, others find statistically significant effects. Yet other studies find that the effects of IIAs vary in function of level of development of the contracting states or economic sectors and activities. The challenge of determining the impact of BITs on investment flows arguably derives from poor data as well as from an endogeneity problem. It is difficult to evaluate whether certain states conclude BITs because their investment relationship is intensifying, or whether the conclusion of BITs leads to an increase in investment activity. Finally, many international investment projects do not directly evolve between the home and host country but are routed through intermediary jurisdictions further complicating measurement (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; Copenhagen Economics, 2012, pp. 46–47).

The effectiveness of IIAs in enhancing legal certainty as well as in increasing investment activities obviously also depends on their respective content. One can distinguish two models of BITs/IIAs today. European BITs merely cover post-establishment treatment standards as well as investment protection provisions. The so-called NAFTA-like IIA¹⁰, moreover, comprises binding investment liberalisation commitments. The main similarities and differences between these two approaches are briefly discussed below.

Investment and investor

¹⁰ NAFTA stands for North American Free Trade Area. It is a comprehensive regional trade and investment agreement concluded between the USA, Canada and Mexico (1994). The NAFTA model agreement is generally synonymous with the US model BIT.

All IIAs seek to regulate international investment and investors. European and NAFTA-like IIAs by and large advance similar definitions of investors. Investors are natural or legal persons holding the nationality of one of the contracting states according to its national laws. European and NAFTA-like IIAs, however, advance slightly different definitions of the term investment, which theoretically translates into differences in the coverage of agreements. European IIAs typically contain an open-ended list of assets qualifying as investments. NAFTA-like IIAs, on the other hand, contain a similar list but enumerate also several assets (e.g. commercial loans), which do not qualify as investment under these agreements. Both types of IIAs albeit cover not only FDI but also portfolio investments and other investment-like or related business assets (e.g. real estate, intellectual property rights, patents, licences, etc.) (see Dolzer and Stevens, 1995; Fontanelli and Bianco, 2013; Lavranos, 2013).

Market access

European and NAFTA-like IIAs differ also in regard to their market access provisions. NAFTA-like IIAs often contain negative lists indicating economic sectors open and closed to foreign investors. They normally provide for Most Favoured Nation (MFN) or National Treatment (NT) of foreign investors wishing to enter a liberalised economic sector. European IIAs/BITs, on the other hand, do not contain binding market access provisions. They merely include ‘best endeavour’ statements, which encourage the parties to gradually dismantle market access barriers (Dolzer and Schreuer, 2012, p. 89). Prior to the Lisbon Treaty, market access provisions mostly came under shared competence between the EU and the Member States. Hence, neither the Member States, nor the EU could individually regulate in this domain and include such provisions into their IIAs (Dimopoulos, 2011, pp. 78, 86). The EU and the Member States however jointly negotiated and concluded several ‘mixed’ trade agreements with market access provisions for investors since the 1990s. The most notable agreements being: the General Agreement on Trade in Services (GATS) (see

Chapter IV), the Energy Charter Treaty (see Chapter V), the Multilateral Agreement on Investment (see Chapter VI) and several Free Trade Agreements (FTAs) (see Chapter VII).

Post-establishment treatment

European and NAFTA-like IIAs contain provisions regulating the post-establishment treatment of foreign investors. They contain relative treatment standards like MFN and NT as well as absolute treatment standards like ‘treatment in accordance with Customary International Law’ (CIL), ‘fair and equitable treatment’ (FET) or ‘full protection and security’ (FPS). Recent NAFTA-like IIAs mostly provide for CIL treatment, whereas European IIAs normally afford FET and FPS treatment to foreign investors. It is controversial whether FET and FPS represent higher minimum treatment standards than CIL (see Dolzer and Schreuer, 2008; Fontanelli and Bianco, 2013; Lavranos, 2013).

Investment protection

Investment protection provisions are the cornerstone of IIAs. They seek to ensure states’ respect for the substantive commitments to foreign investors under IIAs. Investment protection clauses contain provisions on dispute settlement procedures, which allow the contracting states and, normally, foreign investors to enforce their substantive rights in case of mistreatment in a host country. IIAs normally provide for state-to-state dispute settlement and for investor-to-state dispute settlement (ISDS). While the former is of little relevance today, investors increasingly draw on ISDS. Investors use ISDS to see the removal of nonconforming measures affecting the operation and value of a foreign investment and/or to claim financial compensation for any damages accruing from such measures or acts of outright expropriation. The advantage of ISDS for foreign investors is the possibility of circumventing national courts in host countries, which might be biased. European and NAFTA-like IIAs typically state that ISDS can be held under the rules of ICSID,

UNCITRAL, the International Chamber of Commerce, the Stockholm Chamber of Commerce and the like. These rules regulate the selection and composition of arbitration panels, working method, decision-making, enforcement and annulment of awards. It needs to be mentioned that the approaches to investment protection of European and NAFTA-like IIAs differ in two important regards (see Alvarez, 2009, pp. 220–246). First, NAFTA-like IIAs deliberately complicate the access of foreign investors to ISDS. They may, for instance, oblige foreign investors to wait for a certain time period, to first seek mediation with the host country or to exhaust local remedies before turning to ISDS. European IIAs, on the other hand, typically impose little or no conditions on the use of ISDS. Second, the substantive provisions of NAFTA-like IIAs are much more detailed than those of European IIAs. The underlying objective is to limit the room for interpretation by ISDS panels, to make ISDS awards more predictable and thus to safeguard states' regulatory space (Fontanelli and Bianco, 2013; Gugler and Tomsik, 2006; Lavranos, 2013).

Today's international investment agreement landscape

IIAs are primarily bilateral today. About 3,500 BITs have been concluded among ca. 150 states. Despite this high number, BITs only cover approximately 13% of all possible interstate investment relations (Mills, 2011, p. 472; UNCTAD, 2011, p. 84). On the other hand, only a few plurilateral and multilateral investment agreements exist. The European Treaties establishing the EU, the North American Free Trade Area, the Energy Charter Treaty and the General Agreement on Trade in Services are the only binding multi- and plurilateral agreements which contain noteworthy market access, post-establishment treatment and/or investment protection rules. The OECD Guidelines on Multilateral Enterprises and the OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations are furthermore gentlemen's agreements, which encompass rules on pre-establishment treatment, market access commitments and post-establishment treatment. These agreements are of a plurilateral nature. Attempts to negotiate truly global and

comprehensive investment agreements have failed on several occasions during the last 60 years (see Chapters IV and VI) (Dattu, 2000; Vandevelde, 1997).

Academics debate whether today's BIT network, nevertheless, exhibits the characteristics of an international regime. In public international law, a regime is conventionally defined as a coherent set of rules, standards and objectives governing a particular issue area of international relations. It has been pointed out that almost all countries have signed BITs. A big majority of states therefore subscribes on a bilateral basis to the fundamental principles enshrined in BITs. Such fundamental principles are, for instance, FET, post-establishment treatment no worse than provided under CIL, and the prohibition of expropriating from foreign nationals without paying adequate and prompt compensation. One may, however, also refute the argument that today's network of BITs establishes de facto a multilateral investment regime. The provisions in BITs vary and provide for different standards of treatment as well as different levels of protection for foreign investors. States, moreover, arguably conclude BITs so as to provide their economies with a competitive edge in the international race over capital and investment opportunities. As BITs are arguably instruments to increase the competitiveness of national business and states in the international race for investment, they cannot aim to establish a global regime of public international law ruling international investment (Alvarez, 2009; Mills, 2011).

2.4 A brief history of international investment

The preceding sections might have created the impression that investment policy is a dull, technocratic and dry matter. This impression is, however, erroneous. International investment flows and their regulation have always been a politicised and ideological battleground of international relations. The following pages first summarise the development of the modern international investment regime since the 18th century. Afterwards, it briefly discusses geographical and sectoral trends of international investment flows in the recent

past. The term international investment regime is broadly understood here so as to summarise the rules governing international investment. The study does not seek to take sides in the academic debate on the regime-like qualities of today's IIA network.

2.4.1 The emergence of the modern international investment regime

The economic phenomenon of international investment is as old as humanity. As long as 3,000 years ago, the Phoenicians invested outside their territories and established trading posts around the Mediterranean Sea. During the middle ages, the merchants of the English Russia Company and of the Hanseatic League established *kontors* in trading hubs all over Northern Europe. During the Renaissance, Florentine and Lombard banking houses founded branches in London and the Low Lands. Since these times, states have pursued – at least implicitly – investment policies and concluded investment-related agreements.

The origin of the modern international investment regime can be traced back to the late 18th century. In 1778, the USA and France concluded a Treaty of Amity and Commerce, which is sometimes considered to be the precursor of the first modern investment agreement. It sought to protect the property of French and US nationals abroad. It referred to the principle of due process, which is similar to the FET standard in modern IIAs (Dattu, 2000, p. 303; The Avalon Project (Yale Law School Lillian Goldman Law Library), 1999).

What is more, in 1789, the French National Constituent Assembly adopted the *Declaration of Rights of Man and of the Citizens*. The declaration established the right to property. States should only expropriate property in exceptional circumstances, for public purposes, on a non-discriminatory basis and following due process of law. Other European and American states gradually endorsed the fundamental right to property in the early 19th century, which also affected customary international law on the protection of foreign property (Dattu, 2000, pp. 280–281). Since the Middle Ages, it was assumed in Europe that states had the right to

protect their nationals abroad against harm from other states. When the right to property became a fundamental right in Europe and Northern America in the early 19th century, the right of diplomatic protection was logically extended to the protection of nationals' property abroad (Vandevælde, 1997, p. 379).

In the first decades of the 19th century, the *opinio juris* formed that foreigners were entitled to non-discriminatory treatment and fair compensation in case of expropriation. In cases where the overall level of protection of property or compensation was inadequate in a host state, home states were entitled to seek redress with legal and military means in the name of their injured nationals (Dolzer and Schreuer, 2012, pp. 1–12). CIL thus established national treatment of foreign investors and set a minimum standard of treatment, protection and compensation for foreign-owned property. This CIL standard later became known as the Hull Doctrine.¹¹ The Hull Doctrine prevailed as a CIL standard during the entire 19th and first half of the 20th century (Dolzer and Schreuer, 2012, p. 12). CIL standards are non-codified albeit binding obligations of public international law. A legal standard becomes part of CIL if a vast majority of states adheres to it.

In 1868, Carlos Calvo published an economic nationalist critique of the Hull Doctrine. The so-called Calvo Doctrine suggests that CIL merely requires states to afford national treatment to foreign investors. CIL arguably does not establish a minimum treatment and protection standard or the right of foreign investors to financial compensation for mistreatment. Foreign investors should only seek legal redress for controversial treatment through national courts of the host country. Home country governments must not resort to diplomatic protection and physical violence in order to protect the property rights of their nationals abroad. The Calvo Doctrine was a reply to the aggressive 'gunboat diplomacy' of capital-exporting European and Northern American states during the 19th century. Although the Calvo Doctrine stood in the tradition of economic nationalism, which flourished in

¹¹ The doctrine was named after Cordell Hull, who was US Secretary of State in the 1930s.

Europe and Northern America throughout the 19th and early 20th centuries, it was never endorsed by leading nations. European and Northern American capital-exporting states as well as their dependencies and colonies held on to the Hull Doctrine in order to protect assets abroad. In 1907, European and Northern American countries, nevertheless, partly conceded to critics like Calvo. The second Hague Conference on International Peace adopted the so-called Drago-Porter Convention, which prohibited the use of force in case of commercial, investment or financial interstate disputes. The prohibition on the use of military intervention also further reduced the appeal of the Calvo Doctrine among capital-exporting states and their dependencies (Dolzer and Schreuer, 2008, pp. 1–12, 378–381; UNCTAD, 1999a, p. 13; Vandeveld, 1997, pp. 378–381).

In 1917, a third doctrine regarding the treatment and protection of foreign property emerged. The new Bolshevik government of the Soviet Union nationalised all private property – regardless of the owner’s nationality – and refused to pay compensation (Vandeveld, 1997, pp. 380–381). Private property and its protection were seen as incompatible with the socialist *ordre public* of the Soviet Union. From a Marxist-Leninist perspective the non-compensated nationalisation of foreign-owned investments was just and desirable, because it arguably weakened the international class of capital owners, strengthened the proletariat and promoted the world revolution (see Cain, 1978).

The Socialist assault on the Hull doctrine remained, at first, without consequences. It was only in the late 1940s that three developments gradually eroded the status of the Hull Doctrine as CIL standard. First, the failure to establish the International Trade Organisation (ITO), inter alia due to disagreement on investment disciplines between the USA and its closest allies, indicated the absence of a policy consensus among Western, capital-exporting democracies (Dattu, 2000, pp. 287–288). Second, the gradual expansion of socialism in Eastern Europe, Asia, Latin America and Africa was accompanied by large-scale nationalisations of private property without any form of compensation. This wave of

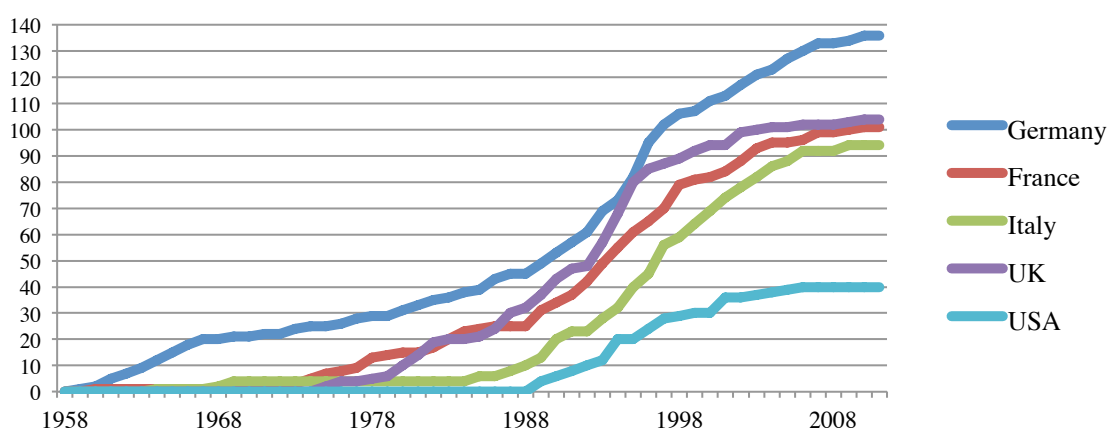
nationalisations decisively weakened the Hull Doctrine (Vandevelde, 1997, pp. 383–384). Third, the decolonisation of large parts of Africa and Asia between 1945 and the mid-1970s was a further blow for the Hull Doctrine. The newly independent states engaged in large-scale expropriation of foreign-owned property without paying compensation to foreign investors. Foreign investors were mostly from the former colonial motherlands and were active in agriculture, mining and extractive industries. They thereby controlled vast parts of national territories and natural resources. Many newly independent countries felt it necessary to expropriate these foreign investors in order to gain not only de jure independence on paper, but to re-assert their economic, territorial and ultimately political sovereignty (Vandevelde, 1997, pp. 383–384).

The demise of the Hull Doctrine as a standard of customary international law became ever more obvious during the 1950s. Several resolutions of the General Assembly of the United Nations (UN) – where developing and socialist countries represented the majority – documented this change in public international and customary law. In 1962, resolution 1803 on *the permanent sovereignty over natural resources* was adopted. The resolution clarified that states had the right to expropriate foreigners' assets, but should pay appropriate compensation. The wording of the resolution neither invalidated the Hull Doctrine, nor confirmed the Calvo or Socialist Doctrine as a standard of customary international law (Dolzer and Schreuer, 2012, p. 4). An international consensus emerged in 1973/74, when the UN General Assembly adopted by a large majority a declaration and several related resolutions on the establishment of a so-called *New International Economic Order* (NIEO). The NIEO documents stated that states have the right to nationalise foreign-owned property and should pay 'appropriate compensation'. In cases where an expropriation or compensation gives rise to disputes, these should be settled using the host country's laws and courts, unless a host country had agreed to other dispute settlement procedures. The NIEO declaration thereby decisively weakened the Hull Doctrine and implicitly confirmed the Calvo Doctrine as a new standard customary international law. Rather than having a right to

‘fair compensation’ foreign investors could only ask for compensation deemed appropriate by a host country government or court as suggested by the Calvo Doctrine (Dattu, 2000, pp. 283–285; Dolzer and Schreuer, 2012, p. 5; Vandevelde, 1997, p. 384).

The demise of the Hull Doctrine entailed the so-called *treatification* of the international investment regime. As customary international law did not provide sufficient protection of international investments, governments of capital-exporting states started concluding BITs in order to restore adequate standards of treatment and protection for national business abroad. The Federal Republic of Germany led the way in the treatification of the international investment regime. It concluded the first modern BIT with Pakistan in 1959. Today, Germany is the state with the highest number of BITs with third countries; it is party to 134 BITs (UNCTAD, 2014a). Other European states did not immediately follow the West German example. It was only in the 1970s that other European states like the United Kingdom, France, the Netherlands, Belgium and Italy started negotiating BITs with developing economies (see Figure 2.2) (Vandevelde, 1997, p. 386).

Figure 2.2 Number of ratified BITs of leading capital-exporting countries

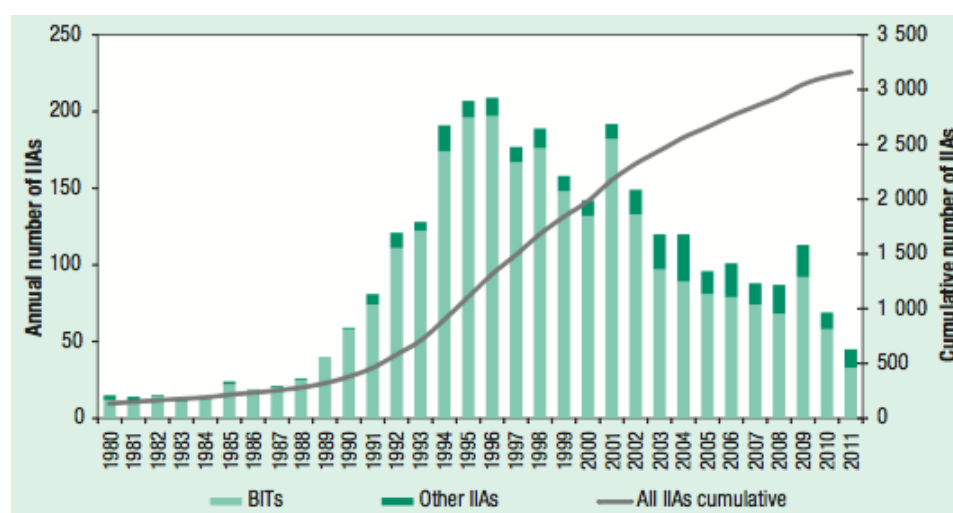


Source: UNCTAD, 2014b, author’s own calculations.

The number of BITs in force has surged since the 1980s. Between 1959 and 1980, less than 200 BITs had been signed. By the end of the 1980s, states had signed about 400 BITs. Today

some 3,500 agreements are in force (UNCTAD, 2014a, 2006, p. 3). Three developments fuelled the abrupt diffusion of BITs since the 1980s. First, the economic decline of the Soviet Union and its partners apparently demonstrated the superiority of the Western market economy. In this context, developing countries came to see BITs as ‘admission tickets’ to the Western international economy (Dolzer and Schreuer, 2008, p. 5). Second, in the 1980s many developing, and in particular Latin American, countries suffered from severe financial crises. These countries badly needed capital and hard currency inflows in order to recover. As former proponents of the Calvo Doctrine, these countries felt the need to send a signal to Western investors that their capital was welcome and secure. Hence, many Latin American countries altered their stance on BITs and started concluding them (Vandeveld, 1997, pp. 387–390). Third, the USA finally endorsed investment agreements as an instrument of investment policy in the early 1980s. Until then, the US government did not conclude IIAs, because it sought to defend the status of the Hull Doctrine as a standard of customary international law. The US government, however, revised its position in the early 1980s and concluded its first IIAs. The reorientation of the US approach to BITs arguably intensified international regulatory competition (Bungenberg, 2008, pp. 1–6).

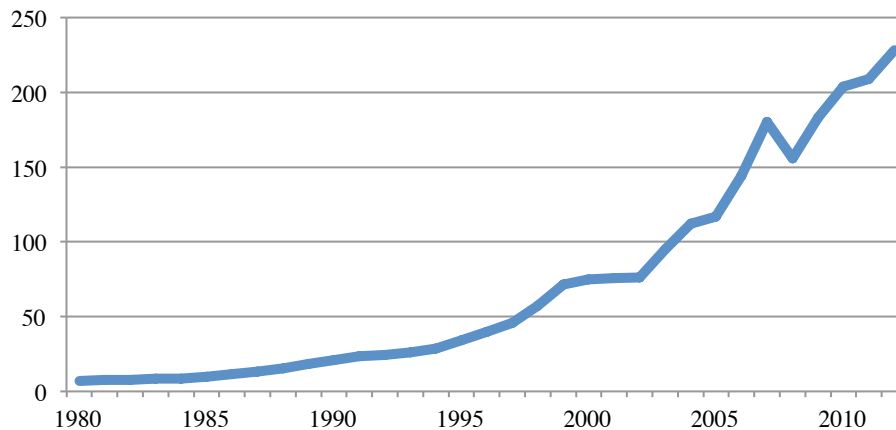
Figure 2.3 Number of IIAs concluded per year



Source: UNCTAD, 2012, p. 84.

The 1990s were a crucial decade for the evolution of the international investment policy in four regards. First, the speedy diffusion of IIAs practically re-established, and even enhanced, the worldwide level of investment treatment and protection vis-à-vis the previously abandoned Hull Doctrine (see figure 2.3). The 1990s thereby saw a significant improvement in the global investment climate. States also launched negotiations on a codified multilateral investment regime for the first time since the early post-war years and the failure of the ITO in 1950. NAFTA and the ECT are, for instance, products of the spirit of the 1990s. Negotiations on a multilateral set of investment rules were also conducted in the Uruguay and Doha Rounds of the GATT/WTO (see Chapters IV and VII) as well as in the OECD (see Chapter VII). These multilateral attempts, however, ultimately failed. Second, investment disciplines gradually became part of the standard agenda of international trade talks. Whereas investment and trade policy were neatly separated policy areas until the late 1980s, in particular the USA started including IIA-like investment chapters into bilateral and regional trade agreements and also pushed for investment negotiations in the GATT. As will become clear in the empirical chapters, the extension of the standard agenda of international trade negotiations to investment disciplines triggered functional pressures on the Member States to cooperate and to delegate negotiating on investment disciplines to the EU/Commission. After all, the EU traditionally speaks with a single voice in trade policy fora such as the GATT/WTO and FTA negotiations regardless of the EU-internal distribution of legal competences. Third, until the 1990s investment arbitration was a sporadic occurrence. It was only in the 1990s that investors started frequently launching arbitration proceedings against host countries thereby giving proper meaning to the ISDS clauses of modern IIAs. By 2012, at least 514 cases had been filed and the number is constantly rising (UNCTAD, 2013, p. 1, 2005). Finally, the late 1990s were characterised by an unprecedented increase in the volume of international investment flows mostly due to major advances in communications and transport technology as well as continued deregulation and privatisation policies (see figure 2.4).

**Figure 2.4 World inward FDI stock in trillion US Dollars
(1980-2012)**



Source: UNCTADSTAT, 2014b.

The last ten years have brought a further increase in international FDI flows, arbitration proceedings and international investment agreements. In particular, one major change in the political economy of international investment flows has affected the international investment regime and national policies during the last years. In the past, Northern American and Western European states were net capital exporters. During the last two decades, North America and Western Europe have become net capital importers. In 2010, 30% of the EU's inward FDI originated from Russia, India, China, Hong Kong and Brazil (Eurostat, 2011). The partial reversal of international investment flows has significant consequences for the international investment regime. In the past, IIAs were de facto instruments to discipline and bind policy-makers in developing countries, which imported capital. The partial reversal of FDI flows means that IIAs now also constrain Western policy-makers. Firms from emerging and developing markets have started investing in OECD economies and now draw on IIAs and ISDS so as to bring claims against these states. The US government has therefore repeatedly readjusted its model investment agreement since 2004. The pre-2004 model agreement was worded in rather broad terms so as to provide for a high level of protection for US investors abroad. The reversal of investment flows and first arbitration cases against the USA motivated the US government to narrow down the provisions of its model

agreement. The US government thereby seeks to reduce its vulnerability to claims under ISDS as well as to maintain its regulatory space (Alvarez, 2009, pp. 301–305). While some Member States have been critical of such reforms, it seems that the EU will follow the US example. The Commission seeks to ring-fence states' regulatory space and to scale back investor rights under future EU IIAs and FTAs like the Transatlantic Trade and Investment Partnership (TTIP) with the USA and the Comprehensive Economic and Trade Agreement with Canada (CETA) (see for instance Peterson, 2011).

2.4.2 Geography and sectors of international investment activity in historical perspective

The preceding discussion indicated that the volume and direction of international investment flows affected the substantive provisions of IIAs, national investment policies and lastly the international investment regime. The following paragraphs briefly trace the evolution of FDI flows in terms of volume, geographical direction and economic sectors for the last century in order to complete the picture.

Prior to World War I (1914-1918), international investment was of comparable economic importance to Western European and Northern American economies as in the late 1980s (see Table 2.3) (Velde, 2006, p. 5). International investment was then, to a large extent, a North-South phenomenon. Firms from Northern America and Europe invested in colonies and developing countries in the south. Two economic sectors attracted the bulk of investment during this time. European and American MNEs invested heavily into the transport sector and in particular in railway networks. Furthermore, investment flowed into mining industries (Velde, 2006, p. 5). International investment was therefore primarily strategic asset- or resource-seeking and unlike the bulk of modern international investment.

The interwar period (1918-1939) brought considerable economic, financial and political turmoil. During World War I, economic nationalism and protectionism had spread in Europe and Northern America and persisted during the inter-war period. Furthermore, the war had irrevocably destroyed the former international currency system. Attempts to restore the pre-war gold standard de facto failed. States engaged in ‘beggar-your-neighbour’ policies by under- or overvaluing their currencies as well as adopting inflationary monetary policies. These developments led to a disintegration of the international economy and considerable decline in MNE and international investment activities. Nevertheless, Western European and Northern American countries partly saw rising inward FDI stocks in relation to GDP. Two factors explain this counterintuitive observation. On the one hand, countries’ GDP had decreased due to the war and economic crises. On the other hand, most countries in the world prohibited disinvesting or repatriating profits in order to prevent capital flight. Hence, MNEs had to reinvest their profits in the host economy leading to an increase in FDI stocks. During 1930, MNEs also became forces of economic disintegration. International cartels emerged, which dominated domestic and international markets. These cartels effectively closed down their markets thereby inhibiting further international investment activities (Jones, 2005, pp. 29–31).

After World War II, the United Kingdom and the USA intended to prevent the economic mistakes of the interwar period. They sought to establish an open and liberal international economy under the auspices of the Bretton Woods System. This attempt succeeded in part. States in Western Europe, Northern America and Japan gradually opened up their economies for trade and investment flows during the decades following World War II. Until the mid-1960s, US capital accounted for 80% of worldwide FDI flows. Then, Western European states and Japan started investing abroad and became important creditor regions. FDI flows, however, remained primarily transatlantic. By 1980, two-thirds of worldwide FDI stocks were concentrated in the EU, the USA and Canada. FDI was mostly market- or strategic-asset-seeking. It was concentrated in the manufacturing and, to a lesser extent, service

sectors. It was only in the late 1980s that FDI stocks attained comparable levels and economic importance in Western European and Northern American countries to those of the pre-1914 period (Dunning, 1997, pp. 3–5; Jones, 2005, pp. 33–35; United Nations, 1993, p. 55).

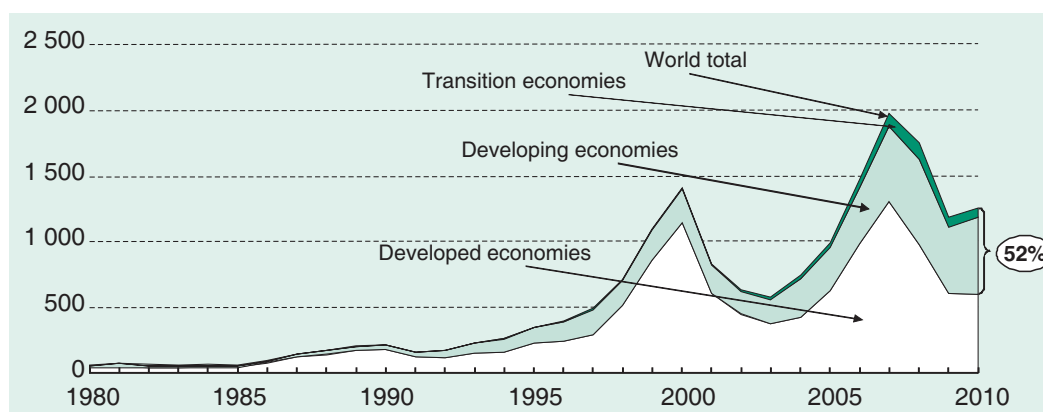
Table 2.5 North-South FDI stock as percentage of GDP 1913-2004

	1913/14	1930s	1950s	1970/1	1980	1995	2003/4
Developed countries	Outward stock of FDI/GDP (per cent)						
Canada	6	25	6	7	9	20	37
France	23	10		5		25	38
Germany	11	5		3	4	10	31
Japan	11	47		2	2	5	8
Netherlands	82	28		35	25	47	94
UK	49	18	9	17	15	28	65
US	7	8	4	8	8	18	17
Developing countries	Inward stock of FDI/GDP (per cent)						
Average colonies	42	61	35	14		19	
Average Independent	36	37	17	9		14	
Average	40	51	30	13		18	26
Latin America					4	12	38
Asia					4	12	24
Africa					8	15	32

Source: Velde, 2006, p.5.

The increasing concentration of FDI flows and stocks in the manufacturing sectors in North America and Western Europe was mirrored by a marginalisation of developing and socialist countries in the international investment landscape (see Table 2.3 above). As previously explained, many developing and socialist countries engaged in large-scale nationalisation of foreign-owned property in the late 1940s and 1960s. These nationalisation programmes scared off inward FDI. Second, most developing countries adhered to economic nationalism and adopted protectionist foreign economic policies. Inward FDI was generally undesired (Jones, 2005, p. 31).

Figure 2.6 Global FDI inflows in billions of US Dollars (1980-2010)



Source: UNCTAD, 2011, p.3.

The international investment landscape changed after the late 1980s. Five trends must be highlighted. The demise of socialism and widespread sovereign debt crises in developing countries in the mid-1980s entailed the adoption of liberal economic, trade and investment policies in many countries. This move toward liberal, market-based policies – in combination with technical improvements in transport and telecommunications – triggered an unprecedented surge in the volume of worldwide FDI flows (Jones, 2005, p. 35; Velde, 2006, p. 5). Around the mid-1990s, the volume of international FDI flows started exceeding the volume of traditional trade in goods and services. Only the *Dot-com* and *Subprime* crises temporarily interrupted the growth of FDI stocks and flows (UNCTAD, 2011, p. 3). Second, the increase in the volume of world FDI stocks and flows was not limited to North America, the EU and Japan. Developing and emerging countries also experienced increasing volumes of FDI stocks and inflows. In 2010, developing and emerging countries received 52% of worldwide inward FDI flows (see figure 2.4; UNCTAD, 2011, p. 3). This trend is, nevertheless, geographically limited. Since 1980, eight developing and emerging economies¹² have accounted for more than 75% of inward FDI into this group of countries. The leading 25 developing and emerging countries account for 95% of inward FDI in this

¹² China, Hong Kong, Mexico, Brazil, Singapore, Russia, Chile and India.

group (Velde, 2006, p. 6). Third, the increasing share of developing and emerging economies in worldwide FDI flows has partly reversed the direction of FDI flows. The last 20 years produced a significant increase in South-South FDI flows. Moreover, emerging and developing countries have started investing in Northern America, Europe and Japan. In 2010, 30% of the EU's inward FDI, for instance, came from emerging countries (Eurostat, 2011). Fourth, during the last 20 years the share of FDI flowing into the services sector has constantly increased, while the share flowing to the manufacturing and agriculture sectors has decreased (UNCTAD, 2014b, pp. 9–10). Finally, whereas greenfield investments constituted the bulk of FDI in the past, today MNEs often invest abroad in the form of mergers and acquisitions with existing local enterprises (UNCTAD, 2014b, p. 7).

2.5 A short overview of the EU's legal competences in international investment policy

The following chapters discuss the evolution of the EU's legal and de facto competences in international investment policy in detail. It is, nevertheless, helpful to the reader to briefly summarise the EU's legal competences in this field. The summary should enable the reader to better identify the relationship between the empirical observations in Chapters IV to VIII and the emergence of the EU's international investment policy. The section – as the entire thesis – primarily focuses on the EU's competences to conclude IIAs. For the sake of completeness, it also briefly evaluates the EU's legal competences regarding investment guarantee schemes and diplomatic protection. The following discussion is not conclusive. The legal literature on this matter is voluminous and continues to grow. The exact delimitation of the national, shared and exclusive Union competence remains controversial despite the entry into force of the Lisbon Treaty.

2.5.1 The EU and investment guarantee schemes

The EU mostly plays a supervising role regarding investment guarantee schemes. Article 112 EC of the Treaty of Rome stipulated that the EU should ensure a harmonisation of Member States' export policies. The term export policy comprises investment guarantee schemes. In 1975, Opinion 1/75 of the European Court of Justice (ECJ) confirmed that the EU was indeed competent under the CCP to adopt autonomous measures and to conclude international agreements aiming at the harmonisation of Member States' export policies. Since then, the EU unilaterally adheres to and transposes OECD guidelines on export policies into binding European legislation. The references to export policies in the Treaty were later deleted through the Treaty of Nice. The EU remains, nonetheless, competent to adopt general rules and to harmonise Member States' export policies. Some scholars suggest that the EU is competent to launch a proper European investment guarantee scheme, but so far the Member States administer and finance their own export policy programmes including investment guarantees (Bourgeois, 2003, pp. 638–762; Dimopoulos, 2011, pp. 103–104; Vedder, 2008, p. 28).

2.5.2 The EU and diplomatic support

The EU and the Member States jointly provide diplomatic protection and support to European investors. Taking into consideration that measures of diplomatic protection and support are mostly political in nature, there was never a controversy about the distribution of legal competences in this domain. The EU/Commission and the Member States both maintain a multitude of bilateral committees with third country governments in order to discuss any problems relating to trade or investments. What is more, the EU and the Member States also use their formal diplomatic channels to raise attention to the problems of European investors. The EU and the Member States, moreover, both provide information to European investors who plan to invest in third countries. Most Member States, finally, have

established so-called investment promotion agencies, which advise foreign investors seeking to enter their economy.¹³

2.5.3 The EU and the conclusion of international investment agreements

Today, IIAs are the main instrument of international investment policy. Since the entry into force of the Treaty of Lisbon in 2009, the EU is exclusively competent to regulate FDI. Hence, the EU is in general competent to conclude IIAs. The Member States, on the other hand, must abstain from concluding new IIAs with third countries. The EU's new competence under Articles 206 and 207 TFEU to conclude IIAs is comprehensive, albeit not exclusive, regarding all elements of IIAs. Certain elements of IIAs still come under national or shared competence. The following paragraphs briefly evaluate the EU's legal competence regarding the core elements of IIAs: market access, post-establishment treatment and investment protection.

Market access

The EU holds an exclusive competence to regulate market access for FDI under Articles 206 and 207 TFEU. It holds merely a shared competence to regulate market access for portfolio investments under Article 63 TFEU. IIAs typically cover both types of cross-border investments. It follows from this review that only the EU can enter into market access commitments vis-à-vis third countries, but that the Member States have an important say over any decision in this domain. It needs to be mentioned here that the Lisbon Treaty did not significantly change the situation in this domain. The EU was already competent to regulate market access for service-related FDI under Article 133 TFEU after the entry into force of the Nice Treaty (2003). The EU, moreover, held a shared competence regarding the regulation of market access for FDI and portfolio investments under Article 57 TFEU of the Maastricht Treaty (1993). It is, however, the subject of academic dispute whether this

¹³ See for instance UBI France, Trade and Invest Germany, etc.

competence basis ruled out that the Member States act and regulate in this domain. While the Member States did not conclude BITs with investment liberalisation commitments, some lawyers take the view that the EU was too passive during the 1990s to prevent Member State action in the domain. Regardless of this theoretical debate, it is fair to say that the Lisbon Treaty did not significantly extend the EU's legal competences in this particular domain (Dimopoulos, 2011, pp. 94–108, 123).

Post-establishment treatment

The EU is exclusively competent under Articles 206 and 207 TFEU to enter into international commitments regarding the post-establishment treatment of foreign investors. The EU is furthermore competent to regulate trade- and currency-related performance requirements under articles 207 and 219 TFEU. The EU also holds the exclusive competence to regulate the movement of investment-related key personnel under article 207 TFEU. The EU holds a mixed competence regarding the treatment of other established investments under article 54 TFEU (freedom of establishment), article 56 TFEU (free provision of services) and article 90 TFEU (common transport policy) (Dimopoulos, 2011, pp. 94–108, 123). In summary, the EU is the key regulator in this domain, while the Member States exercise varying influence on European regulatory activity in function of the concerned investment and policy domain. The EU was already competent to regulate many of the discussed issues before the Lisbon Treaty. The Lisbon Treaty, however, established a crosscutting competence for post-establishment treatment regarding FDI.

Investment protection

The EU arguably holds the exclusive competence to enter into investment protection commitments under Articles 206 and 207 TFEU of the Lisbon Treaty. The regulation of investment protection was a largely unchallenged stronghold of Member State competence before the entry into force of the Lisbon Treaty. The Lisbon Treaty's investment-related key innovation is thus the extension of the scope of the CCP to investment protection. The

question whether the EU is now indeed (exclusively) competent to enter into investment protection commitments remains controversial. Several Member States – notably the Netherlands and Germany – as well as some academics, have challenged this assumption. They inter alia argue that Article 345 TFEU rules out an exclusive competence of the EU in regard to investment protection. Article 345 TFEU stipulates that European measures must not affect the system of ownership of the Member States. Investment protection provisions of IIAs nevertheless seek to circumscribe states’ right to expropriate i.e. to freely regulate the national ownership system. Critics thus conclude that the EU could not hold an exclusive competence under the CCP in this domain. Opponents of this view have advanced several counter arguments. They caution that Article 345 TFEU does not bring Member States’ systems of ownership under exclusive Member State competence. The EU has, for instance, adopted many measures concerning intellectual property rights. The ECJ has, moreover, delivered several judgements, which contributed to the harmonisation of expropriation procedures and compensatory rules across Member States. Article 17 of the Charter of Fundamental Rights of the European Union, which is an integral part of European primary law, furthermore jointly obliges the EU and the Member States to protect the right to property. Investment protection provisions and ISDS are indisputably the cornerstone of international investment policy, which implies that the authors of the Lisbon Treaty arguably must have intended to bring investment protection under the scope of the CCP. Finally, lawyers have argued that alongside Articles 206 and 207 TFEU, Article 352 TFEU (extension of Union competence if necessary by unanimity in Council of Minister) as well as Articles 114 and 115 TFEU (approximation of laws) also provide a competence basis for the EU to enter into investment protection commitments (Dimopoulos, 2011, pp. 108–116). In summary, it remains unclear as yet whether the EU holds an exclusive, shared or concurrent competence regarding investment protection. Critical Member States have adopted a more reconciliatory position on this question during the last two years, following the *Repsol v. Argentina* case (Rucinski et al., 2014). It seems, nonetheless, likely that the ECJ will ultimately have to decide on this issue. On the whole, however, the Member States seem to

have recognised that they are not competent anymore to individually enter into international commitments in this domain.

The preceding discussion underscores that the EU holds comprehensive – albeit not always exclusive – competences to enter into IIAs. While the exact nature of the EU's competences under the Lisbon Treaty remains controversial, the Member States have by and large accepted that they need to abstain from unilateral action in this domain. The EU has finally replaced the individual Member States as the main actor in the international investment regime.

Chapter III – The analytical and methodological groundwork

This study seeks to explain the emergence of the EU's new international investment policy. In theoretical terms, it raises the question of why the Member States of the EU started cooperating, at first temporarily and then permanently, in international investment policy. This chapter first defines the concepts of international cooperation and integration and expounds how they relate to EU competences. The following section reviews the literature on European Integration. It puts special emphasis on the research on expanding Member State cooperation and integration in EU foreign economic policy. The section then develops two competing explanations for intensifying Member State cooperation in international investment policy. The final section discusses the methodological strategy employed to verify the validity of these explanations.

3.1 International cooperation, integration and EU competence

During the last thirty years, the Member States decided to cooperate, at first temporarily and then permanently, in international investment policy-making. The EU thus acquired first de facto and then legal competences in international investment policy. International investment policy-making was thereby gradually integrated at the European level. But what exactly is international cooperation and integration? And how do these concepts relate to EU competence? This section addresses these conceptual questions.

Axelrod and Keohane famously coined the term ‘international cooperation’ for the adjustment of states’ behaviour to the actual or anticipated preferences of other states (Axelrod and Keohane, 1985, p. 226). In their view, international cooperation is a tacit process. It does not require directed communication among states or explicit coordination of state behaviour. While this definition has become the benchmark in international relations research, it is inappropriate for the purposes of this study. The Member States are highly interconnected within the EU. Hence, it is difficult to think of any Member State behaviour which would not qualify in some way as international cooperation under this very broad definition.

Zartman and Touval propose a more adequate definition for the purpose of this study, which advances a higher threshold for international cooperation. They suggest that international cooperation is a “...*situation where states agree to work together to produce new gains for each of the participants unavailable to them by unilateral action, at some cost.*” (Touval and Zartman, 2010, p. 1). The definition builds on two defining elements. First, states explicitly agree on cooperation. It does not come about tacitly. And second, cooperation manifests itself in states actively working together. Cooperation is thus an observable work process between government administrations. Integration, finally, is widely considered to be the process of institutionalising and formalising such Member State cooperation at the European level.

International cooperation among the Member States can take various forms. The literature on EU foreign economic policy traditionally focuses on one particular form of cooperation among the Member States. It mostly discusses Member State cooperation in the form of a comprehensive and permanent delegation of policy-making and negotiating powers to the EU and Commission. This narrow view of cooperation as permanent delegation and integration stems from the literature’s traditional focus on trade in goods and the GATT/WTO negotiations. Other forms of Member State cooperation, however, frequently

occur in issue areas beyond the Union's exclusive competence under the Common Commercial Policy (CCP) (Woolcock, 2011). In some fora, the Member States, for instance, negotiate with third countries on their own behalf but closely coordinate their positions and strategies within the EU. In other fora, the Member States negotiate on certain issues but in parallel empower the Commission to speak on issues of common European interest. In other fora again, the Member States sometimes empower the Council Presidency to represent their interests vis-à-vis third countries. These examples qualify as international cooperation, as the Member States explicitly agree to cooperate and engage in an observable administrative work process. The examples, moreover, clarify that Member State cooperation entails a complete or partial aggregation and merging of Member State preferences and activities into European preferences and activities. Hence, the Member States fully or partially disappear as international actors, while the EU emerges as a substitute and 'collective' actor on the international stage. Member State cooperation thus is closely tied to 'EU actorness' in international affairs (Groenleer and Van Schaik, 2007; Jupille and Caporaso, 1998).

But how do Member State cooperation and integration actually relate to EU competences? One must distinguish between de facto and legal competence. Woolcock argues that the EU holds de facto competences if the Member States and the European Institutions agree on and use informal policy-making rules so as to jointly govern issue areas, which de jure lie outside the scope of Union competence (Woolcock, 2011, pp. 33–34). The term de facto competence is by and large synonymous to the definition employed here of Member State cooperation. It refers to a 'Brusselisation' of policy-making in issue areas which legally speaking fall within Member State, or eventually shared, competence. Legal competences, on the other hand, are codified in European primary and secondary law. Legal competences enshrine the EU's formal, permanent and institutionalised powers to regulate in certain policy domains, which are thus subject to compulsory Member State cooperation. De facto and legal competences are intimately linked. In EU foreign economic policy, the informal 'Brusselisation' of policy-making often precedes the institutionalisation of cooperation through a codification of

legal competences under European law. De facto and legal competences should therefore be considered as different stages of Member State cooperation and integration.

3.2 European Integration in theoretical perspective

Why do the Member States of the EU cooperate and integrate policy-making tasks? And why does cooperation evolve and expand to new policy areas over time? This thesis addresses these questions at the example of the emergence of the EU's international investment policy. The raised questions are not the exclusive object of inquiry of this thesis. They lie at the very heart of an extensive theoretical literature and academic debate on European Integration.

The literature can be broadly divided into intergovernmental and supranational explanations of European Integration. The two approaches primarily differ on the importance of governments and supranational actors in European Integration. Intergovernmental explanations claim that the Member State governments are in full control and that supranational actors such as the Commission and the European Court of Justice (ECJ) do not significantly influence European Integration. Supranational explanations, on the other hand, stress that governments have at least partly lost control and that supranational actors do significantly shape European Integration. In the last years, scholars of European Integration have turned toward other approaches such as new institutionalism and multilevel governance in order to account for cooperation and integration in the EU. Unlike supranational and intergovernmental explanations, which are rooted in International Relations, these approaches originate in comparative politics. They seek to transcend the traditional opposition between intergovernmental and supranational theories. They adopt a more nuanced approach to the study of European Integration. Rather than categorically claiming that either governments or supranational actors shape European Integration, they ask when, why and how governments or supranational actors shape European Integration. But despite

this more nuanced approach, many studies – arguably unintentionally – lend support to either one of the two theoretical camps. The following section discusses the literature in more detail.

3.2.1 Intergovernmental theories of European Integration

Intergovernmental explanations of European Integration form part of the neo-realist school of International Relations (Waltz 1979). Like neo-realism, intergovernmentalism considers states to be the only actors of causal importance in international affairs. Cooperation and European Integration should reflect Member State preferences. Member States should be in full control of cooperation and integration. Cooperation and integration should be state-driven and state-serving processes (Hoffmann 1966; Moravcsik 1993).

Andrew Moravcsik's 'liberal intergovernmentalism' is the main exponent of intergovernmentalism today (Moravcsik 1991; 1993; 1998). Moravcsik claims that cooperation and integration within the EU only occur in policy areas, where states want to address collective action problems as described in the prisoner's dilemma. Put differently, states should resort to integration, if non-institutionalised cooperation or individual action can be expected to deliver suboptimal outcomes. Moravcsik models European Integration as a three-step process. First, societal preferences – in most cases business demands – should inform government preferences on European Integration. Societal preferences on European Integration should form in function of the expectable welfare impact of (non-)integration in a given policy area. Governments should take societal preferences into account to maximise national welfare and their chances for re-election. Second, governments should then enter into substantive international negotiations. The outcome of these negotiations, Moravcsik argues, should depend on the asymmetrical interdependence of the Member States¹⁴ as well as the availability/manipulation of information by supranational actors like the Commission.

¹⁴ In other words, states incurring higher opportunity costs from non-cooperation should be more willing to compromise to ensure cooperation.

Third, the Member States should then engage in international negotiations on the institutionalisation of their cooperation. Moravcsik primarily draws on rational institutionalism and principal-agent theory to explain why the Member States opt for different degrees of institutionalisation for different issues. Hence, the choice of institutionalisation should depend on the need for technical expertise and management, credible commitment concerns and eventually federalist ideology.

Intergovernmentalists, moreover, challenge on several grounds the supranational claim that the Commission and the ECJ shape cooperation and European Integration. First, intergovernmentalists argue that the powers of the Commission and the ECJ to actually push for greater cooperation in certain policy areas merely reflect Member State preferences to have cooperative agreements monitored, neutrally interpreted and enforced (Garret 1992; 1995; Pollack 2003; Caporaso and Keeler 1995). Second, the Commission and the ECJ should only dare to push for greater cooperation and integration, if the Member States do support such measures. If the Commission and the ECJ push for greater cooperation despite public Member State opposition, the Member States are likely to pursue a “blame-avoidance” strategy in the light of domestic opposition. In other words, the Member States silently support greater cooperation, but leave it to supranational agents to push for it in order to avoid domestic controversy (Garret 1992; Schmidt 1998; Weaver 1986; Woll 2006). Finally, intergovernmentalists also reject the supranational claim that the expansion of qualified majority voting in the Council of Ministers has limited national sovereignty. Intergovernmentalists stress that Member State governments should approach decision-making in the Council of Ministers as a re-iterated long-term game. All Member State governments should fear to get outvoted at some point and thus collectively nurture a culture of compromise building (Moravcsik 1991).

Intergovernmentalism enjoys considerable prominence in European Integration research. Episodes like the Empty Chair Crisis (1965/66), the Eurosclerosis of the 1970s and 1980s

and today's Eurocrisis with a surge in intergovernmental policy-making in issue areas of vital importance to the European Integration Project seem to confirm the intergovernmentalist assumption that cooperation and European Integration remain essentially government-driven. But while intergovernmentalism – and in particular Moravcsik's liberal intergovernmentalism – are of great theoretical appeal, they also suffer from important shortcomings. First, the wholesale rejection of supranational actors playing no significant role in shaping cooperation and integration across all policy areas seems overdetermined and little credible. Various studies have shown that the Commission and the ECJ do affect cooperation and integration directly but also indirectly by re-shaping Member State preferences in various policy areas (Woll 2006; Schmidt 1998; Young 2001, 2002). Second, liberal intergovernmentalism draws heavily on societal and in particular business preferences to account for Member State preferences and ultimately Member State decisions to cooperate and to integrate. It does not, however, provide indications on how societal preferences form. While this theoretical gap is understandable, it nevertheless partially externalises the explanatory challenge. Third, liberal intergovernmentalism is a theory of institution building. It intends to explain why and how states establish new institutions for cooperation. But despite its inherent focus on institutions, it does not take the institutional and legal context of debates on cooperation and integration into account. It disregards pre-existing institutions as well as the setup and procedural rules employed to review the European Treaties. The latter has become important with the Convention on the Future of Europe (2002/3). The Convention drafted the Lisbon Treaty and differed considerably from classic intergovernmental conferences (IGCs) with regard to its composition, working method and self-conception. The Convention's peculiar functioning is likely to have affected debates and outcome. Finally, liberal intergovernmentalism is a theory of grand integration bargains and Treaty revisions. It does not seek to explain the EU's de facto competences i.e. informal ad hoc cooperation among the Member States in daily policy-making and international negotiations. At first sight, liberal intergovernmentalism seems therefore of rather limited

avail to this dissertation. It does not account for the EU's de facto competences in international investment policy since the 1980s.

In EU foreign economic policy, informal cooperation and de facto competences almost always precede formal integration and legal competences. Scholars of EU foreign economic policy hardly ever explicitly draw on liberal intergovernmentalism to analyse and to explain the EU's evolving role in this domain. Many studies, nevertheless, advance arguments, which implicitly reflect a liberal intergovernmental logic (Young, 2001, 2002). As Woolcock notes “... *the broad EU trade policy position over the past decades can be summarised as the defensive interests of agriculture competing against the market opening interests of manufacturing and services. These interests reflect the competitive positions of the respective sectors...*” (Woolcock and Bayne, 2007, p. 26). If business decisively shapes the substantive policy preferences of the Member States and the EU, business should equally shape cooperation and integration in this domain. Business demands are unlikely to perfectly mirror the EU's often uncertain legal competences. Hence, business may – unintentionally – push the Member States into cooperation and integration on issues beyond Union competence. So while most studies drawing on business preferences to explain substantive policy outcomes may not actually intend to uncover integration dynamics, they nevertheless convey information about such dynamics (Baccini and Dür, 2012; M. Baldwin, 2006; R. Baldwin, 2006; De Bièvre and Jappe, 2010; Dür, 2007; Manger, 2009; Nicolaidis and Meunier, 1999; Young, 2001, 2002). A good example is Manger's work (2009) on the global proliferation of free trade agreements (FTAs). He explains that European business lobbied the Commission and Member State governments to conclude competitive FTAs with services and investment chapters with Mexico and Chile in order to mitigate negative effects arising from US FTAs. While the EU did not yet hold the necessary legal competences, these FTAs nevertheless became the first to encompass comprehensive services and investment chapters. Manger's work thus implies that business lobbying – in response to an evolving standard agenda of trade negotiations – pushed the Member States into cooperation in new

issue areas beyond the EU's legal competences. Nicolaidis and Meunier (1999) adopt an even more state-centric intergovernmental approach. They observe that the 1990s brought an intergovernmental backlash in CCP policy-making. The Member State governments successfully defended their competences over the so-called "*new trade issues*" such as services against the Commission's attempts to assert its political and legal influence. They suggest that this intergovernmental backlash in CCP policy-making reflected an altered perception of the economic benefits of cooperation in foreign economic policy-making as well as ideological changes within government administrations.

3.2.2 Supranational theories of European Integration

Supranational accounts of European Integration stress that supranational actors like the Commission and the ECJ exert decisive influence on cooperation and European Integration. Hence, cooperation and integration do not necessarily reflect Member State preferences, which have lost at least in part control over European Integration (Haas, 1958; Lindberg 1963; Schmitter, 2009). David Mitrany's (1943) functionalism is considered as the intellectual prime father of modern supranational theories of European Integration. Mitrany argued that governments should serve human needs and not become an end in itself like the nation state in realist, liberal or federalist thinking of international relations. In accordance with his technocratic understanding of government, Mitrany suggested that policy issues transcending the boundaries of the nation state should be dealt with at an appropriate supranational or sub-national level of governance. Such effective multilevel governance should shift the expectations and loyalties of domestic interest groups from the nation state to new supranational authorities thereby promoting international cooperation and integration. Mitrany predicted that a functionalist system of multilevel governance should ultimately bring about a peaceful world order.

Ernst Haas' neo-functionalism (1958) elaborates on Mitrany's reasoning. Neo-functionalism is less normative and more analytical than Mitrany's functionalism. While Mitrany pondered about the question why and how states *should* cooperate, Haas sought to theorise why and how states actually cooperate. He observes that the initial integration of few strategic economic sectors and the creation of a supranational authority, which monitors and sponsors further integration, should trigger functional pressure – i.e. spill-overs – to integrate additional economic sectors at the European level. Domestic interest groups should slowly shift their expectations and loyalties to the European level and the supranational authority thereby sponsoring further integration. Progressing economic integration should require an ever more intense institutionalisation of European cooperation as well as ever more complex and intrusive transnational regulation. Hence, political cooperation and integration should be an inevitable side product of initial economic cooperation. Mitrany, Haas and other neo-functionalists thereby argue that cooperation among the Member States of the EU is a self-sustaining process fuelled by functional spillovers, domestic interest groups and supranational institutions (Haas, 1958; Lindberg 1963; Hoffmann, 1966; Schmitter 2009; Börzel 2013; Rosamond, 2000).

During the last years, new institutionalism has gained considerable prominence in research on European Integration. In essence, it claims that international institutions shape cooperation and outcomes (Pollack 2003, 2006; Hawkins et al., 2006; Schmidt 1998; Scharpf 1998; De Bièvre and Dür, 2005; Da Conceição-Held, 2009; Damro 2007; Pierson, 1994). Intergovernmentalists criticise that institutionalism – and in particular historical institutionalism – are only a rebranding of neofunctional thinking (Schmitter, 2009; Moravcsik, 2005). One may broadly distinguish two strands of institutionalist research. First, rational and sociological institutionalism depicts institutions – defined as implicit and explicit norms and rules – as exogenous rules on political games. In other words, institutions should shape the preferences and strategies of the Member States and supranational actors and thereby affect cooperative and integrative outcomes within the EU. Scharpf's work

(1988) on the “joined decision trap” is a prime example of this strand. He argues that the decision-making rules in the EU lead to structurally suboptimal cooperative outcomes. Also Dinan (1997), Schmidt (1997, 1998), Meunier (2000), Menon and Kassim (2004), Hooghe and Kassim (2008) and Woll’s (2006) research on how the Commission – as policy entrepreneur – exploits its agenda-setting power, decision-making rules and means of judicial review to build political alliances for its preferred policies underscore the core argument that institutions shape cooperative outcomes. Second, historical institutionalism depicts institutions as endogenous. It seeks to explain why, when and how institutions evolve over time and thereby alter cooperation and policy outcomes. Historical institutionalism builds in particular on the concepts of path dependence and critical junctures. Pierson (1994) and Elsig (2002) for instance draw on these concepts to account for evolving Member State cooperation in social and trade policy. Finally, Mark Pollack’s application of principal-agent models to cooperation and integration in the EU partly bridges the analytical distinction between an exogenous and endogenous take on institutions. Pollack, on the one hand, uses principal-agent models to explain the initial decision of the Member States to cooperate and to delegate – to varying degrees – certain policy tasks to supranational agents. Delegation should lower transaction costs, facilitate the neutral enforcement of cooperation and lower monitoring costs. Limited or far-reaching delegation of policy tasks to supranational agents should therefore depend on the importance of transaction costs, enforcement and monitoring of cooperative arrangements. On the other hand, Pollack uses principal-agent models to explain how institutions affect daily cooperation and outcomes. He argues that the Member States and supranational actors often hold diverging preferences. Policy outcomes are thus a product of varying Member State oversight and control over supranational agents. It follows from this discussion that the various strands of institutionalism indeed adopt a more nuanced take on the role of governments and supranational actors in cooperation and integration. Unlike neofunctionalism or intergovernmentalism, institutionalist research seeks to understand when, how and why either governments or supranational actors and institutions influence European Integration and cooperation.

Supranationalism – in particular institutionalism and to a lesser extent neo-functionalism – enjoys considerable prominence in research on EU foreign economic policy-making. This observation can hardly surprise taking into consideration the dense institutional web governing foreign economic policy in the EU (Woolcock, 2010; Woolcock and Bayne 2007). De Bièvre and Dür (2005) explain evolving Member State cooperation in the form of varying delegation in EU trade policy management through a principal-agent approach. Member States, they argue, delegate trade policy-making in order to shield themselves from protectionist and liberal societal demands while maintaining an inflow of lobbying resources. Reiter (2005) draws on principal-agent models and advances a functionalist explanation for the Commission's varying powers as representative of the EU in different international organisations such as UNCTAD, the OECD and the WTO. Meunier (2000, 2007) examines how the EU's institutional setup for trade policy-making shapes its bargaining power in negotiations with third countries and thereby cooperative outcomes. Elsig (2002) draws on various institutionalist approaches – including principal-agent models and historical institutionalism – to account for daily policy-making in EU foreign economic policy as well as the evolution of Member State cooperation and integration in this domain.

3.2.1 Supranational accounts of the EU's role in international investment policy

Special attention should be given here to the few studies, which seek to explain the extension of the EU's de facto and legal competences to the regulation of foreign direct investment. All existing studies build onto supranational thinking on European Integration. Young (2001, 2002) seeks to solve the puzzle of why the Member States closely cooperated and jointly negotiated in issue areas beyond the CCP – air transport, telecommunication services and international investment – despite diverging government and sectorial preferences. In accordance with institutional reasoning, he argues that the Member States started cooperating in these areas due to implied external powers, a European socialisation of

policy-makers and the growing opportunity costs of non-cooperation in these issue areas. Young's analysis provides valuable insights, but exhibits empirical and theoretical weaknesses. Young cannot explain varying degrees of Member State cooperation across different investment negotiations. His focus on endogenous institutional dynamics, moreover, seems to understate systemic, exogenous factors. Young's analysis is, moreover, empirically incomplete. He examines only one (MAI) of several international investment negotiations in the 1990s and ignores debates on the EU's legal competences.

Billiet advances another institutionalist explanation for the EU's involvement in international investment policy. Drawing on principal-agent models, he argues that the Commission – as self-interested agent – consciously shaped the negotiating agenda of the WTO so as to increase functional pressures on the Member States to cooperate and delegate international investment regulation to the Commission (Billiet, 2006). Billiet's argument is convincing, but suffers again from shortcomings. His explanation leaves open why the EU got involved in international investment negotiations on the MAI, ECT and FTAs. He does not, moreover, explain how the EU's temporary involvement in investment negotiations in the WTO relates to the extension of the EU's legal competences under the CCP.

Meunier (2013) seeks to explain the extension of the CCP to FDI regulation in the Lisbon Treaty. To that end, she examines the relevant debates during the Convention on the Future of Europe (2002/2003). She finds that the Member State governments and European business were opposed or ambivalent regarding an extension of the EU's legal competences in this domain. She suggests that the CCP nevertheless got extended to FDI regulation due to Commission entrepreneurship and 'by accident'. Meunier thus concludes that the EU's new international investment policy is not the product of functional considerations as often assumed. Meunier's study offers valuable insights. She provides a rather accurate empirical account of the Convention debates. Her theoretical analysis is, however, disappointing. She does not seriously attempt to explain the key puzzle of why the Commission succeeded in

extending the CCP to FDI regulation despite significant Member State opposition. She simply discounts it as 'chance'. This shortcoming is striking, as Meunier and Nicolaidis argue elsewhere that Member State preferences are absolutely central to the evolution of the EU's legal competences under the CCP (Meunier and Nicolaidis, 1999).

Niemann, finally, develops a new theoretical perspective. He builds on neo-functionalism in order to explain the extension of the CCP to FDI regulation in the Lisbon Treaty. He argues that the CCP extension is in essence the consequence of functional, cultivated and social spill-over dynamics. While these spill-overs did not lead to a CCP reform during the IGC on the Nice Treaty, the procedural features of the Convention weakened Member State opposition and paved the way toward the extension of the CCP to FDI regulation (Niemann, 2013, 2012). Niemann's analysis is thorough and in many regards convincing. It, nevertheless, has deficiencies. Niemann's understanding of spill-overs is remarkably broad, which blurs his analysis. He labels socialisation effects and policy entrepreneurship as spill-overs, for instance. This broad understanding bears the risk of transforming the concept into a meaningless placeholder. Niemann's selection of spill-over dynamics is, furthermore, surprising. He focuses on short-lived phenomena like the upcoming Eastern Enlargement in order to account for the decision to streamline the CCP, but ignores long-term interactions between international investment regulation and EU policies. Finally, Niemann's exclusive focus on spill-overs equates to a purely endogenous explanation for the emergence of the EU's international investment policy. This focus on endogeneity and consequent disregard for developments in the world economy is questionable.

In conclusion, the debate between intergovernmentalists and supranationalists has been structuring research on Member State cooperation and integration for many years. Both approaches have inspired work on Member State cooperation in the form of daily policy-making in foreign economic policy as well as research on grand Member State bargains on Treaty revisions. In particular supranational approaches have been applied to account for the

EU's growing de facto and legal competences in international investment regulation. These studies, however, suffer from theoretical and empirical shortcomings. Most notably, work on the EU's involvement in international investment policy examines only short instances of policy-making, which inherently rules out the formulation of a comprehensive explanation for the emergence of the EU's international investment policy since the 1980s. What is more, these studies generally remain vague regarding Member State and business preferences, which must be considered as weakness taking into consideration the prominence of these factors in European Integration research.

3.3 The analytical framework

The section develops a framework to comprehensively analyse the emergence of the EU's international investment policy. Building on the theoretical literature review above, it formulates two competing – a supranational and an intergovernmental – explanation. These explanations form the basis for the subsequent empirical investigation.

3.3.1 A supranational explanation – Commission entrepreneurship for a EU international investment policy

A sizeable literature inspired by supranational theories argues that the Commission frequently acts as policy entrepreneur and pushes for an extension of the EU's de facto and legal powers in various policy domains (Haas, 1958; Lindberg 1963; Hoffmann, 1966; Schmitter 2009; Schmidt, 1998; Kassim and Menon, 2004; Hooghe and Kassim, 2008; Woll, 2006). Schumpeter (1934) and Weber (1930) coined the concept of policy entrepreneurship. Policy entrepreneurs seek to innovate policy – normally to further their own welfare. Policy innovation is a disruptive process. Other actors are likely to resist attempts to innovate policy. Hence, a policy entrepreneur invests political resources and thereby takes risks hoping to mitigate opposition against its policy innovation.

It is reasonable to assume that the Commission acted as policy entrepreneur and pushed for an extension of the EU's de facto and legal competences in international investment policy since the 1980s for functional as well as power consideration. On the one hand, the Commission should have felt the need for an extension of EU competences in this domain due to the growing role of investment disciplines in trade policy and negotiations (see chapter II). The non-adjustment of the CCP to the evolving realities of international trade should have threatened the effectiveness of this key policy. On the other hand, the Commission should have pushed for an extension of the EU's de facto and legal competences in order to increase its power and influence in European politics and foreign economic relations. As mentioned in the introduction, several Member State administrations indeed reproached the Commission in the aftermaths of the entry into force of the Lisbon Treaty that it had surreptitiously usurped competences in this domain.

While the assumption of the Commission acting as policy entrepreneur seems realistic, it is equally manifest that the EU's de facto and legal competences considerably varied across different policy-making fora despite the Commission's allegedly continuous efforts. Hence, other factors must have conditioned the effectiveness of Commission entrepreneurship. In theoretical terms, Commission entrepreneurship might be considered as a 'necessary' but not 'sufficient' condition. It is therefore important to identify the factors and strategies, which the Commission may have used to overcome resistance and to successfully push for an extension of the EU's de facto and legal competences. The supranational literature points to five factors/strategies conditioning the success of Commission entrepreneurship: 1) the Commission's agenda setting powers and ability to shape the EU-internal discourse; 2) the Commission's ability to exploit and/or to shape the standard agenda of international trade negotiations for its purposes; 3) the Commission's ability to push negotiations into international fora where it traditionally acts as the EU's single voice; 4) the Commission's ability to invoke fringe, implied and de facto competences to make the EU's participation in

international negotiations a legal or functional necessity; 5) the Commission's strategic use of judicial review through the European Court of Justice (ECJ) to assert legal competences. The following paragraphs discuss how the Commission may have used these factors and strategies to convince and/or to pressure the Member States to step up cooperation and delegation, which should ultimately have led to the emergence of the EU's international investment policy.

Agenda-setting powers in daily policy-making and Treaty revisions: Research on principal-agent relationships implies that the Commission as agent of the Member States should significantly influence the policy-making agenda in EU foreign economic and trade policy (see Hooghe and Kassim, 2008; Pollack, 2003; De Conceição-Heldt, 2009; Kerremans, 2004; Delreux and Kerremans, 2008). The Commission's ability to broadly delimit the EU-internal policy-making debate on trade policy should enable it to emphasise vis-à-vis the Member States the need to extend cooperation and EU competences toward new issues such as international investment policy. The Commission's agenda setting powers should derive from its 'first-mover' privilege and informational advantages.

The Commission's 'first-mover' privilege is enshrined in the European Treaties. The Commission holds the exclusive right to initiate trade measures and international negotiations with third countries. To that end, it submits draft negotiating mandates and autonomous draft measures to the Council of Ministers. The Council must then adopt, amend or reject these initiatives.¹⁵ Depending on the concerned issues areas, the Council adopts such measures and mandates by qualified majority or unanimity. In most cases – and in particular with regard to negotiating mandates – the Council does not comprehensively amend the Commission's draft texts. The Commission's right of initiative thus grants it considerable influence on the policy agenda. The Council of Ministers and nowadays the

¹⁵ Since the entry into force of the Lisbon Treaty, the European Parliament also has a say on many draft measures.

European Parliament must discuss and position themselves regarding the Commission's policy proposals. If the Commission proposes to regulate or to negotiate with third countries not only on classic trade policy issues but also on international investment disciplines, the Member States and the European Parliament have to evaluate this proposal.

The Commission's informational advantages and expertise should reinforce its influence on the policy agenda and ability to press for an extension of Member State cooperation and EU competence (Pollack, 2003; Kerremans, 2004). The Commission administers daily trade policy-making at the domestic and international level. Hence, it is generally more aware of developments in the international trade policy context than most Member State governments. Its evaluation of adequate policy responses to international developments should carry significant weight in EU-internal debates. What is more, the Commission also holds greater technical expertise of trade policy than most Member State governments. As administrator and negotiator of trade agreements, the Commission has specialised and experienced staff, which many Member States administrations lack. So if the Commission recommends extending Member State cooperation and empowering the EU to negotiate on international investment disciplines, the Member States are likely to take such advice seriously (Pollack 2003, 2006).

The Commission's agenda setting powers based on its 'first mover' privilege and its informational advantages should not be limited to daily policy-making. They should extend to intergovernmental conferences (IGCs) on Treaty revisions (Kassim and Dimitrakopoulos, 2007; Hassim and Menon, 2004). The Commission typically drafts a report on the functioning of the EU and advisable reforms prior to IGCs. The Commission's report serves as initial working basis for negotiations among the Member States on Treaty modifications. Since the Treaty of Lisbon, the EU uses the so-called Convention method¹⁶ to draft and to

¹⁶ The Convention Method seeks to provide Treaty revisions with greater democratic legitimacy. In a first step, democratically legitimised representatives of national parliaments

modify Treaties. The new method should have further strengthened the Commission's agenda setting powers in Treaty revisions for three reasons. First, the Commission still briefs the Convention on advisable Treaty reforms through lengthy interventions in dedicated Convention working groups. Second, the Commission now directly participates in deliberations on Treaty reforms alongside Member State governments, national parliaments and the European Parliament. It is thus not only an advisor but stakeholder. Third – and most importantly – the Commission's informational advantages should be significantly greater in the context of the Convention than in classic IGCs. Classic IGCs bring together national technocrats and experts of the policy fields under discussion. In the Convention, on the other hand, politicians with little technical expertise discuss about Treaty changes. National technocrats have only very limited and indirect access due to the intention of holding democratically legitimate and transparent discussions. Hence, the technocratic expertise of the Commission representatives briefing dedicated working groups on sector-specific reforms should carry even greater weight in this context.

Exploiting the evolving standard agenda of international trade negotiations: The Commission may moreover exploit the evolving standard agenda of international trade negotiations to promote a brusselisation of new issue areas and to extend its influence in foreign economic policy (Young, 2001, 2002; Elsig, 2002). The EU traditionally speaks with a single voice in trade negotiations in the GATT/WTO or on FTAs with third countries. The Member States have come to accept that it is generally in their best interest to empower the Commission to speak for them with a single voice in these fora so as to take advantage of the EU's collective bargaining power. Hence, the negotiating agenda practically determines the EU's de facto competences in these fora. The delimitation of legal competences is of little importance. So if third countries push for an extensive negotiating agenda covering issue

and governments as well as the European Institutions deliberate in public about necessary Treaty reforms. In a second step, Member State governments meet for a classic IGC to hammer out the last controversial details. The bulk of the Treaty should be the product of democratic deliberations rather than opaque diplomatic and technocratic bargaining.

areas beyond the EU's legal competences, the Member States should feel obliged to adjust the EU and Commission's de facto competences accordingly. Otherwise they may face high opportunity costs in the form of foregone bargaining power and thus suboptimal negotiating outcomes.

The Commission – as the EU's single voice in pre- and core negotiations in the GATT/WTO and FTA negotiations – may play a two-level game (Putnam, 1988) vis-à-vis third countries and the Member States in order to increase the EU's de facto competences in foreign economic policy. It may support or encourage third countries' demands for extensive negotiations. At the same time, it may underline vis-à-vis the Member States that it is unavoidable to give into such third country demands in order to not jeopardise negotiations. In other words, the Commission may use its role as interface between third countries and the Member States to exploit and to shape the standard agenda of international trade negotiations so as to manipulate Member State preferences and to increase support for Member State cooperation in foreign economic policy beyond the EU's legal competences under the CCP.

Strategic use of international negotiating fora: In a similar vein, the Commission may strategically use different international negotiating fora in order to advance the brusselisation of policy-making in certain policy domains and to extend its influence in foreign economic policy. The EU speaks with a single voice in some, nonetheless, not in all international trade policy fora. The Member States for instance continue speaking on their own behalf on trade-related issues beyond the EU's narrow legal competences in the OECD, the UNCTAD, the World Bank and alike (Woolcock, 2011; Reiter, 2005; Young, 2001, 2002). In these fora, the Commission only speaks on core trade policy issues, which indisputably come under exclusive Union competence. So if an international consensus emerges to negotiate about '*new trade policy issues*' in the OECD rather than the GATT/WTO, the Member States are likely to negotiate on their own behalf. If a similar consensus emerges that such negotiations

should take place in the GATT/WTO, the Member States are likely to cooperate and to empower the Commission to speak with a single voice.

Hence, the Commission may again play a two-level game (Putnam, 1988) to push negotiations into those international fora, where the Member States traditionally cooperate and empower the Commission to act as their single voice. It may use its EU-internal agenda setting powers (see above) to convince the Member States of the functional advantages of negotiating for instance in the GATT/WTO rather than the OECD. On the other hand, the Commission may build alliances with similarly minded governments of third countries in order to ensure that the negotiations in question are held in the desired forum. By pushing negotiations into particular international fora, the Commission may thereby consolidate its influence and advance the brusselisation of policy-making in policy areas beyond the Union's exclusive competences under the CCP.

Invoking fringe, implied and de facto competences: The Commission may, moreover, invoke fringe, implied and de facto competences to maintain/advance the brusselisation of policy-making and a consolidation of the EU's de facto competences in policy areas beyond the EU's exclusive legal competences under the CCP (Young, 2001, 2002; Elsig, 2002).

The term 'fringe competences' refers to competences, which have an undisputable yet indirect bearing on the regulation of the issue area in question. International investment regulation, for instance, does not only touch on trade policy but also on the regulation of capital movements. So while the EU may not hold sufficient legal competences under the CCP to regulate international investment flows, it may nonetheless have to participate in international negotiations and the adoption of autonomous measures regarding international investment flows due to its fringe competences under the capital movements chapter of the European Treaties. The term 'implied competences', on the other hand, refers to the legal reasoning that if the EU is for instance competent to regulate a policy issue within the Single

Market, it should hold the ‘implied’ external competence to equally regulate it in relations between the Single Market and third countries. The underlying logic is that the EU must be competent in such situations to ensure regulatory coherence and effectiveness. If the Member States remained competent to unilaterally regulate the same policy issue in relation to third countries, it would potentially undermine the EU’s internal rules. The ECJ formulated the concept of implied competences in its famous ‘*ERTA ruling*’ of 1971 (Case 22/70) (Kuijper, 2007, p. 1578; Leal-Arcas, 2006, p. 330; Nawparwar, 2009, p. 17). The term ‘de facto competences’ refers to the informal brusselisation of policy-makers in policy domains beyond the EU’s legal competences. Unlike fringe or implied competences, ‘de facto competences’ do not create a legal necessity to cooperate. The Commission may, however, point to functionalist pressures to deal with a policy issue at the EU-level, if the EU has been dealing with it in the past in order to ensure policy coherence. Invoking ‘de facto competences’ should have been a particularly important strategy in debates on the extension of the CCP to investment regulation during IGC and ECJ proceedings.

The discussion on invoking fringe, implied or de facto competences to promote Member State cooperation and delegation has an important implication for integration dynamics. The Commission should find it easy to push for cooperation and delegation in policy domains, which are closely tied or adjacent to policy domains coming under Union competence. The Commission should, however, find it difficult to push for cooperation and delegation in policy domains, which are by and large disconnected from existing European policies and competences. Hence, policy substance should affect integration dynamics.

As Young (2001, 2002), Elsig (2002) and others observe, the Commission regularly invokes fringe and implied competences to force the Member States to cooperate and to accept the EU’s involvement in policy areas beyond the EU’s undisputed legal competences. The existence of such fringe and implied competences makes it impossible for the Member States for instance to individually enter into international agreements or to adopt autonomous

measures. Even if the fringe or implied competence in question is very narrow but yet of central importance to the overall agreement or measure, the Member States practically need to get the Commission and the EU fully involved in the policy-making process. Hence, a brusselisation of policy-making takes place.

It should be mentioned that the Commission's alleged use of fringe, implied and de facto competences to extend the EU's de facto competences resembles a lot to the neofunctional concept of 'spill-overs' and the historical institutionalist concept of 'unintended institutional effects' (Haas, 1958; Lindberg, 1963; Schmitter 2009; Pierson, 2004; Pierson and Skocpol, 2002). The concept of 'spill-overs' stipulates that integration of one policy is likely to spill over into adjacent policies due to functional interdependencies between policy domains. The concept of 'unintended institutional effects', on the other hand, stipulates that institutions have various – often unintended and unknown – effects on society and other institutions. One may therefore argue that the Commission's alleged use of fringe, implied and de facto competences echoes the logic of neofunctionalism and historical institutionalism. It is, however, critical to underline that the focus lies on agency here. Put differently, while neofunctionalism and historical institutionalism largely ignore the role of actors in bringing to bear fringe, implied or de facto competences so as to advance integration, the emphasis lies here on how the Commission deliberately exploited such dynamics to advance its own agenda and to force the Member States into cooperation on issue areas beyond the EU's exclusive competence.

Strategic use of judicial review: The Commission may use its right of legal recourse in front of the ECJ to intensify or to bring about Member State cooperation in new policy areas. The Commission is known to use two strategies of legal recourse. First, it has been demonstrated that the Commission uses legal recourse in order to manipulate the balance of preferences in the Council of Ministers to its favour thereby facilitating the adoption of controversial measures (Schmidt, 1997, 1998; Woll, 2006). Schmidt for instance argues that

the Commission's success to liberalise certain economic sectors despite considerable Member State opposition reflects the Commission's strategic use of legal recourse. The Commission sued key governments opposing its liberalisation proposals over protectionist national legislation. Critical ECJ judgements then made these governments reconsider their positions in order to either take advantage of the newly emerging market structures or to avoid even more far-reaching liberalisation measures.

The Commission may also use legal recourse to have the ECJ recognise disputed Union competences despite Member State opposition. This kind of legal recourse regularly unfolds out of controversies between the Member States and the Commission over the competence basis and ratification modalities for international agreements with third countries (see for instance ECJ Opinions 1/75, 2/92, 1/94). While the Commission traditionally advances extensive teleological interpretations of the EU's legal competences and claims exclusive competence to ratify an agreement, the Member States typically advance narrow interpretations and call for mixed ratification so as to protect their competences against European encroachment. The Commission may then ask the ECJ to recognise its extensive interpretation of Union competences. The ECJ often agrees with the Commission – thereby forcing the Member States into cooperation and delegation. In other cases, the ECJ disagrees but identifies relevant fringe or limited implied competences, which nevertheless strengthen the EU's role in the policy domain under discussion. Legal recourse thus enables the Commission in many instances to force the Member States into cooperation by extending the EU's undisputed legal competences.

Hypothesis on the conditions for successful Commission entrepreneurship: The preceding section developed the supranational argument that the emergence of the EU's international investment policy is in essence the doing of the Commission. The Commission may have acted as policy entrepreneur and pushed for the gradual extension of the EU's de facto and legal competences in international investment regulation. The Commission's

alleged success in consolidating the EU's role in international investment policy, however, markedly varied across international negotiations and intergovernmental conferences since the 1980s. The observation implies that the success of the Commission's policy entrepreneurship may have hinged on other factors. The section therefore discussed five factors and strategies, which the Commission may have used to increase the effectiveness of its policy entrepreneurship: its agenda setting powers; its ability to exploit the evolving trade agenda; its strategic use of international negotiating fora; its use of fringe, implied and de facto competences; and its strategic recourse to legal review. The varying availability of these strategies and factors should account for the varying success of the Commission's policy entrepreneurship during the last 30 years.

Hypothesis H₁: The Commission acted as policy entrepreneur pursuing the creation of a EU international investment policy since the 1980s. The Commission built support and/or pressured the Member States into cooperation in international investment policy by exploiting its agenda-setting powers, the evolving trade agenda, by pushing investment negotiations into certain international fora, by invoking fringe and implied competences and using legal recourse.

3.3.2 A liberal intergovernmental explanation – Business pressure for a EU international investment policy

As discussed above, intergovernmentalists meet supranational explanations of European Integration with scepticism. Intergovernmentalists assume that the Member States remain in full control of the integration process. Integration should only occur, if it benefits and increases the 'capabilities' of states at the domestic and/or the international level. Hence, government preferences are ultimately the key variable to account for integration. Scholars of intergovernmentalism primarily focus on domestic business lobbying and geopolitical considerations to explain the Member State preferences regarding cooperation and

integration. In a second step, they draw on bargaining theory and principal-agent theory to explain the Member States' decision to cooperate and to integrate policy-making as well as the consequent institutionalisation of such agreements (Moravcsik, 1991, 1993, 1998; Rosamond, 2000; Börzel, 2013).

Theorising business preferences: Many policy-makers and commentators indeed believe that the EU's new international investment policy is ultimately the product of business lobbying vis-à-vis Member State governments (see inter alia Bungenberg, 2008; BusinessEurope, 2010; European Commission, 1995a, p. 42). Taking into consideration the general prominence of business-centred explanations in research on EU foreign economic policy, the assumption is hardly surprising (Baccini and Dür, 2012; M. Baldwin, 2006; R. Baldwin, 2006; De Bièvre and Jappe, 2010; Dür, 2007; Manger, 2009; Young, 2001, 2002; Woolcock and Bayne, 2007). Business-centred explanations of EU foreign economic policy typically draw on domestic theories of international political economy (IPE) to explain the formation of business preferences. Domestic theories build on the assumption that business lobbies governments over desired foreign economic policies to maximise profits. Governments should be receptive to business demands so as to maximise national capabilities, welfare and their chances for re-election. The bulk of research in this domain seeks to explain business preferences on trade policy. It focuses on factor endowments and factor mobility in order to explain the formation of domestic preferences. Owners of scarce production factors should hold protectionist preferences so as to keep prices for their factors high, whereas owners of abundant production factors should hold liberal preferences so as to bring prices for their factors up. In advanced economies, factors are, moreover, by and large immobile across economic sectors or firms. Hence, domestic preferences should form at the sector or even firm level (Frieden, 1991; Hiscox, 2002; Ravenhill, 2008, pp. 95–132; Rogowski, 1989).

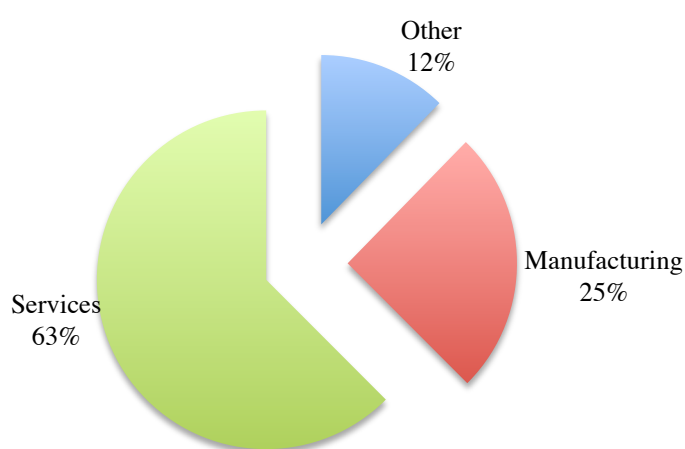
Domestic theories can only be applied to the research topic of this study with two qualifications in mind. First, the study investigates the brusselisation of international investment policy-making and not policy substance per se. The models discussed above, however, predict sectorial preferences on the basis of how policy substance might affect the welfare of domestic interest groups. The models are therefore only applicable to the extent that a brusselisation of international investment policy-making affects policy substance and the welfare of national business communities. Second, the study focuses on international investment policy and not international trade policy. Whereas trade policy is mostly about market access and thus of distributive nature, international investment policy mostly focuses on regulatory issues and only to a small extent on market access. Hence, models based on the abundance/scarcity of production factors and related price/market mechanisms only partly function in this context.

Domestic theories, nevertheless, offer helpful guidance on the question why European business might have pushed for a brusselisation of international investment policy-making. First of all, domestic theories suggest that interest groups hold foreign economic policy preferences, if foreign economic policy significantly affects their welfare. Hence, European firms, which are affected in their business operations by international investment policy, should have held preferences and lobbied policy-makers. Generally speaking, international investment policy seeks to lower investment risks, to unlock new investment opportunities abroad and to increase profits of national investors. Hence, firms with a high propensity to outward investment should have been affected, held preferences and lobbied policy-makers on international investment policy.

It follows from this analysis that European service providers should have been most actively lobbying on international investment policy. In 2011, European service providers accounted for 63% and manufacturing companies for 25% of European outward FDI stocks (see Graph 3.3). More specifically, the three most FDI-intensive economic sectors were financial and

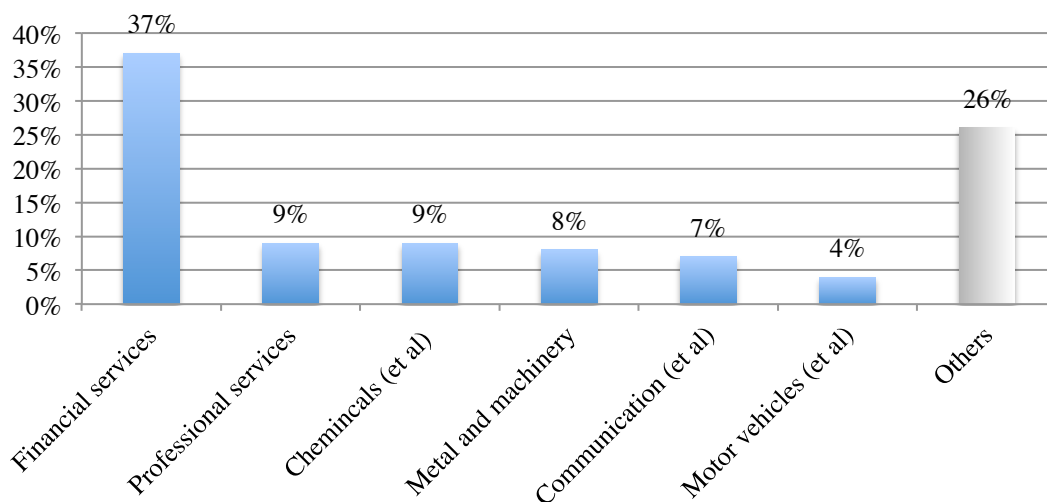
insurance services (37%), professional services (9%), and pharmaceutical and chemical producers (9%) (see Graph 3.4) (Eurostat, 2014). European investors were predominantly domiciled in five Member States – Great Britain, Germany, France, the Netherlands and Belgium. These Member States accounted for 59% of European outward investment stocks in 2013 (see Graph 3.5) (UNCTAD, 2014b, p. 218). Their national business federations should have been the most active in debates on international investment policy.

Graph 3.1 EU FDI outward stocks by grand sectors in 2011



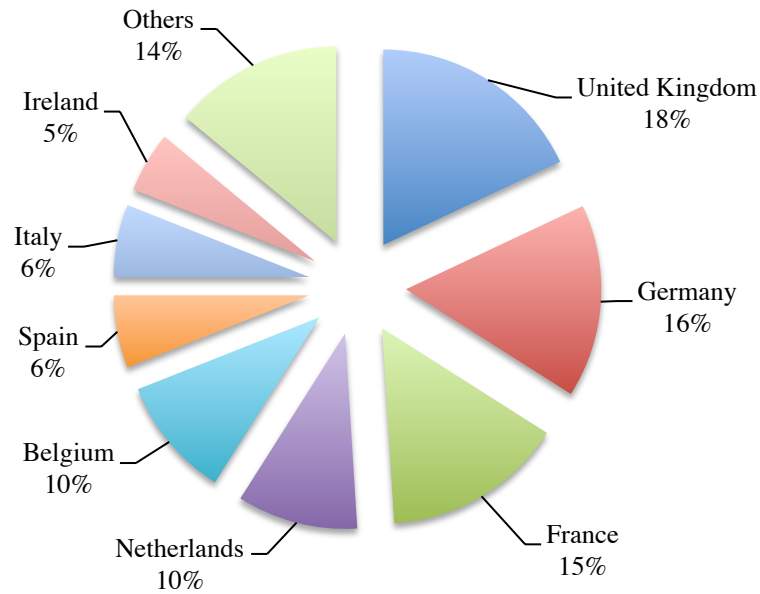
Source: Eurostat, 2014.

Graph 3.2 EU outward FDI stocks by sector in 2011



Source: Eurostat, 2014.

Graph 3.3 Member States' outward FDI stocks as percentage of EU total in 2013



Source: UNCTAD, 2014a, p.218.

Domestic theories, moreover, imply that business should have taken a strong interest in investment liberalisation and a moderate interest in the regulation of post-establishment treatment and investment protection. Investment liberalisation has immediate welfare impacts. The liberalisation of protected economic sectors in third countries through ambitious IIAs should create new business and profit opportunities abroad for European companies. The potentially welfare-enhancing effects of investment liberalisation should motivate European firms to lobby policy-makers over investment liberalisation. Provisions regarding post-establishment treatment and protection of investments abroad, on the other hand, should promise distant, long-term and uncertain benefits to European firms. As explained in detail in chapter II, these provisions seek to ensure a minimum level of treatment and protection for established investors in host countries. While these provisions may acquire crucial importance for international investors once they face discrimination and expropriation in host countries, investors often discount for these risks in their initial

investment decisions. In other words, most investors tend to take their investment decisions based on the assumption that they are unlikely to face discrimination or expropriation in the chosen host countries. Otherwise they would not choose the host country. Hence, they should consider post-establishment treatment and protection provisions as comparatively little welfare-enhancing (Yackee, 2009, 2010). The phenomena of Treaty shopping and invoking the so-called MFN clause for investment protection purposes may further amplify this effect. Both phenomena enable businesses to internationally re-structure their investments in a way that allows them to take advantage of BITs concluded among two third countries (Schill, 2009). Hence, the pressure to lobby Member State or European policy-makers for ambitious provisions may further diminish. Econometric research partly supports the assumption that post-establishment and protection provisions have little impact on business but also suggests that that some sectorial variation may exist. Many studies find limited overall effects of classic BITs containing post-establishment treatment and protection provisions on the direction and volume of international investment flows. Some studies, however, stipulate that such BITs may have a stronger effect on investment projects in politically sensitive sectors and with high sunk costs (e.g. energy, commodities, infrastructure, etc.) (Sauvant and Sachs, 2009; Hallward-Diremeier, 2013; Neumeyer and Spess, 2005; Busse et al., 2010; Egger and Merlo, 2007; Colen et al., 2014). According to domestic theories, the arguably more limited welfare impact of post-establishment treatment and protection provisions should have translated into only moderate business interest and lobbying in this domain.

The focus on welfare effects enshrined in domestic theories, furthermore, stipulates that business lobbying should primarily focus on influencing policy substance and not policy process. This study, however, seeks to explain procedural changes in the form of a brusselisation of international investment policy-making. Hence, it is necessary to evaluate how the brusselisation may have affected policy substance and thereby welfare of European investors? The integration of international investment policy-making is generally thought to

affect policy substance in two regards. First, the integration of international investment policy-making should enable the EU to conclude state-of-the-art trade and investment agreements with third countries. During the 1990s, a new type of IIA emerged, which contains not only traditional post-establishment and protection provisions but also investment liberalisation commitments. FTAs came to include similarly comprehensive investment chapters. Before the entry into force of the Lisbon Treaty (2009), the legal competences necessary for the conclusion of such state-of-the-art IIAs and FTAs were scattered between the EU and the Member States. Hence, neither the Member States nor the EU could arguably act individually in this domain, which should have complicated policy-making and eroded Europe's international competitiveness (Meunier, 2013; Dimopoulos 2011). Second, the integration of international investment policy-making should have increased Europe's bargaining power in the global investment regime thereby ensuring the conclusion of competitive investment agreements with third countries. Since the 1990s, the global political economy has considerably evolved. New economic powers such as China, Brazil, India or the Gulf countries have emerged and compete nowadays with OECD economies and firms for capital and investment opportunities in third countries. In this context of increased global competition, speaking with a single voice should allow Europe to retain its dominant role in the global investment landscape and to reach for ambitious trade and investment agreements with third countries.

In summary, the preceding analysis suggests that in particular the business associations of Great Britain, Germany, France, the Netherlands and Belgium should have lobbied for Member State cooperation in international investment policy-making. In terms of sectors, financial and insurance service providers, chemical and pharmaceutical companies should have been particularly active. Business lobbying should have pushed for Member State cooperation so as to get access to ambitious, state-of-the-art trade and investment agreements with third countries. Business lobbying should have primarily focused on ensuring ambitious

investment liberalisation commitments rather than shaping approaches on post-establishment treatment and investment protection.

Theorising Member State preferences: Liberal intergovernmentalism stipulates that the Member States – and in particular the British, German, French, Dutch and Belgian governments – should have given into business demands for more cooperation to the extent that cooperation indeed promised to increase their domestic and/or international capabilities. After all, liberal intergovernmentalism does not consider governments as mere executors of business demands. Integration is thought to be a state-driven and state-serving process (Börzel, 2013, pp. 504–506; Moravcsik and Schimmelfennig, 2009; Rosamond, 2000, pp. 135–139). The Member States’ evaluation of the costs and benefits of cooperation – and thus of following business demands for cooperation – should have hinged on 1) the policy substance and 2) the policy-making context of potential cooperation.

First, the Member States’ willingness to cooperate and to give into alleged business demands should have hinged on the policy substance under consideration for cooperation. It seems reasonable to assume that the Member States were generally more inclined to cooperate on investment liberalisation than on post-establishment treatment and protection provisions. On the one hand, cooperation on investment liberalisation should have had a greater capability-maximising effect in the form of greater international bargaining power than cooperation on post-establishment treatment and protection provisions. Whereas bargaining power is crucial for outcomes of negotiations on investment liberalisation, it is arguably of limited importance in negotiations on in comparison fairly standardised post-establishment and protection provisions. On the other hand, cooperation on post-establishment treatment and protection provisions should have imposed higher costs in the form of sovereignty losses on the Member States than cooperation on investment liberalisation. Cooperation on post-establishment treatment and protection should have directly interfered with and challenged the continuation of Member States’ BIT programs. What is more, investment protection

partly annuls state immunity under international law and significantly extends state liability (Dimopoulos, 2011; Dolzer and Schreuer, 2012; Kleinheisterkamp, 2014; Van Aaken, 2010). As investment protection provisions significantly circumvent sovereignty, the Member States might have been more hesitant to cooperate and to delegate policy-making on this matter.

Second, the Member States' willingness to give into business demands for cooperation and delegation should have hinged on the policy-making context and fora. Cooperation should have promised greater benefits in some than in other policy-making fora. The Member States might have felt compelled to cooperate and to speak with a single voice, for instance, in major GATT/WTO negotiations facing hundreds of third countries or in negotiations with ambivalent superpowers. Cooperation should have seemed like a reasonable strategy to increase bargaining power. In other fora such as in bilateral talks or in "friendlier" negotiating contexts such as in the OECD, the Member States may have seen less need to cooperate. On the other hand, the policy-making context and forum determine the lead department within government administrations. Depending on the policy-making forum – GATT/WTO, ECT, OECD, FTAs, IGCs or the Convention on the Future of Europe – investment policy officials, trade policy officials, diplomats or politicians should have been in the lead and shaped government preferences. These different groups of policy-makers will have held diverging preferences on cooperation in international investment policy-making. Investment policy officials should have been rather hesitant to cooperate and to delegate policy tasks to the Commission. Trade policy officials, diplomats and politicians, on the other hand, should have held a more welcoming attitude toward cooperation in international investment policy-making. Sociological and rational considerations inform this assumption. Whereas diplomats, trade policy officials and politicians have cooperated with and within the European Institution for many decades, specialised investment policy officials hardly ever cooperated with their counterparts from other Member States or the European Institutions prior to the entry into force of the Lisbon Treaty. This lack of experience of

investment policy officials should have translated into hesitation toward cooperation and delegation. Furthermore, investment policy officials should have been critical toward cooperation and delegation due to the likely implications for their careers and competences. Investment policy officials should have approached cooperation from a ‘turf war’ perspective. As investment regulation was their sole area of expertise and competence, they should have worried about the long-term consequences of cooperation and delegation for their jobs. Diplomats, trade policy officials or politicians, on the other hand, deal with various policy fields and should therefore have been less opposed to cooperation and delegation. Hence, cooperation and delegation of international investment policy-making should have been more likely to occur in policy-making fora, where trade policy officials, diplomats or politicians were in the lead.

Theorising the institutionalisation of cooperation: In function of business and government preferences, cooperation in international investment policy should have occurred on a temporary basis. Liberal intergovernmentalism, however, also raises the second-order question of why and how Member States may institutionalise temporary cooperation. It draws on rational institutionalism and principal-agent theory to predict the institutionalisation of new cooperative arrangements (Moravcsik, 1998; Moravcsik and Schimmelfennig, 2009; Pollack, 2003; Hawkins et al., 2006). Principal-agent theory suggests that states institutionalise cooperation and delegate policy-making to international agents such as the Commission in order to 1) to draw on technical expertise, 2) to credibly commit to cooperation (monitoring, enforcement, interpretation of incomplete contracts) and 3) to render policy-making more effective and efficient.

It is implausible that the Member States decided to institutionalise and to delegate international investment policy-making to the EU in the Lisbon Treaty so as to draw on the technical expertise of the European Institutions. Many Member State governments ran extensive BIT programs since the 1960s and held by far greater expertise in this policy

domain than the European Institutions. It seems more reasonable to assume that the Member States ultimately institutionalised cooperation and delegated international investment policy-making to the EU in the Lisbon Treaty for credible commitment and efficiency purposes. As discussed in chapter II, international investment and IIAs have gained ever greater economic and regulatory importance since the 1990s. Investment flows increasingly substitute and complement traditional forms of trade. Hence, Member States' international investment policies and BIT programs may have become a source of competitive distortions in the Single Market's external relations. As this runs counter the spirit of the European Treaties, the Member States may have decided to institutionalise cooperation and to delegate international investment policy-making to the EU so as to ensure a level playing field regarding international investment policy. Finally and inline with the alleged business interest in the creation of a EU international investment policy, the Member States may have felt the need to delegate international investment policy-making to the EU/Commission so as to ensure swift and efficient policy-making in this new key domain of global economic governance. Principal-agent theory indeed suggest that delegation for credible commitment and efficiency purposes is the most likely to entail comprehensive agency discretion – i.e. policy autonomy of the Commission – as can be observed in this policy domain.

Hypothesis on business- and state-driven integration: The preceding section developed the argument that European business lobbied for the creation of a EU international investment policy vis-à-vis their Member State governments to ensure access to ambitious, state-of-the-art IIAs. The Member States should have given into business demands in case cooperation in the policy-making forum under discussion was likely to increase their domestic and/or international capabilities. Due to the arguably greater welfare impacts and less sensitive nature of investment liberalisation commitments, business and the member States should have been more interested and willing to cooperate on investment liberalisation than in post-establishment treatment and protection provisions. The ultimate decision of the Member States to permanently delegate all aspects of international investment policy-

making in the Lisbon Treaty should reflect the growing need to ensure effective policy-making and a level playing field in international investment policy among Member State economies.

Hypothesis H₂: European business lobbied Member State governments for a communitarisation of international investment policy-making so as to ensure access to ambitious, state-of-the-art international investment and trade agreements. The Member States gave into such demands so as to increase their domestic and international capabilities ultimately leading to the permanent delegation of international investment policy-making to the EU.

3.4 Methodological strategy

The study draws on qualitative as well as quantitative methods in order to test the analytical framework and two competing ex ante hypotheses. Qualitative methods are suitable for projects which examine a few cases which have a small number of variables but complex and diverse dimensions of variations. Quantitative methods, on the other hand, are appropriate for projects which examine a high number of cases with many variables but few dimensions of variations. While quantitative methods allow for a ‘shallow’ large-scale analysis of data, qualitative methods permit conducting in-depth analysis in a relatively limited field of research (King et al., 1994, pp. 3–6). Both methodological approaches thus have strengths and weaknesses. Methodological triangulation seeks to combine the strengths of both approaches so as to overcome their respective weaknesses. The purpose of methodological triangulation is to increase leverage i.e. the validity of research findings.

The research project focuses on a single case – the emergence of the EU’s international investment policy – which a priori favours the use of qualitative methods. The main qualitative method used in the project is analytical process tracing. This goes beyond mere

historiography and the description of a series of events in the past. Instead, it approaches case studies with pre-defined theoretical assumptions about variables and causalities. It recounts in detail the examined periods through an analytical lens and summarises the data accordingly. Analytical process tracing enables the verification of hypotheses as well as the identification of unexpected but potentially important alternative variables, causalities and explanations (George and Bennett, 2005, p. 211). The key independent variables of the project are Commission entrepreneurship as well as business and Member State preferences. The dependent variable are the EU's de facto and legal competences in international investment policy. To gather the necessary data, the research project draws on academic literature, policy documents, archival research, extensive press research, 41 semi-structured anonymised research interviews, an internship at the Investment Policy Unit of the Directorate General for Trade at the European Commission and on countless informal discussions with policy-makers and academics.

The project examines several in-case studies. In-case studies do not follow the logic and method of comparative case studies. They seek to shed some light on the causalities at work in different fora and points of time within the overarching and long-term process of the emergence of the EU's new international investment policy (George and Bennett, 2005, pp. 178–179). In accordance with this approach and the research question, the project examines EU-internal debates on legal competences as well as international investment negotiations with EU involvement. The joint analysis of these policy-making fora should produce a comprehensive picture of the emergence of the EU's international investment policy. Two criteria must guide the selection of these in-case studies. First, the in-case studies must be representative. In other words, an in-case study should not be a known exception to general policy patterns. The representativeness is a prerequisite so as to prevent biased findings. Second, the in-case studies should have had bearing on the EU's legal or de facto competences in international investment policy. In other words, the in-case studies should encompass a period of variation in the EU's competences so as to observe underlying

causalities. In accordance with these criteria, the project examines all intergovernmental conferences and relevant ECJ proceedings since 1980. What is more, it examines all multilateral negotiations on investment in which the EU took part – namely the GATS and TRIMs talks within the Uruguay Round, the negotiations on the Energy Charter Treaty, Multilateral Agreement on Investment in the OECD and the Singapore Issues. Finally, the study analyses how investment disciplines became a standard agenda item of FTAs between the EU and third countries. The analysis focuses in particular on the EU-Mexico and EU-Chile FTA negotiations. While the inclusion of comprehensive, consolidated investment disciplines into the EU-Mexico FTA unexpectedly failed, the EU-Chile FTA which quickly followed does comprise such investment disciplines.

The thesis, furthermore, draws on quantitative methods in order to cross-validate the findings of the in-case studies. The cross-validation proceeds indirectly and builds on the following reasoning. The analytical framework proposed that business promoted the communitarisation of international investment policy in order to get access to more competitive and state-of-the-art IIAs. The underlying assumption of this hypothesis is that international regulatory and economic competition manifests itself in IIAs and promoted the communitarisation of international investment policy-making. If this assumption is correct, international regulatory competition should not only have shaped the EU's de facto and legal competences in international investment policy. It should also have shaped Member States' BIT programmes. The last substantive chapter of the study thus develops hypotheses about how international regulatory competition might have affected the content of Member States' IIAs. It consequently examines 475 IIAs concluded by the Member States and major competitor countries in order to verify whether these IIAs bear the traces of international regulatory competition.

Finally, three important caveats to this research design need mention. First, testing the hypotheses is challenging due to a problem of observational equivalence. Business,

government and Commission preferences might at times be equivalent and interdependent in an examined policy-making instance. While this problem is certainly not unique or even rare in research on European politics, it may render it difficult to identify the actual independent variables behind policy outcomes. In order to prevent erroneous conclusions, it is necessary to carefully evaluate the relationship between these actor categories and the direction of influence. Second, the project faces a potential cognitive bias. The Commission is a much more cohesive actor than the Member States or business. Hence, researchers risk overestimating the causal importance of the Commission, while underestimating the importance of Member State or business preferences and activities. The best remedy is the conscious handling of the problem. Third, the quantitative cross-validation of the hypotheses – at best – sheds further light on the proposition that business preferences promoted the communitarisation of international investment policy making. It does not allow for insights into the validity of the other propositions.

Chapter IV – The EU in investment-related negotiations during the Uruguay Round

The EU first acquired de facto competences to negotiate on international investment disciplines during the Uruguay Round. The Member States decided to temporarily cooperate and to empower the Commission to speak on their behalf in investment-related negotiations. This chapter analyses and seeks to explain with reference to the analytical framework and hypotheses the initial decision of the Member States to cooperate and to empower the Commission as well as the EU's subsequent use of its new de facto competences in investment-related negotiations.

The findings of the chapter primarily lend support to the supranational hypothesis (H₁) and in part invalidate the intergovernmental hypothesis (H₂). The Commission – after an initial learning phase during the pre-negotiations of the Uruguay Round – started acting as policy entrepreneur calling on European business and the Member States to endorse the US proposal to negotiate on the so-called '*new trade issues*' including investment and services. To that end, the Commission primarily used its agenda setting powers in EU-internal debates, its credibility as technical expert and also tentatively pointed to the evolving trade agenda requiring an adjustment of Member State cooperation. The Commission acted as policy entrepreneur at this stage mostly for functional considerations. It came to the conclusion that the multilateral liberalisation of investment and services complemented its Single Market Program, that such negotiations allowed for new trade-offs between Member State preferences and that the EU was competitive in these domains and thus stood to significantly benefit from a multilateral framework. European business was, however, little receptive to the Commission's campaigning. Most investors and service suppliers did not yet

apprehend the meaning of multilateral investment and services negotiations, their potential effects on their operations and did not have the necessary lobbying structures to develop an informed position and to influence policy-making. Several Member States after initial reluctance started supporting the idea to negotiate and to cooperate on investment and services in the Uruguay Round despite a manifest lack of business demands. The change of mind among many Member States reflected the Commission's pedagogical campaigning and the realisation that their economies would significantly benefit from a multilateral liberalisation of investment and services trade. The observations thus lend strong support to the supranational hypothesis H_1 but challenge the liberal intergovernmental hypothesis H_2 . The Member States consequently agreed to cooperate and to empower the Commission so as to speak with a single voice and to wield greater barraging power vis-à-vis more than 100 third countries. They, nevertheless, put on record that their decision to cooperate and delegate was of temporary nature and that they did not cede powers to the EU. The analysis of how the EU actually used its new de facto competences in investment-related negotiations in the TRIMs¹⁷ and GATS¹⁸ negotiating groups draws a similar picture. The Commission sought to proactively advance in particular the GATS negotiations supported by many Member States but hardly by business.

4.1 The way toward Punta Del Este

This section first provides an overview of the pre-negotiations and the agenda-setting phase of the Uruguay Round until the Council decision to cooperate and to delegate negotiating on investment-related provisions to the Commission (1980-1986). The section then analyses the observations with reference to the analytical framework and hypotheses.

¹⁷ Trade-related investment measures form a subcategory of post-establishment treatment measures applied to foreign investors and their produce. TRIMs are, for instance, local content requirements or export performance requirements. Local content requirements force investors to use a certain quantity of local input products so as to stimulate domestic demand and growth. Export performance requirements oblige foreign investors to export a certain amount of their produce abroad in order to strengthen the external trade balance of their host country. TRIMs artificially inflate or reduce the volume of countries' trade flows. What is more, they come with often substantial costs for the investors concerned, who are limited in their managerial decision-making.

¹⁸

4.1.1 The pre-negotiations on the new multilateral trade round

Discussions on a new multilateral trade round under the General Agreement on Tariffs and Trade (GATT) started in the early 1980s. In June 1981, the so-called ‘Consultative Group of Eighteen’¹⁹ first discussed how to strengthen and extend the GATT regime to new issue areas beyond the traditional trade in goods. As these questions ultimately required political answers, the GATT Council decided to hold a ministerial meeting in November 1982 (Glick, 1984, pp. 151–152; Paemen and Bensch, 1995, p. 31). In November 1981, the GATT Secretariat circulated a draft ministerial declaration (GATT, 1981) in preparation of the upcoming ministerial meeting. The draft declaration proposed holding a new multilateral trade round, which should tackle leftover issues from the Tokyo Round (1973-1979) and extend the GATT regime to the regulation of international investment and trade in services (Croome, 1995, p. 12; Paemen and Bensch, 1995, pp. 31–32; Schott, 1994, pp. 4–5). Many developing and developed countries were, however, sceptical of these plans. When the ministers met in Geneva in November 1982, they agreed on a more cautious approach. They merely decided to engage in a two-year reflection period on the future of the GATT regime and, notably, its extension to ‘new trade issues’ like trade in services (European Commission, 1982; Paemen and Bensch, 1995, pp. 32–37; Schott, 1994, p. 5; Stewart, 1993, p. 2062).

Behind the scenes, the USA had been the initiator and driver of these debates. It wanted a new multilateral round in order to advance the liberalisation of agricultural trade, to cut industrial tariffs and to establish full-fledged multilateral frameworks for international investment flows and services trade under the GATT regime. The draft declaration of the GATT Secretariat was thus widely seen as a hidden attempt by the US to set the GATT

¹⁹ The ‘Consultative Group of Eighteen’ reassembled the Geneva-based representatives of the USA, the EU Member States, Canada, Japan and major developing countries. While it was an informal grouping, it had considerable influence on the work of the GATT.

agenda (European Commission, 1982, p. 12; Paemen and Bensch, 1995, p. 33; Interview, Brussels, 24 September 2013). The outcome of the ministerial meeting of 1982 caused considerable frustration and disappointment in Washington (Glick, 1984, p. 161; Paemen and Bensch, 1995, p. 32). The USA underscored its determination to launch a new round by resorting to a twofold strategy. First, it engaged in informative debates with third countries in order to highlight the potential benefits of a new round and an extension of the GATT regime to trade in services and investment regulation. Most governments had never examined the possibility of multilaterally liberalising services trade and investment. They did not know whether, and to what degree, such liberalisation efforts would benefit or harm their economies (Croome, 1995, pp. 20–27; Stewart, 1993, p. 2347). Second, the USA announced that if the GATT parties did not agree to hold a new extensive round, the USA would pursue its foreign economic policy objectives outside of the GATT regime. Non-cooperative countries would therefore get locked out of the policy-making process and the US economy in these booming domains of the world economy. To emphasise its threat, the USA presented its first model bilateral investment treaty (BIT) in 1982 (Wayne, 1984). It also started negotiations on comprehensive free trade agreements (FTAs) covering, for the first time, services and investment disciplines with Israel and Canada (Auerbach, 1985) and announced the establishment of a comprehensive ‘mini GATT’ with interested parties if need be (Stewart, 1993, p. 2355; Tyler, 1985).

US pressure for a new comprehensive multilateral trade round succeeded in the end. By September 1985, the USA had build sufficient support among developed and developing countries to launch the formal preparations for a new multilateral trade round. Only a few developing countries like Brazil and India were still strongly opposed, but they could not stop the course of events (Croome, 1995, pp. 20–27; Stewart, 1993, pp. 2357–2358). In the following months, a preparatory committee was commissioned to determine the agenda of the upcoming round. This task proved to be challenging. The USA insisted on including services and investment on the agenda, while the Group of Ten – led by India and Brazil –

argued that these issues did not fall within GATT competence. Debates on the guidelines for agriculture were, moreover, complicated due to the clashes between the EU and major agricultural producers (Stewart, 1993, p. 2356). The so-called Swiss-Colombian draft agenda, which foresaw negotiations on trade in services and ‘trade-related investment measures’, gained the greatest albeit not unanimous support in the preparatory committee. In the end, the preparatory committee failed to define a negotiating agenda (Croome, 1995, pp. 28–29).

The ministers reconvened in the Uruguayan city of Punta Del Este in September 1986 in order to formally launch the new multilateral trade round. The first task of the ministers was to finally pin down the negotiating agenda of the new round. The USA continued its efforts to include services and investment on the negotiating agenda. In the weeks before the ministerial meeting, US diplomats spread the rumour that the USA would still walk away from the negotiating table in the event that services and investment were not part of the new round (Croome, 1995, p. 30). US President Ronald Reagan, moreover, sought to personally convince the leaders of several opposing countries in telephone calls and underlined in a radio address on the eve of the ministerial meeting that a new round had to liberalise trade in services and investment so as to take account of the changing realities of the modern economy (Paemen and Bensch, 1995, p. 51; Reagan, 1986). At the end of the ministerial meeting, a hard-fought compromise emerged. The compromise agenda provided for services negotiations, which, however, would take place as parallel, independent negotiations outside the GATT regime in order to prevent issue linkages. The agenda also foresaw negotiations on trade-related investment measures, which – as result of a hard-fought compromise – provided for much more limited negotiations than the USA had hoped. The USA had entered the debate with a maximalist position demanding the establishment of a full-fledged multilateral investment framework within the GATT (Croome, 1995, p. 138; Guisinger, 1987, pp. 222–223; Woolcock, 1990, p. 25). The reference to ‘TRIMs’ did not preserve much of this US objective. The ministers adopted the agenda in the form of a ministerial

declaration on 20 September 1986. The core negotiations of the Uruguay Round started in early 1987.

4.1.2 The EU in the pre-negotiations

What role did the EU play in the pre-negotiations? And how do these observations reflect on the theoretical hypotheses formulated in the analytical framework?

Sprouting Commission entrepreneurship: The Commission was initially hesitant regarding the plan to hold a new multilateral trade round and to extend the GATT regime to services and investment. As the Commission's lead negotiator recalled, the Commission at first perceived the proposal primarily as a US attempt to dismantle the Common Agricultural Policy (CAP), which would hardly entail adequate compensation in the form of enhanced industrial market access for European exporters. Many leading Commission officials – even within the Directorate General for Trade – moreover struggled with the idea that the liberalisation of services trade and investment could qualify as trade policy and thus be dealt with within the GATT regime. The question reportedly triggered turf wars within the Commission. Some Commission officials also challenged the assumption that the international liberalisation of services trade and investment would be beneficial to the European economy (Interview, Brussels, 24 September 2013). The Commission thus stressed on the eve of the ministerial meeting of 1982 that the meeting should not be misinterpreted as the prelude to a new round (Paemen and Bensch, 1995, pp. 32–34).

Toward the mid-1980s and after lengthy internal debates, the Commission albeit gradually bought into the US proposal. In line with hypothesis H_1 , the Commission consequently started campaigning and using its agenda setting powers but also invoked the changing economic realities and policy agenda at the domestic level and in international trade to convince the Member States and European business of the opportunities of a new

comprehensive GATT round. The Commission's change in mind reflected three realisations and functional considerations. First, the Commission understood that a new trade round extending the GATT regime to investment and services would actually deliver significant economic gains for the EU (Interview, Brussels, 24 September 2013). In late 1982, Christopher Tugendhat, Vice-President of the Commission, thus publically endorsed the British proposal for an international standstill clause for services trade, which implied a generally positive view on the liberalisation of international service trade (Agence Europe, 1983). In the following year, Leslie Fielding, Director General in charge of trade policy, lamented that the EU and the Member States did not know yet what they wanted regarding the liberalisation of services trade and investment despite the fact that Europe was the world market leader in these domains. The link between the liberalisation of services trade and economic growth, he added, had not yet been universally accepted within Europe. He called upon the Member States to finally step up their efforts to study these issues and to develop informed positions on these new key issues of national and international economic policy. He regretted that – with the exception of British business – European service providers were not organised and invested in these debates (Cheeseright, 1983). The Commission therefore demanded European service providers to get involved and asked the Member States to finally prepare studies on the effects of international liberalisation on their service sectors (Cheeseright, 1985a). The Commission even started funding a research centre to further study these issues (Tyler, 1983).

The Commission's change in mind, moreover, reflected the insight that the proposed multilateral liberalisation of services trade and investment within the GATT complemented the Single Market programme put forward by the Commission. The Single Market programme focused on dismantling the remaining barriers to trade in goods, labour mobility, trade in services and investment activities within the EU. The overarching objective was to lift the European economy out of recession. The investiture of the Delors Commission in January 1985 and the publication of the white paper 'Completing the Single Market' in June

1985 illustrated this reorientation of the EU and its Member States from Keynesian policies toward liberal economic ones. The Commission declared in policy debates that the proposed multilateral liberalisation of services trade and investment to be in accordance with its domestic liberalisation agenda (Interview, Brussels, 24 September 2013; Interview, Oxford, 11 October 2013).

Finally, the Commission realised that the proposed comprehensive GATT agenda would facilitate its role as administrator of the CCP. The proposed extensive GATT agenda allowed for new trade-offs among the Member States in the Council of Ministers. It in particular promised to facilitate dealing with France. France had met the US proposal of new round with considerable hesitation as it expected a new US attack on the CAP. France, however, was also a leading exporter of services and stood to significantly gain from a new comprehensive GATT round. The Commission thus started highlighting the economic opportunities of a new comprehensive round in particular vis-à-vis France and other sceptical Member States in EU-internal debates (Buchan, 1992; Paemen and Bensch, 1995, pp. 34–35; Stewart, 1993, p. 2350).

Lethargy and incomprehension in the European business community: European business initially remained silent in debates on a new multilateral trade round and an extension of the GATT regime to services and investment (Tyler, 1983; Interview, Brussels, 24 September 2013; Interview, Oxford, 11 October 2013; Interview, telephone, 17 June 2013; Interview Brussels, 25 September 2013b). British service providers marked a notable exception. The Liberalisation of Trade in Services (LOTIS) Committee brought together banks, law firms, and accounting and insurance companies from the City. The LOTIS Committee welcomed the plan to hold a new round and to extend the GATT regime to trade in services and investment regulation. Similar cross-sectorial associations of service providers did not exist in other Member States or at the European level. Architects, lawyers, management consultants or hoteliers did not apprehend themselves as ‘service providers’

with common interests and thus took little interest in debates on the creation of the GATT framework for the liberalisation of services trade (Agence Europe, 1983; Tyler, 1983; Interview, Brussels, 25 September 2013b). The LOTIS Committee, in cooperation with its US-American counterpart – the International Committee on Trade in Services – sought to raise awareness and to mobilise service providers from other Member States like Germany; this, however, was of little success (Tyler, 1983). Over the next years, similar attempts of the Commission also failed and caused considerable frustration in Brussels. The LOTIS Committee remained the only proactive business voice during the pre-negotiations on an extension of the GATT agenda to services trade and investment (Dullforce, 1986).

From Member State opposition to moderate support: Most Member State governments met the US demand for a new comprehensive multilateral trade round with considerable mistrust at first. Like initially the Commission, they perceived the US proposal as another ‘attack’ on the EU’s CAP (Paemen and Bensch, 1995, p. 32). The plan to extend the GATT regime to trade in services and investment was, at first, a secondary issue for most Member States, and did not receive a lot of attention (Interview, Oxford, 11 October 2013). Many European policy-makers initially took the view that the GATT parties should first fully implement their commitments of the Tokyo Round before aiming for a new round (Woolcock, 1990, p. 4). France and Italy were the most vocal exponents of this view, while Germany and the Netherlands adopted more welcoming positions and rhetoric (Farnsworth, 1982; Paemen and Bensch, 1995, p. 34; Interview, Brussels, 24 September 2013). The subsequent nomination of Clayton Yeutter – a renowned expert of agricultural economics – as new US Trade Representative (USTR), however, increased hesitation in many Member State capitals. As a high-ranking Commission official recalled, Yeutter made it clear that he saw it as a matter of personal honour to reverse the agricultural concessions made to the EU by the USA in previous rounds (Interview, Brussels, 24 September 2013.). A notable exception was the British government in this context. The British government was barely preoccupied with the implications of a new round for British farmers, but primarily focused

on the potential gains for its growing service sector. During the ministerial meeting of 1982, Peter Rees, the British Minister for Trade, thus proposed to his colleagues to agree on a standstill clause to prevent the erection of new barriers to services trade and, moreover, supported the idea of holding a new round in order to discuss the creation of a framework for the liberalisation of trade in services within the GATT regime (Financial Times, 1982).

The Commission manages to convince a critical mass of Member States: Toward the mid-1980s, several Member States started tentatively reconsidering their stances on the US plan to launch a new round and to extend the GATT regime to services trade and investment. This change in mind at least partly reflected the Commission's campaigning but not – as stipulated in hypothesis H₂ – lobbying of European business. Many Member States slowly realised that a reform of the CAP was inevitable regardless of a new multilateral trade round. In 1985, the OECD released a report which qualified the CAP as unsustainable and wasteful. The potential costs of a new round in the form of agricultural concessions were thus limited (Paemen and Bensch, 1995, pp. 34–35). Second, the German, French and other Member State governments underwent a learning process after the ministerial meeting of 1982. On insistence of the Commission, the Member States studied their services sectors, external trade balances for services and likely effects of a multilateral liberalisation in these domains for the first time. They gradually understood that the liberalisation of services trade and investment indeed promised considerable benefits (Paemen and Bensch, 1995, pp. 34–35). As the Commissioner for Trade, Willy De Clercq emphasised vis-à-vis the Member States, the EU was actually the “*superpower in trade in services, with exports three times higher than those of the US*” (Dullforce, 1986). Finally, many Member States agreed with the Commission that the proposed multilateral liberalisation of services trade and investment was complementary to the EU's new liberal economic orientation enshrined in the Single Market programme.

By late 1985, international support for a new round had grown to such an extent that the GATT Council formally launched preparations and commissioned the preparatory committee to define the negotiating agenda of the upcoming round. In the following months, the Commission vigorously supported the plan for a new round and the extension of the GATT regime. It continued highlighting that a liberalisation of services would be beneficial for Europe and had to go hand in hand with the creation of a multilateral framework for investment (Dullforce, 1986). In June 1986, the Commission submitted to the Council of Ministers the so-called 'overall approach' outlining the EU's position for the upcoming round. The 'overall approach', *inter alia*, indicated that the EU sought negotiations on services trade and investment disciplines. The Member States generally agreed to this objective and did not raise competence concerns. Only Greece and Italy criticised that the EU should not aim for an across-the-board liberalisation of services trade (Paemen and Bensch, 1995, pp. 43–48; Peel, 1986). The Council endorsed the 'overall approach', which did not, however, represent a legally binding negotiating mandate for the Commission. But despite the EU's documented interest in negotiating on services trade and investment, the EU did not push for these issues during negotiations on the agenda of the upcoming round. During debates in the preparatory committee and at the ministerial meeting of Punta Del Este, the EU primarily focused on defending its agricultural interests against developing countries. The EU left it to the USA to battle for the inclusion of services trade and investment, as the EU arguably did not want to fight developing countries in yet another domain (Paemen and Bensch, 1995, p. 49). Even without the active support of the EU, the USA managed to strike a deal with the developing countries at the ministerial meeting in Punta Del Este, which paved the way toward negotiations on trade in services and investment in the upcoming round.

4.2.3 The Commission's non-mandate of Punta Del Este

The ministers of the GATT parties adopted the negotiating agenda and formally launched the Uruguay Round on 20 September 1986 – the last day of the ministerial meeting of Punta Del Este. Until this day, the Commission and the Member State had managed to sidestep formal discussions on competence questions. The Council of Ministers had not yet adopted any legal measures in these domains, which would have triggered debates about the appropriate competence basis and distribution of competences between the EU and the Member States. And as customary in GATT debates, the Member States had tacitly agreed that the Commission should speak on their behalf in the run-up to the Uruguay Round even on issues like services trade and investment. The pending opening of the Uruguay Round put an end to this pragmatic approach. The Council of Ministers, on the one hand, had to formally endorse the draft ministerial declaration of Punta Del Este and the therein-enshrined negotiating agenda so as to establish the EU's assent to opening the Uruguay Round. On the other hand, the Council of Ministers had to issue a negotiating mandate in order to legally empower the Commission to participate in the Uruguay Round. In other words, the Member States had to take an explicit decision on whether and how to cooperate on investment disciplines in the context of the Uruguay Round.

The Commission invited the Council of Ministers to convene on the fringes of the ministerial meeting in the early hours of 20 September 1986 in order to establish the EU's assent to the draft ministerial declaration and to adopt the legal negotiating mandate for the Commission. The Commission and the British Presidency of the Council of Ministers energetically pleaded for the endorsement of the draft ministerial declaration and the opening of a comprehensive and ambitious multilateral trade round (Paemen and Bensch, 1995, p. 56). The British minister chairing the meeting was very much inspired by the proactivity and vigour of the US delegation during the weeklong ministerial meeting and sought to emulate this atmosphere within the Council of Ministers (Paemen and Bensch, 1995, p. 56). But while all Member States endorsed the draft ministerial declaration, it became evident that

many Member States were not yet fully convinced by the economic opportunities of the new round (Interview, Brussels, 24 September 2013).

The then following discussions among the ministers on the negotiating mandate drew an interesting picture. In essence, it shows that the Commission and the Member States agreed that as customary the Commission should speak on the EU's behalf on all GATT agenda items, including this time services trade and investment. Senior Member State and Commission officials recalled that the representation modalities were never the object of serious discussions among the minister or in the '113 Committee' (Interview, telephone, 17 June 2013; Interview, Oxford, 11 October 2013; Interview, Brussels, 24 September 2013). This tacit agreement, on the one hand, reflected the long-established division of labour among the Member States and the Commission under the CCP. In the absence of a veritable bilateral trade strategy, the CCP and the Directorate-General were practically the EU's mouthpiece for GATT negotiations. Member State and Commission officials met in small circles once or twice per month over years to determine the EU's positions within the GATT and came to trust and respect each other. Nobody, therefore, seriously challenged the Commission's traditional role and claim to be the EU's single voice on all items of the evolving trade agenda in this key policy forum. The expanding trade agenda functioned as an external constraint promoting Member State cooperation and delegation of powers for '*new trade issues*'. On the other hand, the ministers seemed to agree that the Commission should act as their single voice in order to wield greater bargaining power. The Member States thus perceived cooperation and delegation as capability-maximising strategy (Interview, telephone, 17 June 2013; Interview, Oxford, 11 October 2013; Interview, Brussels, 24 September 2013). Only the French delegation occasionally 'grumbled' about the Commission intruding into domains of Member State competence. A high-ranking Commission official commented in that regard that "*If the Member States believe that it is in their interest to negotiate through the Commission, competence issues never play a role. Competence questions only surface, if somebody wants to block things.*" (Interview,

Brussels, 24 September 2013). But while the ministers agreed on cooperating and empowering the Commission to negotiate, inter alia, on services trade and investment disciplines on their behalf, they also feared that this pragmatic decision might compromise their legal competences. The ministers thus put on record the following formal statement in Punta Del Este:

“The Council, acting on a recommendation from the Commission, approved the Punta Del Este Declaration annexed to these minutes and authorised the Commission to open the negotiations provided for in that declaration within the framework of the directives which the Council will issue to it. The Representatives of the Governments of the Member States also approved that Declaration to the extent that they are concerned.

The decision does not prejudge the question of the competence of the Community or the Member States on particular issues.”

(Paemen and Bensch, 1995, p. 56)

The ministers apparently held the view that the ‘*new trade issues*’ – with the notable exception of TRIMs – came under Member State competence and anticipated a future competence dispute with the Commission. They manifestly worried that the Commission could exploit the mandate in order to later claim legal competences over these issues. These concerns were justified, as Opinion 1/94 (discussed in Chapter VIII) demonstrated. At the end of the Uruguay Round in 1994, the Commission endorsed a teleological interpretation of the Treaty articles on the CCP and indeed argued that all so-called ‘*new trade issues*’ would come under exclusive Union competence. At the end of the meeting in Punta Del Este in September 1986, the ministers announced they would be issuing a legal mandate empowering the Commission to negotiate on all issue areas of the Uruguay Round in due course. While it did not affect the Commission in its function as negotiator, it needs mention here that the Council of Ministers never issued this legal mandate. The Council of Ministers only provided the Commission with a legal mandate for agricultural negotiations. Regarding

all other issues, the Commission represented the EU and the Member States on the basis of the overall approach of 1986 and continuous coordination meetings with the Council of Ministers and the '113 Committee' (Interview, Brussels, 24 September 2013).

A theoretical evaluation of the pre-negotiations: The section reported that the Commission – after initial hesitation – became for functional consideration a proponent of the US proposal to hold a new GATT round encompassing negotiations on the multilateral liberalisation of services trade and investment. It consequently started acting as policy entrepreneur, sought to raise awareness and to inform the Member States and European business about the economic opportunities of a new comprehensive GATT round. But whereas a critical mass of Member States showed receptive to the Commission's campaigning, European business remained by and large passive and uninterested in these debates. The Member States and the Commission finally agreed in Punta Del Este that the Commission should act as the EU's single voice – including on services trade and investment – as customary in the GATT. While the Member States had generally endorsed the rationale for a new round and far-reaching delegation, they remained cautious and underlined that they remained competent regarding these new trade issues. These observations mostly lend support to the supranational hypothesis H_1 , which stipulates that the Commission acted for functional and/or power consideration as policy entrepreneur and sought to consolidate the EU's role in international investment policy. The Commission drew on its agenda setting powers and invoked the evolving international trade agenda to convince and to pressure the Member States into cooperation and delegation in this instance of international investment policy-making. It lends only little support to the intergovernmental hypothesis H_2 , which stipulates that business lobbied the Member States to cooperate and to delegate in order to get access to state-of-the-art investment disciplines. While the Member States gradually endorsed the plan to cooperate on services and investment disciplines, this was not the case due to business lobbying but due to the Commission's efforts to communicate the economic opportunities of a new round. The

following sections examine how the EU used its new de facto competences in the TRIMs and GATS negotiations and how this reflects back on the two ex ante hypotheses.

4.2 The TRIMs negotiations

The preceding section shed light on the question of why the Member States decided to cooperate in international investment policy in the context of the upcoming Uruguay Round. This section complements the analysis. It examines how the EU subsequently used its new de facto competences in international investment policy in the TRIMs negotiating group. TRIMs are in essence measures affecting the post-establishment treatment of foreign investors. It first provides a brief overview of the negotiating history and then seeks to explain the EU's role in the TRIMs negotiations.

4.2.1 A brief negotiating history

A senior GATT official once commented that "*The TRIMs negotiations were to be among the most frustrating and least productive of the Uruguay Round*" (Croome, 1995, p. 138). Several factors explain this observation. The TRIMs negotiations were a domain of stark confrontation between the USA, Japan and major developing countries. The USA and Japan advanced a maximalist position in the TRIMs negotiations. The USA adopted an extensive definition of TRIMs and sought to establish a multilateral framework agreement prohibiting the use of these measures against goods and foreign investors (GATT, 1987a, 1987b). The EU held an intermediate position. As explained in more detail in the following subsection, the EU adopted a more limited definition of TRIMs and pleaded for the creation of a framework agreement, which would circumscribe and only prohibit the use of certain TRIMs (GATT, 1989a, 1988, 1987c). Most developing countries – and notably India and Brazil – categorically rejected the plan to establish a framework agreement regulating the use of TRIMs in the first place. They were unwilling to accept any limitation of their sovereignty in

this domain. They underlined that TRIMs were essential instruments of their development policies. They stressed that the vague negotiating agenda of the Uruguay Round merely provided for an examination of ‘the applicability of GATT articles to trade-distorting effects of TRIMs’. The agenda did not allow for negotiations on a new framework agreement limiting, or even prohibiting, the use of TRIMs (Croome, 1995, pp. 138–142; GATT, 1987d, 1987e). These starkly contrasting positions between developed and developing countries made the negotiations in the TRIMs negotiating group a tedious enterprise. The situation was further exacerbated by the unwillingness of the key actors to invest political capital into advancing the TRIMs negotiations. All countries – even the USA which had initially spared no efforts to include investment into the negotiating agenda of the Uruguay Round – considered TRIMs to be a secondary issue within the overall negotiating process of the Uruguay Round (Croome, 1995, p. 138).

The TRIMs negotiations produced no results in the first two years of the Uruguay Round. The USA and major developing countries fought over the interpretation of the negotiating agenda and the definition of TRIMs without any signs of a convergence of minds. When the ministers reconvened for the midterm review in Montreal in December 1988, the ministers did not even discuss TRIMs as no controversial issue had reached the decision-making stage yet (Croome, 1995, pp. 141–142). After the midterm review, the TRIMs negotiating group sought to overcome the deadlock. It limited its discussion on studying the trade-distorting effects of certain TRIMs (GATT, 1989b). Progress seemed possible at first; notably, when the USA moved away from its maximalist position and endorsed a narrower definition of the term TRIMs (GATT, 1989c). In the run-up to the ministerial meeting in Brussels in December 1990, which was intended to close the Uruguay Round, it became clear, however, that all countries were sticking to their entrenched positions. The USA, the chairman of the TRIMs group Kobayashi and the lead negotiator of Hong Kong successively tabled draft texts of a TRIMs Agreement, which helped to identify the key controversies but failed to gain broad support (Croome, 1995, pp. 259–261; Stewart, 1993, p. 2123). As a high-ranking

GATT official recalled “*no negotiating text went to Brussels in worse shape than the one on TRIMs...*” (Croome, 1995, p. 261). The ministers would finally try to resolve the controversies over TRIMs in a Green Room session during the ministerial meeting of Brussels. The ministerial meeting, however, ran into complete stalemate over agriculture one day before the scheduled Green Room session on TRIMs (Croome, 1995, p. 284). The Uruguay Round negotiations only restarted in February 1991. The negotiations on TRIMs slowly struck new paths as the USA and developing countries gradually revised their preferences on TRIMs. US policy-makers grew concerned with a hike in Japanese FDI in the USA and started pondering about the benefits of TRIMs, while many developing countries adopted more liberal policies toward FDI (Croome, 1995, p. 308). In autumn 1991, George Maciel, the new chairman overseeing the TRIMs negotiations, started bilaterally and informally consulting with countries over a new draft text for a TRIMs Agreement. In December 1991, Maciel released his non-negotiated draft text and sent it to lead negotiators of the Uruguay Round in the trade negotiating committee (TNC). The TNC did not challenge Maciel’s draft text, which ultimately became part of the WTO Agreement in April 1994. The final text of the TRIMs Agreement is of rather humble nature. It prohibits TRIMs which are incompatible with GATT articles III (national treatment) and XI (prohibition of quantitative restrictions), such as investment incentives or trade performance requirements (Croome, 1995, pp. 284–286, 309).

4.2.2 The EU in the TRIMs negotiations

The EU as a reactive and marginal actor in the TRIMs negotiations: What role did the EU play in the TRIMs negotiations? The EU did not proactively use its new de facto competences in international investment policy in the TRIMs negotiating group. And although the EU spoke through the Commission with a single voice, the EU remained a marginal and reactive party in this negotiating forum. As explained above, the key bargains took place between the USA and Japan, on the one hand, and major developing countries on

the other. The EU did not belong to these camps and did not attempt to play a moderating role. The EU's submissions to the TRIMs negotiating group confirm this view. While the USA tabled a draft working agenda, followed by 9 position papers and a draft text for a TRIMs Agreement, the EU tabled merely 3 position papers in the course of the TRIMs negotiations.²⁰ The EU's submissions did not develop a new, distinctly European approach to the regulation of TRIMs or add decisive ideas and issues to the discussions. The EU's position papers mostly clarified the EU's position in relation to the language and substance of US position papers. Regarding substance, the EU adopted an intermediate position between the USA, Japan and major developing countries. It stressed that only some of the TRIMs, which the USA sought to outlaw within the GATT regime, had a direct and significant effect on trade flows and could therefore be tackled under a TRIMs Agreement (GATT, 1989a, 1988, 1987c). The EU referred to the so-called FIRA Case²¹ in order to evaluate the relevance of existing GATT rules for the regulation of TRIMs and the potential need for new GATT norms in this domain (GATT, 1987c). Neither the USA and Japan, nor major developing countries, showed support or interest in the EU's position.

The Commission treats TRIMs as an issue of secondary importance: The Commission did not attach great importance to the TRIMs negotiations. Senior Commission officials recalled that the TRIMs negotiations were only discussed in passing within the Commission. It was a clearly an issue of secondary importance in Commission-internal deliberations (Interview, Brussels, 5 October 2011). A high-ranking Member State official confirmed this and lamented that the Member States occasionally had to figuratively '*drag the Commission to the negotiating table*' in this field (Interview, telephone, 17 June 2013).

²⁰ See GATT Digital Library of Stanford University for a comprehensive archive of negotiating documents <http://gatt.stanford.edu>.

²¹ The acronym FIRA stands for Foreign Investment Review Act. The USA brought a claim against Canada, because it took the view that local content and export performance requirements imposed on US investors under FIRA were illegal under the GATT. The FIRA Case thus had a direct bearing on the TRIMs negotiations.

The Commission's lack of interest in the TRIMs negotiations reflected two considerations. On the one hand, the Commission took the view that the TRIMs negotiations were mostly about the interpretation, application and elaboration of existing GATT articles in regard to TRIMs. The TRIMs negotiating group would not work towards a comprehensive multilateral investment framework. Hence, the TRIMs negotiations did not offer the Commission the opportunity to prove itself as international negotiator or the opportunity to shape the global political economy. As will become clear below, moreover, the Commission did not get pressure from the Member States or European business to push for specific TRIMs disciplines. This combination translated into the Commission dealing with the TRIMs negotiations as a mandatory exercise rather than economic and political opportunity (Interview, Brussels, 24 September 2013).

European business lacks interest: Business showed little interest in the TRIMs negotiations. This observation holds true for European as well as national business federations. The European umbrella federation UNICE, the Confederation of British Industries, the German Federation of Industries or the German Chamber of Industry and Commerce and others occasionally encouraged negotiations on TRIMs, but according to all accounts did not engage in meaningful lobbying in order shape the negotiations (Agence Europe, 1992a; Montagnon, 1988; Thomson, 1990; Interview, telephone, 17 June 2013). How can one explain that European business representatives by and large disregarded these negotiations while US business reportedly pushed for ambitious TRIMs disciplines? First, many European investors arguably incurred lower TRIMs-related costs than US firms, as they benefited from the BIT networks of their Member States (Interview, telephone, 17 June 2013; Interview, Brussels, 24 September 2013). Second, many European investors had arguably already put up with TRIMs and the related costs in developing countries, because they had been active in many developing countries since colonial times. US investors, on the other hand, had been less active in most developing countries in the past and perceived TRIMs as significant barriers to market entry. Third, those European companies which

nonetheless showed some interest in the TRIMs negotiations, cautioned that the EU should not push for overly ambitious TRIMs disciplines in the GATT so as not to antagonise developing countries. A TRIMs Agreement would only make sense if developing countries would agree to sign up to such an agreement (Woolcock, 1990, pp. 25–26). Finally and in-line with the above, many European investors felt that the TRIMs negotiations tackled irrelevant investment barriers. The position of the European Chemical Industries Federation (CEFIC) – a very investment-intensive sector – illustrates this view. CEFIC stressed that European chemical companies were highly interested in the creation of a multilateral investment framework under the auspices of the GATT. CEFIC and its national members strongly lobbied the Member States and the European Institutions to this end. CEFIC clarified, however, that European chemical companies mainly sought enhanced market access for investments and a better protection of their patents abroad. Both issues were not discussed in the TRIMs negotiating group, which therefore received little attention from European chemical producers (Montagnon, 1989).

The Member States divided and uninterested: Like the Commission and European business, the Member States, on the one hand considered the TRIMs negotiations as an issue of secondary importance in the big scheme of things. The TRIMs negotiations were unlikely to generate important benefits for the European economy and business. Unlike the USA, several Member States had already started establishing sizeable BIT networks with third countries, which limited the applicability of certain TRIMs to their investors. The Member States concentrated their attention and political capital on the economically more potent negotiations on agriculture, non-agricultural market access and services (Interview, Brussels, 5 October 2011; Interview, telephone, 17 June 2013). On the other hand, the Member States had difficulties agreeing on a clear-cut position and strategy for the TRIMs negotiations. The lead negotiator of the Commission observed that the EU constantly sat on the fence in the TRIMs negotiations (Paemen and Bensch, 1995, pp. 86–87). The divisions among the Member States mirrored in many respects the divisions at the international level in the

TRIMs negotiating group. All Member States used TRIMs to regulate inward FDI, but certain Member States imposed TRIMs much more frequently on foreign investors than other Member States. The United Kingdom, the Netherlands and Germany for instance used TRIMs only in a few circumstances. France, on the other hand, drew heavily and frequently on TRIMs. France considered TRIMs an indispensable instrument for its industrial policy and its national economic development strategy. So while liberal Member States were ready to limit the use of TRIMs within the GATT regime so as to facilitate the operations of their multinational companies abroad, protectionist Member States were sceptical (Paemen and Bensch, 1995, pp. 86–87; Interview, telephone, 17 June 2013; Interview, Brussels, 24 September 2013). In 1988, this divide between the Member States came forcefully to the fore. France restricted the import of Nissan cars produced in a plant in the United Kingdom. It argued that the cars produced in the British Nissan plant did not attain a local content threshold of 80% so as to qualify as European produce. Hence, they had to be considered as Japanese imports and counted against France's unilaterally imposed import quota for Japanese cars. So far the French import quota had gone unchallenged within the EU and the GATT, but the Commission and the British government now announced that they would challenge the French measure. Italy expressed its sympathy for the French position (Buchan, 1989; Montagnon, 1988; Montagnon and Dullforce, 1988). The Nissan dispute raised question marks about the legality of TRIMs in the context of the Single Market. As the Member States and the Commission got into internal quarrels about the legality of certain TRIMs, the EU could not play a leading role in international negotiations. The Nissan dispute, moreover, complicated negotiations in the TRIMs negotiating group, as it signalled to developing countries that not even the developed countries could agree on a common position.

A theoretical evaluation of the TRIM's negotiations: The EU made only limited use of its de facto competences in investment regulation in the context of the TRIMs negotiations. While this observation generally speaks against both ex ante hypotheses, it nevertheless

weakens the intergovernmental hypothesis H_2 more than the supranational hypothesis H_1 . The analysis of the TRIMs negotiations demonstrated that European business did not lobby for the EU's involvement in this domain. Also it suggested that the Member States were uninterested and divided over the EU's approach to TRIMs and could not effectively cooperate in this international investment policy-making forum. Hence, it is impossible to claim that the EU's involvement and role reflected either business or government preferences as suggested by liberal intergovernmentalism. Yet, while the Commission did not act as a policy entrepreneur in this context – as stipulated in the supranational hypothesis H_1 – the EU's involvement in these investment negotiations still reflects in essence supranational and institutionalist dynamics. Member State cooperation and delegation occurred, nevertheless, as TRIMs became part of the GATT agenda and trade policy encroached into investment regulation. The EU had to play a role for legal reasons and because the Member States had generally agreed to speak with a single voice in the GATT.

4.3 The GATS negotiations

In the beginning, the TRIMs negotiations were the focus of investment-related negotiations in the Uruguay Round. As the Round progressed, it became clear that the GATS negotiations would aim to liberalise service-related investments and the creation of general post-establishment treatment standards for investors in services sectors. The GATS negotiations thereby turned into the epicentre of investment-related negotiations in the Uruguay Round. The following section examines how the EU used its new de facto competences in international investment policy in the GATS negotiations. It first provides a brief overview of the GATS negotiations and then evaluates to what extent the EU's use of its de facto competences and its role in the GATS negotiations lends support to one of the two ex-ante hypotheses.

4.3.1 A brief negotiating history

The negotiations on services trade were highly complex and controversial. As explained above, the USA had fought hard with developing countries to set services trade on the negotiating agenda of the Uruguay Round. In the end, the developing countries accepted negotiations on services trade, but their hesitation translated into a vague and contradictory negotiating mandate for the Group on Negotiations on trade in Services (GNS). The negotiating agenda of the Uruguay Round stipulated that the GNS should, on the one hand, establish a framework for the liberalisation of services trade and, on the other hand, preserve the policy space of governments to regulate – and de facto to protect – their national services sectors (Stewart, 1993, p. 2359). The GNS was, therefore, set for onerous negotiations. In order to facilitate the negotiations, they proceeded in a two-step approach. Until the midterm review, the GNS should examine definitions, volume and geography of services trade and should eventually draft a framework agreement. After the midterm review, the GNS should then start negotiations on liberalisation commitments.

The initial stocktaking phase was meant to ease tensions among the parties by disseminating knowledge about services trade. It evolved, however, into a confrontational exercise. Discussions started out with an argument between the USA, the EU and developing countries over the representativeness of the examined data on the volume and geography of services trade. Several developing countries suspected that behind this data lay a hidden attempt by developed countries to reduce the developing countries' bargaining power in subsequent negotiations on liberalisation commitments (Stewart, 1993, pp. 2362–2363). Moreover, the parties could not agree whether the definition of services trade should encompass service-related investments and the movement of natural persons. The USA had initially proposed a narrow definition, which only encompassed cross-border supply and consumption abroad. The USA had feared that a broad definition including service-related investments would antagonise developing countries too much. Developing countries, however, rejected this narrow definition. They stressed that the definition had to encompass

the movement of natural persons in order to allow the competitive advantages of developing countries to play out (Hindley, 1990, p. 14; Stewart, 1993, pp. 2362–2363). Thereupon, the USA and the EU underlined their demand to include the establishment of commercial presences i.e. service-related investments into the definition of services trade (Sidhu, 2004, p. 188). The USA, the EU and other developed countries repeatedly pushed for ending this stocktaking phase and to start with veritable negotiations on a framework agreement and liberalisation commitments. Developing countries, however, resisted these demands (Croome, 1995, pp. 127–128).

The first two years of negotiations produced no results. Only the midterm review during the ministerial meeting in Montreal delivered progress. The ministers decided that the term services trade should encompass cross-border supply, consumption abroad, movement of natural persons and the establishment of commercial presences (Stewart, 1993, p. 2369). The GATS negotiations thereby became multilateral investment negotiations. The adoption of this broad definition of services trade had reportedly become possible, as major developing countries like India and Brazil had slowly warmed to the idea of a comprehensive multilateral services agreement (Croome, 1995, p. 242). In the following two years, the USA and a group of developing countries tabled and discussed several draft texts for a future GATS, while the EU gave detailed comments (GATT, 1990, 1989d, 1989e, 1989f, 1989g). The discussions in the GNS, *inter alia*, focused on four questions. First, how could one apply GATT principles like MFN or NT to trade in services? The GNS carried out several sectorial tests to determine the likely impact of such principles (Stewart, 1993, pp. 2372–2373, 2376–2378). Second, should a framework agreement cover all or only selected service sectors? The EU and many other countries were pleading for a framework agreement applying to all sectors in order to facilitate an equitable liberalisation of services trade. The EU argued that if need be, the parties could add sector-specific protocols to complement general rules. The USA rejected the EU's position and pleaded for a framework agreement applying to a limited number of service sectors. The USA added that sensitive sectors like financial

services required sector-specific rules and discussions (Croome, 1995, pp. 250–251; Interview, Oxford, 11 October 2013; Interview, Brussels, 24 September 2013). Third, should the MFN principle apply unconditionally or conditionally? The USA stressed the need for a conditional MFN clause in order to promote the liberalisation of services trade. The USA explained that an unconditional MFN clause would provide protectionist countries with full access to liberal services markets like the USA, while US service providers would gain no additional market access to generally closed markets. The EU, and almost all other parties, harshly criticised the US position. They argued that the reasoning of the USA ran counter to the very purpose of the MFN principle and was incompatible with general GATT rules (Croome, 1995, pp. 250, 282; Stewart, 1993, pp. 2378–2379, 2393–2394). Finally, should investment liberalisation proceed on the basis of a positive or negative list? And relatedly, should liberalisation commitments take force immediately or be the result of on-going negotiations? The USA and the EU pleaded for liberalisation on the basis of negative lists. Developing countries opposed this proposal. They argued that negative lists would result in a too speedy and comprehensive liberalisation of service sectors. The USA, moreover, demanded an immediate liberalisation, whereas the EU and developing countries initially favoured a progressive liberalisation. In the end, the parties agreed to undertake some immediate liberalisations as well as to continue negotiations on the basis of positive lists (Croome, 1995, pp. 245–246; Stewart, 1993, pp. 2371–2372, 2397–2399). As the Brussels ministerial meeting approached, the GNS drew up a draft text of the GATS in mid-1990, which consolidated the state of negotiations and was rife with brackets (Stewart, 1993, pp. 2394–2395).

The ministers convened in December 1990 in Brussels with the formal – while unrealistic – objective of concluding the Uruguay Round. The key priority of the ministers regarding the GATS negotiations was to finalise the framework agreement. The objective slowly shifted beyond reach, as the USA voiced ever more radical demands in the days prior to the ministerial meeting. The USA now demanded to exclude entire service sectors from the

negotiations and emphasised that it would only accept a conditional MFN clause (Dullforce, 1990). The USA thereby transformed from being the engine driver to being the brakeman of the GATS negotiations. The shift in US attitude de facto put the EU, as second economic heavyweight and major liberal actor, into the driver's seat of the GATS negotiations (Croome, 1995, pp. 250–251). The following ministerial negotiations could not resolve the many disagreements on the GATS, but ran anyway into complete deadlock over agriculture. The GNS reconvened in June 1991 and subsequently focused on three issue areas. The negotiators sought to finalise the framework agreement. The task was difficult taking into consideration that the central questions of the scope of the framework agreement and the MFN controversy could only be resolved in the light of countries' final liberalisation efforts (Croome, 1995, pp. 312–314). The negotiators, moreover, started talks on sector-specific annexes notably for telecommunications, maritime transport and financial services (Croome, 1995, pp. 314–316). The negotiators finally started with discussions on liberalisation commitments. The scheduling exercise was challenging, as the negotiators at first did not know how to identify and measure barriers or how to codify commitments (Croome, 1995, pp. 316–318). As the extended deadline of December 1991 for the conclusion of the Uruguay Round approached, the chair of the GNS drew up a draft framework agreement based on his personal judgement. The draft foresaw universal coverage of the framework agreements, but allowed countries to file temporary MFN exceptions for certain sectors (Croome, 1995, pp. 317–318; Stewart, 1993, pp. 2394–2395). The TNC – the highest negotiating organ of the Uruguay Round under the ministerial level – accepted the draft, which became part of the final WTO Agreement. The as yet incomplete liberalisation schedules for services trade and in particular frictions over agriculture, however, prevented the end of the Uruguay Round. The Uruguay Round continued for another two years. The negotiations on services trade mostly focused on finalising the liberalisation schedules for particularly sensitive sectors like financial services, maritime transport or cultural and audiovisual services. The USA and the EU stood at the very centre of this nerve-wrecking bargaining exercise (Croome, 1995, pp. 332–333, 355–358; Paemen and Bensch, 1995, pp.

233–235). On 15 December 1993, the negotiating parties were finally ready to sign the WTO Agreement. The final text of the GATS covers all services sectors, provides for general MFN treatment and contains several sector-specific annexes. The GATS decisively liberalised service-related investment flows and until today constitutes the most important multilateral investment agreement.

4.3.2 The EU in the GATS negotiations

The EU proactively and ambitiously uses its new de facto competences: What role did the EU play in the GATS negotiations? It shone through in the preceding subsection that in comparison to the TRIMs negotiations, the EU proactively used its new de facto competences in international investment policy in the GNS. The EU spoke through the Commission with a single voice and became a central negotiating party in the GNS. The EU's important role in the GNS manifested itself in several ways. First, the EU acted as driver and broker in the GNS negotiations. While the EU was clearly part of the liberal camp, it successfully managed to maintain the dialogue with the opposing camp of developing countries (Paemen and Bensch, 1995, p. 132). As discussed above, the EU supported the developing countries, for instance, in rejecting the US demand for a conditional MFN clause. The EU also pushed for a framework agreement covering all service sectors in order to enable the adoption of an equitable package of liberalisation commitments. Second, the EU gradually became the leader of the liberal camp in the GNS talks. The EU pushed for a comprehensive liberalisation of service trade including service-related investments on the basis of a negative list. The EU – together with the USA – thereby spearheaded the liberal camp in the GNS negotiations. When the USA gradually adopted a more protectionist position in the GNS negotiations after 1990, the role of leader of the liberal camp quite naturally fell to the EU (Croome, 1995, p. 163). Finally, the EU played a decisive role in the GNS negotiations, because it possessed badly needed expertise for the highly technical negotiations in the GNS. Due to the EU's on-going internal liberalisation of

services and capital flows in the context of the Single Market Program, the Commission and the Member States had acquired expertise which most other countries lacked. In summary, it seems fair to say that the EU proved itself for the first time in its history as a serious actor in investment regulation in the context of the GNS talks.

The Commission – an ambitious and resourceful policy entrepreneur: Commission preferences and behaviour had a decisive influence on the EU's proactive use of its de facto competences and central role in the GNS talks. As explained in the section on the pre-negotiations, the Commission had turned into an outspoken supporter of multilateral negotiations on services trade within the EU in the mid-1980s. From the Commission's point of view the negotiations promised to deliver significant welfare gains for the European economy and offered the rare opportunity to design a new central building block of the future global political economy. The Commission thus attached great importance to the GNS negotiations and promoted them in EU-internal debates (Interview, Brussels, 24 September 2013; Interview, Brussels, 5 October 2011). The Commission's policy entrepreneurship for a proactive and ambitious use of the EU's de facto competences came to the fore in several ways.

The Commission drew on its agenda setting powers and expertise to mobilise and maintain support for the GNS talks and to consolidate the EU's role in services and investment regulation. The Commission, for instance, conducted inter-service consultations so as to elaborate an informed position and strategy papers and to guide the initial debates in the Council of Ministers (Interview, Oxford, 11 October 2013). The Commission also strongly propelled the Member States to conduct similar inter-service consultations and to share their results in Council meetings. These inter-service consultations brought together officials from diverse ministries with different outlooks and preferences, which made them a challenging while very productive exercise. The Member States developed increasingly informed positions (Interview, Oxford, 11 October 2013). The Commission also called upon the

Council of Ministers to establish a new ‘113 sub-committee’ on trade in services so as to finally create a permanent forum for expert discussion and build up an institutional memory. The debates in the new sub-committee were complex and the Commission had the influential yet challenging task of reconciling the many Member State demands with those from third countries in the GNS. The Commission’s lead negotiator on services commented that his work sometimes felt like ‘*herding cats*’ (Interview, Oxford, 11 October 2013). At the same time, the Commission continued calling on European business to get more engaged in these debates. As discussed in detail below, European business showed little responsiveness to these invitations (Interview, Oxford, 11 October 2013).

The Commission, moreover, used the progressing EU-internal liberalisation of services trade in order to consolidate the EU’s role in international services and investment regulation. The finalisation of the Single Market – inter alia for intra-EU service trade and related investments – clearly shaped and facilitated the EU’s central role in the GNS talks. While many GNS parties struggled, for instance, with a broad definition of the services trade encompassing service-related investments and movements of persons, the Commission could easily convince the Member States of this broad approach by pointing to EU-internal legislation and the Single Market programme, which built on a similarly broad definition of cross-border service provision. Hence, the broad definition of services – encompassing cross-border investment – showed uncontroversial within the EU, which enabled the Commission to push in the name of the EU for a multilateral service framework encompassing service-related investments (Interview, Oxford, 11 October 2013). What is more, the Single Market programme supported the formation of fairly homogenous Member State preferences and thereby a strong European position on service-related investment liberalisation commitments. The EU-internal liberalisation facilitated international liberalisation, as it incidentally also eliminated barriers to international services trade and service-related investment. It, moreover, fostered the competitiveness of European service providers and prepared them for global markets (Messerlin, 1990, pp. 132–134, 137). In

consequence, the Member States and thus the EU generally held firm offensive positions in EU-internally liberalised service sectors, while they continued holding rather defensive preferences on yet protected service sectors such as postal, telecommunications, audio-visual or cultural services. Homogenous Member State preferences generally facilitate the Commission's role as single voice, which allows the Commission and the EU to build up a reputation as serious negotiating parties and skilful negotiators thereby consolidating their role in new policy areas such as investment regulation.

European business remains passive and lethargic: Sectoral preferences, on the other hand, cannot account for the EU's central role and proactive use of its de facto competences in the GNS negotiations. All business representatives, Member State and Commission officials interviewed for this thesis agreed that – with the exception of very few sectors and associations – European business did not take a genuine interest and shape debates within the EU on the GNS negotiations. National and European federations and business leaders occasionally and publically supported ambitious negotiations on services trade, but did not get wholeheartedly involved in policy-making debates or provide technical expertise to the Member States and Commission (Agence Europe, 1991a; Cheeseright, 1985b). The Member States and the Commission repeatedly called on service companies to provide technical expertise. The Commission, moreover, demanded European service providers to finally get organised and learn a lesson from the International Committee on Trade in Services in the USA, which played a decisive role in shaping the US position and strategy in the GNS negotiations. The Commission's calls showed, however, only limited success. Some time after the launch of the Uruguay Round, the European Communities Services Group (ECSG) formed in order to provide European service providers with a common voice across sectors and Member States in the GNS negotiations (Dullforce, 1987). But the ECSG reportedly did not exert great influence on European policy-making, as service providers from different Member States and sectors found it difficult to identify common objectives and to agree on common positions (Interview, Brussels, 25 September 2013b). Among the few proactive and

interested business representatives in this domain were reportedly the LOTIS Committee, audio-visual service companies, maritime transport companies, the Dutch business federation and the German Chamber of Industry and Commerce (DIHK) (Interview, telephone, 17 June 2013; Interview, Brussels, 25 September 2013b). This heterogeneous group could not, however, make up for the general lack of business interest and input.

The Member States in support of ambitious GNS talks: Despite the lack of business lobbying and in contrast to liberal intergovernmental assumptions and hypothesis H₂, many Member State governments took a sincere interest in the GNS negotiations. In comparison to other negotiating formations of the Uruguay Round, the Member States held rather homogenous and overall offensive preferences regarding the liberalisation of services trade. All in all, Member State governments considered the liberalisation of services trade to be in their national economic interest and therefore readily cooperated and delegated negotiating powers to the Commission in order to attain a good deal. As discussed above, the Member States' support for ambitious negotiations and readiness to cooperate to a large extent reflected the Commission's pedagogical campaigning prior and during the Uruguay Round. The United Kingdom, the Netherlands and, to a lesser extent, Spain, Belgium and Germany were eager to see a comprehensive liberalisation of services trade (Interview, Brussels, 24 September 2013; Interview, Oxford, 11 October 2013, Interview, telephone, 17 June 2013). Italy, Portugal and Greece, on the other hand, were initially sceptical and then neutral regarding the plan to liberalise services trade within the GATT regime (Interview, Brussels, 24 September 2013; Peel, 1986). France, finally, held a peculiar position in these debates. France had manifestly offensive interests in services trade. The French economy comprised a large and competitive services sector, which stood to significantly gain from a multilateral liberalisation of services. France was nevertheless ready to sacrifice gains for its services sector to protect its agriculture (Interview, Oxford, 11 October 2013; Buchan, 1992). It repeatedly applied the brakes to the GNS negotiations if, for instance, the USA voiced unacceptable agricultural demands. These observations suggest that the size and

competitiveness of their respective service sectors and, ultimately, their national economic welfare shaped government preferences and their willingness to cooperate – not however business lobbying.

A theoretical evaluation of the GNS negotiations: The EU played a proactive role in the GNS talks and fully exploited its new de facto competences in international investment regulation. The EU's central role and proactive use of its new de facto competences primarily reflected Commission entrepreneurship and thus lends support to hypothesis H1. The Commission's proactive attitude, its recourse to agenda setting powers and referral to the emerging Single Market managed to mobilise and to convince the Member States to closely cooperate in this forum of international investment policy-making. The Member States bought into the Commission's argument that participation and cooperation in the GNS promised to deliver considerable economic benefits. European business, on the other, remained passive and lethargic. These observations contradict hypothesis H₂. While the Member States indeed happily cooperated in this instance of international investment policy-making, it did not reflect business lobbying but the Commission's resourceful campaigning.

4.4 Conclusion

This chapter traced the EU's involvement in investment-related negotiations during the pre- and core negotiations of the Uruguay Round (1982-1994). The chapter primarily lends support to supranationalism and hypothesis H₁ and only partly to liberal intergovernmentalism and hypothesis H₂. Member State cooperation and the EU's in part central role in investment-related negotiations during the Uruguay Round mostly reflected Commission entrepreneurship. After initial hesitation, the Commission came to see the US proposal to hold a new comprehensive GATT round including negotiations on services trade and investment as being in the EU's very own economic interest. During the pre- and core negotiations, the Commission thus heavily used its agenda setting powers and referred to the

evolving trade agenda so as to convince European business and the Member States of the benefits to endorse the launch of investment negotiations within the GATT. It encouraged and funded research on services trade and investment, promoted the establishment of a dedicated Council committee for services trade, called on business to establish lobbying structures and pointed to the complementarity between the EU-internal liberalisation enshrined in the Single Market program and the upcoming GATT round. While European business hardly responded to the Commission's proactive stance, the Member States gradually came around and bought into the Commission's argument and agreed to cooperate and to delegate on investment regulation in the GATT. The Member States, nevertheless, underlined that this decision was of temporary and not permanent nature. In conclusion, the chapter showed that European cooperation and integration occurred at this instance due to supranational rather than liberal intergovernmental dynamics.

Chapter V – The EU in investment-related negotiations on the Energy Charter Treaty

The previous chapter examined the EU's involvement in investment negotiations during the Uruguay Round. The present chapter shifts the focus of enquiry to the EU's involvement in the negotiations on the Energy Charter Treaty (ECT). The ECT is little known to the general public. Its content and geographical scope nevertheless make it a milestone agreement of global economic governance. The much discussed arbitration award of some \$50bn in the case of *Yukos Universal Limited (Isle of Man) vs Russia* (ITA Law, 2014) and the pending proceeding *Vattenfall vs Germany (II)* (Bernasconi-Osterwalder and Hoffmann, 2012) concerning Germany's nuclear phase-out were both filed under the ECT and underline the importance of the agreement. The ECT was negotiated between 1990 and 1998 and governs energy trade and investment among the contracting parties. It contains, inter alia, soft law provisions on market access for investors in the energy sector, and binding post-establishment treatment and protection standards as well as investor-to-state dispute settlement (ISDS) provisions. The content of the ECT is thus in many regards identical to bilateral investment treaties (BITs). Fifty-two parties from Europe, Asia and Oceania have signed the ECT and some 20 parties from the Americas, Middle East and Africa have observer status under the agreement (Energy Charter Secretariat, 2003). Hence, the ECT is the only existing truly multilateral investment agreement. The ECT is, moreover, of special importance to this study. The EU was closely involved in the negotiations on the ECT and acceded – next to its Member States – as full-fledged party to the agreement. The ECT is the only veritable investment agreement, which has been concluded by the EU so far. What is

more, the ECT is the only agreement in force which entitles investors to file investment arbitration claims against the EU.

The chapter finds that supranational theories and hypothesis H₁ better capture the surprisingly high degree of Member State cooperation and delegation during the ECT negotiations than intergovernmental thinking and hypothesis H₂. Even for today's standards, the EU held significant de facto competences in this investment policy-making forum. The EU's extensive de facto competences reflected to a large extent Commission entrepreneurship. The Commission skilfully used its agenda setting powers, invoked fringe competences and pointed to synergies between the emerging Single Market for energy and the ECT talks so as to ensure the central role of the EU in this international investment policy-making forum. European business was lethargic and partly even opposed to the ECT project, which it perceived as a Commission-led liberal attack on its business model. Despite the critical attitude of business – and in contradiction to hypothesis H₂ – the Member States were increasingly receptive, supportive and grateful for the Commission's proactive attitude. They felt that it was in their best geopolitical and economic interest to speak with a single voice in the ECT talks. They hoped to thereby exert greater influence on the collapsing Soviet Union and to ensure better access to the Soviet Union's huge energy resources. Hence, they gradually allowed the Commission to play an ever more important role in the ECT negotiations. The chapter first provides an empirical account of these important – yet often overlooked – international negotiations. In a second part, it theoretically analyses the observations in order to explain the EU's extraordinary role in this forum.

5.1 A negotiating history of the Energy Charter Treaty

The negotiations on the ECT evolved in four stages. First, the EU conceived the ECT project as 'Lubbers Plan' and conducted pre-negotiations with the Soviet Union (June 1990 – July 1991). Second, the parties negotiated the European Energy Charter, which was a political

agreement (July 1991 – December 1991). It documented the overarching objectives of the ECT project and the intention of the contracting parties to subsequently enter into a binding ‘basic agreement’. The ‘basic agreement’ is better known today as the ECT and is referred to here as such henceforth. Third, the parties then engaged in negotiations on the binding ECT (February 1992 – December 1994). Finally, the parties conducted negotiations on the so-called ‘supplementary protocol’ of the ECT (January 1995 – autumn 1998). The parties had initially agreed to include binding investment liberalisation commitments into the ECT but failed to reach a compromise on this issue. Hence, they decided to exclude the issue from the ECT negotiations and to deal with it in a ‘supplementary protocol’. The negotiations on the ‘supplementary protocol’ produced an elaborate draft text, but ultimately collapsed. The chapter examines each stage in turn. The analytical focus of this section primarily lies on international negotiating activities between the EU and third countries. EU-internal dynamics shaping the EU’s negotiating behaviour and de facto competences in international investment policy are analysed in the second section of this chapter.

5.1.1 The Lubbers Plan

Discussions on a ‘European Energy Community’ started in June 1990. The Dutch Prime Minister Ruud Lubbers proposed the creation of such a community to his fellow heads of state during a session of the European Council. Under his proposal, the ‘European Energy Community’ should establish a trade and investment regime for the energy sector encompassing the Single Market of the EU, the Soviet Union and the countries of Central and Eastern Europe. The ‘European Energy Community’ should allow the parties to capitalise on their complementary relationship. While the Member States of the EU were in need of secure and affordable access to energy, the Soviet Union and the Central and Eastern European countries urgently needed Western capital, technology and know-how to modernise their ailing energy sectors and to revive their economies. Lubbers underlined that such a ‘European Energy Community’ would support a peaceful transition of the Soviet

Union and the Central and Eastern European countries from autocratic command economies toward democratic capitalism (Buchan, 1990; Doré, 1996, p. 138; European Commission, 1991). The so-called Lubbers Plan clearly echoed classic liberalism and the paradigm of Western European Integration to overcome entrenched hostility and to foster peace through economic cooperation and the integration of strategic economic sectors. One may recall here that in the early 1950s the EU had started out as an energy community known as the European Coal and Steel Community (ECSC) (Konoplyanik, 1996, pp. 156–157).

The ECT as a geopolitical tool: The Lubbers Plan reflected the preoccupations of its time. On the one hand, it echoed the mounting geopolitical challenges in Europe due to the upheavals in the Soviet Union and its satellite states since the late 1980s. The Soviet Union had fallen into a state of economic, political and social paralysis during the 1970s and early 1980s. In 1985, Mikhail Gorbachev became General Secretary of the Communist Party. Between 1987 and 1989, Gorbachev launched hitherto unseen reforms in order to lead the country out of its paralysis. He introduced private ownership of business to boost the Soviet economy. He loosened control over media, adopted a liberal stance on civic rights and tentatively democratised the electoral system of the country (Thompson, 1998, pp. 268–283). Gorbachev's reforms had, however, unintended dramatic consequences. Instead of reviving the Soviet Union, they spurred destabilising dynamics. The social and political reforms deeply divided the political elite of the country. The economic reforms, on the other hand, did not ease the country's economic problems but exposed its dysfunctional allocation mechanisms, severe shortage of capital and lack of modern technologies and know-how. In the late 1980s, the Soviet economy slipped into an ever-deeper recession. Material scarcity grew, public finances rapidly degraded and the Soviet government had to ask for emergency loans from Western countries in order to ward off sovereign default. The Soviet Union's economic and financial difficulties kindled old ethnic, religious and national tensions within the country. These tensions increasingly undermined the control of the federal government in Moscow over the Soviet territory and the satellite states in Central and Eastern Europe

(Evtuhov et al., 2004, pp. 779–799; Thompson, 1998, pp. 283–289). The creeping collapse of the Soviet Union slowly reconfigured the political and security landscape of Europe. Western and Soviet policy-makers faced the question of how to ensure a peaceful and orderly disintegration and transition of the Soviet Union. The Lubbers Plan – and the therein-enshrined idea of economic integration for the sake of peacebuilding and friendship – constituted a Western answer to this geopolitical challenge.

The ECT as the external relations component of the emerging Single Market for energy: The Lubbers Plan, on the other hand, sought to complement the beginning creation of a Single Market for energy. In response to the failure of Keynesian macroeconomic policies in the 1970s and early 1980s, the Member States and the Commission launched the Single Market Programme in the mid-1980s. This was a manifestation of the emerging neoliberal economic paradigm at that time. The Single Market Programme foresaw the finalisation of the Single Market by 1993 through the strengthening of market mechanisms and the dismantling of persisting barriers to trade in goods, services, capital and labour movements within the EU. The creation of the Single Market should allow for economies of scale, foster efficiency and European competitiveness and ultimately lead the European economy out of crisis (Moravcsik, 1991). The Commission took the view that the Single Market Programme also had to encompass Member States' energy sectors (European Commission, 1985, p. 24). The transition from fragmented, monopolistic national markets toward a competitive European energy market should lower energy prices equivalent to 0.5% of the EU's GDP, increase energy security and create vital background conditions for economic prosperity (Eikeland, 2004, pp. 4–5; Padget, 1992, p. 57). As the energy sector had always been a *domaine réservé*, most Member States initially met the Commission's proposal with hesitation (Padget, 1992, pp. 58–59). However, they could not deny the benefits of a Single Market for energy, as they had endorsed the general economic rationale underlying the Single Market Programme. In 1988, the Council of Ministers formally endorsed the proposal and asked the Commission to elaborate adequate measures so as to

create a Single Market for energy. In the following years, the Commission tabled a number of measures in order to advance this objective. The Commission notably proposed measures providing for ‘third party access’ (TPA) to energy networks as well as measures providing for greater transparency in energy pricing. TPA proved to be particularly sensitive in Council debates and among national utilities. Progress on the implementation of TPA thus took until the late-1990s. The Commission argued that TPA was a prerequisite for competition in the energy sector, as it enables consumers to buy gas and electricity from any supplier within the market regardless of ownership of interjacent transmission networks (Padget, 1992, p. 59). National utilities questioned the technical feasibility and the Commission’s expertise in this domain (Padget, 1992, pp. 69–72). In many regards, the Lubbers Plan can be considered as an initiative to extend the emerging Single Market for energy to the main transmission and supplier countries of the EU. The underlying reasoning was that the Single Market for energy needed to be embedded into an appropriate regional energy regime to properly function (European Commission, 1991, pp. 3, 4).

The Member States bring in the Commission to wield greater influence on the Soviet Union: The European Council welcomed Lubbers’ proposal for a ‘European Energy Community’ in its session in June 1990. The heads of state decided to further study the proposal. They entrusted the Commission to examine it on behalf of the Member States. The central role of the Commission reflected the intention of the heads of state to sell the ECT as a “European project” and to appear as a unitary actor in order to exert greater geopolitical influence and ensure a better economic deal with the Soviet Union. In the following year, the Commission – and more specifically the Directorate General for Energy (XVII) and for Trade (I) – fathomed the interest of Soviet Union (Buchan, 1990). The Soviet government embraced the proposal for a ‘European energy community’. The proposal promised to accelerate the modernisation of the antiquated and highly inefficient Soviet energy sector, to boost exports, to deliver technology spill-overs into further economic sectors and to generate badly needed hard currency inflows. It thereby bore the opportunity for the Soviet

government to lead the country out of its economic crisis and to get away from short-term economic aid from Western countries. Soviet and Western policy-makers drew parallels between the Lubbers Plan and the Marshall Plan, which had financed the reconstruction of Western Europe after World War II (Konoplyanik, 1996, pp. 156–158; Laurance, 1991). The Commission, moreover, continued consultations with the Member States in order to pin down the general objectives and institutional layout of a European energy community. The Dutch and British governments strongly supported the Commission in these efforts (Buchan, 1991). In November and December 1990, Commission President Delors sketched the Commission's ideas for a European energy community in different international fora (Agence Europe, 1990a). The European Council reacted positively to these ideas and expressed its hope of starting negotiations in 1991 (Agence Europe, 1990b).

The Commission enthusiastically assumes its role: Following the preliminary green light from the European Council, the Commission published a communication and draft text for a European Energy Charter in February 1991 (Agence Europe, 1991b, 1990c). The draft charter, *inter alia*, provided for free trade in energy resources, access to transmission networks and provisions on technical and environmental cooperation. More importantly for this study, the draft charter stipulated the liberalisation of the exploration and exploitation of energy resources and the enhancement of the level of post-establishment treatment and protection afforded to foreign investors in the energy sectors of host countries. The Commission's draft charter thereby foresaw the establishment of a full-fledged international investment agreement governing market access, post-establishment treatment and investment protection under the participation of the individual Member States and the EU (European Commission, 1991).

The Council of Ministers of the EU examined and formally endorsed the draft text of the European Energy Charter in April 1991 (Agence Europe, 1991c). The Soviet government also expressed its support. In the following months, the Commission – again in close

cooperation with the Dutch government – started the preparations for the launch of the negotiations on the European Energy Charter scheduled for July 1991. Two problems overshadowed this preparation period. The Commission and the Member States initially did not agree on which countries to invite to the negotiations. In the end, the Council of Ministers took the decision to invite all European and OECD countries to the ECT negotiations (Agence Europe, 1991d, 1991e). The second problem concerned the growing political instability in the Soviet Union and the countries of Central and Eastern Europe. In early 1991, the Red Army intervened in Lithuania and Latvia to oppress demonstrations for the independence of the Baltic Soviet Federal Socialist Republics (SFSRs). Several people died during these interventions, which triggered demands in the EU for an end to consultations with the Soviet government (Buchan, 1991; Palmer, 1991). Several SFSRs, moreover, raised first question marks over the competence of the central Soviet government to negotiate with Western Europe on a European Energy Charter. In particular, the Russian SFSR sought to assert exclusive competence over all energy resources within its territory in spring 1991. As the bulk of the Soviet Union's gas and oil deposits were located in the Russian SFSR, these quarrels threatened the ECT project. In the light of this situation, the Member States and the Commission stressed that they would exclusively negotiate with the central Soviet government and not engage in consultations with the SFSRs. The unclear distribution of competences, nevertheless, caused a headache in Brussels (Buchan, 1991).

5.1.2 The European Energy Charter

Despite these obstacles, the negotiations on the European Energy Charter started on time. On 15 July 1991, the delegates of about 50 European and OECD countries gathered in Brussels for the first day of negotiations. During the first session, the delegates elected Charles Rutten, a senior Dutch diplomat, as chairman of the conference. They agreed to structure the

negotiations in five working groups²², which would jointly elaborate the text of the European Energy Charter and prepare the text of the ‘basic agreement’. All negotiating parties sent representatives to all working groups. The Council Presidency and the Commission jointly represented the EU and the Member States in the negotiations. The individual Member States only rarely intervened in the negotiations in order to clarify their national positions in relation to the EU position previously presented by the Council Presidency or the Commission. Such interventions mostly concerned highly technical issues or issues coming predominantly under Member State competence (Interview, London, 16 January 2014). The working groups and their chairmen could draw on the support of a small conference secretariat. The secretariat was formally independent, but staffed with officials and hosted in the offices of the European Commission (Interview, London, 16 January 2014). During the first session, the delegates agreed to meet at first in their respective working groups and to reconvene for a second plenary session in late October in order to adopt the final text of the Charter. The energy ministers of the participating countries should then meet in The Hague on 17 December 1991 in order to sign the Charter (Agence Europe, 1991f).

The tight timetable of the conference reflected the pre-existing, high degree of support for the Commission’s draft text for a European Energy Charter as well as the non-binding, political nature of the Charter. The Commission’s Director General for Energy, Clive Jones, commented to that effect that the only unclear issue was “*the degree to which the Soviet Union will be willing to accept an attempt to reform its energy policy along market lines to give confidence to western companies and bankers to invest in the industry*” (Hill and Hargreaves, 1991). The timetable also echoed the concerns of the delegates with the increasingly unstable political situation in the Soviet Union (Agence Europe, 1991f). The

²² Working group I in charge of drafting the European Energy Charter (chaired by Director General for energy Maniatopoulos); working group II in charge of drafting the ECT (chaired by British diplomat Duncan Slater); working group III in charge of energy efficiency and environmental protection (chaired by Hungarian official); working group IV in charge of questions relating to oil and gas (chaired by Norwegian official); working group V in charge of nuclear energy and safety (chaired by Canadian official).

seriousness of these concerns forcefully manifested itself in mid-August 1991, when conservative forces in the Communist Party, the KGB and the Red Army staged a coup d'état against Gorbachev. The coup was unsuccessful. It nevertheless raised doubts about the prospects of the ECT project and the sustainability of East-West cooperation (Hill and Gardner, 1991). After the coup, a sense of urgency spread among Western policy-makers. Jacques Delors voiced the criticism that Gorbachev had managed to destroy the old Soviet system, but had failed in establishing a new order. Delors reasoned that the EU and the G7²³ had to step up their assistance to the Soviet government in managing the transition of the country, and underlined that the European Energy Charter constituted a core element of Western assistance to the Soviet Union (Agence Europe, 1991g).

The delegates reconvened in the working groups in mid-September 1991. Despite the political turmoil in the Soviet Union, the delegates made excellent progress on the substance of the European Energy Charter in the following weeks. In early October the working group overseeing the drafting of the European Energy Charter announced that they had already reached general agreement on content. They added that the Charter could be adopted as planned in the plenary session of the conference in late October (Agence Europe, 1991h). The delegates of the Soviet Union, Eastern and Central European countries merely cautioned that their countries would need a transition period to undertake the economic reforms necessary so as to conform to the objectives of the Charter (Hill, 1991a). Judging from press coverage and secondary literature, one must assume that the swift agreement was possible due to the pre-existing consensus on the general content of the non-binding charter. What is more, it was reported in later stages of the negotiations that the delegates of the Soviet Union, Eastern and Central European countries often did not understand the meaning and implications of the discussed clauses. The Charter project, its concepts and terminology were rooted in Western international economic law, which was yet uncharted territory for the

²³ The 'Group of Seven' encompasses Canada, France, Germany, Italy, Japan, the United Kingdom and the United States of America.

formerly socialist countries. Hence, the delegates from East and West did not, de facto, discuss as equals. Soviet, Eastern and Central European delegates acted as eager students of Western experts, listening to the elaborations of their Western counterparts (Doré, 1996, p. 146).

The disintegration of the Soviet Union applies the brakes: While the substantive work on the European Energy Charter could be concluded by early October, the overall negotiating process nevertheless stalled in autumn 1991. The failed coup d'état of August 1991 had kicked off the territorial disintegration of the Soviet Union. The Baltic SFSRs gained their formal independence from the Soviet Union and consequently participated in the conference on the European Energy Charter as sovereign states. Other SFSRs followed the example and sent 'observers' to the negotiations in Brussels (Agence Europe, 1991i). The delegation of the central Soviet government tried to reassure Western delegates that it remained fully competent to negotiate on the Charter. This position was, however, soon overtaken by events. On 22 October 1991, several SFSRs signed the Treaty on an Economic Community. The treaty was intended to create an economic community – similar to the EU – among sovereign SFSRs (Brzezinski and Sullivan, 1997, pp. 32–37). The treaty, inter alia, implied that the SFSRs were in control of energy resources and energy policy. In the following days and weeks, nascent energy companies, local authorities and newly created energy ministries of the SFSRs sought to assume control over the energy sector in the Soviet Union. The transfer of control remained, however, incomplete, and the resultant power vacuum made the planned adoption of the final text of the European Energy Charter in the plenary session of late October impossible. The delegates agreed that the text was ripe for adoption, but nobody knew whether the central Soviet government or the individual SFSRs should adopt the final text (Hill, 1991b; Hill and Lloyd, 1991). The delegates finally agreed on 21 November 1991 that the interstate economic committee of the central Soviet government as well as the governments of the SFSRs should jointly sign the European Energy Charter. The

compromise was not intended to prejudge the sensitive competence question of who was in control over energy resources and policy within the Soviet Union (Hill, 1991b).

On 16 and 17 December 1991, the energy ministers of the negotiating parties met in The Hague to sign the European Energy Charter (Agence Europe, 1991j). The group encompassed representatives of 46 parties, namely of the Soviet Union and the SFSRs, Eastern and Central European countries, the Commission, the Member States of the EU, the USA, Canada and Japan.²⁴ The final text of the European Energy Charter still clearly bore the signature of the Commission. While the wording of the final text (Energy Charter Secretariat, 2004, pp. 209–226) diverged from the Commission's draft text (European Commission, 1991) of February 1991, the general content and objectives of the final document had remained unchanged. The Charter documented the intention of the parties to establish a binding regulatory framework to promote, liberalise and protect investments in the energy sector (Energy Charter Secretariat, 2004, p. 216). At the occasion of the closing ceremony, the Dutch Prime Minister Ruud Lubbers called upon the parties to conclude the subsequent negotiations on the ECT by the end of 1992 in order to quickly harvest the economic and political benefits of the European Energy Charter (Agence Europe, 1991j; Hill, 1991c). Lubbers' optimism was, nevertheless, premature (Hill, 1991d). One week after the signing of the European Energy Charter in Brussels, the SFSRs concluded the so-called Alma Ata Protocols. The signing of these protocols led to the resignation of the Soviet government, the formal dissolution of the Soviet Union and marked the beginning of a decade of considerable political and economic instability within the successor states of the Soviet Union (Evtuhov et al., 2004, p. 799; Thompson, 1998, pp. 288–289).

²⁴ Albania, Armenia, Australia, Austria, Azerbaijan, Belgium, Belarus, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Estonia, European Communities, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Interstate Economic Committee of the Soviet Union, Ireland, Italy, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, The Netherlands, Norway, Poland, Portugal, Romania, The Russian Federation, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, The United Kingdom, The United States of America, Uzbekistan, Yugoslavia.

5.1.3 The Energy Charter Treaty

The negotiations on the binding ECT started in late February 1992 (Agence Europe, 1992b). Working group II was commissioned to elaborate the draft text of the ECT. As its task overlapped with the work of all other working groups, it rapidly absorbed the entire negotiating process (Interview, London, 16 January 2014). The negotiations on the ECT advanced at a good pace at first. The negotiating sessions of March and April 1992 produced progress; notably on disciplines for investment protection, energy trade, energy transit and environmental protection. The progress reflected, on the one hand, the increased interest of Russia and Eastern and Central European countries in the negotiations. They faced an increasing number of energy-related disputes among themselves and came to see the ECT as a framework to amicably settle these disputes (Hill, 1992). On the other hand, the Commission had come forward with a first draft text of the ECT in order to speed up the negotiations and to ensure the compatibility of ECT provisions and the Single Market for energy. The Council of Ministers endorsed the draft text, sent it to the other negotiating parties and underlined that the ECT negotiations should first forge agreement on trade, post-establishment treatment and investment protection provisions and only then discuss investment liberalisation commitments (Agence Europe, 1992c). But despite this fresh impetus, the negotiations soon ran into stalemate. It became clear that the legal systems of Russia and the Central and Eastern European countries were not sufficiently developed to honour obligations under Western international economic agreements. In April, the delegates therefore agreed to postpone further negotiating sessions. The negotiating pause was intended to allow the delegates of the former socialist countries to enhance their knowledge of western international economic law (Agence Europe, 1992d, 1992e). The substantive negotiations only started again in September 1992. The hope of concluding the negotiations on the ECT by the end of 1992 rapidly vanished. By spring 1993, a glut of disagreements had piled up, which delayed the negotiations on the ECT for almost two years. The following paragraphs summarise the most important disagreements.

Deadlock over investment disciplines: Investment disciplines stood very much at the centre of the deadlock. A key controversy concerned the question of whether investment liberalisation should proceed on the basis of NT or MFN treatment. The EU and the USA favoured the application of NT to the pre-establishment stage including the distribution of exploration and exploitation licences. They thereby sought to unlock the energy reserves of Russia and Central Asia for their national energy companies (Doré, 1996, p. 139; Wälde, 1996, pp. 277–284). Norway – silently supported by other countries – nevertheless rejected these demands. Norway proposed to provide market access for foreign investors on the basis of Most-Favoured Nation (MFN) treatment i.e. the obligation to treat all foreign investors alike. Norway also sought to keep the possibility of privileged treatment of national energy companies vis-à-vis foreign companies. The EU and the US strongly opposed the Norwegian proposal. European policy-makers reportedly even publicly pondered importing the dispute into the accession negotiations between the EU and Norway in order to increase pressure on Oslo (Agence Europe, 1993a, 1993b).

Another key controversy concerned the scope of acceptable reservations to the envisaged general investment liberalisation commitment under the ECT. Once the delegates had agreed to liberalise market access for foreign investors on the basis of negative lists, several countries – including some Member States – tabled lengthy lists with reservations. The Commission criticised such lengthy lists, saying they would unbalance the benefits of the ECT among the parties and might ultimately obstruct agreement. Russia and most Eastern and Central European countries, moreover, cautioned that they were unable to table conclusive lists of reservations or to commit to a planned standstill clause (Doré, 1996, p. 146). Under a standstill clause, a country must not introduce new restrictive measures, but may dismantle existing ones. As Russia wanted to attract foreign capital and gain access to downstream markets in Western Europe, it was generally in favour of liberalising market access for investors on the basis of NT (Konoplyanik, 1996, pp. 166–172). Russia stressed, however, that its investment and economic law was still in a formative stage (Konoplyanik,

1996, p. 173). It proposed, at first, an open-ended and then a 10-year transition period for the applicability of a standstill clause and most other key provisions of the ECT. The Russian proposal foresaw that transition countries could enact and dismantle restrictive investment measures and reservations under the ECT as deemed necessary by them. The US and the EU rejected the Russian proposal. Russia was, de facto, asking for a blank cheque to unilaterally determine and alter its liberalisation commitments. It took a considerable time before the EU and the USA came around and accepted a transition period in principle (Agence Europe, 1993c, 1993d; Doré, 1996, pp. 146–147).

Negotiations on post-establishment treatment, protection clauses and dispute resolution mechanisms were less controversial while no less complicated. The specific regulatory challenges of energy investments²⁵ and the diverging Northern American and European approaches to investment regulation triggered lengthy expert discussions on the design and wording of concepts like expropriation. These expert discussions mostly evolved between the delegates of the EU and other OECD countries. The delegates of Russia, and Eastern and Central European countries, were bystanders in these debates, as they did not possess the necessary expertise (Agence Europe, 1993e; Doré, 1996, p. 146; Interview, Brussels, 19 October 2011)

The USA and the EU, moreover, clashed over the so-called Regional Economic Integration Organisation (REIO) clause and the applicability of the ECT to sub-federal entities. The Commission and the Member States insisted that the ECT had to contain a REIO clause.

²⁵ The regulatory challenges of investments in the energy sector differ in two important regards from investments in most other economic sectors. First, investments in the energy sector are normally of considerable volume, complexity and duration. Energy exploration, exploitation, transport and distribution are highly capital-intensive activities. Investment projects often run over a period of 20 years or more before amortisation. And they are structured in a sequence of sub-projects and investments (construction of base camps, exploration and initial drilling, building of pipelines, roads, harbours, etc), which blurs the distinction between the pre- and post-establishment stage under international investment law. Second, host country governments normally assume a dual role in the energy sector. Governments act as supposedly neutral regulators of the national energy sector as well as proper economic actors. Many governments, for instance, act as business partners of foreign investors in joint ventures with state-owned energy companies. See Wälde (1996) for more information on this matter.

They wanted to prevent a multilateralisation of all benefits of EU-membership under the MFN clause of the ECT to non-EU members. The USA rejected the European demand as hidden protectionism (Agence Europe, 1994a; Doré, 1996, pp. 149–150). The USA, on the other hand, reiterated that it could not conclude the ECT for constitutional reasons unless the ECT would not apply to its sub-federal entities i.e. the federal states of the USA. The EU stressed that it was unable to accept such a broad carve-out under the ECT (Agence Europe, 1994a; Doré, 1996, pp. 150–151).

By late summer 1993, the ECT negotiations had ground to a halt. Policy-makers started pondering the possibility that the ECT negotiations might collapse without agreement (Agence Europe, 1993f). The chairman of the ECT negotiations called upon the Commission to resume its “driving seat” and to inject new dynamism into the negotiating process (Agence Europe, 1993g). In order to avert failure, the EU, Russia and the US met for trilateral talks in Moscow in mid-September to hammer out compromises for the key controversies (Agence Europe, 1993h). The outcome of the trilateral summit was, however, disappointing. The EU, Russia and the US were unable to bridge their differences; notably on Russia’s demand for a transition period (Agence Europe, 1993d).

The Commission assumes leadership and successfully unties the Gordian knot:

Following the unsuccessful trilateral meeting, the Commission grew determined to finally achieve a breakthrough. In October 1993, the Commission presented a proposal to resolve the crucial transition period issue. The Commission proposal consisted of a sequenced entry into force of the ECT. The negotiating parties should conclude the ECT as quickly as possible. The provisions on energy trade and transit, as well as on post-establishment treatment, protection standards and dispute settlement, should take effect directly after signing. Regarding investment liberalisation, a transition period of three years should apply. Countries with mature legal systems should table conclusive reservation lists and grant NT at the pre-establishment stage to foreign investors directly after the signing. Countries with as

yet maturing legal system should grant MFN treatment to foreign investors during the transition period. They should be allowed to enact new restrictive measures during this period. Toward the end of the transition phase, these countries should compile conclusive reservation lists. The delegates should then reconvene to examine and to jointly approve these lists. The Commission thereby sought to accommodate Eastern demands for a transition phase as well as Western concerns over providing these countries with a blank cheque for investment liberalisation (Agence Europe, 1993c). What is more, the Commission once more assumed international responsibility for the successful conclusion of the ECT negotiations and sought to demonstrate that it was an important actor in international politics capable of taking the lead (Doré, 1996, p. 148).

The Commission's proposal gained broad support among the delegates. In particular Russia praised the new approach as a breakthrough (Agence Europe, 1993c; Doré, 1996, p. 147). In the following weeks, the delegates slightly altered the Commission's proposal. Instead of concluding one international agreement with comprehensive provisions on a transition period, they agreed to conclude two separate agreements in an interval of three years. The ECT should be concluded first and encompass trade, transit, environmental, competition, post-establishment, protection and dispute settlement provisions. The later concluded 'supplementary protocol' should then contain binding provisions on investment liberalisation commitments (Agence Europe, 1993i; European Commission, 1993).

On 4 November 1993, the Commission formally informed the Council of Ministers and the European Parliament about the new two-stages approach in its communication "*The European Energy Charter: fresh impetus from the European Community*".²⁶ In this communication, the Commission requested the Council of Ministers to adjust the negotiating

²⁶ The communication is of considerable relevance for today's policy debate on future EU investment agreements. It addresses the question of how to ensure the supremacy of EU law in intra-EU investment relations as well as how to ensure the judicial monopoly of the European Court of Justice to authoritatively interpret European law. In particular the latter question is of considerable relevance today.

mandate to this new approach. The ministers changed the mandate accordingly on 10 November 1993 (Agence Europe, 1993j) and underlined that the ECT had to provide, in any case, for NT at the post-establishment stage and for investment protection provisions (Agence Europe, 1993k).

The Commission had hoped to conclude the ECT negotiations on the basis of the new approach before the end of the year 1993. These hopes were frustrated in December, when the Commission openly clashed with France. The Commission held on to its plan to include in the ECT a preliminary, albeit binding, MFN treatment obligation for the pre-establishment stage. The NT obligation, enshrined in the supplementary treaty, should later supersede this MFN obligation (Doré, 1996, p. 148). France, on the other hand, opposed to a binding MFN treatment obligation in the ECT. It stressed that some negotiating parties had largely opened their energy sectors and, de facto, granted NT to foreign investors, while other negotiating parties had isolated their energy sectors. A MFN obligation would thus cement vastly different levels of openness and distort the bargaining positions of the parties in the negotiations on the 'supplementary protocol' (Doré, 1996, pp. 148–149). The US introduced yet a third opinion into this debate. It underlined that it still sought an agreement providing for NT at the pre-establishment stage. It insisted that it preferred no agreement to a shallow agreement (Doré, 1996, pp. 148–149). In search for an ambitious compromise, it proposed allowing parties at least to annex positive lists containing unilateral commitments to grant NT (European Commission, 1993, p. 5). In the end, the interest to swiftly conclude the negotiations prevailed. The delegates agreed to the French demand that the ECT should merely provide for voluntary MFN treatment. The delegates discarded US concerns that the pre-establishment provisions were not ambitious enough. The European Energy Charter secretariat tellingly commented that “*you need Russia and the EC [to have a Treaty], and you hope to have the US as well*” (as cited in Doré, 1996, p. 149).

The final rounds of negotiations took place in early 1994. The delegates mostly focused on the rules for trade in nuclear goods; the cast of an envisaged Regional Economic Integration Organisation (REIO) clause; the applicability of the treaty to sub-federal entities, notably in the US; technical aspects relating to dispute settlement; and Norway's general concerns about joining the treaty. These remaining disagreements were controversial but manageable details within the overall negotiating process (Agence Europe, 1994a). In late April 1994, the chairman, Charles Rutten, therefore tabled a draft text for the ECT. The Rutten text sought to balance the different positions on these matters and indeed earned considerable support among the delegates. The EU's Council of Ministers expressed its support for the Rutten text in May. The delegates, nonetheless, continued haggling over details until mid-September, when the final text was sent out to the negotiating parties for approval (Agence Europe, 1994b, 1994c).

The signing of the agreement was set to take place on 17 December 1994 (Agence Europe, 1994c). In October, the US, however, demanded the reopening of the negotiations. The US expressed the criticism that it was unwilling to conclude an agreement without ambitious pre-establishment commitments, and could not accept the REIO clause or the provisions relating to the application of the treaty to sub-federal entities (Agence Europe, 1994d). Most other parties and the chairman of the negotiations rejected the US demand and held on to the planned signing of the agreement on 17 December 1994. In consequence, the US announced that it would not sign the ECT. On 17 December 1994, 42 negotiating parties, including the EU and its Member States, signed the ECT. It immediately entered into force on a preliminary basis and thereby established a new international organisation and multilateral framework for energy investment and trade (Doré, 1996, p. 151). The EU acceded to the ECT as a full-fledged party alongside the individual Member States.

5.1.4 The ‘Supplementary Protocol’

The negotiations on the ‘supplementary protocol’ started in early 1995, soon after the conclusion of the ECT. The ‘supplementary protocol’ should enshrine NT for foreign investors in energy sectors of host countries and promote the privatisation and demonopolisation of energy markets (Agence Europe, 1997a). In comparison to the preceding negotiations on the European Energy Charter and the ECT, the negotiations on the ‘supplementary protocol’ attracted only a little attention. European policy-makers primarily focused on speeding up the ratification process and extending the ECT membership to interested third countries. The ratification process of the ECT, moreover, became increasingly complicated. The Russian Duma voiced concerns about the limitation of Russia’s sovereignty over its energy resources under the ECT and its ‘supplementary protocol’. By 1997, it became clear that Russia was unlikely to ratify the ECT and would abide to the ECT merely on a preliminary basis (Agence Europe, 1997b). Taking into consideration that the ECT project had been conceived in order to subject Russian energy policy and its energy sector to international economic law and market mechanisms, this development was a serious blow. European policy-makers spent most of their time trying to convince Russia to ratify the ECT.

The negotiations on the ‘supplementary protocol’ rapidly progressed in the slipstream of these events (Agence Europe, 1997a). In January 1997, media reported that the negotiations on the ‘supplementary protocol’ could be wrapped up within hours, if the parties showed the political will to do so (Agence Europe, 1997b). Mostly Russia, Norway, Australia and Iceland remained critical of the ‘supplementary protocol’ due to the potential limitation of their sovereignty over their energy resources. France, on the other hand, disliked the idea of opening up its energy market to foreign investors. The French position not only slowed down the negotiations on ‘supplementary protocol’ of the ECT, but also undermined the finalisation of the Single Market for energy. France generally rejected measures which would challenge the monopolies of its utilities Electricité de France (EdF) or Gas de France

(GdF) or allow foreign investors to buy shares in these companies. In particular, the United Kingdom expressed criticism that French utilities were benefiting from the gradual liberalisation of energy trade and investment within the EU, while the French government went to great lengths to keep the French energy sector closed to foreign investors (Johnstone, 1998). In December 1997, the chairman of the ECT, Charles Rutten, nevertheless, informed the public that most sensitive issues in the negotiations on the ‘supplementary protocol’ had been resolved. He stressed that the conclusion of the talks in early 1998 was realistic (Agence Europe, 1997a). Rutten’s optimism was premature. During spring 1998, France re-emphasised its opposition to investment liberalisation in the energy sector. France, moreover, linked the conclusion of the ‘supplementary protocol’ to the conclusion of the stalled negotiations on the Multilateral Agreement on Investment (MAI) in the OECD. It stressed that the concerns of civil society against the liberalisation of international investment flows, which came forcefully to the fore in the context of the MAI negotiations, could not be discarded in the negotiations on the ‘supplementary protocol’ of the ECT. France consequently vetoed the assent of the Council of Ministers to the draft text of the ‘supplementary protocol’ (Interview, telephone, 4 February 2014a). As the EU was unable to formally endorse the draft text of the ‘supplementary protocol’, the conclusion of the negotiations was repeatedly postponed (Agence Europe, 1998a). In December 1998, and under the shadow of the collapse of the MAI negotiations, the negotiations on the ‘supplementary protocol’ broke down without furor. The ECT thus only contains soft law provisions on investment liberalisation.

5.2 The EU in the negotiations on the Energy Charter Treaty

The preceding section traced the negotiations on the ECT from their earliest stages to the collapse of the negotiations on the ‘supplementary protocol’. It constitutes by far the most comprehensive and detailed account of the ECT negotiations so far available in the literature. It has already shed some light on the question of why the EU acquired sufficiently

comprehensive de facto competences to even enter into investment protection commitments in this forum. The following section complements this account. It first zeroes in on, and evaluates, the EU's role in the ECT negotiations. It then examines whether supranational or intergovernmental accounts better explain the noteworthy degree of Member State cooperation and delegation in this instance of international investment policy-making.

The EU acquires and uses comprehensive de facto competences in international investment regulation: The EU played a pivotal role and possessed extensive de facto competences in investment negotiations under the ECT. The ECT was from the outset a 'European project' rather than an 'intergovernmental project'. When Ruud Lubbers presented his plan to establish a European energy community during the session of the European Council of June 1990, his fellow heads of governments immediately decided to cooperate and to empower the Commission to manage the preparations of the ECT negotiations on their behalf across all issue areas (Buchan, 1990). The Member States and the Commission underlined in their discourse during this period that the EU as a cohesive actor of international affairs – rather than a group of states – sought to negotiate the ECT with the Soviet Union. What is more, not the individual Member States but the Commission conducted EU-internal and international consultations with the Soviet Union, drew up a draft text for a European Energy Charter and managed the logistics of the upcoming negotiations on the European Energy Charter and ECT. As the Lubbers Plan only vaguely foresaw the establishment of an energy trade and investment agreement with the Soviet Union, the Commission necessarily enjoyed some leeway in further defining the project including its investment disciplines.

The EU acquired an even more important role during the core negotiations on the European Energy Charter, the ECT and its 'supplementary protocol' between July 1991 and December 1998. The Member States closely cooperated on all agenda items – including investment liberalisation, post-establishment treatment and protection standards – and sought to speak

with a single voice in the ECT negotiations. At the beginning of the ECT negotiations, the Council Presidency was the main representative of the Member States and the EU. The Council Presidency typically outlined the EU position vis-à-vis third countries and then invited the Commission to elaborate on technical aspects of the position. The Member States were generally present in the negotiations and would – if necessary – intervene in order to provide technical expertise or to clarify their national position in relation to the EU position. The working method within the EU delegation was, nevertheless, to keep the number of Member State interventions limited and to confine such interventions to areas of Member State competence (Interview, London, 16 January 2014; Interview, Brussels, 18 January 2012; Interview, telephone, 4 February 2014a). The coordination between the Member States, the Council Presidency and the Commission was generally harmonious and trustful across all issue areas (Interview, telephone, 4 February 2014a). As the ECT negotiations advanced, the representation modalities slightly evolved. The Commission gradually took over the role as the EU's main representative from the Council Presidency (Interview, telephone, 4 February 2014a). The Commission's increasingly central role was not limited to areas of exclusive or shared Union competence like trade or transport provisions. The Commission became the main representative of the EU in negotiations on investment disciplines, too. Third country negotiators recalled that the Commission official obviously spoke on behalf of the EU and its Member States in investment negotiations (Interview, Brussels, 19 October 2011). The Commission increasingly stood at the very centre of negotiations on investment liberalisation, post-establishment treatment and protection standards. Negotiators explained that the Commission gradually acquired this central role within the EU delegation, because the negotiations required considerable preparation and technical expertise, which the rotating Council Presidency and the Council secretariat could not provide. What is more, they underlined that the Commission official in charge of the investment negotiations was highly capable, motivated and thus naturally became a key figure in the negotiations (Interview, Brussels, 19 October 2011; Interview, telephone, 4 February 2014a). Third countries, moreover, strongly felt the cohesiveness and importance

of the EU in the ECT negotiations in the form of lengthy negotiating breaks, which the EU delegation frequently demanded in order to coordinate its position. One third country negotiator recalled that about a third of the negotiating time elapsed while waiting for the EU to pin down its position in internal coordination meetings behind closed doors in a special room located next to the negotiating venue (Interview, telephone, 4 February 2014a). Finally, the preceding analysis of the negotiating history of the ECT demonstrated that the EU was also the main driver of the negotiations. The EU – and more specifically the Commission – conceived the ECT project, repeatedly tabled draft texts for the Charter and the ECT, developed decisive compromise proposals to successfully conclude the negotiations and ratified the Charter and ECT as a full-fledged negotiating party. In conclusion, the EU was cohesive, proactive and acquired de facto competence in all areas of international investment policy in this forum.

Commission entrepreneurship through agenda setting, fringe and de facto competences: In accordance with hypothesis H₁, the Commission eagerly promoted the consolidation of the EU's de facto competences in international investment policy during the negotiations on the ECT. While the EU was seen as the driver of the ECT project at the international level, the Commission was the main driver and architect of the ECT project within the EU including its ambitious investment provisions. When, in 1993, the ECT negotiations had for instance ground to a halt, the chairman of the negotiations Charles Rutten called upon the Commission to resume its “driver's seat” and to lead the negotiations out of deadlock (Agence Europe, 1993g).

The Commission's policy entrepreneurship reflected power and functionalist considerations. On the one hand, the Commission reportedly sought to prove itself as a veritable actor of international affairs beyond the narrow field of trade policy. It wanted to play a proper role in global affairs next to the Member States. As this objective comprised in the given context to play a proactive role in investment talks, the Commission also pushed into this domain.

On the other hand, the Commission saw the ECT project as a crucial building block of its EU-internal energy policy. It argued that the Single Market would only function smoothly if embedded in an appropriate regional energy regime. From its point of view, it was thus crucial to have the EU and itself play a decisive role in the ECT project so as to ensure policy coherence.

The Commission drew on three strategies to consolidate the EU's role in the ECT negotiations and in particular in investment talks. First, it used its agenda setting powers in order to ensure its central role in the negotiations. The Commission decisively elaborated on Lubber's first vague proposal of a 'European Energy Community'. It, moreover, tabled decisive drafts of the European Energy Charter, the Energy Charter Treaty and critical compromise proposals, which paved the way to the successful conclusion of the negotiations and decisively shaped the investment provisions of today's treaty. The Commission's proactive and skilful negotiating behaviour and technical, administrative knowledge of its officials led to the concentration of all negotiating activity in the Commission's hand with the Council Presidency and the individual Member States gradually withdrawing from the negotiating process (Interview, Brussels, 19 October 2011; Interview, telephone 4 February 2014a).

Second, the Commission invoked the EU's fringe competences to ensure the EU's central role in the ECT project. While the ECT is primarily known for its investment provisions, it also contains substantial trade, transport and other policy issues coming under exclusive or shared Union competences. The ECT was thus bound to become a so-called 'mixed agreement'. Many ECT provisions govern trade in goods (i.e. energy commodities) and trade in services (i.e. exploration, exploitation, distribution, sales etc.). These ECT provisions fell into the Union's undisputed exclusive competence under the CCP. The Member States were therefore obliged to cooperate on trade policy questions, the Commission was legally entitled to administer the preparations in this domain and the EU had to ratify the agreement

together with the Member States. As the Commission had to play an important role in the ECT project, it manifestly suggested itself to the Member States to cooperate and to empower the Commission to also assist in the elaboration of the project in domains beyond Union competences, like investment regulation (Interview, Brussels, 18 January 2012; Interview, London, 16 January 2014).

Third, the Commission invoked its Eu-internal de facto competences and emphasised the regulatory link between the ECT and the emerging Single Market for energy to promote Member State cooperation and delegation. From the beginning, the Commission underlined that the ECT was conceived as the international relations component of the emerging Single Market for energy. The ECT should extend the Single Market for energy beyond the EU's borders. The underlying reasoning was that the Single Market for energy would only function efficiently and securely, if the supply and transmission countries also embraced a market-based approach to the regulation of their energy sectors. The Commission clearly formulated this view in its communication accompanying the draft text for the European Energy Charter of spring 1992.

“[The European Energy Charter]... finds itself fully integrated within the energy policy which the Commission wishes to promote... with a view to completing the internal energy market and providing an external relations policy to back it up.”

(European Commission, 1991, pp. 4, 3)

As the Member States had agreed to cooperate on energy policy and had accepted the Commission's decisive role in liberalising and deregulating the Single Market for energy, it was only natural for the Member States to engage in close cooperation and to extend the EU-internal de facto competences of the Commission to the international sphere. The Commission could thereby play a central role in the ECT project and ensure regulatory coherence (Interview, telephone, 4 February 2014a).

European business opposes the Commission-led ECT project: In contrast to hypothesis H₂, European business did not promote the EU's pivotal role in investment-related negotiations under the ECT negotiations. European business took little interest in the project during the first two years. It only got involved in the project in early 1992, when the talks advanced from political deliberations on the Lubbers Plan and European Energy Charter to technical negotiations on the binding ECT and its 'supplementary protocol'. It was around that time, moreover, that European policy-makers started regular consultations with European business (Interview, telephone, 4 February 2014a).

European utilities were the most active business actors in this process, and their attitude toward the ECT project was outright hostile. They perceived the ECT as a regulatory component of the creation of the Single Market for energy and thus as a threat to their monopolies. European utilities focused their lobbying activity on national ministries, which were often sympathetic to their concerns. (Doré, 1996, p. 142; Wälde, 1996, p. 255). European utilities sought to prevent the inclusion of too liberal clauses into the ECT and the supplementary protocol, such as provisions on 'third party access' to gas and electricity grids (Doré, 1996, p. 142; Wälde, 1996, p. 255). Representatives of trade unions from the energy sector backed the concerns of European utilities and warned that the ECT might contribute to increasing energy prices, a degradation of energy infrastructure and compromise the EU's energy security (Agence Europe, 1992f). Representatives of European utilities, moreover, challenged the assumption of policy-makers that investment projects in the energy sectors of the Soviet Union and Central and Eastern European countries could even be profitable in the first place (Riley, 1991). Other representatives of European utilities stressed that the key challenge in the Eastern countries was the modernisation of the antiquated energy infrastructure. They warned that a competitive market order and, notably, provisions on 'third party access' would hinder a modernisation of the energy infrastructure in these countries (Müller, 1991). As the ECT negotiations advanced, European utilities did not drop

their opposition to the ECT project. They nevertheless understood that it was too late to nip the project in the bud and consequently adopted more nuanced and arguably constructive “token” positions (Interview, telephone, 4 February 2014a). European upstream energy companies, on the other hand, were more open-minded vis-à-vis the ECT project. Most European energy companies active in upstream markets, like British Petroleum or Royal Dutch Shell, did not own distribution networks or engage in sizeable downstream business activities. Hence, they did not perceive the creation of the Single Market for energy or the ECT project as a major threat. The E&P Forum²⁷ – a global federation of upstream energy companies – participated in regular consultations with European policy-makers and welcomed the plan to agree on binding investment liberalisation commitments, post-establishment treatment and protection standards. It even supported the inclusion of weak provisions on ‘third party access’ in the form of energy transit provisions. But the E&P Forum, nonetheless, made no secret of its general scepticism regarding the ECT project. It questioned the assumption of policy-makers that the ECT would effectively enhance the trade and investment climate in the former socialist countries (Jenkins, 1996, pp. 190–193). Other business sectors, finally, did not take an interest or get involved in policy-making debates on the ECT project. Secondary literature and interviews with negotiators confirm this finding. Press research produced merely one generic statement of support for the ECT from the Belgian Federation of Large Industrial Energy Consumers (Agence Europe, 1992g). In conclusion, business preferences cannot be considered as a driver of the ECT project or the EU’s pivotal role in it.

The Member States seek to enhance their geopolitical and economic capabilities:

Despite the opposition of substantial parts of European business against the ECT project – and thus in partial disagreement to hypothesis H₂ – the Member States generally favoured close cooperation and delegation in the ECT negotiations including for international

²⁷ The E&P Forum is the predecessor of today’s International Oil and Gas Producer Association (OGP).

investment disciplines. The Member States' readiness to cooperate and to delegate reflected several considerations.

Member State support for the Lubbers Plan was very high during the conception and pre-negotiation period of the ECT project. The Member States immediately agreed to closely cooperate on the project due to economic and geopolitical considerations. The Member States felt that potentially cheaper and more reliable access to energy resources was desirable. They also welcomed the prospect of unlocking investment opportunities in up- and midstream energy markets for their national energy companies. All Member States, albeit to varying degrees, came to the conclusion that the Lubbers Plan would benefit their economies (Interview, 17 June 2013; Interview, Brussels, 18 January 2012). The Member States, moreover, supported the Lubbers Plan as a geopolitical instrument to shape the transition in the Soviet Union and its satellite states. As the Soviet Union was still a hostile global superpower with huge armed forces and nuclear arsenal, the Member States considered it to be in their vital interest to stabilise the Soviet Union. They took the view that the Lubbers Plan – much like the ECSC after World War II – would promote cooperation and increase their influence on the country through international economic integration. By the same token, the Member States felt the need to empower the Council Presidency and the Commission to act as their single voice across all issue areas in order to wield more bargaining power vis-à-vis Moscow (Interview, Brussels, 19 October 2011; Interview, telephone, 17 June 2013). Concerns over the distribution of competences between the Member States and the EU therefore never surfaced (Interview, Brussels, 18 January 2012). Commission and Member State officials commented to the effect that European and Member State policy-makers were aware that the ECT project was of a unique nature and constituted a *'one off'* decision. What is more, the ECT negotiations, despite their complexities, were no *'ideological battlefield'* over competing regulatory approaches. Unlike GATT/WTO or the MAI negotiations in the OECD, European policy-makers knew and agreed that the ECT negotiations would not set a precedence for the division of labour, legal competences or

global regulatory approaches in future trade and investment negotiations, which the Commission could later invoke to demand for greater de facto or legal competences in other fora (Interview, telephone, 17 June 2013; Interview, Brussels, 18 January 2012). Close Member State cooperation and delegation was thus inherently unproblematic. And as the Commission invested considerable resources in proving itself as a serious broker of international affairs, the Member States were willing to allow the Commission to play an increasingly central role in the negotiating process.

During the core negotiations, Member State preferences nevertheless became more nuanced. The Member States started focusing on the economic rather than geopolitical aspects of the ECT. They increasingly evaluated the provisions of the ECT against the background of ongoing policy-making debates on the Single Market for energy (Interview, telephone, 4 February 2014a). While all Member States continued to support the ECT project and were ready to closely cooperate and to speak with a single voice, EU-internal coordination grew slightly more complicated. The surfacing divisions among the Member States also affected the EU's behaviour and position in the investment negotiations. All Member States could agree on the objective of working toward high post-establishment treatment and protection standards for energy investment. Hence, the EU firmly pushed for such provisions in the negotiations on the ECT (Agence Europe, 1993k, 1992c). The Member States nevertheless disagreed on the scope and desirability of investment liberalisation commitments under the ECT. Negotiations on investment liberalisation commitments under the ECT were intimately linked to debates on the liberalisation of energy investments within the emerging Single Market for energy, the privatisation of national utilities and the demonopolisation of national energy sectors through mandatory 'third party access' to gas and electricity networks. The privatisation, demonopolisation and 'third party access' were highly sensitive issues within the Council of Ministers as well as in Member State administrations. The Commission, the United Kingdom, the Netherlands and Belgium were generally in favour of these measures. France, backed by southern European Member States, sought to contain liberalisation efforts

within the EU and under the ECT. Germany held an intermediate position in these debates (Padget, 1992; Interview, telephone, 4 February 2014a). These divisions made it difficult for the EU to develop and to defend a common position vis-à-vis third countries in negotiations on investment liberalisation under the ECT. The divisions repeatedly surfaced in the negotiations on the ECT as well as on the 'supplementary protocol' when, notably, France sought to prevent too extensive investment liberalisation commitments. These observations stand in opposition to the assumptions made in the analytical framework. The framework developed the argument that post-establishment treatment and protection clauses – unlike liberalisation commitments – should significantly circumscribe the policy space and sovereignty of states. Hence, they should be less likely to engage in cooperation and delegation. This case, however, shows that at least in sensitive sectors such as public services, states may have a different perception. It needs to be mentioned here that in the early 1990s, states were yet little experienced with ISDS and may not have fully grasped the sovereignty-limiting implications of investment protection. To conclude, Member State preferences clearly promoted the EU's initial involvement as well as the subsequent use of its de facto competences at different stages of investment-related negotiations on the ECT. While these observations are in line with liberal intergovernmentalism and the assumption that the Member States seek to maximise their capabilities, they are in disagreement with the hypothesis H₂, which stipulates that European business shaped Member State preferences and promoted cooperation and delegation.

5.3 Conclusion

The chapter traced the EU's involvement in the ECT negotiations. It finds that the EU's outstanding role and de facto competences in these negotiations confirm supranational theories and hypothesis H₁, but partly invalidate liberal intergovernmentalism and hypothesis H₂. The Commission engaged in policy entrepreneurship and decisively contributed to the EU's central role and extensive de facto competences in this forum. To that end, it drew on

its agenda setting powers, invoked its fringe competences under the CCP as well as fringe and de facto competences stemming from its central role in the creation of the Single Market for energy. The ECT and this milestone project of the EU were linked. For exactly this causal link between the ECT and the Single Market for energy, most European energy companies opposed to the ECT project. They perceived it as another Commission-led attack against the monopolistic market positions. Due to their defensive interests and the liberal nature of the ECT project, they lobbied against the project and the Commission's efforts. The Member States, finally, were eager to cooperate and to delegate negotiating to the Commission. They felt that it was in their best economic and geopolitical interest to appear as a unitary actor vis-à-vis the Soviet Union. The Commission's campaigning, its proactive attitude and the '*one-off nature*' of the ECT negotiations further propelled cooperation and delegation. This observation is in line with intergovernmentalism, which stipulates that states cooperate to maximise their capabilities, but it contradicts the assumption that business preferences decisively informed government preferences and drove integration. Hence, the chapter casts further doubts on hypothesis H₂.

Chapter VI – The EU in negotiations on the Multilateral Agreement on Investment and the Singapore Issues

The Chapter examines the EU's involvement in the investment negotiations on the Multilateral Agreement on Investment (MAI) in the OECD as well as in the consequent negotiations on investment as part of the so-called Singapore Issues in the WTO. The negotiations on the MAI and the Singapore Issues are examined in one chapter, as they were intimately linked. The chapter examines on the basis of the analytical framework and *ex ante* hypotheses why the EU played a central role in both investment negotiations. The chapter draws a truly intriguing picture of European Integration. It demonstrates that supranational thinking and hypothesis H_1 better account for the EU's involvement in investment negotiations on the MAI and the Singapore Issues than intergovernmental theories and hypothesis H_2 . The EU's involvement in both negotiations reflected Commission entrepreneurship, rather than business lobbying and Member State preferences.

In short, the Commission ensured the EU's participation in the MAI negotiations – in addition to the individual Member State delegations – by invoking fringe competences. The Commission saw the US-led MAI project critically for functional and power considerations. Hence, it went to great lengths to ensure that investment disciplines also became part of the WTO agenda as one of the so-called Singapore Issues. European business showed only moderate interest in the MAI project, as it was unlikely to deliver significant economic gains. The Member States met the MAI project with greater interest than the Commission and European business, but only unwillingly accepted the Commission's demand to partially cooperate and to delegate negotiating to the EU-level. To the frustration of the Commission,

the Member States sought to keep the EU's involvement in the MAI negotiations to the legally required minimum. So in 1997-1998 when the MAI negotiations ran into stalemate over substance, the US Trade Representative Office (USTR) in a remarkable alliance with the Commission reportedly exploited the situation to make the MAI negotiations collapse and to shift multilateral investment negotiations back to the WTO. The Commission openly favoured the WTO, as it was arguably serving European economic interests better and because it could act as the EU's single voice without having to deal with hostile Member States at the negotiating table. This remarkable instance of Commission entrepreneurship clearly helped consolidating the EU's role in international investment policy, as will become clear *inter alia* in chapter VIII.

6.1 The way toward the MAI negotiations

Plans to negotiate a binding multilateral agreement on investment under the auspices of the OECD reach back to the 1960s. In 1962, the OECD produced the Draft Convention on the Protection of Foreign Property, which, however, was never adopted due to disagreements among its members. Instead the Draft Convention served afterwards as a model text for BITs for the coming decades. At the same time, the OECD elaborated the Codes of Liberalisation of Capital Movements and Invisible Operations. The Codes remain until today a key policy instrument in the liberalisation and treatment of capital and investment flows. The Codes are, however, mere gentlemen's agreements, which are enforced through peer review in OECD meetings (Muchlinski, 2000, pp. 1035–1036). In 1988, the OECD countries explored the possibility of upgrading the Codes to a comprehensive multilateral investment agreement. The negotiations nevertheless quickly ended in stalemate. The US was unwilling to grant Canada a national treatment exemption for its cultural sector and started pushing for talks on ambitious investment liberalisation commitments. Negotiations on comprehensive investment liberalisation commitments, however, were not acceptable for most other OECD countries (Corporate Europe Observatory, 1998; Tieleman, 2000, p. 8).

A US initiative to increase pressure on developing countries in the Uruguay Round:

The US government soon revived plans to negotiate a multilateral investment agreement in the OECD. US pressure led to the decision of the OECD Council of Ministers²⁸ to commission a feasibility study on the prospects of establishing a multilateral agreement on investment. Observers interpreted the US efforts to re-launch negotiations in the OECD as a reaction to the onerous talks on investment disciplines in the Uruguay Round of the GATT. As described in Chapter IV, the US government had pushed investment disciplines onto the agenda of the Uruguay Round and remained throughout the entire negotiating process the *demandeur* of the creation of ambitious investment disciplines under the GATT. Developing countries, however, persistently opposed US plans to establish a full-fledged investment framework. The US government thus started pushing for negotiations on a multilateral investment agreement in the OECD in order to create an outside option to the Uruguay Round. The underlying reasoning of the US government was that developing countries could either cooperate by contributing to the Uruguay Round negotiations on an ambitious multilateral investment framework or else get sidelined in the form of an OECD investment agreement. The US government assumed that negotiations on investment disciplines in the OECD would be an easy and swift enterprise, which would produce a state-of-the-art multilateral investment agreement. The agreement should be open for accession of non-OECD states and thereby, de facto, set global investment policy standards, which would practically also bind the opposing developing countries. The US government – and in particular the US State Department – thereby sought to increase pressure on developing countries to adopt a more collaborative attitude toward investment negotiations in the GATT. This strategy reportedly guided the US government throughout the MAI negotiations

²⁸ OECD membership comprised the following 29 countries at this point in time. Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, South Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The European Communities, represented by the European Commission, took part in the Council of Ministers as observer, and was allowed to speak but not to vote.

(Corporate Europe Observatory, 1998; Lawrence et al., 2006, pp. 149–153; Smythe, 1998, pp. 242–245; Tieleman, 2000, p. 8).

Due to US pressure, the OECD's Committee on International Investment and Multinational Enterprise (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT) officially re-examined the possibility of establishing a multilateral investment agreement under the auspices of the OECD after 1991 (Henderson, 1999, p. 19). In early 1994, the Committees set up five issue-specific working groups²⁹ so as to examine important technical matters in more detail. The OECD Council of Ministers received a joint draft report of the CIME, CMIT and working groups in June 1994 and requested the OECD Secretariat to prepare a formal negotiating mandate (OECD, 1995a)-

Business expresses moderate and conditional support: Business was involved in the preparations of the MAI negotiations and generally welcomed the project. The US Council on International Business (USCIB) was reportedly the most supportive national business federation and provided significant input. USCIB pointed out that investment had become even more important than traditional trade in goods and thus required multilateral rules (Lawrence et al., 2006, pp. 152–153). The Business and Industry Advisory Committee to the OECD (BIAC) – the official representative of the business community in OECD policy-making – was closely involved in the discussions on the draft mandate and accompanying final report on the MAI. BIAC promoted the MAI negotiations and reportedly markedly influence the negotiating mandate and the accompanying final report. European business federations like UNICE – today BusinessEurope – also welcomed the MAI initiative and participated in discussions on the negotiation agenda of the MAI. UNICE commented at the end of preparatory discussions that it was satisfied with the mandate and final report (Tieleman, 2000, pp. 9–10). Several Member State business federations voiced similar

²⁹ The working groups examined existing liberalisation commitments under OECD instruments, liberalisation commitments in new areas, institutional matters, investment protection and dispute settlement arrangements as well as the involvement of non-OECD countries.

general statements of support without voicing specific requests (Interview, by telephone, 3 July 2013; Interview, by telephone, 17 June 2013). Unlike American business, which primarily focused on investment liberalisation, European business reportedly was mostly interested in enhancing post-establishment treatment and protection standards in developing countries (Woolcock, 1990, p. 25; Interview, Brussels, 13 June 2012). The support of European business thus hinged on the assumption that the MAI would be multilateralised either through subsequent WTO negotiations or the accession of non-OECD countries. Some business representatives however were more hesitant regarding the project. They feared that European policy-makers were unfamiliar with the NAFTA-approach of investment regulation, which clearly informed the MAI project. They cautioned that European policy-makers might therefore lose out in negotiations on investment liberalisation to the detriment of European business (Interview, telephone, 3 July 2013). Finally, the Trade Union Advisory Committee to the OECD (TUAC) was also regularly consulted on the MAI initiative, but got less involved in the preparations (Tieleman, 2000, pp. 10–11).

It needs mention that many experts questioned the authenticity of business support for the MAI project. Many business federations, which came out in favour of the MAI initiative, had very close ties with governments. Former diplomats of the US State Department – the main promoter of the MAI negotiations – for instance were heading USCIB. Many experts came to the conclusion that governments artificially triggered business demands for the MAI. Pierre Sauvé, then official at the OECD's Trade Directorate, commented that “... *bureaucracies were proposing an agreement that the private sector in most countries was not necessarily calling for*” (as cited in Lawrence et al., 2006, p. 153).

The OECD Council of Ministers reconvened and examined the proposed negotiating mandate and an attached final report in May 1995. The final report on the MAI initiative stated that the preceding years had brought a surge in international investment activities. It was now the right time to establish a multilateral framework for international investment.

The report lay out as negotiating objectives that the MAI should provide for ambitious investment liberalisation, investment protection and investment dispute settlement provisions (Lawrence et al., 2006, pp. 153–156).

On 5 May 1995 and largely in response to US instigation, the OECD Council of Ministers endorsed the final report, the negotiating objectives and the formal mandate without controversy (Graham, 2000, p. 2). It underlined in the formal mandate that the MAI should be a self-standing international treaty and open to accession by OECD countries, the European Communities and also non-OECD countries. The Council, moreover, indicated that the OECD ministerial meeting of 1997 should conclude the MAI negotiations. The literature reports that all OECD countries seemed to generally agree on the objectives and content of the MAI and were optimistic about bringing the negotiations to a successful and swift conclusion. Experts observed that the launch of the MAI negotiations took place in the favourable environment created by the recent wave of BIT conclusions, the successful ratification of NAFTA and the Energy Charter Treaty. In comparison to these complex negotiations, the MAI negotiations looked like a “walk in the park” – an easy stocktaking of best practices among like-minded capital-exporting Western democracies (OECD, 1995a).

6.1.1 Commission entrepreneurship for WTO-based investment negotiations

Not all participating parties shared the enthusiasm of the US government for the MAI project (Dymond, 1999, p. 26; Smythe, 1998, pp. 239, 244–245). In particular the European Commission – which participated in all OECD meetings as the representative of the EU – did not hide its half-hearted support for the initiative (Graham, 2000, pp. 23–25; Henderson, 1999, p. 15; Muchlinski, 2000, p. 1039). Functionalist and power considerations explain the Commission’s scepticism regarding the MAI negotiations. First, the Commission argued that negotiations on multilateral investment disciplines in the OECD could only deliver second-best solutions in comparison to negotiations in the WTO. About a month before the

endorsement of the mandate for the MAI negotiations in the OECD, the Commission published its communication “*A level playing field for direct investment world-wide*” in which it described its overall approach to international investment policy (European Commission, 1995a). The communication underlined that the WTO should be the primary forum for multilateral negotiations on investment disciplines so as to get developing and emerging countries aboard. Most investment barriers resided in developing and emerging countries, whereas OECD countries were already relatively open and granted high levels of investment protection. In the eyes of the Commission, and arguably European investors, the MAI initiative would marginally enhance the investment climate in the least critical countries, while excluding from the outset those countries where European investors suffered most from high market access barriers and insufficient protection. The MAI negotiations could deliver only marginal benefits for business and the contracting states. The Commissioner for Trade, Sir Leon Brittan, did not get tired of reiterating this position in public statements throughout the MAI negotiations.³⁰ And a former top official of DG Trade, who oversaw the Commission’s participation from Brussels, recalled that he continuously qualified the MAI as a ‘*bad and pointless project*’ in Commission-internal debates (Interview, Brussels, 24 September 2013). The second reason for the Commission’s scepticism regarding the MAI negotiations was arguably its de facto representation monopoly in the WTO. The Commission reportedly favoured the WTO over the OECD, because it would act as sole representative of the EU and its Member States in WTO negotiations. It was nevertheless evident that the Commission would have to negotiate together with Member State delegations in the OECD, as the Member States were competent regarding many aspects of international investment policy and traditionally participated and spoke in the OECD on their own behalf. The Commission did not underline this motivation in public statements, but involved experts and the literature on the MAI almost unanimously point to this concern behind the Commission’s position. The view is also indirectly

³⁰ See for instance Commissioner Brittan’s speech on the MAI at the European Parliament on 10 October 1998 (EP reference: Speech/98/212).

supported by the observation that most EU Member States were more supportive of holding multilateral negotiations on investment disciplines in the OECD, as it enabled them to negotiate for themselves (Dymond, 1999, p. 28; Lawrence et al., 2006, p. 151; Muchlinski, 2000, p. 1039).

Commission entrepreneurship through agenda setting and the strategic use of international negotiating fora: Even though the Council of Ministers of the OECD formally launched the MAI negotiations on 5 May 1995, the Commission did not drop its reservations or plan to hold negotiations on international investment disciplines under the auspices of the WTO. The Commission continuously expounded the problem that the MAI negotiations could only deliver second-best solutions. In EU-internal debates, the Commission persistently demanded the Council of Ministers of the EU for a mandate to push investment disciplines back onto the working agenda of the WTO. The Commission, moreover, continued international debates with Canada, developing countries and the US so as to gather support for also negotiating on investment disciplines under the auspices of the WTO. Many developing countries and the US were very critical regarding the Commission's proposals, while Canada, Japan and South Korea were supportive (Smythe, 1998, pp. 244–245; Woolcock, 2003, p. 251). In 1996, the Commission's two-level game and advocacy for WTO work on investment played out. The Council of Ministers of the EU followed the Commission's recommendations and provided it with a mandate to seek the inclusion of investment into the working agenda of the WTO on the occasion of the first ministerial meeting of the WTO in Singapore at the end of the year (Graham, 2000, pp. 24–25).

The US government criticised the decision of the Council of Ministers of the EU. The US government felt that the EU – and more specifically the Commission – sought to sideline the MAI negotiations. Frustrated with these developments and the Commission's activism, the US government directly addressed the EU Member States and demanded them to confirm their full commitment to the MAI negotiations in the OECD. In the course of these debates,

the US government, the Commission and the EU Member States ultimately reached a shaky compromise. The US government agreed that it would support the EU's initiative to set international investment disciplines back onto the working agenda of the WTO. The EU Member States and the Commission, on the other hand, would publically acknowledge and accept that the MAI negotiations would remain the primary forum for negotiations on multilateral investment disciplines (Graham, 2000, pp. 24–25).

In December 1996, the ministers of the newly created WTO gathered in Singapore so as to discuss the working agenda for the coming years. The discussions took place already under the impression that a new round of multilateral trade negotiations was in preparation. The EU, Canada, Japan and South Korea strongly pushed for establishing working groups on investment, competition, trade facilitation and government procurement. These working groups should examine the prospects of holding full-fledged negotiations on these issues in the coming round. The four issues became known as *Singapore Issues*. The US provided half-hearted support to the EU-led initiative during the deliberations in Singapore. Many developing countries strongly criticised the initiative. In the end, the EU and its supporters, however, prevailed and working groups on the four issues were established. The working group on investment started meeting in May 1997 and consulted on the general elements, benefits and risks of a Multilateral Investment Framework under the WTO. The EU and the US had informally agreed that in-depth discussions and veritable negotiations should only start once the MAI negotiations had ended (Graham, 2000, pp. 24–25; Kumar, 2003; Woolcock, 2003, p. 251). The creation of the WTO investment working group, which should later become the nucleus for investment negotiations during the Doha Round, is the product of the Commission using its agenda setting powers in EU-internal debates while at the same time mobilising like-minded third countries for its project. The creation of the WTO working group, on the other hand, consolidated the EU's role in international investment policy by making the Commission the EU's single voice in this key forum.

6.1.2 The Commission mandate for the MAI negotiations

Despite only moderate interest of European business, the EU Member States had generally endorsed the MAI project during the preparatory debates on the MAI project. In particular Germany, Austria, the United Kingdom and the Netherlands had warmed to the project and showed sincere interest. France, on the other hand, formally supported the project, but worried about the implications of the MAI for its often discriminatory and *dirigiste* industrial policy (Interview, telephone, 17 June 2013; Interview, Brussels, 18 January 2012; Interview, Brussels, 24 September 2013). In late 1994, EU-internal discussions on the EU's representation modalities and a potential negotiating mandate for the Commission started.

The Commission fails to become the EU's single voice: The Commission reportedly soon tried to convince the Member States to assign it as their sole representative and single voice in the MAI negotiations even though its reservations vis-à-vis the MAI project were well known. The Commission sought to further consolidate the EU's role in the MAI negotiations by referring to alleged relevant fringe and implied competences. It claimed that the EU was anyway likely to be competent to regulate international investment under the Common Commercial Policy (CCP). It added that the upcoming Opinion 1/94 on the scope of the CCP of the European Court of Justice (ECJ) was very likely to confirm its teleological interpretation of the CCP. Disgruntled with the Commission's continuous attempts to expand the EU's competences as *inter alia* illustrated in Opinion 1/94, the Member States discarded the Commission's proposal and argument. They saw no need to pool negotiating efforts in the hands of the Commission in this forum. National investment policy officials had been successfully representing their governments in the OECD for decades. From their point of view, the pooling of negotiating in the hands of the Commission would merely undermine their competences and was unlikely to deliver a better deal. They, moreover, stressed that the upcoming Opinion 1/94 was likely to prove that most agenda items of the MAI negotiations still came under national competence (Interview, telephone, 3 July 2013). In Council debates prior to the start of the MAI negotiations, some Member States even underlined that they

saw no need to coordinate their positions with their counterparts from other EU Member States (Council of Ministers, 1995). In November 1994, the ECJ indeed ruled in favour of the Member States by advancing a remarkably narrow interpretation of the CCP (see Chapter VIII). The Commission's attempt to even further extend the EU's de facto competences in international investment policy thus failed as the Member States were fed up with the Commission's competence usurping behaviour.

Fringe competences nevertheless ensure the Commission's participation: In May 1995, the Council of Ministers of the EU adopted, without much further debate, a mandate empowering the Commission to participate in the MAI negotiations alongside the Member States (Agence Europe, 1995a). The consensus in the Council of Ministers regarding the joint participation of the Member States and the Commission in the MAI negotiations primarily reflected the EU's undeniable fringe and implied competences in MAI-relevant domains as well as the EU's customary participation i.e. de facto competences in all OECD meetings as observer. Policy-makers from the Member States and the Commission shared the assumption that the MAI would be a 'mixed' agreement. The recent entry into force of the Treaty of Maastricht, and Opinions 1/94 and 2/92, left no doubt that the EU held fringe competences necessary for negotiations (see Chapter VIII, Section 3) (European Court of Justice, 1994, 1994; Koutrakos, 2006, pp. 40–48). In particular, the proposed disciplines on investment liberalisation, transfers of funds, trade-related investment measures and certain post-establishment treatment standards indisputably fell into shared or exclusive Union competences according to the Treaty chapter on capital movements and the CCP. The 'mixity' of the MAI obliged the Member States to empower the Commission to participate in the negotiations. As it was impossible to disentangle agenda items in OECD negotiations according to the competence distribution within the EU, European policy-makers agreed that the Commission had to participate in all negotiating formations of the MAI talks. In addition to this EU-internal institutional constraint, the OECD functioned as an external institutional constraint promoting the EU/Commission's involvement in the MAI negotiations. The

regulatory activity of the EU regarding the Single Market and the work programme of the OECD strongly overlapped, which made close cooperation between the EU and OECD a regulatory necessity. Hence, the EU had been a formal observer in the OECD for many decades. The Commission represented and spoke on behalf of the EU in the OECD meetings. As the EU and the Commission had well-established roles in the OECD, it was coherent for the Member States and other OECD countries to also accept their participation in the MAI negotiations (Dymond, 1999, p. 28; Interview, telephone, 3 July 2013; Interview, Brussels, 18 January 2012).

After the adoption of the mandate, the Council of Ministers further underlined the Member States' claim to competence over international investment regulation vis-à-vis the Commission in the choice of the EU-internal coordination setup for the negotiations. The Council discarded the possibilities of either holding formal coordination meetings on the MAI negotiations in the '113 Committee' or of establishing a specialised Commission working group. Instead the Council decided to create an ad hoc Council committee. The committee directly reported to the General Affairs Council and was not linked to a specific Treaty chapter such as the CCP or Capital Movements. The Member States thereby underlined that the MAI negotiations primarily came under national competence. They also sought to prevent the creation of a precedent which the Commission could invoke so as to challenge the delimitation of the CCP in Opinion 1/94 (Interview, telephone, 3 July 2013). According to all accounts, European business did not take an interest in these debates, but occasionally repeated its statements of general support for the MAI project. In summary, neither the Member States nor European business were truly interested in speaking with a single voice in the MAI negotiations. Despite the tense relationship with the Member States in the light of Opinion 1/94, the Commission tried to become the EU's single voice but without success. The EU's undeniable fringe and implied competences, nevertheless, ensured a minimum level of EU involvement in the MAI negotiations.

6.2 The MAI negotiations

In September 1995, the delegations of 29 OECD member countries and the Commission started meeting for the first negotiating sessions. The Dutch diplomat Frans Engering was appointed as chairman of the negotiations. The OECD Secretariat hosted and provided technical expertise to the negotiating parties and thereby acquired an important role in the negotiating process. BIAC and TUAC were regularly briefed and invited to submit comments to the MAI negotiations so as to integrate business and labour concerns (Tieleman, 2000, pp. 9–11). Furthermore, representatives of the World Trade Organisation (WTO), the World Bank and the International Monetary Fund (IMF) observed the MAI negotiations whenever agenda items concerned their work. In autumn 1997, finally, several non-OECD delegations – Argentina, Brazil, Chile, Hong Kong, China, Estonia, Latvia, Lithuania and Slovakia – gradually joined the negotiations as observers (Henderson, 1999, p. 20).

The negotiating process was structured in several negotiating formations. The so-called Negotiating Group assembled the national lead negotiators and oversaw the entire negotiating process. Deliberations in the Negotiating Group focused on six substantive areas: scope and application of the agreement, investment liberalisation, investment protection, dispute settlement, implementation, accession of non-OECD countries, and the relationship to other investment agreements (OECD, 1995b). The Negotiating Group would determine the general direction of the negotiations as well as resolve disagreements on controversial issues. Negotiations on technical details were delegated to five expert groups and three drafting groups.³¹ The similar and narrow foci of the drafting and expert groups underlined the considerable technicality of the MAI negotiations (OECD, n.d.).

³¹ Expert group No. 1 focused on selected issues of dispute settlement and geographical scope. Expert group No. 2 examined the treatment of tax measures under the MAI. Expert group No. 3 focused on the so-called special topics like investment incentives, state monopolies, corporate practices and the movement of key personnel. Expert group No. 4 discussed institutional matters. Finally, expert group No. 5 finally addressed matters related to financial services. Discussions on more typical components of international investment agreements (IIAs) were held in three drafting groups. Drafting group No. 1

6.2.1 The EU in the MAI negotiations

The Commission nonetheless proves itself as important negotiating party: The Member States and the Commission jointly participated and spoke in all negotiating formations of the MAI talks. The Commission typically spoke first in negotiations followed by the individual Member States. The EU was thus much less cohesive in the MAI negotiations than in the Uruguay Round or the ECT negotiations. All interviewees suggested that the Commission was a central negotiating party despite the Member States' initial reservations about involving the EU/Commission in the negotiations. Several interviewees argued that the Commission managed to acquire a central role because of the proactive and constructive negotiating style of the political and technical lead negotiators (Interview, Paris, 1 October 2012a; Interview, Paris, 1 October 2012b). The Commission reportedly frequently sought to forge broad coalitions with third countries and came up with compromise proposals so as to advance the negotiations. Despite this general perception, the Commission's powers, and hence role, remained sometimes unclear and became the object of controversy. It was occasionally unclear within the EU delegation – i.e. among the delegations of the EU Member States and the Commission – as well as to third countries, whether the Commission could speak, whether only the Commission could speak and to what extent the Commission's positions in deliberations were authoritative. A former US negotiator commented that the ambivalent powers and role of the Commission sometimes became a problem and slowed down discussions (Interview, Paris, 1 October 2012a; Interview, Paris, 1 October 2012b). In addition to the Commission's role as a proper negotiating party alongside the Member States, it sought to play an important role in coordinating the positions of the then 15 Member States of the EU. The Commission would typically organise coordination meetings in Paris with the delegations of the EU Member States on the morning of each

examined selected topics of investment protection. Drafting group No. 2 discussed selected topics concerning definition and treatment of investors and investments at the pre- and post-establishment stage. Drafting group No. 3, finally, examined selected topics of definition, treatment and protection of investors and investments.

negotiating day as well as before and after important negotiating sessions so as to forge and maintain a common EU position as far as possible.

The Member States seek to contain the Commission: The readiness of the EU Member States to coordinate their positions nevertheless varied considerably across issue areas. Most EU Member State delegations accepted the Commission's coordination attempts on issues like the Regional Economic Integration Clause (REIO) or capital movements, where the EU/Commission was undoubtedly competent to act. In these domains the EU Member States indeed jointly defended a common position, allowed the Commission to speak on their behalf and acted as a 'collective actor' (Interview, Paris, 1 October 2012a). Most EU Member State delegations refused, however, to coordinate on issues falling into national competence like investment protection or questions related to intellectual property rights. What is more, the so-called *big four* – France, Germany, the Netherlands and the United Kingdom – continuously coordinated their positions in these domains among themselves and even with the US government, but deliberately excluded the Commission from these meetings. The Member States – and in particular France, the United Kingdom and Germany – were determined to protect their competences in international investment policy from any attempts by the Commission to interfere and to become active in this domain (Interview, Brussels, 18 February 2012). The Member States' remarkable preoccupation with competences, on the one hand, reflected the great number of investment policy officials involved. Many governments sent – as customary in OECD Committee debates on investment – technical experts in charge of national BIT programmes as negotiators. These expert officials were arguably more concerned with protecting their competences than national trade policy officials and diplomats were, who were already used to close cooperation and did not risk losing any competences from cooperation in this domain. On the other hand, cooperation and coordination between the Commission and the Member States were also clearly influenced by the recent heated debates over the scope of exclusive Union competence under the CCP during the proceedings of Opinions 1/94 and 2/92

(Smythe, 1998, p. 248; Interview, Brussels, 18 January 2012). A former negotiator of the Commission commented to the effect that cooperation with the Member States was very difficult and frustrating in comparison to the preceding ECT negotiations due to the latent struggle over competences (see Chapter VIII) (Interview, Brussels, 18 February 2012).

6.2.2 Substantive disagreements among the negotiating parties

The MAI negotiations quickly gained momentum due to a very intense meeting rhythm. From September 1996 onwards, the negotiating group met 23 times – i.e. every six weeks – for three days each time in order to determine the overall direction of the talks. The three-day sessions of the Negotiating Group were followed by three days of technical discussions in the expert and drafting groups so as to examine and hammer out details (Dymond, 1999, p. 29; Interview, Paris, 1 October 2012b). It became soon clear that the MAI negotiations would be a more challenging enterprise than initially thought. The negotiating parties broadly agreed on the key elements of the MAI, as most of them could be found in the more than thousand investment agreements which OECD countries had already concluded. Deliberations in the negotiating group, expert and drafting groups showed, however, that no common approach to these elements and provisions had emerged among OECD countries. Moreover, the negotiating parties showed unwilling and/or unable to bridge these differences in their national approaches. The following paragraphs briefly summarise technical and political controversies in the Negotiating Group and the degree of European unity on these questions for the period between September 1995 and early 1997 (Dymond, 1999, p. 29).

Disagreements over post-establishment treatment and protection provisions:

Disagreements on technical questions were surprisingly frequent. Often these technical disagreements reflected the different regulatory approaches under NAFTA-type and European BITs. Many disagreements were thus transatlantic and promoted European unity despite latent competence struggles. The following list contains the most important

controversies and is not exhaustive. First of all, the negotiating parties could not agree on a definition of investment. While many European countries favoured a broad, open-ended, asset-based definition, Canada and the USA insisted on a narrow definition of investment, as under NAFTA. Second, the negotiating parties could not agree on disciplines regarding performance requirements and investment incentives. Some delegations considered certain performance requirements as valuable economic policy instruments, while others considered performance requirements as inherently wasteful and discriminatory. Third, the question of whether the MAI should require states to pay financial compensation only for direct or also indirect, creeping expropriation became another point of controversy. Negotiating parties with strong regulatory traditions feared that the obligation to financially compensate for indirect expropriation could become extremely costly and would undermine their right to regulate, while other parties considered such an obligation to be a quintessential element of an IIA. Fourth, the negotiating parties initially also attempted to establish rules preventing discriminatory tax treatment. The Commission, in particular, pushed for negotiations on this issue, as European investors reportedly faced discrimination in many US states. Discussions in a special working group showed to be so complicated that after one year of negotiations all parties agreed to drop the agenda item. Fifth, the inclusion of a non-lowering of standards clause regarding environmental and labour standards became a controversial issue toward the end of the negotiations, when NGOs started criticising the MAI negotiations. While, for instance, the Canadian and US delegations were sympathetic to the idea, many EU Member States rejected such plans. Sixth, although most negotiating parties had investor-to-state dispute settlement (ISDS) provisions in their BITs, some delegations disliked the plan to provide for ISDS under the MAI and insisted on state-to-state dispute settlement. When, in late 1998, the MAI negotiations collapsed, no compromises had been found for most of these issues (Dymond, 1999, pp. 34–41; Graham, 2000, p. 27; Muchlinski, 2000, pp. 1040–1046; UNCTAD, 1999b).

Disagreements over investment liberalisation commitments: The high number of disagreements on rather technical questions was undoubtedly a burden for the MAI negotiations. Eyewitnesses, nonetheless, agree that it was instead a set of questions relating to investment liberalisation which seriously endangered and contributed to the collapse of the MAI negotiations. The most significant controversy concerned the question of whether the MAI negotiations should seek commitments on up-front investment liberalisation. The negotiating mandate stipulated that:

“[The MAI]... should go beyond existing commitments to achieve a high standard of liberalisation covering both the establishment and post-establishment phase with broad obligations on national treatment, standstill, roll-back, non-discrimination/MFN, and transparency, and apply disciplines to areas of liberalisation not satisfactorily covered by the present OECD instruments;... [and] be legally binding and contain provisions regarding its enforcement.”

(OECD, 1995a)

The negotiating parties interpreted this clause differently. The US delegation argued that the mandate foresaw negotiations on up-front liberalisation commitments. Hence, the US pushed for bargaining in this area. Canada supported the US delegation. The US demand was widely perceived as an attempt to multilateralise NAFTA. European BITs normally did not bind governments regarding the regulation of inward investment. The chairman of the MAI negotiations, the EU Member States, the Commission and other negotiating parties, on the other hand, were surprised and taken aback by this US demand. The EU Member States and the Commission rejected the US reading of the mandate. They argued that the MAI mandate only foresaw the codification of existing levels of investment liberalisation. The EU Member States and the Commission pointed out that they were not ready to accept any liberalisation commitments in services which went beyond commitments under existing GATS and OECD commitments. The Europeans argued that any new liberalisation commitments under the

MAI would be multilateralised through the MFN clause of the GATS and thus enable third countries to free ride (Graham, 2000, p. 34). The EU Member States and the Commission instead proposed that the MAI should contain a standstill clause as well as a rollback obligation like the OECD Codes on Capital Movements and Invisible Operations. The US and Canadian delegation in turn disliked the idea of unconditional standstill and rollback clauses. The EU Member States and the Commission moreover stressed that any new liberalisation commitments should be non-reciprocal and arise from the long-established peer review process in the CIME and CMTE after the conclusion of the MAI negotiations (Dymond, 1999, p. 34; Lawrence et al., 2006, p. 157; UNCTAD, 1999b, pp. 11–13; Interview, Paris, 1 October 2012b).

Discussions on the question of up-front liberalisation commitments stood increasingly at the centre of the negotiating process. They continued for more than a year without any significant convergence of minds. While the US strongly insisted on launching negotiations on up-front investment liberalisation, most other countries felt that such negotiations could only start – if at all – once the core text of the MAI was finalised. Unless the core text was agreed, the negotiating parties could not be certain about the actual implications of eliminating reservations. In late 1996, the chairman, nevertheless, proposed that the negotiating parties should table negative lists indicating existing market access reservations for foreign investors. He hoped that the lists would enable the Negotiating Group to find common ground and finally advance on the issue of up-front liberalisation. These hopes were frustrated when the OECD Secretariat received the lists in February 1997. The US, Canada, many EU Member States and the EU tabled very extensive lists. The US list counted more than 400 pages of highly detailed reservations enumerating non-conforming investment measures as well as a general disclaimer that sub-federal entities would not be bound by the MAI (Marchand, 1998). The lists of the EU Member States and the EU, on the other hand, were often long and very vague in their reservations. Only the Benelux countries tabled few to no reservations (Thomas, 1997). The US and Canada strongly criticised many

EU Member States, as they felt the vague wording of the reservations left many sectors outside the scope of the MAI. Disputes on liberalisation commitments even emerged among EU Member States, which made it impossible to develop and follow a unified EU position in this domain of the negotiations. Spain, for instance, strongly criticised the United Kingdom, which planned to keep access to its fishery sector closed to foreign as well as European investors (Thomas, 1997). A former negotiator recalled that at the end of the negotiations the “*lists of reservations on market access filled three books of the size of telephone directories*” (Interview, Brussels, 24 July 2012a) which clearly showed that the space for agreement among the negotiating parties was extremely limited in this key issue of the negotiations. The extensive lists of reservations made it difficult to strike an acceptable balance of liberalisation commitments among the negotiating parties. Attempts to find solutions to these problems were numerous, but all failed. At the latest, in late 1997, it was clear that the liberalisation commitments under the MAI would not exceed the existing commitments under the OECD Codes and GATS. In consequence, US business in particular lost interest in the MAI negotiations (Graham, 2000, pp. 34–35; UNCTAD, 1999b, p. 13).

A closely related transatlantic controversy concerned the so-called Regional Economic Integration Organisation (REIO) clause and the applicability of the MAI to sub-national entities. The EU – and notably the Commission – pushed for the inclusion of a REIO clause into the MAI text. The REIO clause stipulates that liberalisation commitments within regional economic integration organisations like the EU do not have to be granted to third countries under MFN clauses. The EU Member States and the Commission acted very cohesively and sought to prevent the MAI from fully multilateralising access to the Single Market. The US and Canadian delegation criticised the European demand for a REIO clause. They argued that such a clause contradicted the very spirit of the MAI negotiations, as it constituted a huge, open-ended and vague carve-out and would allow for the continued discrimination against foreign investors in the Single Market. The US delegation particularly feared that the REIO clause would enable the EU to circumvent Article 54 TFEU, which

stipulates that foreign enterprises incorporated in one Member State had to be treated as European nationals. In other words, the US delegation assumed that a REIO clause could entail a significant de-liberalisation of access to the Single Market. The US delegation, on the hand, vehemently demanded a clause providing for the non-applicability of the MAI to sub-national entities i.e. US federal states. The US delegation insisted that it could not conclude the agreement otherwise for constitutional reasons. The Member States, and notably the Commission, stressed that such a clause would constitute a huge carve-out to the MAI and therefore rejected the US demand. The controversy over the REIO and sub-national entities clause could not be resolved before the collapse of the MAI negotiations and increasingly slowed them down (Graham, 2000, pp. 30–31).

The French demand for a general carve-out for cultural industries became a further problem related to the liberalisation of investment flows. The French delegation refused to accept any liberalisation commitments or other obligations in the domain of cultural industries. It argued that cultural industries were central to national identity and culture. The special role of culture for society thus required special treatment under international agreements. Canada, Italy, Belgium, Greece and Australia supported the French demand. The US delegation, on the other hand, strongly opposed it and rejected the alleged special nature of cultural industries for society. The US argued that the demand for a general exception of cultural industries served to shelter non-competitive national cultural industries. Japan, New Zealand, the Nordic Countries, the United Kingdom, Germany and the Netherlands supported the US position, as they feared that a too broad carve-out would harm their cultural industries abroad (Agence Europe, 1997c). The EU was thus divided on the cultural exception clause. As the matter closely tied into debates on the treatment of intellectual property rights under the MAI – a jealously guarded domain of Member State competence at this time – it was impossible for the Commission to coordinate Member States and define a common strategy in this field (Dymond, 1999, p. 35; Graham, 2000, pp. 31–32; Interview, Brussels, 18 January 2012)

Finally, in summer 1996, the so-called extraterritoriality issue became a major dispute among the negotiating parties and overshadowed the entire MAI negotiations. The Commission and the EU Member States showed great unity in their rejection of the US demand to accommodate the Helms-Burton Act (July 1996) and the Iran-Libya Sanctions Act (June 1996) under the MAI. Most third countries supported the EU position. The Helms-Burton Act, inter alia, enabled US nationals to bring claims before US courts against foreign companies allegedly trafficking in assets expropriated by the Cuban government. The act was particularly controversial as it even enabled persons who had not been US nationals at the time of expropriation to bring claims. The Iran-Libya Sanctions Act, on the other hand, foresaw the imposition of sanctions on foreign firms which invested or traded in oil and gas with Iran or Libya. Most legal experts and negotiating parties agreed that both acts were not in conformity and even contradicted core principles of public international law, international investment law and the key principles of the MAI. The US assertion of, de facto, exporting its legislation to third countries thus caused a severe row between the EU Member States, the Commission and the US delegation. The Commission – in the name of the Member States and the EU – even warned the US delegation that it would file a claim against the Helms-Burton Act at the WTO Dispute Settlement Body as the measure violated the US obligations under the WTO Agreement. The Commission ultimately desisted from this step, when the US government showed its willingness to limit the applicability of both acts against investors and firms from the MAI negotiating parties (Dymond, 1999, pp. 37–38; Graham, 2000, pp. 28–31; Muchlinski, 2000, p. 1047).

The MAI negotiations run into stalemate: In early 1997, technical and political disagreements had become very numerous. Observers agreed that the MAI negotiations had run into serious problems despite the alleged like-mindedness of the negotiating parties. The chairman of the Negotiating Group declared in March 1997 that it was impossible to bring the negotiations to a successful end by May 1997 as stipulated by the negotiating mandate.

He advised the negotiating parties to extend the deadline of the MAI negotiations for another year so as to settle the many disagreements (Dymond, 1999, p. 30). The OECD Council of Ministers of May 1997 followed the chairman's advice. The hope that the extension of the negotiating deadline would help to overcome disagreement was soon frustrated. The Negotiating Group showed unable to broker compromises in the following months. During summer and autumn 1997, the question of up-front liberalisation crystallised as the main stumbling block of the MAI negotiations with no agreement between the US and the EU in sight (Dymond, 1999, p. 30).

The inability of the Negotiating Group to advance the negotiations at this stage was arguably due to the very nature of the MAI negotiations. The MAI negotiations had been conceived and carried out at the bureaucratic level without significant involvement of heads of governments or ministers. With regard to the US, it is known that Congress never discussed the MAI project before the actual collapse of the negotiations. Also, President Bill Clinton reportedly never looked into the MAI project despite it being a US-led initiative. Politicians from the EU Member States were not involved or interested in the project. The only notable exception was the Commissioner for Trade, Leon Brittan. Commissioner Brittan however was publically in favour of holding multilateral negotiations on investment disciplines in the WTO rather than in the OECD. The absence of political decision-makers from the negotiating process was probably fatal to the MAI negotiations at this stage. Many of the substantive disagreements were too sensitive for bureaucrats to decide. Hence, the MAI negotiations slowly ran into stalemate in the second half of 1997 (Lawrence et al., 2006, pp. 172–173).

6.2.3 Non-Governmental Organisations and the anti-MAI campaign

NGOs are not of direct relevance to the topic of the study. The NGO community nevertheless claims – rightly or wrongly – to have played a decisive role in the collapse of

the MAI negotiations. Hence, the involvement of NGOs in the MAI negotiations should be mentioned at least briefly here so as to provide a comprehensive picture of the negotiating process.

In May 1997 – shortly after the decision of the Council of Ministers of the OECD to extend the deadline of the negotiations – a draft text of the MAI was leaked and widely circulated among NGOs in OECD countries. Most NGOs reacted with outrage. They criticised the fact that the MAI negotiations had been conducted in complete secrecy without democratic scrutiny and that the agreement would significantly circumscribe the regulatory space of the parties. The MAI was depicted as a treaty dictated by multilateral corporations to the detriment of the contracting states and their citizens (Tieleman, 2000, p. 11). The NGO community started an internationally coordinated campaign against the MAI in spring 1997. The campaign sought to explain the content and potential implications to politicians and citizens. In consequence, several trade unions became aware of the issue and pressed their governments to include clauses to ensure the non-lowering of social, labour, health and environmental standards (Dymond, 1999, p. 30). The USA, France and the United Kingdom showed themselves to be sympathetic to these demands, while more orthodox countries like Germany or the Netherlands were only ready to accept preambular language on this point (De Jonquières, 1998a). Due to the NGO campaign, the general public – in particular in France – developed a strong interest in the negotiations. Demonstrations were held outside the premises of the OECD in Paris. And the MAI negotiations even became a hotly debated topic among cineastes at the Cannes Film Festival of 1998 (Interview, Paris, 1 October 2012a). The OECD Secretariat was caught off guard by these developments. In an apparent reaction of panic, it published the draft text of the MAI in spring 1997 and invited the NGO community to consultation meetings (Tieleman, 2000, pp. 12, 15–16). The NGO community saw these measures as hypocritical and laconically reiterated its demand to abandon the MAI project (Graham, 2000, pp. 47–48).

As the opposition from NGOs grew ever stronger during 1997, a well-known structural problem of the MAI negotiations came to bear down on them even more strongly. Business stood to be the beneficiary of the MAI project, but hardly spoke up for the MAI project. American business had lost interest in the project when it had become clear that the MAI would not deliver liberalisation commitments beyond existing GATS and OECD commitments. European business, on the other hand, had always shown rather lukewarm support. And its interest in the project further diminished when it became apparent that the MAI would include special clauses regarding social, health and environmental standards. European business felt that the MAI would set a lower level of investment protection and post-establishment treatment than normally afforded under Member State BITs. It again became evident that the MAI negotiations were mostly a government-driven rather than a business-driven initiative. The lack of business support for the MAI weakened the argumentative position of policy-makers in public debates (Graham, 2000, p. 49; Lawrence et al., 2006, pp. 171–172; Woolcock, 2003, p. 251).

6.2.4 The collapse of the MAI negotiations – A tale of competence struggles and institutional rivalries

In May 1997, the OECD Council of Ministers had extended the deadline for the conclusion of the MAI negotiations for another year in the hope of finally resolving the many substantive disagreements, which had surfaced during the first two years. Instead, the disagreements further crystallised and the NGO campaign further complicated the negotiations. As the year 1997 elapsed, it became evident that the Negotiating Group would not conclude the technical work on the MAI within the extended deadline. The Negotiating Group announced it would be seeking a political settlement over the remaining controversies until April 1998. The political settlement should comprise the broad structures and key components of the MAI. The details and technical drafting of the agreement should then be completed after April/May 1998 (Dymond, 1999, pp. 30–32).

In January 1998, the USA, however, explained that the remaining time was insufficient for reaching a political settlement on the many outstanding issues. The Member States and the Commission rejected the US view. It was clear to most delegations that the US government adopted this new position because it had not been able to renew its fast track authority from Congress for the MAI negotiations. Due to the mounting anti-MAI campaign in the US and upcoming midterm elections, the US government was not keen on making a fresh attempt in the near future. The US government did not want domestic debates on its trade policy strategy at this point in time and hence had no intention to either conclude or discontinue the MAI negotiations. The main *demandeur* thus de facto withdrew from the MAI negotiations for the foreseeable future (Dymond, 1999, p. 31; Lawrence et al., 2006, pp. 172–173).

The Europeans collectively underlined their continuing commitment to a quick conclusion of the MAI negotiations in March 1998. The Commission tabled a communication demanding the Council of Ministers to adopt a unified position and cohesive negotiating strategy so as to bring the MAI talks to a swift and successful end against all odds. The Commission called in particular for a common approach regarding the applicability of the agreement to sub-national entities, a general limitation of the number of reservations, the controversy over extraterritorial enforcement of national legislation, and related the definition of national security. The EU and the Member States disagreed on all of these points with the US, which implicitly suggests that the Commission called for a cohesive stance of the EU vis-à-vis the US (Agence Europe, 1997d). The Council of Ministers acknowledged the Commission's communication and enumerated its proper objectives for the remaining month of negotiations. The Council reply indicated that the MAI should be applicable to sub-national entities, should contain a REIO clause, conform with WTO law, contain the extraterritorial applicability of national law and should not contain liberalisation obligations exceeding GATS commitments. The Council reply, moreover, indicated that France insisted on a cultural exception clause, while other Member States were hesitant (Agence Europe, 1997c).

European business also called one last time for a swift conclusion of the talks. UNICE stressed that the failure to conclude the MAI negotiations in May 1998 would be particularly detrimental for European Small and Medium-Sized Enterprises (SMEs), which relied much more on transparent and predictable investment conditions than big multinational companies. It stressed, moreover, that OECD and WTO negotiations on investment disciplines should not exclude each other (Agence Europe, 1998b).

The Negotiating Group continued its frequent meetings until April 1998 without, however, engaging in serious negotiations. With the USA de facto withdrawn from the process, it was impossible to resolve any outstanding issues. In April 1998, the French government demanded a formal suspension of the MAI negotiations. The underlying assumption was that any negotiating efforts would be in vain until the midterm elections in the US were over and the US government could seek fast-track authority (De Jonquières and Kuper, 1998). The US and Canada were sympathetic to the French proposal. Most other negotiating parties rejected it, as they feared that a formal suspension would practically kill off the MAI negotiations. The OECD Council of Ministers thus extended the mandate of the MAI negotiations without setting a new deadline and arranged for the next meeting of the Negotiating Group on 20 October 1998. The negotiating parties should use the pause in the talks to better communicate the advantages of the MAI to their constituencies. Most observers and media interpreted this outcome of the meeting of the OECD Council of Ministers, nevertheless, as the de facto break down of the MAI negotiations (Denny, 1998; Financial Times, 1998; Turner, 1998). And indeed when the 20 October 1998 came, it had become impossible to continue with the MAI negotiations. France had declared its withdrawal from the MAI negotiation on 14 October 1998 (Marchand, 1998). As France was one of the biggest OECD economies and a major hub for foreign investment, the decision seriously undermined the MAI project. Moreover, the French withdrawal cast doubts on the EU's legal ability, and the validity of the Commission's mandate, to further pursue the MAI negotiations (Chatignoux, 1998; Lawrence et al., 2006, pp. 174–175).

What caused these developments of autumn 1998? It is often assumed that the NGO campaign was the straw that broke the camel's back and triggered the collapse of the MAI negotiations. All interviewed negotiators nevertheless rejected this view. They explained that the substantive disagreement among the parties were the underlying reason for the breakdown of the MAI negotiations. They elaborated that rather competence struggles and institutional rivalries between the office of the United States Trade Representative (USTR) and the US State Department and, to a lesser degree, between the Commission and the Member States were the catalyst triggering the breakdown of the MAI negotiations. Some interviewees even suggested that the USTR and the Commission deliberately obstructed the MAI negotiations during the third year in order to end the negotiations in the OECD and push investment negotiations into other negotiating fora, like FTAs or the WTO.

The USTR backstabs the MAI project of the State Department: The US delegation comprised officials from the State Department, the Treasury and the USTR. The State Department was traditionally in the lead in OECD negotiations and the main driver of the MAI project. The Treasury took part in the talks due to their potential bearing on the American financial sector and primarily sought to prevent any liberalisation of market access for financial services. The USTR participated as it was normally in charge of international investment negotiations and trade policy. Institutional rivalries and competence struggles developed early between the State Department and the USTR (Interview, Paris, 1 October 2012a). The USTR did not hide that it considered the MAI project to be an inappropriate interference of the State Department in its policy domain. Moreover, the USTR made known that it considered the MAI negotiations a futile project. After the failure to establish ambitious investment disciplines in the Uruguay Round, the USTR was convinced that the time was not ripe for multilateral negotiations on them. When the first disagreements started slowing down the MAI negotiations in the first year, the USTR took it as a confirmation of its view. The USTR decided to scale down its involvement in the daily negotiating process.

Its officials no longer regularly participated in the meetings of the Negotiating Group, or of the expert and drafting group. Instead of focusing on the MAI negotiations, the USTR henceforth stepped up its efforts to conclude bilateral trade and investment agreements with third countries. While the behaviour of the USTR illustrated already its tense relations with the State Department, it did not directly threaten the continuation of the MAI project (De Jonquières, 1998b; Interview, Paris, 1 October 2012a; Interview, Paris, 1 October 2012b).

The institutional rivalries became critical in autumn 1998. The State Department still held on to its plan to conclude the MAI negotiations once the US midterm elections were over. The USTR, on the other hand, considered the MAI project as, de facto, failed (De Jonquières, 1998b). At the same time, debates in France took a critical turn. Trade unions, cultural industries, artists and NGOs drew a lot of attention to the MAI project. Anti-MAI demonstrations were held in the streets of Paris and media coverage was intense. The MAI was depicted in the public debate as the surrender of the state and its citizens to the dictate of multinational corporations and their profit-making interests. What is more, some parts of French business, like the film industry and audiovisual companies, demanded the French government to withdraw from the MAI negotiations. Other parts of the French business community were not interested in the negotiating process and public debates as the MAI did not promise significant benefits. Moreover, the Communists and the Greens – both part of the coalition government with the Socialists – gradually saw the MAI as an election topic. During 1998, politicians from both parties started criticising the MAI project and demanded – together with NGOs, trade unions, certain business groups and artists – the withdrawal of the country from the negotiations (Agence Europe, 1998c; Chatignoux, 1998).

In 1998, Prime Minister Lionel Jospin and the Socialist Party realised that they stood to lose a lot while winning almost nothing from further participating in the MAI negotiations. In the eyes of Jospin, the only serious risk of withdrawing from the MAI negotiations was a potential deterioration of French-American relations. In autumn 1998, Jospin therefore

commissioned his Minister of Economics, Dominique Strauss-Kahn, to discuss with US Trade Representative Charlene Barshefsky the possibility of France dropping out of the negotiations. Barshefsky, who was known to describe the draft MAI as a 'lousy agreement', reportedly signalled to Strauss-Kahn that a French withdrawal would not entail a deterioration of French-American relations and thereby clearly encouraged the French government to leave the negotiating table. A former MAI negotiator and official of the State Department commented that Barshefsky's position had not been cleared with the State Department, which officially led the US delegation. The State Department perceived this as an act of betrayal, which contradicted the formal US position (Interview, Paris, 1 October 2012a; Interview, Paris, 1 October 2012b).

On 14 October 1998 – one week before the resumption of the MAI talks – Jospin informed the Assemblée Nationale that France would withdraw from the MAI negotiations. Jospin stressed that French key demands were not met and that the current MAI draft was unacceptable. He added that the draft was no longer a suitable basis for the continuation of the talks. Jospin declared that instead his government would seek the opening of multilateral investment negotiations under the auspices of the WTO. In his view this was a more suitable forum for negotiations. Negotiations in the WTO would enable developing countries to participate delivering more balanced and equitable results (Chatignoux, 1998). France thereby became overnight the Commission's strongest ally in the Council of Ministers in demanding the continuation of multilateral investment negotiations in the WTO. Jospin's decision to withdraw from the MAI negotiations had not been coordinated with his coalition partners – the Communists and the Greens – or with other Member States and the Commission (Interview, telephone, 13 June 2013). Although all negotiating parties knew about the views and concerns of the French government, Jospin's abrupt decision came as a surprise. Observers speculated that Jospin's abrupt decision was intended to signal to the French public that he did not leave the negotiating table due to pressure from civil society. Rather it should look like a deliberate decision of a statesman, which nonetheless remained a

political concession to his coalition partners (Lawrence et al., 2006, p. 175; Interview, Paris, 1 October 2012a).

The Commission as a willing helper of the USTR? The negotiators interviewed for this thesis differed over the question of to what extent similar institutional rivalries within the European delegation contributed to these developments. Several interviewees underlined that the Commission had always remained loyal to the Member States and tried to play a constructive role in the MAI negotiations. They nevertheless cautioned that the Commission's public insistence on shifting investment negotiations to the WTO was not helpful for advancing the stalling MAI negotiations (Interview, Paris, 1 October 2012a; Interview, Paris, 1 October 2012b; Interview, email, 13 January 2014). Other interviewees argued that toward the end of the negotiations the Commission and the USTR formed a peculiar alliance with the shared objective of obstructing the MAI negotiations and pushing investment negotiations back into the WTO, where they both held representation monopolies. To that end, the Commission and the USTR arguably reiterated demands which were very difficult for the other side to accommodate for constitutional reasons. While the Commission emphasised its demand that the USA accept the applicability of the MAI to sub-national entities, the USTR vehemently rejected the proposed REIO clause. A Member State negotiator commented that the permanent confrontation between the Commission and the USTR on these issues was unnecessary from a substantive point of view and harmful to the overall negotiating dynamics. It amplified the atmosphere of stalemate, which ultimately became the pretext for the French withdrawal (Interview, telephone, 3 July 2013). While it is difficult to prove which evaluation of the Commission's role is correct, it is certain that the Commission never undertook any actions to bring France back to the negotiating table and to re-establish European unity. Instead, the Commission made no secret of its relief and satisfaction that investment negotiations would now continue in the WTO. On 21 October 1998, only one week after the French withdrawal, Commissioner Brittan explained his position on that matter to the European Parliament in Strasbourg.

“Let me... give you my own views on the issue. It seems to me that we have made strong efforts to achieve the kind of transparent framework within the OECD which would benefit both the EU economies and those of other MAI participants. The MAI negotiations have already done much to clear the ground on investment and to highlight those issues which are of key importance to the EU, including civil society. Nonetheless, I have always taken the view that the WTO is the best long-term home for this work for which the MAI has already provided valuable signposts. In present circumstances the chances of bringing the current MAI negotiations to a successful conclusion frankly do not look at all promising.”

(Brittan, 1998)

The Negotiating Group met several times after the French withdrawal. It did not, however, formally continue negotiations on the MAI. It merely consulted on the prospects of successfully concluding the negotiations despite the withdrawal of France. Even though many delegates publically downplayed the impact of France’s decision, most were aware that it was too late to save the MAI negotiations. Without France, the EU was unable to negotiate. Without the EU, the MAI project had become useless. On 30 October 1998, the British government informed the public that it was following the French example and would leave the negotiating table (Denny and Atkinson, 1998). On 3 December 1998, the Negotiating Group announced that negotiations on the MAI were no longer taking place. The MAI negotiations had collapsed (Lawrence et al., 2006, pp. 174–175).

Summary: The Commission ensured the EU’s involvement in the MAI negotiations by invoking fringe and implied competences vis-à-vis sceptical Member States. It managed to prove itself as a capable, resourceful negotiator and sought to promote European unity. The Commission, nevertheless, preferred holding multilateral investment negotiations in the WTO, where it traditionally acts as the EU’s sole voice and does not need to negotiate alongside the Member State delegation. It used its agenda setting powers and mobilised third

countries to build EU-internal and international support for shifting multilateral investment negotiations back to the WTO as part of the Singapore Issues. European business showed only moderate support for this bureaucracy-driven project. It did not expect the MAI negotiations to deliver significant economic benefits. The Member States, finally, were more interested in the MAI project, but sought to keep the Commission and the EU at bay. Under the impression of the Maastricht IGC and Opinion 1/94 (see chapter VIII), national investment policy officials worried about the implications of cooperation and delegation in the MAI for their competences and were not expecting to reap a better deal if speaking with a single voice. So when the MAI negotiations ran into stalemate in late 1997, the Commission did not seek to prevent a collapse but adopted a welcoming attitude. Some sources even argue that the Commission ‘engineered’ the collapse so as to shift multilateral investment negotiations back to the WTO, where customarily acted as single voice. These observations support supranational thinking and hypothesis H₁ but go against intergovernmentalism and hypothesis H₂. European cooperation in this investment policy-making forum was clearly due to the Commission’s resourceful strategizing rather than business or Member State preferences.

6.3 The negotiations on the Singapore Issues

Despite the collapse of the MAI negotiations, the project to establish multilateral investment disciplines was not off the table. The immediate reaction of NGOs reflected this fact. In the days following the breakdown of the MAI negotiations, more than 300 NGOs published a joint letter “*A call to reject any proposal for moving MAI or an investment agreement to the WTO*” (Lawrence et al., 2006, p. 175). The reaction of the NGOs was understandable. As mentioned above, France and the Commission called for negotiations on investment disciplines in the WTO. And the EU and the USA had agreed in a gentlemen’s agreement in 1996 that work in the WTO on a binding multilateral investment framework should be pending as long as the MAI negotiations were running. From a European – and notably from

the Commission's – perspective, the collapse of the MAI negotiations finally opened the door for the launching of veritable investment negotiations in the WTO.

The WTO in the starting blocks: The WTO was already in the starting blocks for taking over from the OECD. On the initiative of the EU – or rather of the Commission – and Canada, South Korea and Japan, the Singapore ministerial meeting of December 1996 had established a working group to examine the relationship between trade and investment. The working group started meeting in May 1997. Most delegations stressed that the mandate of the working group was primarily of an educational nature. In other words, the working group should analyse ties between investment and trade, but not engage in preliminary informal negotiations on multilateral investment disciplines. During the year 1997, discussions and countries' submissions to the working group evolved around the economic impact of investment on home and host economies as well as on trade flows. In spring 1998, the working group started discussing the similarities and differences in countries' international investment policy approaches. Throughout the years 1998 and 1999, discussions in the working group became more lively, and technical as well as political. Delegates discussed, inter alia, the actual need for a multilateral investment framework, and the potential scope and definitions of such a framework as well as the cast of a dispute settlement mechanism (See document series “WT/WGTI/W/...” at <https://docs.wto.org/>; WTO, 2002b; Interview, Brussels, 24 July 2012a; Interview, telephone, 13 June 2013). The consultations were evolving into pre-negotiations on a multilateral investment framework and the collapse of the MAI reinforced this trend.

The Member States immediately agree on the Commission as their single voice: The EU's representation modalities in the working group on investment in the WTO were never the subject of serious debate in the Council of Ministers. All Member States tacitly agreed that the Commission – and more specifically the Directorate General (DG) for Trade – were in charge of representing European interests in the WTO inline with the ever-evolving

international trade agenda. As one interviewed official put it, DG Trade was then still a machinery with the sole purpose of dealing with all WTO agenda items (Interview, Brussels, 24 July 2012a). The EU-internal distribution of competences was of little importance in the WTO context. The Commission was, from the outset of the debates on investment in the WTO, the unchallenged sole representative of the EU and its Member States and possessed significant authority and influence; notably in comparison to the OECD-based MAI negotiations. The interesting twist to this observation is obviously that the Commission was central to setting investment disciplines back onto the WTO agenda in 1996. As discussed above, the Commission first sought to contain the MAI negotiations, then pushed investment disciplines back onto the WTO agenda and arguably played a more or less active role in the breakdown of the MAI negotiations. The Commission shaped the international trade agenda, which then shaped the EU's de facto competences. From this angle, the launch of investment negotiations in the WTO constitutes an impressive instance of Commission entrepreneurship to the end of, inter alia, consolidating the EU's de facto competences in international investment policy.

Cooperation between the Commission and the Member States in the '113 Committee' and on-site in Geneva took place in a productive and friendly atmosphere, unlike in the MAI negotiations. The 'usual suspects' of national and European trade policy officials dealing with WTO affairs – not investment policy officials as during the MAI talks – coordinated and determined the EU's approach in investment negotiations. Most Member States adopted a welcoming attitude toward investment talks in the WTO. France, the United Kingdom and Germany were particularly interested. As expounded above, the French government assumed that its interests were better served in the WTO, where negotiations necessarily aimed for lower standards and liberalisation commitments. The British government was particularly interested in unlocking the financial service sectors of other WTO members. Germany, finally, hoped for enhanced investment protection throughout the WTO. Cooperation between the Commission and the Member States, and thus European unity, was moreover

relatively easy to sustain as many potentially controversial issues were off the table in the WTO due to the more modest objectives and scope of investment talks in the WTO in comparison to the MAI negotiations (Interview, telephone, 13 June 2013).

The Commission as motor of investment negotiations in the WTO: The general convergence of minds enabled the Commission to play a proactive and central role in the working group meetings. The Commission reportedly acted as the main driver of discussions in the working group. Several observations support this conclusion. On the one hand, the Commission was the first party to table a comprehensive working paper and proposal for a working agenda (WTO, 1997). The Commission thereby influenced the initial discussions and broad direction of deliberations in the working group. On the other hand, the EU tabled a high number of working papers. While the Commission submitted 18 papers to the working group between 1996 and 2003 on behalf of the EU and its Member States, the US delegation merely tabled 6 working papers (see Table 6.1). So whereas the US delegation had often taken the lead and decisively shaped negotiations on investment disciplines during the Uruguay Round and MAI talks, the US delegation was relatively passive in the working group in comparison to the EU (Woolcock, 2003, p. 251).

Table 6.1: Number of meetings and submissions per year by country (selection)

	Number of meetings	EU	Canada	Japan	South Korea	USA
1996	0	0	0	0	0	0
1997	2	2	1	2	1	0
1998	4	3	1	4	3	5
1999	5	1	0	1	3	0
2000	2	2	0	2	2	0
2001	4	1	2	1	1	0
2002	4	7	5	6	3	1
2003	4	2	3	2	1	0
Total	25	18	12	18	14	6

Source: Author's own calculations; http://www.wto.org/english/tratop_e/invest_e/invest_e.htm.

European business shows moderate support: European business was supportive, albeit not enthusiastic, of holding investment negotiations in the WTO. UNICE, as well as most national business and industry federations, expressed their support for the creation of investment rules in the WTO. The newly founded European Services Forum (ESF) encouraged European policy-makers to work toward a multilateral investment framework under the WTO (European Services Forum, 2003a, 2003b). International Financial Services (IFS), the association of English financial service providers, supported investment negotiations in the WTO. While being sympathetic to the idea of negotiating a comprehensive investment agreement with market access commitments, the main concerns of European business were post-establishment treatment and protection standards. It was unlikely that developing countries would sign up to ambitious liberalisation commitments going beyond the GATS. So as to create added value, investment negotiations should therefore focus in particular on post-establishment treatment and protection standards, which were not yet comprehensively covered by WTO law (British Parliament, 2004).

In 1999, the developed countries sought to upgrade the consultations on various issues in the WTO to a veritable new trade round. The ministers of the WTO countries convened in Seattle. The Commission, together with Japan and South Korea, pushed hard for having the Singapore Issues, and thus investment, included in the agenda of the new round. The USA lent only lukewarm support, while developing countries were hesitant or rejected the Commission's initiative on investment negotiations. The ministers could only agree on the formula that Singapore Issues and, notably, investment were important and that all countries should show flexibility in their positions on investment and the other Singapore Issues (WTO, 1999). The ministerial meeting failed to launch a new trade round due to opposition from major developing countries as well as hitherto unseen protests, and even riots, by radical social groups, NGOs and other parts of civil society. The failure to launch the new round was a serious blow to the WTO and developed countries. Observers questioned

whether the WTO – a relatively young organisation – could ever recover from the Seattle disaster (Schott, 2000).

The ministers gathered again at Doha in 2001. The ministers this time succeeded in launching the so-called Doha Development Round. The inclusion of the Singapore Issues and, notably, investment negotiations on the agenda of the new round was one of the most controversial issues during the ministerial meeting. As before, the EU, Japan and South Korea were the key proponents of the Singapore Issues and investment negotiations, while developing countries, under the leadership of India, sought to prevent the inclusion of the Singapore Issues on the agenda of the new round. They argued that the working group on trade and investment had been commissioned to study the interrelationship between trade and investment, which arguably had not yet been finished. Moreover, they questioned the ability of developing countries to negotiate and domestically implement complex competition, trade facilitation, public procurement and investment disciplines. The proponents of the Singapore Issues, on the other hand, pointed to the central importance of these issues for the world economy (Kumar, 2003, p. 3178). At the end of the Doha meeting, a hard-fought compromise emerged on the Singapore Issues and notably investment. For a start, the Singapore Issues should remain on the negotiating agenda of the new round. Hence, the working group on trade and investment continued to exist. Its main objective should be to elaborate the modalities of investment negotiations i.e. to delimit in detail the main elements and objectives of investment negotiations. The WTO ministers should then explicitly endorse the modalities for investment negotiations at the occasion of the next ministerial meeting in Cancún, Mexico in September 2003 (WTO, 2001).

The Member States criticise the Commission's obsession with investment: In September 2003, the ministers re-convened in Cancún to discuss the results of two years of negotiating and to eventually endorse the modalities for negotiations on investment disciplines. The EU remained the major proponent of negotiations on investment disciplines and the Singapore

Issues, whereas many developing and least developed countries became increasingly assertive in their rejection of negotiations on investment and the other Singapore Issues (Lamy, 2003). What is more, the Member States of the EU supported investment negotiations, but attached only low priority to them in comparison to other issues. In EU-internal discussions, many Member States increasingly criticised the Commission's insistence on the Singapore Issues and investment. The Commission's insistence arguably alienated and antagonised many developing countries, which made compromises on more important issues like agriculture or non-agricultural market access more difficult (De Jonquières, 2003a). After the collapse of investment negotiations in Cancún, a Member State official stated:

“The Commission should have backed off much earlier... Instead of trying pig-headedly to impose the Singapore issues on other WTO members, it should have been asking what concessions the EU was ready to make to get its demands accepted.”

(as cited in De Jonquières, 2003a)

Opposition to the Commission's arguably inflexible negotiating strategy also grew within the Member States. The development committee of the British House of Commons, for instance, criticised the EU/Commission for their insistence on investment negotiations. It demanded the British government to stop strongly supporting the Commission in its efforts and to take development objectives more into account. The parliamentarians argued that investment disciplines harmed the ability of developing countries to develop and catch up (De Jonquières, 2003b). And as it became increasingly unlikely that investment negotiations would deliver market access, high post-establishment or protection standards, support from European business also shrank (De Jonquières, 2003a). The Doha negotiating mandate for the investment working group made it clear that the Doha Development Round could only deliver humble investment disciplines if at all, which hampered business interest in the Commission-led initiative. At the end of the ministerial meeting, the Commission took

internal and external pressures into account. It suddenly gave in and proposed dropping the most controversial Singapore Issues – investment and competition – from the round. The Commission instead proposed pursuing negotiations on investment and competition disciplines on a plurilateral basis outside the round's single undertaking (European Voice, 2003). South Korea and Japan, which so far had been the Commission's allies in this domain, had not been consulted on this decision. Taken aback, they refused to follow suit and forged a compromise with the developing countries. In consequence, the developing countries refused to re-confirm the negotiating mandate for the Singapore Issues, which entailed the discontinuation of talks on investment disciplines in the WTO. When the Cancún meeting drew to an end, many observers asked whether the Doha Round had, de facto, collapsed due to the many controversies and deadlocks on the Singapore Issues, agriculture, textiles and non-agricultural market access (De Jonquières, 2003a).

Summary: The EU held markedly increased de facto competences in investment negotiations in the WTO in comparison to the MAI negotiations. European business showed moderate interest in the investment negotiations at the WTO. The Member States, nevertheless, happily cooperated and delegated negotiating on investment to the Commission. National investment policy officials had not doubt that it was in the national interest to speak with a single voice on all agenda items of the Doha Round including investment. Also it was customs that the Commission acted as single voice in the WTO. The sudden readiness of the Member States to cooperate thus did not reflect business demands, but rather the international negotiating context. As shown above, the Commission had gone to great lengths to put investment on the work agenda of the WTO in 1996 and played a central role in upgrading the WTO work on investment to proper negotiations. In other words, the EU's increased de facto competences in the Doha Round reflect the Commission agenda setting powers and strategic use of international negotiating fora to consolidate the EU's role in international investment policy. These observations again lend support to

supranational thinking and hypothesis H₁, but contradict partly liberal intergovernmentalism and hypothesis H₂.

6.4 Conclusion

The chapter traced the EU's involvement in investment negotiations on the MAI in the OECD (1995-1998) and in the WTO as part of the so-called Singapore Issues (1996-2003). It examined whether supranational thinking and hypothesis H₁ or rather liberal intergovernmentalism and hypothesis H₂ explain the EU's role in the investment negotiations on the MAI and Singapore Issues.

The chapter clearly lends support to supranational thinking and hypothesis H₂. The Commission acted as policy entrepreneur to consolidate the EU's role in international investment policy. It primarily drew on its agenda setting powers, invoked fringe competences and strategically used international negotiating fora to increase the EU's de facto competences in the examined policy-making instances. Most notably, it pushed multilateral investment negotiations out of the OECD into the WTO in order to consolidate the EU's role in international investment policy.

The chapter lends little support to hypothesis H₂. European business was only moderately interested in the MAI and WTO negotiations. It expected little economic benefits from the MAI and was similarly sceptical of the outcomes of the still on-going Doha Round. Hence, business lobbying can hardly explain the EU's central role in these negotiations or Member States preferences. In comparison to business and the Commission, the Member States showed sincere interest in the MAI project – inter alia because they could negotiate on their own behalf in the OECD. They saw no functional need to closely cooperate and moreover worried about the Commission's continuous attempts to extend its de facto and legal competences. Hence, they sought to contain the Commission's role in the MAI negotiations.

As customary, the Member States were, however, ready to cooperate and to delegate negotiating to the Commission in the WTO. While this arguably reflected power-maximising behaviour and their attempt to reach for the best possible deal in this forum, the continuation of multilateral investment negotiations in the WTO was arguably a conscious strategy of the Commission to increase the Member States' readiness to cooperate and to delegate in international investment policy-making. Hence, the Member States' readiness to cooperate in this forum primarily reflected Commission entrepreneurship.

Chapter VII – Investment disciplines in European Free Trade Agreements

This chapter shifts the analytical focus away from multilateral to bilateral negotiations between the EU and third countries on Free Trade Agreements (FTAs). The chapter examines the question of why the Member States started cooperating and empowered the Commission to negotiate on investment disciplines in FTA talks since the late 1990s. It analyses for this purpose the first FTA negotiations between the EU and third countries to cover investment liberalisation commitments and post-establishment provisions³² – the negotiations on the EU-Mexico FTA (1996-1999) and EU-Chile FTA (2000-2002) (Ceysens, 2005, p. 266). The comparison between these two negotiations is, moreover, particularly interesting due to their differential outcomes. Both FTAs would initially encompass ambitious investment provisions, but while the Member States vetoed such provisions in the EU-Mexico negotiations in a last minute revolt, they accepted their inclusion in the EU-Chile negotiations. All following FTA negotiations encompassed similar investment disciplines.

The chapter seeks to evaluate whether intergovernmental thinking and hypothesis H₂ or rather supranational thinking and hypothesis H₁ better account for Member State cooperation

³² The chapter disregards accession, association and partnership and cooperation agreements. Accession agreements typically contain very comprehensive investment provisions. Nevertheless, they cannot be considered as part of the EU's foreign economic policy strategy. They seek to fully integrate third countries into the legal and economic regime of the EU. Early association as well as Partnership and Cooperation Agreements – such as with the former Soviet Republics or Mediterranean countries concluded in the 1990s – are of economic and geopolitical nature alike. These agreements contain very shallow provisions indirectly touching on investment activities (e.g. liberalisation of current or capital accounts), which albeit cannot be considered as a manifestation of a proper EU international investment policy.

and delegation in investment-related FTA negotiations. While the observations from this chapter again primarily lend support to supranational thinking and hypothesis H₁, they draw a more nuanced picture than previous chapters. It finds that European business, most Member States and the Commission indeed supported the idea to include investment provisions into FTAs with Mexico and Chile to stop the erosion of the EU's competitiveness on these markets due to existing or planned US FTAs. The Commission thus reached for ambitious services and investment disciplines in the negotiations with Mexico. Yet, some Member States had second thoughts toward the end of the negotiations and suddenly argued that the Commission had overstepped its mandate and vetoed the inclusion of ambitious services and investment provisions in order to protect their competences against European encroachment. The Commission consequently adopted a more cautious approach in the negotiations with Chile. It used its agenda-setting powers to convince the Member States of the functional benefits of including ambitious services and investment chapters in the FTA with Chile. It, moreover, referred to the EU's international credibility as driver of investment negotiations in the WTO (see chapter VI) to pressure the Member States into accepting such chapters. Taking into consideration that the Commission had previously spared no efforts to put investment back on the WTO agenda (see chapter VI), an intriguing instance of Commission entrepreneurship emerges. The Commission exploited and shaped the international trade agenda thereby successfully consolidating the EU's role in international investment policy. The EU-Chile FTA was the first FTA to contain a proper investment chapter encompassing commitments for services and non-services sectors. It set a new precedent as all following FTAs contain similar provisions.

7.1 A theoretical note on agenda-setting in bilateral and multilateral negotiations

Multilateral and bilateral negotiations differ in important regards. Multilateral negotiations involve a high number of states. Hence, agenda-setting is a complex exercise, which requires

finely tuned compromises among all involved states. No single country can impose its ideal agenda and objectives. The previously discussed breakdown of negotiations on the so-called Singapore Issues in the WTO is a case in point. The EU and other developed countries were eager to establish multilateral rules for these issues. A sizeable group of developing countries opposed negotiations on these issues and ultimately succeeded.

Bilateral negotiations comprise only two parties. The two involved countries often differ in their political and economic power. Hence, bilateral negotiations are often characterised by a significant degree of asymmetry, which shapes the negotiating agenda. Powerful countries insist on negotiating on certain issues, whereas weak countries find it difficult to resist such pressure. Weak or small countries often act as *demandeur* in international economic negotiations, and seek access to a larger market. Hence, agenda-setting is often manifestly biased in bilateral negotiations and reflects the preferences of the more powerful country.

The EU is no international power in the classic sense. It wields little influence in geopolitics. The EU is nevertheless a major power in the international political economy. The size and potency of the Single Market provide the EU with considerable bargaining power and influence in international economic affairs. The EU is normally the bigger and more powerful negotiating party in bilateral negotiations. The involved third country, on the other hand, typically acts as *demandeur* for enhanced market access to the EU's Single Market. It follows that the EU should hold considerable sway over the agenda of bilateral negotiations. So if FTA negotiations between the EU and third countries encompass investment disciplines, it is reasonable to assume that it reflects to a large extent EU-internal considerations rather than the demands of third countries.

This train of thought is important for the thesis. It clarifies that the examination of the negotiations on the EU-Mexico and EU-Chile FTA should shed additional light on EU-internal factors promoting the EU's growing role in international investment policy. In

theoretical terms, the chapter puts the spotlight on the EU-internal factors driving the emergence of the EU's international investment policy.

7.2 Investment disciplines in the negotiations on the EU-Mexico FTA

Debates on an FTA between the EU and Mexico can be traced back to the early 1990s. In 1991, the EU and Mexico institutionalised their relationship through a first cooperation agreement. The agreement should support the democratic and economic reform processes in Mexico. It was, however, of symbolic nature. It established general structures for political and economic relations between the EU and Mexico, but did not contain noteworthy provisions on bilateral trade and investment liberalisation. The shallowness of the agreement, notably in regard to bilateral trade and investment relations, reflected a lack of European interest. The Mexican government had proposed negotiating a veritable FTA in parallel with the political cooperation agreement, but European policy-makers were preoccupied with finalising the Single Market, the Uruguay Round and also had to cope with the geopolitical turmoil in Eastern Europe (Manger, 2009, p. 106).

7.2.1 The pre-negotiations on the EU-Mexico FTA

The entry into force of NAFTA between the USA, Canada and Mexico in 1994 fundamentally changed the situation. For the purpose of this thesis, three effects of NAFTA are particularly noteworthy. First and foremost, NAFTA cut or completely abolished tariffs for US and Canadian imports to Mexico, making equivalent European imports less attractive to consumers. Mexican consumers started switching away from European imports, entailing falling market shares for European firms in Mexico. Mexico reinforced this trend by increasing tariffs for non-NAFTA members in 1995 and 1999 (Dür, 2007, p. 838). Second, under NAFTA Mexico transformed into an ideal entry point, investment and low-cost production hub for the US market. Products and services from Mexico benefited from

preferential access to the US market (Manger, 2009, p. 97). Third, NAFTA was the first FTA to cover ambitious investment liberalisation commitments. These made it particularly easy for Canadian and US investors to establish and operate subsidiaries in Mexico. In turn, this implies that the relative ease and costs of investing in Mexico deteriorated for European firms. European firms incurred through NAFTA a competitive disadvantage vis-à-vis US and Canadian investors, further eroding their competitive position in the Mexican and Northern American economy.

NAFTA spurs business, Member State and Commission interest in an ambitious FTA:

NAFTA spurred international regulatory and economic competition. This effect was not limited to the narrow scope of traditional FTAs. The highly comprehensive scope of NAFTA carried international regulatory and economic competition into new policy domains. NAFTA thereby extended the standard agenda of FTAs, inter alia, to investment regulation. It encouraged third countries to emulate the NAFTA approach and to conclude similarly comprehensive FTAs. This effect was indeed observable within the EU following the entry into force of NAFTA. In accordance with the intergovernmental hypothesis H_1 , European business started lobbying Member State policy-makers for the conclusion of a competitive FTA with Mexico comprising ambitious services and investment disciplines so as to re-establish a level playing field. Many Member State policy-makers were receptive to such business demands, as they grew increasingly worried about the falling European market share in Mexico. At the same time, they understood the new interest in the Mexican economy as an entry point into the potent NAFTA market. In accordance with the supranational hypothesis H_1 , the Commission welcomed and sought to cultivate the interest of European business and the Member States in a competitive FTA with Mexico (Heydon and Woolcock, 2009, pp. 109–113, 156; Manger, 2009, pp. 106–118).

Mexico welcomed the new attitude of European business and policy-makers. Mexico hoped that an FTA with the EU might help rebalance its current account, stabilise its currency,

promote its liberal economic reforms and reduce its dependence on the US economy. The Mexican government campaigned for an EU-Mexico FTA and sent several delegations to Brussels to advance discussions (Manger, 2009, pp. 96–97). In late 1994, the Commission and the Mexican government started preliminary consultations on an FTA.

The Commission uses agenda setting and invokes the evolving trade agenda to push for comprehensive FTA talks: In the following months, the Commission constantly underlined that the FTA should be ambitious and indeed reach for NAFTA-parity and create a free trade area. European business active in Mexico expressed its support for such plans (Agence Europe, 1995b; Manger, 2009, pp. 106–107). The Member States welcomed the plan to negotiate an FTA. Several Member States, however, signalled that the establishment of a free trade area – i.e. the dismantling of all tariffs – would go too far. In February 1995, the Commission released a communiqué to the Council of Ministers and the European Parliament, which laid out its vision of the potential cast of a future EU-Mexico FTA. The Commission avoided using the term “free trade area” in its communiqué. It nonetheless underlined its intention to reach for an ambitious FTA, which would provide for NAFTA-parity in trade in goods, trade in services, investments and capital movements. The Commission warned that a failure to conclude an agreement of NAFTA-parity would result in the erosion of EU-Mexico economic relations in the long run. While the proposed agenda of the FTA by far exceeded the normal scope of European FTAs and the Union’s competences under European law, the Council of Ministers nevertheless endorsed the communiqué on 11 April 1995 (Agence Europe, 1995b; Manger, 2009, pp. 106–107). The Council, moreover, called for a swift start of the negotiations with Mexico (Agence Europe, 1995c). In May 1995, the Commission and Mexico signed a solemn declaration, which formally documented their intention to start negotiations on a new political and economic framework agreement (Manger, 2009, p. 106; Sanahuja, 2000, p. 48).

7.2.2 The Commission mandate

The evolving international trade agenda and consequent systemic pressures shaped the EU-internal debates on the Commission mandate for the upcoming EU-Mexico FTA. The Commission drew up a draft mandate for the so-called EU-Mexico Political Coordination and Cooperation Agreement during summer 1995. The agreement should encompass one chapter on political cooperation and another on economic cooperation. The economic chapter should, de facto, become the EU-Mexico FTA. The Commission used its first-mover advantage to put post-establishment treatment and investment liberalisation on the agenda of the FTA negotiations. The Commission even briefly toyed with the idea of aiming for the inclusion of investment protection provisions into the EU-Mexico FTA, but Germany, the Netherlands and, in particular, France signalled their opposition. Such provisions arguably interfered too much with their BIT programmes and encroached upon national competences (Interview, Brussels, 24 July 2012b). On 25 October 1995, the Commission released a press communication which underlined the ambitious and unseen agenda for the economic chapter i.e. FTA with Mexico.

“Economic chapter: The Commission and Mexico will gradually establish a favourable framework for the development of trade in goods, services and investments, including through gradual and reciprocal liberalization, taking account of the sensitive nature of certain products and in accordance to the relevant WTO rules. The conclusion of the agreement will mark the beginning of a process which in the long-run will lead to the establishment of a favourable framework for the development of trade in goods, services and investments.”

(As cited in Agence Europe, 1995d)

The Member States endorse the Commission’s objective to reach for ambitious investment provisions: The Council of Ministers discussed the draft mandate in February 1996. The substantive provisions regarding ‘new trade issues’ like investment, services and

capital movements proved to be rather uncontroversial according to press coverage, secondary literature and interviews. Given the new regulatory context in Mexico, most Member State governments considered it to be in their interest to reach for ambitious commitments in these domains. In the end, the mandate provided, nevertheless, for negotiations on the liberalisation of service-related investment, services trade and capital movements. It thus clearly exceeded the scope of Union competence and previous European FTAs or association agreements. The Member State governments, moreover, agreed with the implicit assumption of the draft mandate that the Commission would act as their single voice in the FTA negotiations across all agenda items regardless of the EU-internal distribution of competences. The Member State governments thought that the Commission was in charge of negotiating FTAs (Interview, telephone, 14 November 2013).

But the Member States disagree over the timeline of the negotiations: But while the remarkably broad substantive agenda of the Commission's draft mandate did not cause veritable frictions within the EU, the Member States were divided over the procedural provisions it contained. The Commission and Mexico had agreed that the political and economic chapters should be negotiated in parallel in one single phase. This so-called 'single phase' approach diverged from the EU's standard 'two phase' approach. The EU normally first concludes a political cooperation agreement. Depending on the satisfactory implementation of this agreement, the EU then eventually concludes a FTA. In the case of Mexico, the Commission wanted to speed up the negotiations so as to mitigate the negative effects of NAFTA on European business and thus proposed a 'single phase' approach. Mexico, on the other hand, had insisted on a 'single phase' approach in order to make sure that any political concessions by Mexico would be balanced by economic and trade concessions by the EU (Manger, 2009, p. 107; Sanahuja, 2000, p. 48).

Spain and the United Kingdom – and to a lesser extent Luxemburg, Sweden and Germany – supported the Commission's plan to engage in swift 'single phase' negotiations. Of the EU's

Member States, their national business communities had arguably the closest ties with the Mexican economy and thereby incurred the highest opportunity costs from NAFTA. In March 1996, Spain published a forceful memorandum in favour of the Commission's proposal. It, *inter alia*, stressed the need for swift negotiations, the reduction of Mexican tariffs, investment liberalisation and better investment protection. The memorandum, *inter alia*, raised the problem that the rules of origins of NAFTA had reduced the profitability and value of European investments in Mexico (Sanahuja, 2000, p. 48).

France – supported by Austria, Denmark, Portugal, the Netherlands and others – rejected the proposed 'single phase' approach. They lamented that the effects of bilateral trade liberalisation had not been sufficiently studied yet. They demanded to slow down talks with Mexico and to return to the 'two phases' approach. France voiced the widely shared concern that Mexican agricultural produce could displace imports from African, Caribbean and Pacific Group of States (ACP States) and European overseas territories. It warned that a EU-Mexico agreement might set a negative precedent and deteriorate the EU's future bargaining position in particular in the upcoming trade negotiations with the Mercosur³³. In addition, France underlined that it worried about the cumulative effects of the growing number of FTAs with third countries. France's scepticism reportedly reflected its general aversion to free trade (Agence Europe, 1996a, 1996b; Manger, 2009, p. 107; Sunahuja, 2000, p. 48; Interview, Brussels, 25 September 2013a).

The Council Presidency devises a compromise: The Italian Council Presidency, nonetheless, managed to strike a compromise between the two camps on 13 May 1996. The ministers accepted the Commission's 'single stage' approach in principle. They amended, however, the negotiating mandate so that the negotiating process would, *de facto*, resemble the traditional 'two phases' approach. The EU and Mexico should first agree on a so-called 'global agreement'. This should enumerate the objectives, issues areas and define the

³³ The Mercosur is a Common Market between Argentina, Brazil, Paraguay, Uruguay and Venezuela.

institutional framework of cooperation. The global agreement should moreover contain a clause comparable to a ‘fast track authority’ for the Commission and Mexican government to engage in subsequent FTA negotiations without further domestic authorisation. The ministers cautiously underlined, however, that any provisions of the FTA coming under shared competence – like investment, services and capital movements – would still require unanimous consent in the Council of Ministers and that the FTA and the global agreement would only jointly enter into force in the form of a new EU-Mexico Cooperation Agreement (Agence Europe, 1996c). The compromise was satisfactory to for the Commission and both camps in the Council of Ministers. The Commission procured a broad mandate, which empowered it to act as the EU’s single voice regarding all agenda items including investment, services and capital movements. The Member States in favour of swift and ambitious FTA negotiations secured a firm mandate to open talks with Mexico, while hesitant Member States secured the explicit right to veto the conclusion of the FTA (Agence Europe, 1996c, 1996d).

7.2.3 The core negotiations of the EU-Mexico FTA

The representation modalities of the EU delegation: The EU and Mexico met for the first negotiating session on 14 October 1996. The Directorate General for External Relations (DG Relex) supported by the Directorate General for Trade (DG Trade) and the Directorate General for Economic and Financial Affairs (DG Ecfina) represented the EU and its Member States on all agenda items. Trade policy officials of the Member State governments typically sat at the back of the negotiating room to observe, take notes and, if necessary, to pass written comments to the Commission negotiators (Interview, Brussels, 25 September 2013a). The Commission embarked on the first negotiating sessions with the objective of swiftly agreeing on the cast of the global agreement so as to subsequently launch the FTA negotiations. The Commission presented a first draft of the global agreement in October 1996, which in principle received a positive echo from Mexico. Mexico, nevertheless,

criticised the ‘democracy clause’³⁴ and the de facto ‘two phases’ approach proposed in the Commission’s draft. Mexico complained that the de facto ‘two phases’ approach ran counter to the spirit of the solemn declaration of May 1995 and stressed that the standardised ‘democracy clause’ was a manifestation of European arrogance (Agence Europe, 1997e, 1996e; Sanahuja, 2000, pp. 50–51). In June 1997, the Commission and Mexico, nonetheless, managed to resolve their differences and agreed on a draft text for the global agreement³⁵, an Interim Agreement Concerning Trade and Trade-Related Issues³⁶ as well as a Joint Declaration on Services and Intellectual Property Matters³⁷. Support for the draft texts seemed high. The ratification of the global agreement by late 1997 and the subsequent start of the FTA negotiations in early 1998 seemed possible (Agence Europe, 1997f; Sunahuja, 2000, pp. 51–52).

France starts picking fights with the Commission: Several disagreements nevertheless surfaced within a week. France was critical of the fact that the draft texts contained more commitments on the future liberalisation of trade in goods than on services and was therefore biased in favour of Mexico (Agence Europe, 1997g). France, moreover, forged a coalition of 12 Member States, which criticised the Commission for agreeing to a slightly altered ‘democracy clause’ in the draft text of the global agreement. They lamented that the Commission had overstepped its mandate and warned that they would veto the global agreement unless Mexico endorsed the standard clause. Only Spain, the United Kingdom and Denmark reportedly thought that that the altered clause of the draft text was in line with the mandate of the Commission (Sunahuja, 2000, p. 52). The controversies increasingly

³⁴ The EU includes into its FTAs and Association Agreements clauses, which stipulate that both parties are committed to the protection of Human Rights and democracy.

³⁵ The so-called Agreement on Political and Economic Association and Cooperation.

³⁶ The Interim Agreement was a de facto fast track authority. It should automatically enter into force after the conclusion of the global agreement and provided for the establishment of the joint EU-Mexico committee in charge of the FTA negotiations.

³⁷ The Joint Declaration, finally, was a peculiar document. It essentially underlined that agenda items like investment, services, capital movements and intellectual property rights came under shared or national competences and thus were subject to specific negotiating and decision-making rules. Hence, the Joint Declaration should be considered as an expression of the Member States’ preoccupation with competence questions.

delayed the negotiations. The Commission harshly criticised the double standards of certain Member State governments, and notably France. It pointed out that earlier that year France had decided to not take a position in a similar discussion in the Council on the ‘democracy clause’ of the EU-China cooperation agreement (Agence Europe, 1997h; Sunahuja, 2000, p. 52). In early July 1997, Mexico decided to end this ‘charade’. It accepted the standard ‘democracy clause’ while releasing a unilateral declaration on the non-intervention of third countries in Mexico’s domestic affairs (Manger, 2009, p. 107; Sanahuja, 2000, p. 51). This first clash between the Commission, on the one side, and France and sympathising Member States, on the other, would set a precedent and the atmosphere for the following two years of negotiations. France repeatedly applied the breaks to the negotiations and exhibited its hesitant and occasionally destructive attitude during the talks.

The EU and Mexico ratify the Global Agreement: The Council of Ministers consequently endorsed the text in late July 1997 and the Commission signed the agreement on behalf of the EU in December 1997 (Agence Europe, 1997i; Financial Times, 1997). The European Parliament and the Mexican Senate ratified the global agreement in spring 1998. The responsible rapporteur of the European Parliament, Miranda de Lage, cautioned that the assent of the European Parliament was not a blank cheque for the Commission negotiators. While the future FTA did not have to undergo separate ratification again, she underlined that the European Parliament expected the future FTA to reach for NAFTA-parity notably in the fields of investment, public procurement as well as telecommunications, financial, transport, cultural and audiovisual services (Agence Europe, 1998d).

The core negotiations start: The ratification of the global agreement paved the way for the launch of the actual FTA negotiations. These started with a first symbolic meeting of the joint EU-Mexico committee in mid-July 1998 (Agence Europe, 1998e). The substantive negotiations began in November 1998. The joint EU-Mexico committee, which was handling the FTA negotiations, established three working groups focusing on 1) market

access for goods, 2) services and capital movements and 3) regulatory issues like rules of origins, competition policy, public procurement and intellectual property rights (Agence Europe, 1998f, 1998g). The first negotiating rounds, until early summer 1999, focused primarily on the reduction of industrial tariffs, rules of origin and agricultural tariffs. The negotiating focus reflected the main preoccupation of European business, which worried that the tariff differentials for European and NAFTA products eroded its market share in Mexico. The Commission thus demanded an equal and simultaneous reduction of Mexico's industrial tariffs as foreseen under NAFTA. What is more, the Commission wanted to make sure, through new rules of origin, that European exports could easily enter the Mexican market, while US and Canadian exporters should find it difficult to free ride on the EU-Mexico agreement. The negotiations on the rules of origins were among the toughest of the entire FTA talks, as Mexico had already adjusted its policy to the complex rules under NAFTA. Finally, Mexico wanted also a bite off the EU's huge agricultural market, which caused frustration for many Southern European Member States (Agence Europe, 1999a, 1999b, 1998h).

Investment as a secondary issue: Investment-related negotiations in the working group on services and capital movements were initially only an issue of secondary importance within the overall negotiating process. Several reasons explain this observation. First, services, capital movements and investment were less important to European business and the Member State governments than tariffs for industrial goods and rules of origin (Interview, telephone, 14 November 2013). The Mexican government, on the other hand, held rather defensive interests in these areas and did not push for swift negotiations (Interview, Brussels, 24 July 2012b). Second, the Europeans, in principle, held an offensive interest – in particular in unlocking the Mexican financial and insurance markets – but held no common position regarding other sectors (Agence Europe, 1999c; Manger, 2009, pp. 101–103). The lack of a common European position slowed down talks and reduced the EU's ability to press for ambitious negotiations. Third, the EU and Mexico wanted to take bilateral negotiations on

investment, services and capital movements slowly in order to see the outcome of the negotiations on the Multilateral Agreement on Investment (MAI) in the OECD as well as the next steps in the WTO toward the Millennium Round (Interview, Brussels, 25 September 2013a). Last but not least, discussions on investment, services and capital movement were tedious and slow because they fell under shared or national competence. Decisions required unanimous support from all Member States (Agence Europe, 1999d).

The Commission starts pushing for ambitious investment and services provisions: The Commission started seriously preparing for negotiations on investment, services and capital movement early in autumn 1998. The Commission asked the Member States to draft lists indicating the sectors and activities which should be excluded from negotiations on the liberalisation of trade in services and capital movements. All Member States – except for France – transmitted their reservations to the Commission by the end of the year (Interview, Brussels, 25 September 2013a). Mexico and the Commission agreed to exchange their first offer for services in spring 1999. Mexico reportedly even proposed to negotiate on investment liberalisation beyond service sectors as well as post-establishment treatment and protection standards. The Commission, however, insisted on limiting talks to investment liberalisation for services so as not to displease the Member States. The negotiating guidelines for the Commission reportedly only provided for negotiations on market access. As mentioned above, the Member States considered post-establishment treatment and investment protection as core elements of their BIT programmes and thus as *domaine réservé*. In parallel, Mexico and the Commission also discussed the liberalisation of capital movements, which had an indirect bearing on investment regulation. The Commission initially proposed that Mexico transpose the European directive 88/361/EEC on the free movement of capital into its domestic legislation so as to free bilateral capital movements – including direct investments – between the EU and Mexico. The Mexican government rejected the proposal, mostly on symbolic grounds and not due to its content. Mexico disliked the European demand to transpose the EU's *acquis communautaires* into national

legislation (Interview, Brussels, 24 July 2012b; Interview, Brussels, 25 September 2013a; Interview, telephone, 14 November 2013).

The Commission and the Mexican government exchanged their first offers on services and service-related investments in the fourth round of negotiations in May 1999. Initial discussions on the European and Mexican offers showed that there was still considerable disagreement between the two sides, notably on financial, insurance and maritime services. The negotiations made, however, considerable headway during the following rounds in summer 1999. Common ground notably emerged regarding capital movements (Agence Europe, 1999a). At the seventh round in July, the Commission agreed to the Mexican proposal to liberalise services and investments on the basis of a negative list like under NAFTA. The Commission supported the Mexican proposal, as it facilitated attaining its main goal – to procure NAFTA-parity. The Member States, on the other hand, criticised the Commission's assent to the Mexican proposal as an unnecessary concession to Mexico and the NAFTA approach to services and investment liberalisation. The Member States had become used to the GATS-like positive list approach and felt that a positive list allowed for a more cautious liberalisation of services and investment. In early October, the Commission expressed confidence that the new approach of negative lists would pave the way toward a compromise on the liberalisation of services and service-related investments between the EU and Mexico, but also within the still-divided Council of Ministers (Agence Europe, 1999d; Harding, 1999). The eighth round of negotiations in October 1999 should ultimately conclude the FTA negotiations. And progress was indeed manifest. The Commission and Mexico agreed on liberalisation offers for services and service-related investments in the form of a negative list and a rendez-vous clause, which stipulated that the EU and Mexico would re-examine their bilateral commitments in this domain after three years so as to adjust them to developments in upcoming WTO negotiations. The Commission and Mexico, moreover, agreed on provisions indicating an almost complete liberalisation of bilateral capital movements including FDI (Interview, Brussels, 25 September 2013a). The Mexican

Minister for Trade, Herminio Blanco, commented that the issue of services and investment “that seemed to have dragged the negotiations out for a long time, have been resolved in this eighth round” (Agence Europe, 1999e). Older disagreements like rules of origin, agricultural trade and public procurement, however, unexpectedly resurfaced and made the planned conclusion of the negotiations impossible. The negotiators thus decided to reconvene for a ninth round to close the negotiations in November 1999 (Agence Europe, 1999e).

7.2.4 Clashing over competences on investment regulation

The weeks between the eighth and ninth round brought considerable turmoil regarding the agreed provisions on investment, services and capital movements. Media reports hardly covered these developments. They merely indicated that the comprehensive provisions on investment, services and capital movements had mostly vanished from the draft agreement when the ninth round started. Research interviews shed light on this episode.

The sovereigntist backlash of certain Member States: The reasons behind the sudden changes to the draft agreement were not the result of a clash between the EU and Mexico, but instead one between the Commission and the French government in the ‘113 Committee’. The French government suddenly objected to the use of negative lists for the liberalisation of services and service-related investments (Agence Europe, 1999f). France reportedly thought that their use was an unnecessary concession to Mexico. France feared that the use of negative lists might entail a much more comprehensive liberalisation of services and investments than initially intended. France wanted to keep its bargaining chips for the upcoming Millennium Round in the WTO. It demanded the deletion of the negative lists. France nevertheless wanted to maintain the rendez-vous clause and endorsed the Commission’s spontaneous proposal to integrate a standstill clause on services and related investment into the agreement (Agence Europe, 1999g; Interview, telephone, 14 November 2013; Interview, Brussels, 25 September 2013a).

France, moreover, claimed that the Commission had overstepped its mandate by agreeing with Mexico on a comprehensive ‘capital movements’ clause. It expressed criticism that the agreed clause would, *inter alia*, liberalise FDI and portfolio investment flows. France took the view that the term ‘capital movements’ in the negotiating guidelines only referred to ‘transfers of payments’ (Interview, telephone, 14 November 2013; Interview, Brussels, 25 September 2013a). France’s claim was, however, implausible. The term ‘capital movements’ was clearly defined under Community law³⁸, OECD codes and IMF guidelines. According to these widely accepted definitions, the term comprised FDI, portfolio investments and many other forms of cross-border transactions. It needs mention, though, that these clauses merely liberalise the cross-border transfer of FDI but do not liberalise the subsequent act of establishment, mergers or acquisitions of subsidiaries in the host country.³⁹

France threatened to veto the entire draft agreement unless the Commission deleted the negative lists for services and service-related investments as well as the comprehensive capital movements clause. The French threat was credible, as all the clauses negotiated within the working group on services and capital movements were subject to unanimous endorsement in the Council of Ministers. France was, initially, on its own with these demands. But what had started out as an isolated French veto soon grew into a broad majority of Member States. France skilfully convinced, but also pressured, other Member State governments into supporting its position. In the end, only the Commission and Spain still sought to save the controversial provisions. They, nevertheless, had to give into the demands of the French-led coalition so as to save the rest of the draft agreement (Interview, Brussels, 25 September 2013a; Interview, telephone, 14 November 2013; Manger, 2009, p. 119).

³⁸ See, for instance, the annexes of Directive 88/361/EEC, which provide an inconclusive albeit binding definition of the term.

³⁹ For more information see for instance Hindelang (2009) and OECD (2002).

France's opposition reflected competence concerns as well as the government's general protectionist attitude in international economic affairs. Interviewed negotiators recalled that France was clearly worried about the implications of comprehensive service, investment and capital movement provisions for its national competences and sovereignty. It feared that such provisions might set a precedent which could entail a limitation of its legal competences in the long run. France is traditionally more preoccupied with its national competences and sovereignty than many other Member States. Interviewees moreover stressed that the French government, under the socialist Prime Minister Lionel Jospin, was sceptical of globalisation, free markets and trade. The French government repeatedly voiced concerns over a too comprehensive liberalisation of bilateral trade and consequently applied the brakes to the FTA negotiations. The year before – in September 1998 – the Jospin government had, moreover, withdrawn from the MAI negotiations in the OECD without prior coordination with its European partners and triggered the collapse of the negotiation (see Chapter V) (Interview, Brussels, 25 September 2013a; Interview, 14 November 2013). These observations are important for this study. They suggest that while the expanding international trade agenda and the Commission promoted the extension of the EU's de facto competences, government preferences on the whole still sought to contain an extension of the EU's de facto competences in this policy-making sphere.

The negotiators reconvened for a ninth and last round in November 1999. The round had a twofold focus. On the one hand, the Mexican and Commission negotiators sought to resolve the outstanding disagreements on rules of origin, public procurement and the like. On the other hand, they had to deal with the considerable damage to the investment, services and capital movement sections of the draft agreement. It seems that the debates between the EU and Mexico on the latter issues were relatively uncomplicated. Investment, services and capital movements were no priority for Mexican negotiators. Rather, certain Member States, like Spain and the United Kingdom, had pushed for these issues during the negotiations. The absence of media coverage regarding these issues therefore suggests that the crucial

discussions on the consolidation of the investment, service and capital movement provisions evolved behind the scenes among the Member States rather than between the Commission and Mexico. The FTA was finally initialled in December 1999, signed in March 2000 and gradually entered into force between October 2000 and February 2001 (Agence Europe, 2000a, 2000b; European Commission, 2014a).

The Commission seeks to safe the investment provisions: So which investment-related provisions does the final EU-Mexico FTA⁴⁰ actually contain? As discussed above, the FTA could have delivered highly ambitious investment, services and capital movement disciplines. Or as a Commission official phrased it, the EU-Mexico FTA could have contained a “*sexy investment chapter better than NAFTA*” (As cited in Manger, 2009, p. 119). The Council of Ministers, on the initiative of France, nevertheless put a stop to these provisions. But despite this unseen EU-internal clash, the FTA still comprises – arguably by accident – several noteworthy investment-related commitments. First, the FTA provides for NAFTA-plus investment market access to Mexican service sectors. Why is that? The FTA liberalises bilateral trade in services across all modes of supply on the basis of MFN and NT. European service providers entering the Mexican market must thus receive equal treatment to Canadian and US service providers under NAFTA. What is more, the FTA does not contain a negative or positive list for the liberalisation of services trade but a standstill clause. The standstill clause prohibits the introduction of new trade barriers across all modes of supply. Taking into consideration that in 1999 Mexico’s unilateral market access commitments clearly exceeded its commitments under NAFTA or the GATS, the standstill clause locked in a considerable level of openness. Two caveats nevertheless apply to this reading of investment commitments in the EU-Mexico FTA. The FTA entirely excludes trade in cabotage, maritime, air transport and audio-visual services. On the other hand, the Commission and Mexico never drew up a schedule of the commitments under the MFN and standstill clause. The exact scope of the commitments thus remains opaque and very difficult

⁴⁰ For text of FTA see European Commission (2001).

to enforce. It is difficult for European business to rely on the FTA (Heydon and Woolcock, 2009, pp. 95–96; Interview, telephone 14 November 2013).⁴¹ Second, the FTA contains a special chapter for the liberalisation of trade and investment in financial and insurance services, which explicitly provides for NAFTA-parity across all modes of supply. European, Canadian and US banks thus enjoy the same market access and treatment in Mexico. The special deal on financial and insurance services reflects the greater lobbying activity of, notably, British and Spanish banks during the negotiations (Manger, 2009, pp. 115–117). So while the last-minute deletion of many investment provisions from the FTA draft casts doubts on the intergovernmental hypothesis H_2 , the preservation of the financial services chapter underlines that business lobbying nevertheless shaped Member State cooperation and delegation to a certain degree. Third, the FTA contains a rendez-vous clause for service trade, which provides for the continuation of negotiations on liberalisation commitments within three years. The EU and Mexico albeit have never used the rendez-vous clause.⁴² Finally, the FTA also contains a rendez-vous clause for the chapter on capital movements, which provides for the continuation of negotiations within three years. The ultimately agreed chapter on ‘investments and related payments’ is rudimentary. It provides for the free transfer of payments, recalls the commitments of the parties under OECD codes and encourages the parties to conclude BITs so as to complement the FTA (European Commission, 2001).⁴³

7.2.5 Conclusion

What theoretical conclusions may one draw on the basis of this account of the EU-Mexico negotiations? The observations lend greater support to the supranational hypothesis H_1 than to the intergovernmental hypothesis H_2 . The entry into force of NAFTA spurred international economic competition and significantly shaped European preferences on a FTA with

⁴¹ See Articles 4, 5 and 6 of the services part of the FTA.

⁴² See also Article 35 of the services part of the FTA.

⁴³ See also Chapter IV, title III of the services part of the EU-Mexico FTA.

Mexico. NAFTA gradually eroded the market share of European firms in Mexico and at the same time transformed Mexico into an ideal entry hub into the US and Canadian market. European business thus started lobbying Member State and European policy-makers, who showed receptive to these demands. In consequence, many Member States developed a sincere interest in concluding a competitive FTA of NAFTA parity i.e. comprising ambitious investment provisions. The Commission was eager to satisfy the demands of the Member States and European business. It used its agenda setting powers and invoked the evolving trade agenda to secure a firm mandate providing for services and investment provisions in the FTA with Mexico. As the Member States were calling for a FTA of NAFTA parity, they did not object the Commission's draft mandate and immediately agreed to cooperate and delegate negotiating on these agenda items. Only toward the end of the negotiations, several Member States and notably France started having second thoughts and worried about the implications of a FTA with far-ranging services and investment provisions for their competences. They claimed that the Commission had vastly overstepped its mandate and pressured the Commission to drop these provisions from the draft FTA. The Commission had to give into these demands to avert a veto against the whole agreement in the Council of Ministers but nevertheless managed to save substantial investment commitments. So while the EU-Mexico negotiations seem to confirm at first a business-centred liberal intergovernmental explanation and hypothesis H₂, the decisive final episode and outcome of the negotiations clearly lend support to the supranational hypothesis H₁.

7.3 Investment disciplines in the negotiations on the EU-Chile FTA

The negotiations on the EU-Mexico FTA were the first attempt to include investment provisions into an FTA between the EU and a third country. As examined above, the Member States were initially supportive of this plan but then had second thoughts. The investment, service and capital movement provisions of the EU-Mexico FTA are therefore less 'visible' and comprehensive than initially agreed between the Commission and Mexico.

The negotiations between the EU and Mexico are certainly an interesting episode in the emergence of the EU's international investment policy. The negotiations between the EU and Mexico become, however, even more intriguing if analysed in comparison to the negotiations on the EU-Chile FTA. These negotiations started around the time of the conclusion of the EU-Mexico FTA in late 1999 and came to an end in early 2002. The EU-Chile FTA is the first European FTA to contain comprehensive investment commitments in service and non-service sectors. Taking into consideration the proximity in time between the two negotiations and the marginal importance of the Chilean economy in comparison to the Mexican economy, one must wonder why the EU-Chile FTA finally encompasses ambitious investment commitments. This section traces the negotiations on the EU-Chile FTA. It finds that Commission entrepreneurship as enshrined in the supranational hypothesis H_1 best account for the Member State cooperation and delegation on investment provisions in this forum. The Commission used its agenda setting powers, expertise and exploited the international trade agenda – which it had previously shaped as shown in chapter VI – in order to convince the Member States to accept so far unseen provisions on investment in the EU-Chile FTA.

7.3.1 The pre-negotiations on the EU-Chile FTA

The plan to negotiate a EU-Chile FTA was born out of similar considerations as the EU-Mexico FTA. Following Chile's democratisation in the late 1980s, the country pursued a liberal economic and trade policy strategy. It reduced trade and investment barriers and sought to attract foreign investors. In 1995, Chile intended to join NAFTA but failed due to opposition within the USA. In consequence, Canada signed an FTA with Chile in 1996 and Mexico updated its FTA with Chile in 1998. In 1997, Chile and the USA announced their plan to negotiate on a Free Trade Area of the Americas (FTAA) (Manger, 2009, pp. 169–170). The EU was no bystander in this process. The EU concluded a first shallow and rather symbolic cooperation agreement with Chile in 1990. In 1996, the EU and Chile concluded a

more comprehensive 'Framework Agreement for Cooperation'. The framework agreement documented the intention of the EU and Chile to conclude an FTA in the near future and constituted the first step in the EU's traditional 'two phases' approach to FTA negotiations. The framework agreement came into force in 1999 (Dür, 2007, p. 844; Manger, 2009, pp. 169–172).

European business worries about a US-Chile FTA and lobbies for EU-Chile FTA: As Manger (2009) and Dür (2007) analyse in depth, the proliferation of comprehensive competitor FTAs created systemic competitive pressures. In accordance with the liberal intergovernmental hypothesis H₂, European business consequently started lobbying receptive Member State and European policy-makers to conclude a comparable FTA with Chile. In the early 1990s, the Chilean government had invited foreign companies to invest in Chile so as to diversify and modernise its economy. US firms had mostly ignored Chile's campaign to attract foreign investment and know-how. European, and in particular Spanish, service providers – due to their linguistic and cultural proximity – had nevertheless followed Chile's courting and had invested heavily in the banking, telecommunications and energy sectors (Manger, 2009, pp. 159–161). By the mid-1990s, several Spanish banks, telecommunication and energy companies had acquired commanding market shares and considerable stakes in Chilean service companies due to their first mover advantage in service sectors with strong network effects and oligopolistic market structures. Their investments showed to be highly profitable. Many Spanish companies realised higher margins in Chile than through their core activities in Europe (Manger, 2009, p. 165). The Spanish service providers thus observed the debates on the FTAA with great suspicion. They feared that the liberalisation of bilateral economic relations between the US and Chile might attract US competitors and endanger their dominant positions and profits in Chile. Spanish service providers therefore became the central supporters of an EU-Chile FTA. As these companies already held dominant positions in the Chilean economy, they were hardly interested in enhancing market access. They voiced demands which sought to cement their dominant market positions. First, the FTA

should codify and lock in Chile's current level of openness. Chile's openness was based on unilateral decisions and not bound by international commitments. Spanish service providers apparently feared that Chile might re-introduce protectionist measures against European firms after the conclusion of a highly comprehensive NAFTA-like US-Chile FTA. Second, most companies stressed that an EU-Chile FTA should contain MFN and NT clauses for service providers. These clauses should guarantee European companies at least the same treatment and market access as US firms under a potential future US-Chile FTA. Third, Spanish banks lobbied for the lifting of the 20% ceiling on foreign content for Chilean pension plans. The issue was arguably the only demand from service providers for additional market access (Dür, 2007, pp. 845–846; Manger, 2009, pp. 174–177). In contrast to the negotiations with Mexico, manufacturers and exporters of goods seem to have hardly lobbied for an FTA with Chile due to its small market size and low tariffs.

7.3.2 The Commission mandate

The Commission seizes the opportunity and tables a comprehensive draft mandate: In line with the supranational hypothesis H_1 , the Commission was responsive and proactive in order to satisfy and exploit these business demands. To speed up the negotiating process, it submitted to the Council of Ministers a comprehensive draft mandate for the EU-Chile FTA negotiations in July 1998 – well before the entry into force of the 'Framework Agreement' (Dür, 2007, p. 847; Manger, 2009, p. 172). The Member States, on the other hand, were slow to react and examined the draft mandate only during the weeks prior to the EU-Latin America Summit in June 1999. This Summit brought together the EU, its Member States, the Mercosur countries and Chile. The main purpose of the summit was to evaluate the prospects of a region-to-region FTA between the EU and the Latin American countries. The idea of such a region-to-region FTA reflected the fact that Chile had applied for accession to the Mercosur. European policy-makers thus wanted to conduct the EU-Chile and EU-Mercosur

negotiations in parallel in order to fuse them in case Chile acceded to the Mercosur in time for the conclusion of the negotiations (Agence Europe, 1999h, 1999h).

The Member States agree on investment but fight over the timeline: First discussions in the Council of Ministers on the Commission's draft mandate prior to the EU-Latin America Summit showed that the Member States did not disagree so much over the substance of the draft mandate but, once again, over the proposed timing. Spain, Portugal, Denmark, Sweden and Germany pushed for the swift adoption of both mandates for the EU-Chile and EU-Mercosur negotiations. They intended to use the upcoming summit as a platform to launch the FTA negotiations. Other Member States did not share their enthusiasm for these FTA negotiations. In particular, France and Ireland acted as brakemen in EU-internal debates (Dür, 2007, p. 847). France argued that FTA negotiations with major agricultural exporters like Chile and the Mercosur countries could only start once the EU had completed the reform of the Common Agricultural Policies. With regard to Chile, French wine producers feared competition with cheap Chilean produce. France also warned that Chilean agricultural produce might drive produce from French overseas territories and ACP countries out of the market. Greece, Italy and Ireland shared these concerns. On the other hand, France also stressed that it was bad timing to launch bilateral trade negotiations only a few months before the Seattle ministerial meeting of the WTO and the planned opening of a new multilateral round. The United Kingdom and the Netherlands agreed with France on this point. Germany, which held the Council Presidency, proposed setting 2003 as the deadline for the conclusion of the FTA negotiations with Chile and Mercosur. This compromise should give the EU more time to observe developments at the multilateral level and advance the CAP reform, but also provide for a clear timeframe. France and the United Kingdom rejected the proposal. They suggested starting with non-tariff negotiations on issues like investment, services, intellectual property rights, competition rules and rules of origin in the near future and to delay negotiations on industrial and agricultural tariffs until the WTO talks had delivered results (Agence Europe, 1999h, 1999i, 1999j).

In early June 1999, the European Council finally took a decision on the matter. The heads of states instructed their trade ministers to provide the Commission with mandates to open both FTA negotiations at the occasion of the EU-Latin America Summit. Their decision was based on an elaborate substantive and procedural compromise between the promoters and opponents of the FTA negotiations. The Commission should initially negotiate with Chile on non-tariff barriers and issues like investment, services and capital movements. In a second phase – after summer 2001 – the Commission should then start negotiations on the reduction of tariffs. The sequencing should enable the Commission to take developments in agricultural negotiations in the EU-Mercosur and planned WTO talks into account. The procedural linkage was reportedly a concession to France to gain its support for the opening of the FTA negotiations (Agence Europe, 1999h, 1999h). Second, the mandate instructed the Commission to reach for an ambitious liberalisation of investments and services. The explicit mention of investment and services reflected the fear of European service providers that the conclusion of a comprehensive NAFTA-like US-Chile FTA in the following years might translate into discrimination against them. Following a pre-emptive logic, European service providers thus demanded European policy-makers to seek the conclusion of an equivalent agreement with Chile. The mandate nevertheless clarified in an unusual degree of detail that the relevant chapter and liberalisation commitments should build on a positive list (Interview, telephone, 14 November 2013; Agence Europe, 2001a). The mandate's emphasis on the positive list approach was arguably an anticipating concession and first omen of the looming clash between the Commission and France over the negative list approach three months later in September 1999. It needs mention here that no source suggests that the Member States ever seriously discussed special representation modalities for these issues. The Member States seem to have assumed from the outset that the Commission would, as customary, act as their single voice in FTA negotiations regardless of the EU-internal distribution of competences. The Council of Ministers ultimately endorsed the mandate in time for the EU-Latin America Summit, which formally opened the FTA negotiations

between the EU, Chile and Mercosur. In conclusion, it must be mentioned that the slow reaction of the Member States to business demands for a EU-Chile FTA does not directly contradict the intergovernmental hypothesis H_1 but does not lend strong support to either.

The examination of the intergovernmental debates on the Commission's mandate lends greater support to the supranational hypothesis H_1 than to the intergovernmental hypothesis H_2 . The Commission strongly pushed for a swift opening of comprehensive negotiations. Yet, its draft mandate clearly reflected the intention to build stable and enduring support for comprehensive FTA negotiations. The Member States – under considerable pressure from national business lobbies – were mostly supportive but also harboured concerns regarding competences and too far-ranging liberalisation commitments.

7.3.3 The core negotiations on the EU-Chile FTA

The EU and Chile met for the first symbolic consultations in November 1999. As usual in FTA negotiations, the Commission spoke on behalf of the Member States on all agenda items including investment, services and capital movements. DG Relex was in the lead of the overall negotiating process, but DG Trade handled technical negotiations. The Member States typically sent officials to observe the negotiations, take notes and support the Commission on the spot. The joint EU-Chile negotiating committee agreed to structure the negotiations in three working groups: 1) trade in goods, 2) services and investment, and finally 3) regulatory issues like rules of origin, public procurement, intellectual property rights and so on. The joint EU-Chile negotiating committee and the working groups should meet five times per year for five days. European sources reported that they expected the negotiations to take around three to four years. Chilean representatives, however, expressed their hope of finishing the negotiations within two years, before the second EU-Latin America Summit in 2002 (Agence Europe, 2000c; Mulligan, 2000).

The first round of substantive negotiations between the EU and Chile took place in March 2000 in Santiago de Chile. The negotiators established the working groups and agreed on a preliminary timetable for the talks (Agence Europe, 1999k). The second and third rounds, in June and November 2000, focused on the exchange of technical information on the parties' respective trade policies and regulations (Agence Europe, 2000d). The fourth round of negotiations, in March 2001, brought considerable progress. Chile and the EU made the first attempt to draft parts of the future agreement, notably on rules of origins, standards, intellectual property rights, public procurement and alike (Agence Europe, 2001b, 2001c). Several Commission negotiators recalled that the EU-Chile negotiations were an easy enterprise as the Chilean negotiators were highly trained, very eager and Chile had already unilaterally dismantled many critical trade barriers (Interview, Brussels, 24 July 2012b; Interview, telephone, 14 November 2013).

Thanks to the Chilean and Commission entrepreneurship, the EU-Chile negotiations, moreover, made a procedural leap forward in spring 2001. While the first rounds of negotiations between the EU and Chile had been fruitful, many observers felt that the procedural linkage of the EU-Chile talks with the EU-Mercosur and WTO negotiations considerably decelerated the talks. The Mercosur negotiations had started but hardly progressed. The WTO negotiations had not even been launched as planned, due to the disastrous failure of the WTO ministerial meeting in Seattle. The Chilean government came to the conclusion that it was necessary to set the EU-Chile negotiations on an independent negotiating track so as to prevent stalemate. In summer 2000, the Chilean minister of foreign affairs thus toured with the support of the Commission the Member States to convince his European partners to delink the EU-Chile negotiations from the EU-Mercosur and WTO negotiations. In October 2000, the Commission requested the Council of Ministers and the European Parliament to adjust its negotiating mandate accordingly (Agence Europe, 2001d; Manger, 2009, pp. 172–173). The Council of Ministers was, however, divided on the matter. The sequencing and linking of the EU-Chile FTA negotiations had been a concession of

favourable Member States toward hesitant ones. France and other mostly Southern European Member States had specifically asked for the sequencing and linking of the EU-Chile FTA negotiations in exchange for their assent to the EU-Chile FTA in order to prevent a too far-reaching liberalisation of agricultural trade. After lengthy discussion, the Council and the European Parliament nonetheless bought into the Chilean and Commission's arguments and accepted the request in spring 2001 (Agence Europe, 2001d; Manger, 2009, pp. 172–173). They changed the mandate and set the EU-Chile FTA negotiations on an independent track. The willingness of the Council to revise the mandate reportedly was due to the Commission's pedagogical campaigning and attempts to explain the greater negotiating context. It moreover raised awareness in the Council that after the failure of the Seattle ministerial meeting the EU may have to develop a stronger bilateral strategy and profile as the prospects of further multilateral liberalisation were dim. The Commission's proactive attitude allowed the EU-Chile FTA negotiations to progress, which ultimately consolidated the EU's role in international investment policy (Manger, 2009, pp. 172–173; Interview, Brussels, 25 September 2013a; Interview, telephone, 14 November 2013).

Early 2001 brought another important change. France passed the rotating Council Presidency on to Sweden. While the French government under Lionel Jospin was critical of economic liberalism and the FTA negotiations, Sweden was a liberal trading nation in favour of the FTA negotiations. Sweden, moreover, typically sided with the Commission in EU-internal debates on trade policy. The incoming Swedish Council Presidency identified the advancement of the FTA negotiations with Chile as a priority of its term. The Swedish Presidency understood that the main obstacles to a swift conclusion of a comprehensive and ambitious FTA with Chile were not located outside the EU but in Member State capitals. Many national administrations mistrusted the Commission and Brussels, had an aversion to free trade and sought to protect their competences against European encroachment. Sweden – in close cooperation with the Commission – came to the conclusion that they had to step

up efforts to convince the Member States of the benefits of an ambitious EU-Chile FTA (Interview, telephone, 26 January 2012b).

7.3.4 Commission entrepreneurship for comprehensive investment disciplines

Sweden and the Commission subsequently acted as policy entrepreneurs and devised a campaign to build and to maintain a broad consensus among the Member States for ambitious investment, services and capital movement provisions. In accordance with the supranational hypothesis H_1 , the Commission drew on its agenda setting powers and technical expertise to build trust and exploited the evolving international trade agenda to that end.

In more concrete terms, Commission officials and Swedish diplomats and Commission negotiators reportedly toured Member State capitals – and in particular Paris – in order to build confidence and to inform national administrations about the merits of such a comprehensive FTA. Sweden and the Commission felt that this approach reflected the EU's best economic interests. What is more, the campaign at the same time also consolidated the Commission's role and the EU's de facto competences in international investment policy. This instance of joined policy entrepreneurship of the Commission and Council Presidency thus echoed functional and power considerations. It needs mention that European business reportedly did not propose or lobby for this initiative (Interview, telephone, 26 January 2012b).

Agenda setting, building trust and invoking the evolving trade agenda: The primary objective of the joint initiative of Sweden and the Commission was to prevent another clash on investment, service and capital movement provisions, as had been the case at the end of the EU-Mexico negotiations (Heydon and Woolcock, 2009, p. 112). Swedish diplomats and Commission negotiators sought to ensure continuous support for the Commission's

negotiating mandate and results in these domains. They reassured Member State administrations that the positive list approach used in the EU-Chile talks allowed for greater control over the liberalisation of services and service-related investment than the negative list approach used in the EU-Mexico talks. They, moreover, added that – at the behest of the Member States – the EU was pushing for a new round of multilateral trade negotiations in the WTO. The official EU position stipulated that the new round should seek a further liberalisation of services trade and extend the WTO regime toward the so-called Singapore Issues – investment, public procurement, competition and trade facilitation. The Swedish diplomats and Commission negotiators explained in meetings with sceptical Member State governments that the EU could not credibly advocate a comprehensive new round, if the Member States vetoed the inclusion of comparable disciplines into the EU's FTAs. The very *raison d'être* of FTAs in the multilateral trade regime was to enable countries to go beyond WTO commitments and to reach for a broader and deeper liberalisation of their economic relations. This line of argument was reportedly quite effective with Member State governments and in particular with the French government. In the run-up to the FTA negotiations with Mexico, the Mercosur and Chile, France had constantly reiterated that its trade policy priority were the upcoming WTO negotiations. In consequence, France could hardly veto an ambitious service chapter in the FTA with Chile, if it intended to remain credible (Interview, telephone, 26 January 2012b).

Swedish diplomats and the Commission negotiators used the same argument in order to convince the Member States to finally include investment provisions for non-service sectors. They reiterated that the EU was formally seeking negotiations on 'investment' per se – i.e. investment across all economic sectors – in the upcoming WTO round. So if the EU wanted to be seen as a credible actor in related WTO debates, the EU had to reach for similar provisions in its FTAs. Swedish diplomats and Commission negotiators proposed negotiating on a comprehensive positive list on 'establishment', which should codify investment liberalisation commitments for services and non-service sectors. From the point

of view of regulators, as a Swedish diplomat elaborated, such an encompassing approach to investment made much more sense than the artificial distinction between service-related and non-service-related investments. Sceptical Member States – and notably France – found it again difficult to object to this logic. Only two years before, France had withdrawn from the MAI negotiations in the OECD by arguing that negotiations on investment should continue in the WTO as part of the Singapore Issues, because the WTO was a more suitable forum for such talks. This remained France's official position in the Council of Ministers in the following years. Hence, it would have been contradictory for France to veto the inclusion of such provisions in the EU-Chile FTA (Interview, telephone, 26 January 2012b).

The efforts of the Swedish Council Presidency and Commission facilitated EU-internal debates on the FTA negotiations. Commission negotiators commented that the EU-Chile negotiations took place in an atmosphere of much greater trust between the Commission and the Member States than the previous EU-Mexico talks (Interview, Brussels, 24 July 2012b; Interview, telephone, 14 November 2013). At the fifth negotiating round between the EU and Chile in July 2001, the EU was thus able to present its first full offer to Chile. It proposed to do away with 100% of industrial tariffs and 93% of agricultural tariffs within ten years of the FTA coming into force. It furthermore proposed that all commitments on non-tariff barriers – for instance establishment/investment and services – should take immediate effect (Agence Europe, 2001e). The consequent discussions between the EU and Chile showed that both parties agreed on most aspects of the offer. In consequence, Commission President Romano Prodi and the Chilean President Ricardo Lagos announced in September 2001 that it might be possible to close the negotiations by the end of the year (Agence Europe, 2001f).

The optimism of Commissioner Prodi and President Lagos was premature. In October 2001, the sixth round of negotiations saw further in-depth discussions on tariffs, services and other non-tariff issues. The discussions shed light on three points of persisting disagreement

among the parties. First, Spain demanded access to Chile's territorial waters for European fishery fleets, which Chile was unwilling to grant. The so-called *Swordfish Issue* became the most difficult issue of the entire negotiations. Second, France, Greece and other wine producing Member States demanded that Chile adjust to the European regime for the protection of geographical indicators. Third, the Commission demanded greater liberalisation commitments in financial services from Chile. While Chile did not categorically refuse to further open its financial sector for European companies, it insisted that it would first negotiate on this matter with the USA before taking on further commitments. The Commission dismissed the Chilean point of view and underlined that the EU would not adjust to US rules later on. The disagreements could not be resolved during the sixth round (Agence Europe, 2002a, 2001a; Manger, 2009, pp. 173–174). The EU and Chile therefore held another three negotiating rounds in January, March and April 2002, which finally closed all chapters and ultimately even resolved the above-mentioned points of disagreement (Agence Europe, 2002b, 2002c, 2002d, 2002e, 2002f). The negotiations on the EU-Chile FTA drew to an end in time for the second EU-Latin America Summit in May 2002. The agreement was signed in November 2002 and entered into force in February 2003 (European Commission, 2014b).

The conclusion of the EU-Chile FTA marks a milestone in the emergence of the EU's international investment policy for several reasons. First, the EU-Chile FTA contains comprehensive commitments on market access for investors in services⁴⁴ and non-services⁴⁵ sectors like agriculture, mining and manufacturing. Investors generally benefit from MFN and/or NT under the FTA. The commitments are scheduled in the form of a GATS-like positive list. This list did not significantly enhance market access for European investors in Chile, but it codified and consolidated the existing degree of openness. It is therefore much easier for investors to use than the EU-Mexico FTA, which merely includes a standstill

⁴⁴ See Annexe VII of the EU-Chile FTA.

⁴⁵ See Annexe X of the EU-Chile FTA.

clause regarding service-related investment but no consolidated schedule. The inclusion of investment commitments in non-service sectors, moreover, marks the ‘emancipation’ and emergence of a proper European approach to the regulation of investments in FTAs, which is independent from the regulation of services trade. Second, the EU-Chile FTA also partly liberalises the movement of key personnel.⁴⁶ The establishment of investments not only requires the transfer of capital, but also the ability of investors to manage and build their affiliates. The movement of key personnel is thus crucial to investment liberalisation. Third, the EU-Chile FTA includes a clause encouraging Chile and the Member States to conclude BITs.⁴⁷ The FTA thus seeks to establish an encompassing investment framework. Finally, the EU-Chile FTA provides for the liberalisation of capital movements – including FDI, payments and profits – under specific commitments as well as under the relevant OECD codes.⁴⁸

7.3.5 Conclusion

To summarise, the analysis of the EU-Chile FTA negotiations primarily lends support to the supranational hypothesis H₁. Since the launch of the pre-negotiations, the Commission was highly proactive and sought to quickly advance the project in EU-internal debates and in talks with Chile. Once the core negotiations on the EU-Chile FTA had started, the Commission in cooperation with the Swedish Council Presidency acted as determined policy entrepreneurs in order to ensure the inclusion of an ambitious and so far unseen investment chapter in the FTA. To that end, the Commission drew on its agenda setting powers and technical expertise to build trust and to convince the Member States of its policy agenda. What is more, it invoked the evolving trade agenda and notably the WTO agenda in order to increase pressure on the Member States to accept the inclusion on non-service investment commitments. The intriguing twist to this observation is obviously that the Commission had

⁴⁶ See Annexe X of the EU-Chile FTA, pp. 1,212-1,220.

⁴⁷ See Article 21(b) of the EU-Chile FTA.

⁴⁸ See Articles 164 and 165 of the EU-Chile FTA.

been the main promoter of investment negotiations in the WTO once the MAI talks had broken down. The policy entrepreneurship of the Commission reflected both functionalist and power considerations. The Commission was convinced that it was in Europe's best interest to conclude an ambitious FTA with Chile. It, however, also wanted to ward off another humiliating defeat against the Member States and consolidate the EU's role in international investment policy.

As stipulated in the liberal intergovernmental hypothesis H₂, European business was interested in the EU-Chile FTA talks and pushed for investment provisions. European business worried about the detrimental effects of a planned, highly ambitious FTA between the USA and Chile. Most observers, however, agree that the Member States' acceptance of the comprehensive and so far unseen investment chapter in the EU-Chile FTA primarily reflected the Commission's campaigning rather than European business lobbying. The decision of the Member States to cooperate and to delegate negotiating on international investment disciplines to the Commission thus confirms supranational rather than intergovernmental and business-centred causalities.

7.4 Beyond Chile – Investment provisions in bilateral EU agreements

The negotiations on the EU-Mexico and EU-Chile FTAs were the first bilateral trade negotiations between the EU and third countries to cover comprehensive investment commitments. At the same time, the Member States negotiated on the Treaty of Nice (2000-2001) and ultimately held the Convention on the Future of Europe (2002-2003). While the Nice Treaty extended the Union's exclusive competence under the Common Commercial Policy toward the regulations of services trade and service-related investments, the draft constitution even proposed to generally bring FDI regulation under exclusive Union competence. Taken together, these events triggered reflections in the Council of Ministers about the EU's long-term strategy on international investment. The '113/133 Committee'

reportedly established an expert group which examined, in cooperation with the Commission, the cast of investment chapters in future EU trade and investment agreements (Interview, Brussels, 24 July 2012a; Interview, telephone, 14 November 2013).

In 2006, the Commission presented its so-called Minimum Platform on Investment (MPoI). The MPoI codified and standardised in many regards the investment approach adopted in the EU-Chile FTA. It proposed a single chapter on establishment i.e. investment for future EU trade and investment agreements. Investment liberalisation should proceed on the basis of a GATS-like positive list. Investors in liberalised sectors should benefit from MFN and NT at the pre- and post-establishment stage and have the right to send key personnel to their affiliates in host countries. The MPoI, moreover, proposed the inclusion of a non-lowering of standards clause into the establishment chapter. The clause would prevent countries lowering their social, health, labour or environmental standards to the end of attracting additional inward investments. The MPoI laid out the first comprehensive EU approach to market access and post-establishment treatment under future EU trade and investment agreements. It did not, however, contain any provisions on investment protection as typically found in Member State BITs or NAFTA-like trade and investment agreements (European Commission, 2006).

The MPoI was not in use for long. In December 2007, the Member States signed the Treaty of Lisbon, which replaced the failed Constitutional Treaty. Article 207 TFEU finally provided the EU with the exclusive competences to regulate FDI. It arguably empowered the EU to conclude full-fledged trade and investment agreements covering market access, post-establishment treatment and investment protection provisions. The Council of Ministers consequently instructed the Commission to reach for comprehensive investment chapters – covering market access, post-establishment treatment and investment protection – in the FTA negotiations with Malaysia, Singapore, India, Canada and the USA. The negotiations on the EU-Canada FTA (CETA) are reportedly the most advanced talks. CETA is likely to

become the EU's first highly comprehensive FTA and will thereby set a new European standard for international investment regulation.

7.5 Conclusion

This chapter examined the FTA negotiations between the EU and Mexico as well as the EU and Chile. It sought to answer two questions. First, why was the EU allowed to negotiate on investment provisions with these countries? And second, why does the EU-Mexico FTA contain only limited investment provisions, whereas the EU-Chile FTA encompasses significant investment commitments?

The analysis finds that supranational thinking and hypothesis H₁ better account for the EU's growing de facto competences in FTA negotiations than liberal intergovernmental thinking and hypothesis H₂. In both cases, the Commission was eager negotiate a comprehensive FTA. It pushed proactively for ambitious investment disciplines and sought to speed up negotiations in EU-internal debates and negotiations with Mexico and Chile. European business was also interested in the conclusion of ambitious FTAs and – in contrast to all other examined international negotiations – lobbied policy-makers to that end. At first, the Member States showed similarly interested in the conclusion of ambitious FTAs with inter alia investment provisions. Toward the end of the negotiations with Mexico, certain Member States, however, suddenly blocked the inclusion of ambitious service and investment provisions due to competence and sovereignty concerns. In order to ward off another clash in the EU-Chile negotiations, the Commission subsequently used its agenda-setting powers, technical expertise and the evolving trade agenda. It toured Member State capitals and stressed that the EU could not credibly negotiate and push for investment provisions in the WTO, if it did not include such disciplines in its FTAs. The argument reportedly worked well as the Member States had previously called for ambitious WTO negotiations. Taking into consideration that the Commission had been the main promoter of investment

negotiation in the WTO, the observation constitutes an intriguing instance of Commission entrepreneurship across international negotiating fora. The Commission's tour of Member State capitals built trust and pressured the Member States in maintaining their support for such disciplines. The Commission's policy entrepreneurship was successful. The EU-Chile FTA became the first bilateral trade agreement of the EU to contain a proper investment chapter. It set a new standard and all following FTAs contain similar investment provisions. The extension of the EU's de facto competences in international investment policy toward bilateral negotiations with third countries thus manifestly reflected Commission entrepreneurship.

Chapter VIII – The evolution of the EU’s legal competences in international investment policy

The previous chapters examined the EU’s involvement in multilateral and bilateral investment negotiations since the 1980s despite the Union’s manifest lack of legal competences to regulate international investment flows. The present chapter complements the preceding analysis. It traces the evolution of the EU’s legal competences in international investment policy as enshrined in European primary and secondary law since the 1950s. The chapter builds on the assumption that the evolution of the EU’s de facto competences influences the EU’s legal competences. If the Member States informally cooperate to regulate an issue area, it should create functional pressures to formalise cooperation *inter alia* to ensure swift and effective policy-making as well as regulatory coherence (see chapter III). De facto competences are defined as informal temporary Member State cooperation in daily policy-making, whereas legal competences are defined as formal permanent Member State cooperation. As discussed in the analytical framework, informal temporary cooperation normally precedes formal permanent cooperation among the Member States in EU foreign economic policy (Klein, 2013). De facto and legal competences should thus be considered as consecutive and interdependent stages of Member State cooperation. In short, if the EU holds de facto competences in a policy domain, it should promote the extension of the EU’s relevant legal competences.

The chapter finds that supranational thinking and hypothesis H₁ best describe intensifying Member State cooperation. The Commission persistently used its agenda-setting powers, invoked implied competences, pointed to the evolving trade agenda and the EU’s growing de

facto competences and had strategic recourse to legal review in order to make the Member States agree to permanent cooperation and an extension of the EU's legal competences in international investment policy. The Commission's astounding insistence reflected functionalist as well as power considerations. The Commission thought that international investment complements and substitutes classic trade and should therefore come under the scope of the CCP. At the same time, it sought to assert control over the last major issue area of foreign economic policy not yet integrated at the EU level. The Commission's policy entrepreneurship showed only limited success for many years, as the Member States sought to contain the EU in this policy domain. The breakthrough under the Lisbon Treaty, which finally brought the regulation of FDI under the scope of the CCP, reflected Commission entrepreneurship as well as the procedural particularities of the Convention. The Convention method limited Member State and technocratic control over Treaty revisions and thereby facilitated Commission entrepreneurship.

The chapter lends no support to intergovernmental hypothesis H₂. European business was ambivalent or divided over the question of whether international investment policy-making should be integrated at the EU-level. Business lobbying cannot be considered as a driving force behind the extension of the EU's legal competences. The Member States, moreover, were persistently opposed to extending the EU's legal competences in this domain. They sought to defend their last stronghold in foreign economic policy-making in the form of national BIT programs against European encroachment. The Member States ultimately and unwillingly accepted an extension of the CCP to FDI regulation due to the Commission's smart manoeuvring in the special setting of the Convention.

A brief note on the purpose and place of this chapter in the overarching structure of the thesis is appropriate here. It has been suggested that the analysis of the EU's legal competences should be chronologically integrated with the analyses of the international investment negotiations. The analysis of the IGC on the Maastricht Treaty, for instance,

should follow the examination of the Uruguay Round. This suggestion is convincing at first sight, but neglects analytical problems. First, many negotiations took place in parallel. A truly chronological account would be very confusing for the reader. Second, the Convention on the Future of Europe, which ultimately initiated the extension of the CCP to FDI regulation, actually sits at the end of a long chain of international investment negotiations and EU-internal debates. The purpose of this chapter is indeed to shed light on the way toward, and debates during, the Convention leading to the CCP reform. To analyse the Convention after the chapters on international investment negotiations actually constitutes a logical endpoint of the thesis.

8.1 First steps – The EU and international investment regulation from the 1950s to the 1980s

Veritable debates on the EU's role and legal competences in international investment policy did not start before the late 1980s. International investment was a marginal phenomenon and of limited economic importance before then (see Chapter II). Neither European business nor policy-makers took a strong interest in international investment policy in general or the EU's role and competences in particular. EU-internal policy-making debates, nonetheless, touched twice on this issue during the first three decades of European Integration. First, the preparatory debates on the Treaty of Rome briefly raised the question of the EU's role in the regulation of international investment flows. Second, the Commission proposed the creation of a European export policy in the 1970s, which would, *inter alia*, encompass the conclusion of investment protection agreements between the EU and third countries. The Member States, however, rejected the Commission's plans. While these debates appeared in isolation and were not part of broader reflections on a EU international investment policy, they nevertheless lend support to supranational thinking and indirectly to hypothesis H₂. Institutional dynamics such as functional spill-overs exerted pressure on the Member States to cooperate in international investment regulation.

8.1.1 The Treaty of Rome

The Treaty of Rome did not provide the EU with legal competences in the regulation of international investment flows. The preparatory debates on the Treaty of Rome nevertheless touched on the issue. The publication of the Spaak Report in April 1956 marked the kick-off for in-depth discussions on the Treaty of Rome and the establishment of the EU. The Member States of the European Coal and Steel Community (ECSC) – Belgium, France, Germany, Luxemburg, the Netherlands and Italy – had commissioned an intergovernmental committee headed by the Belgian Minister of Foreign Affairs, Paul-Henri Spaak, to evaluate and further develop the plan to create a Common Market. The report discussed the objectives, overarching rules and institutions of a Common Market (Bakker, 1996, pp. 30–33).

The report's section on the Common Commercial Policy (CCP) did not touch on investment-related questions. Instead, it exclusively focused on the establishment of a customs union, a common external tariff and the abolishment of import and export quotas vis-à-vis third countries (Comité intergouvernemental créé par la conférence de Messine, 1956, p. 75). This focus reflected the then still limited working agenda of the GATT. Issues like international investment, trade in services or technical barriers to trade did not become the subject of GATT discussions before the 1970s and 1980s.

The need for an external capital regime? The report, nonetheless, touched upon the EU's potential role in the regulation of international investment flows in its section on the free movement of capital. The report stipulated that the Common Market should provide for the free movement of goods, services, labour and capital. The free movement of capital – a scarce production factor in post-war Europe – should promote its efficient allocation, stimulate economic growth and welfare gains (Comité intergouvernemental créé par la

conférence de Messine, 1956, pp. 92–93). The report, however, cautioned that the liberalisation of capital movements – including foreign direct investment – would require several accompanying actions⁴⁹ and, notably, the creation of a common external capital regime. The absence of such a regime, the report warned, would create a regulatory gap. Capital could enter and exit the Common Market through Member States with liberal external capital regimes and then flow into Member States with more protectionist external capital regimes.

*« Le [...] obstacle, c'est la possibilité que les capitaux passent d'un pays vers un autre, non pour s'y investir mais pour échapper vers l'extérieur au bénéfice d'une inégalité dans la rigueur des contrôles. La liberté de la circulation des capitaux à l'intérieur du marché commun appelle donc dans les relations avec les pays tiers une certaine attitude commune qui [...] au stade finale, aboutirait à une égale liberté ou à un degré de contrôle équivalent.»*⁵⁰

(Comité intergouvernemental créé par la conférence de Messine, 1956, pp. 93–94)

The report implicitly advised the states to empower the EU to regulate market access for foreign investors to maintain regulatory coherence across the Common Market. Since the EU's very inception, institutional dynamics in the form of spill-overs thus exerted pressure on the Member States to cooperate in international investment regulation. The question of intensifying integration emerged without business lobbying and Member State preferences favouring such a step. So while Commission entrepreneurship did not promote an

⁴⁹ The Spaak Report stresses that the creation of a Common Market for Capital would require 1) the harmonisation of capital taxation to prevent capital flight, 2) the harmonisation of monetary policies to prevent exchange rate fluctuations and 3) the creation of structural development funds in order to channel capital back into less competitive regions of the Common Market.

⁵⁰ “The problem is that capital may flow from one country to another not for investment purposes but to exit the Common Market by taking advantage of varying national external capital regimes. The free movement of capital within the Common Market thus requires at the final stage a common approach in relation to third countries which should end in a common level of openness or degree of control.” Author's own translation.

intensification of Member State cooperation in this domain yet, the observation nevertheless lends support to supranational thinking.

The Member States reject the creation of an external capital regime: The Spaak Report became the basis for negotiations on the Treaty of Rome, which were held between June 1956 and March 1957. The governments followed the recommendations of the Spaak Report in regard to trade policy. They provided the Union with the exclusive competence to regulate the Common Market's external trade relations in Article 113 EC. The wording of Article 113 EC clearly reflected the as yet limited understanding of trade policy of the 1950s and did not encompass the regulation of international investment flows. The governments followed only partly the recommendations of the Spaak Report in regard to capital movements due to sovereignty concerns. They did not provide the EU with competences to regulate capital movements between the Common Market and third countries. This diversion from the Spaak Report is not surprising. The Member States adopted a cautious approach to the liberalisation of capital movements within the Common Market. While Articles 67-73 EC in principle liberalised capital movements, Article 69 EC underlined that the free movement of capital was only a subordinate Treaty freedom. The liberalisation of capital movements should only proceed to the extent necessary for the functioning of the Common Market for goods and services (Bakker, 1996, pp. 42-44; Ohler, 2002, pp. 1-3; Usher, 1992, pp. 35-37). What is more, the articles regarding the free movement of capital should not be directly enforceable but require the implementation of secondary legislation (Ohler, 2002, pp. 1-3). The Member States waited almost three decades before enacting any significant implementing legislation so as to advance the liberalisation of capital movements within the Common Market. The manifest hesitation of most Member State governments reflected their worries that a liberalisation of capital movements would undermine their Keynesian macroeconomic policies, taxation regimes and, lastly, sovereignty (Bakker, 1996, pp. 32-36). It was only with the demise of the Keynesian economic paradigm and the emergence of the neoliberal one in the 1980s that the Member States revised their positions on capital movements. In

conclusion, the Treaty of Rome did not provide the EU with its first legal competences in international investment policy, but the examination of the preparatory debates already pointed to the importance of institutional dynamics in the long-term evolution of this policy field.

8.1.2 First debates on European BITs in the 1970s

Following the entry into force of the Treaty of Rome in 1958, the EU's legal competences in international investment policy did not resurface as a topic in EU-internal discussions for more than a decade. Only the debates on the creation of a European export policy and related Opinion 1//75 of the ECJ brought the topic up again. While previous EU-internal debates had only indirectly touched on the EU's competences in international investment regulation, these debates indeed focused on whether and how the EU could regulate the activities of international investors under the CCP. The debates constitute a first instance of Commission entrepreneurship to the end of consolidating the EU's legal competences in international investment regulation.

The Commission proposes a European BIT program: In late 1972 and 1975, the Commission published two draft regulations, which sought to establish a European export policy as an integral part of the CCP (Deutscher Bundestag, 1976; Johannsen, 2009, pp. 5–6; Seidl-Hohenveldern, 1977, pp. 54–59). One draft regulation foresaw the creation of a European investment guarantee agency. The agency should provide investment guarantees to European investment projects in third countries. The Commission explained in its proposal that joint investment projects of investors from different Member States had insufficient coverage through national schemes. The European scheme should be complementary. The investment guarantees should insure investors against non-commercial investment risks like war, riots, expropriation, payment restrictions and major exchange rate fluctuations. Access to common investment guarantees should be conditional on the existence or conclusion of

investment protection agreements i.e. BITs between the EU and the concerned third countries (Johannsen, 2009, pp. 5–6; Seidl-Hohenveldern, 1977, pp. 54–59). The Commission’s proposal thus emulated the German approach to international investment policy. The German government had conceived of BITs in order to lower its financial exposure under state-backed investment guarantees (Interview, Berlin, 17 February 2012; Poulsen, 2010, pp. 555–557). The Commission’s draft regulation referred to Article 113 EC as the competence basis for the creation of the EU investment guarantee agency and the conclusion of EU BITs covering post-establishment treatment, protection and compensation standards.

The Commission’s strategic recourse to legal review: In July 1975, the Commission stepped up pressure on the Member States to accept its draft regulations and to acknowledge the EU’s competence over export policy through the strategic recourse to legal review by the ECJ. It called on the ECJ to assess in Opinion 1/75 the EU’s legal competences to enter into the so-called “Understanding on a Local Cost Standard” drafted in the OECD. This gentlemen agreement sought to establish ground rules for export policies including investment guarantee schemes in order to prevent unfair international competition among OECD exporters and investors. The Commission argued that the EU should adhere and enforce the OECD standard on behalf of the Member States due to its exclusive competence over export policy under the CCP. The ECJ partly confirmed the EU’s competence under Article 113 EC to adhere to the agreement and to harmonise Member States’ export policies. Lawyers interpreted the ECJ’s Opinion as an encouragement and wakeup call for the Commission to get active and to regulate in this domain as foreseen in the CCP provisions (Seidl-Hohenveldern, 1977, pp. 56–57).

The Member States reject the Commission’s call for a European BIT program: The Member States did not receive the draft regulations and Opinion 1/75 well. They were unwilling to create a European export policy. The Council criticised the Commission’s draft

regulations and argued that the CCP provisions and Opinion 1/75 provided for the harmonisation of national export policies but did not call for the creation of a complementary EU policy. The German government stressed that national export policies provided sufficient coverage to all European investment and export projects. The German Bundestag warned that the creation of an EU investment guarantee scheme would bear incalculable financial risks for German taxpayers and was unacceptable. The French government sought to protect its competences and sovereignty. The EU was entitled to harmonise national policies, but did not hold the necessary competences to become a proper actor in this domain (Johannsen, 2009, pp. 5–6; Seidl-Hohenveldern, 1977, pp. 56, 59). To conclude, the episode points to a first instance of determined policy entrepreneurship of the Commission. In accordance with hypothesis H₁, the Commission used its agenda setting powers and legal recourse to pressure the Member States into acceptance. Opinion 1/75 and the CCP provisions, however, did not entail a legal necessity to create a EU BIT program, which the Member States pointed out to keep the Commission at bay.

8.2 The Treaty of Maastricht

The previous section highlighted two isolated instances of EU-internal discussions, which touched on the EU's legal competences and role in international investment policy. They imply that since the EU's earliest days, institutional dynamics such as spill-overs and Commission entrepreneurship played a pivotal role in promoting the EU's involvement and legal competences in international investment policy. Focused in-depth discussions on the scope of the EU's legal competences to regulate international investments albeit only really started with the Uruguay Round (see Chapter IV) and the intergovernmental conference (IGC) on the Treaty of Maastricht in the late 1980s and early 1990s. The negotiations during the IGC on the Treaty of Maastricht touched directly and indirectly on the EU's legal competences in this domain. The Commission again acted as policy entrepreneur and pointed to the evolving trade agenda in the GATT (see chapter IV) and invoked implied

competences – or in its own words sought to ‘clarify’ the EU’s existing legal competences – so as to consolidate the EU’s role inter alia in international investment policy. In the absence of business support for such plans, the Member States blocked the Commission’s attempt. The Treaty of Maastricht, nevertheless, provided the EU with implicit shared external competences to regulate market access for investment ‘by accident’. The Member States finally created a common external capital regime for the emerging Single Market for capital, which necessarily affected the regulation of international investment flows. The EU’s legal competences thus grew due to unintended institutional interactions and spill-overs. Both – the debates on the CCP reform and the creation of an external capital regime – lend support to supranational thinking and hypothesis H₁, but contradict the liberal intergovernmental hypothesis H₂. The drivers of European Integration were clearly the Commission or institutional dynamics, whereas business was little active and the Member State governments acted as brakemen. The following section traces these debates and develops the argument in more detail.

8.2.1 Unsuccessful Commission entrepreneurship to ‘update’ the CCP

Commission entrepreneurship through agenda setting, invoking implied competences, the evolving trade agenda and the EU’s de facto competences: The Member States convened for the IGC on the Treaty of Maastricht between December 1991 and February 1992. In March 1991, the Commission published a report on the functioning of the EU and advisable modifications to the European Treaties so as to prepare the IGC and facilitate negotiations. The Commission used its agenda setting prerogative to highlight vis-à-vis the Member States the CCP as an area in urgent need of reform. The Commission proposed to rename the CCP the ‘Common Policy of External Economic Relations’. It stressed that the new external economic relations policy would encompass the regulation of trade in goods, services, export policy, intellectual property rights, capital movements, investments, establishment and competition through trade agreements and autonomous measures. It

underlined that the EU would be competent to regulate investment liberalisation as well as investment protection (Conference of the representatives of the governments of the Member States, 1991a, pp. 16, 28–29).

The Commission, moreover, emphasised that the EU had always held implied legal competences in these areas. Advancing a teleological interpretation of the CCP provisions, it argued that the proposed modifications only sought to consolidate and to clarify the EU's implied competences. They did not substantially broaden the scope of the EU's legal competences in foreign economic relations (Conference of the representatives of the governments of the Member States, 1991a, pp. 16, 28–29). The Commission argued that the main purpose of the EU's competences under the CCP should be the effective representation of the EU's Single Market regime in GATT negotiations. Hence, the scope of the CCP – as intermediary between the Single Market and the GATT regime – had to be congruent with the agenda of GATT negotiations (Eeckhout, 2011, p. 28).

Finally – and relatedly – the Commission pointed out that the EU already held *de facto* competences over these issues in the Uruguay Round (see chapter IV). It was thus only a matter of formalising existing realities. The proposed modifications would finally end the long-lasting controversy with the Member States over the scope of the CCP and would ensure the effective '*representation of the union on the external scene and notably in dealings with international organizations*' (Conference of the representatives of the governments of the Member States, 1991a, p. 28).

European business shows little interest: In contrast to the assumptions enshrined in the liberal intergovernmental hypothesis H₂, European business showed fairly little interest in debates on the reform of the CCP. The archive of the Council of Ministers contains the formal submission of UNICE to the IGC (Conference of the representatives of the governments of the Member States, 1991f, p. 9). The UNICE position paper of 10 April

1991 did not exclusively focus on the reform of the CCP. It discussed the views of UNICE on all Treaty chapters and advisable changes. The paper remained comparatively vague on the CCP, which implies that the CCP reform was not a priority for European business. The only substantive demand from UNICE to European policy-makers was that trade policy measures should be subject to qualified majority voting in the Council of Ministers so as to ensure swift and effective decision-making (Conference of the representatives of the governments of the Member States, 1991f, p. 9). The paper thus implicitly called upon the Member States to bring the scope of the CCP in line with the agenda of the Uruguay Round. The absence of any explicit mention of investment regulation suggests that European business did not take a strong interest in this particular issue. It needs to be mentioned here though that it is difficult to reconstruct the detailed preferences of European business since more than two decades have passed. Business federations tend to have short institutional memories; most do not archive their documents and their employees typically change jobs every few years.

The Member States determinedly reject the Commission's proposal: Again in contrast to the liberal intergovernmental hypothesis H_2 , the Member States did not receive the Commission's recommendations during the IGC well. As reported in Chapter IV, during the debates on the Commission's negotiating mandate in September 1986 the Member States had collectively underlined that the Commission's role as their single voice in the Uruguay Round would not prejudice the distribution of legal competences on the *new trade issues*. The Member States obviously felt that most *new trade issues* came under national competence and that there was no functional need to delegate and extend the EU's legal competences. From the Member States' point of view, the Commission was arguably trying to overthrow the EU-internal gentlemen's agreement not to raise competence questions during the Uruguay Round. Instead the Commission exploited the EU's de facto competences in the Uruguay Round, so as to extend the EU's legal competences under the CCP. The Council archive unfortunately does not cover in detail the intergovernmental

debates on the Treaty of Maastricht. It does, nevertheless, contain several draft Treaties discussed during the IGC. The evolution of these draft Treaties allows for some inference regarding the positions of the Member States on the recommendations of the Commission. A first draft Treaty of 17 April 1991 maintained the new name of the CCP as ‘Common Policy of External Economic Relations’. It stated, however, that the new policy should only cover the regulation of trade in goods and services. The Member States directly discarded the proposed reference to international investment regulation. Hence, the Member States must have immediately concurred that international investment regulation was and should remain under national competence. The following Treaty drafts consecutively revoked all other proposed modifications to the CCP articles. The final text of the Treaty of Maastricht did not contain any changes to the CCP and hence the EU’s competences in foreign economic relations (Conference of the representatives of the governments of the Member States, 1991b, p. 31, 1991c, p. 30, 1991d, p. 31, 1991e, p. 59; Eeckhout, 2011, pp. 26–27).

In conclusion, the Commission sought to promote an extension/clarification of the EU’s legal competences *inter alia* in international investment policy. To that end, it used its agenda setting powers, invoked alleged implied competences and pointed to the evolving trade agenda and the EU’s *de facto* competences over the so-called *new trade issues*. While European business was little interested in the CCP reform, the Member States blocked the Commission’s attempts. In the absence of business lobbying and seeing arguably no functional need to revise the CCP provisions, they determinedly rebuked the Commission’s attempt to revise the gentlemen agreement from Punta Del Este not to use the EU’s *de facto* competences in the Uruguay Round to grasp more power. While the Commission did not succeed, the observations mostly lend support to supranational thinking and hypothesis H₁. Pressure for integration came from the Commission and institutional dynamics rather than European business or the Member States.

8.2.2 Competence ‘by accident’ – A common external capital regime for the Single Market

The Treaty of Maastricht did not reform the CCP. It, nevertheless, provided the EU with first legal competences relevant for the regulation of international investment flows under the chapter on capital movements. As mentioned above, the Treaty of Rome in theory liberalised capital movements within the Common Market. The liberalisation of capital movements, however, was not directly enforceable but required the implementation of secondary legislation. The Member States were unwilling to enact measures, which would substantially liberalise capital movements within the Common Market, during the first three decades of European Integration. Most Member States feared that a liberalisation of capital and current accounts would trigger capital flights and exchange rate fluctuations, which would undermine their Keynesian macroeconomic policies and ability to tax (Interview, Paris, 19 October 2011; Bakker, 1996, pp. 32–36; Ohler, 2002, pp. 1–3).

The neoliberal turn in European politics: The Member States reconsidered their stance on the liberalisation of capital movements in the late 1970s and early 1980s. During the 1970s, the Member States had to deal with profound economic crises. Keynesian macroeconomic and monetary policies did not succeed in easing these crises, but instead produced stagflation. The failure of Keynesian policies fuelled the emergence of the neoliberal economic paradigm in Western countries. The neoliberal paradigm prescribed the reduction of state intervention and the deregulation and international opening of national economies in order to strengthen market mechanisms and the efficient use of production factors. In line with this new paradigm, several Member States unilaterally liberalised capital movements (Bakker, 1996, pp. 169–177). In 1982, the European Council, moreover, decided to advance and to finalise the Single Market for goods, services, and labour as well as capital by 1992 in order to inject a new impetus into the ailing European economy. Intergovernmental debates on the liberalisation of capital movements, and thus the creation of a Single Market for capital, continued during the mid-1980s (Bakker, 1996, pp. 161–162; European

Commission, 1985, pp. 5–6; OECD, 2002, pp. 27–28). The Single European Act (SEA; 1987) and a new capital movements directive (1986) did not significantly advance the liberalisation of capital movements within the EU (Bakker, 1996, pp. 177–181). They, nonetheless, underlined the political will of European policy-makers to create a Single Market for capital. In 1988, the Commission’s long-standing insistence on a comprehensive liberalisation of capital movements finally paid off. The Council of Ministers came around and adopted the Commission’s draft directive 88/361/EEC. The directive instantaneously liberalised capital movements, obliged the Member States to dismantle their capital control systems and finally created a veritable Single Market for capital (Bakker, 1996, pp. 210–212).

The creation of the Single Market for capital was perceived as a milestone of European Integration. European policy-makers nevertheless soon realised that the job was not finished yet. Directive 88/361/EEC had dismantled all capital controls and barriers within the Single Market. But it had not established a common external capital regime. The directive had thus created the regulatory gap, which had already been problematised in the Spaak Report three decades earlier in 1956. Capital could circumvent the external capital regimes of rather protectionist Member States, like France, by flowing in and out of the Single Market through liberal Member States without capital controls, like the United Kingdom. The Council of Ministers soon started looking into this problem and possible remedies (Bakker, 1996, pp. 230–231). In the course of these debates, which started in late 1988 and continued until the end of the IGC on the Treaty of Maastricht, two camps formed.

A liberal camp pushes for the ‘erga omnes’ principle: The first camp wanted the creation of an external capital regime based on the ‘erga omnes’ principle. In other words, the unconditional liberalisation of capital movements within the Single Market should be extended toward third countries. The Commission and a majority of Member States – namely Belgium, Denmark, Germany, the Netherlands and Italy – supported this plan. Three

considerations informed their position (Bakker, 1996, pp. 230–231). First, the freeing of capital movements to and from the Single Market was thought to enhance the functioning of market mechanisms and thus to promote welfare. Second, an open Single Market for capital should bolster the confidence of investors in the European Monetary Union (EMU) and force the Member States to pursue sustainable budgetary policies. Third, several Member States had unilaterally liberalised their capital markets during the 1980s and were unwilling to partially close them again (Hindelang, 2009, pp. 24–30; Ohler, 2002, p. 39).

Other Member States campaign for a preferential and reciprocal liberalisation: The second camp favoured a common external capital regime based on a differential and reciprocal liberalisation of capital movements between the Single Market and third countries. The United Kingdom and France were the main supporters of this position. The United Kingdom held a strong offensive interest in this domain due to its important financial services sector. It wanted a liberalisation of capital movements vis-à-vis third countries on the basis of reciprocity. The British government worried that a liberalisation of capital movements based on the ‘erga omnes’ principle would deprive the EU of its bargaining power in international negotiations on market access. France, on the other hand, felt that only close partners should enjoy free access to the Single Market for capital (Bakker, 1996, pp. 193, 230).

The liberal camp prevails: In the end, the former camp prevailed during the IGC debates. Article 57 EC implemented the ‘erga omnes’ principle. It comprehensively liberalised all capital movements between the Single Market and third countries. Article 57 EC, moreover, stated that the EU – but not the individual Member States – could reimpose temporary capital restriction in the event of major economic and monetary turmoil in a Member State or in order to comply with international sanctions (Hindelang, 2009, pp. 37–38; Usher, 1992, pp. 42–43, 46–47). After the conclusion of the Maastricht Treaty, the ECJ and expert lawyers concluded that Article 57 EC provided the Union with a shared, implicit, external

competence to regulate market access regarding extra-EU FDI flows (Dimopoulos, 2011, p. 78). The new, shared competence of the EU did not translate into heightened European regulatory activity in this domain. From a policy-makers perspective, the main consequence was that the individual Member States had to be careful to individually regulate and to conclude international agreements in this domain. Once the EU would start regulating extra-EU capital movements, the Member States would lose their ability to individually regulate and would need to cooperate under the umbrella of the EU to enact measures in this domain. The Maastricht Treaty thereby created an essential building block for an EU international investment policy although neither the Member States nor the Commission had aimed for this. The EU acquired its first legal competence in international investment policy very much by accident as a product of a functional spill-over (necessity to create a common external capital regime) and unintended institutional effect (shared, implied external competence to regulate market access of FDI). While these observations neither confirm hypotheses H_1 or H_2 , they nevertheless suggest that supranational integration dynamics better account for this advancement in European Integration than intergovernmental concepts.

8.3 The Commission calls on the ECJ to recognise the EU's legal competences

During the IGC on the Maastricht Treaty, the Member States had immediately brushed off the Commission's attempt to 'clarify' the allegedly highly comprehensive scope of the CCP. But despite this first political defeat, the Commission remained determined to have the Member States recognise the EU's exclusive competence under the CCP to regulate all *new trade issues* of the Uruguay Round, including international investment. In accordance with the supranational hypothesis H_1 , the Commission sought to invoke alleged implied competences, the evolving trade agenda and made strategic use of legal recourse in order to make the Member States accept the EU's alleged legal competences over international investment policy-making. By 1995, the Commission and the Member States opposed each

other in two legal proceedings before the ECJ, which in essence examined the scope of the CCP and inter alia the EU's legal competences in international investment policy. In contrast to hypothesis H₂, the Member States determinedly rejected the Commission's claim and harshly criticised the Commission's power-maximising behaviour. The pleadings of the Commission and the Member States provide important insights into the dynamics behind the emergence of the EU's international investment policy. This section remains silent on business preferences, as European business hardly ever takes an interest in technical, legal proceedings at the ECJ.

8.3.1 Opinion 1/94 – The Commission seeks to revisit its Maastricht defeat

Opinion 1/94 was, in essence, a continuation of the IGC debates on the scope of the CCP. After eight years of negotiations, the GATT parties had finally concluded the Uruguay Round in April 1994. The outcome of these lengthy negotiations was the WTO Agreement, which encompassed in its annexe, inter alia, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Intellectual Property Rights (TRIPs). As could be expected, the Commission and the Member States disagreed over the question of whether the scope of the CCP was sufficiently broad to enable the EU to conclude the WTO Agreement and its annexes or whether it had to be concluded as a mixed agreement under participation of the individual Member States. In April 1994, the Commission decided to refer this legal question to the ECJ (Eeckhout, 2011, p. 27; Koutrakos, 2006, p. 41).

The Commission invokes the EU's implied and de facto competences and the evolving international trade agenda: In accordance with hypothesis H₁, the Commission invoked in its submission to the ECJ alleged implied competences and pointed to the evolving trade agenda in order to claim exclusive Union competence over the conclusion of the WTO Agreement and its annexes. Mixed ratification under participation of the Member States was, it argued, not a legal necessity. The Commission developed a twofold justification for its

position. First, the CCP articles had to be interpreted in a teleological manner. In other words, the authors of the Treaties had conceived the CCP in 1956/57 in order to ensure the effective representation of the Union in trade negotiations and notably in GATT talks. Hence, the legal scope of the CCP had to evolve in line with the international trade and GATT agenda. The Commission had advanced the same argument during the IGC debates (Koutrakos, 2006, pp. 40–41). Second, the Commission added that the Union also held implied, exclusive, external competences regarding all issues covered in the WTO Agreement and its annexes under other Treaty chapters (Eeckhout, 2011, pp. 87–89). It needs mention that although the Commission’s submission did not explicitly dwell on the Union’s legal competences in international investment policy, it contained the implicit claim that the Union held comprehensive competences in this domain. The WTO Agreement and its annexes covered investment liberalisation (GATS) and post-establishment treatment (TRIMs & TRIPs Agreements), which accordingly had to fall under exclusive Union competence (Johannsen, 2009, p. 7). The Commission’s teleological interpretation of the CCP, moreover, implied that it was only a matter of time before all aspects of international investment policy would come under Union competence. As Chapter IV reported, the USA had indeed embarked upon the Uruguay Round with the objective of creating a comprehensive multilateral investment framework. The USA failed to convince many critical countries of its plan during the Uruguay Round. But the idea of creating a comprehensive multilateral investment framework within the GATT/WTO was not off the table in 1994.

The Member States determinedly reject the Commission’s claim to competence: The Member States rejected the Commission’s position and arguments. They demanded a mixed ratification of the WTO Agreement and its annexes. The submission of the Council of Ministers – i.e. the entirety of the Member States – and the individual submissions of the United Kingdom, France, Spain, Greece, the Netherlands, Germany, and Denmark underlined that the broad scope of the WTO Agreement and its annexes fell partly into the

scope of the CCP, other EU policies and national policies and competences. They criticised in particular the Commission's overbearing claim that the Union held the exclusive competence under the CCP to conclude the GATS and TRIPs Agreements. The Member States assumed that these agreements, which inter alia affected international investment regulation, came predominantly under national competence (European Court of Justice, 1994). The Council, moreover, harshly rebuked the Commission for its alleged attempt to extend the Union's competences under the CCP through the backdoor after the failure to convince the Member States to acknowledge an extensive interpretation of the CCP during the IGC debates.

“At the intergovernmental conference on Political Union, the Commission had proposed such an extension of Community competence. The concept of a common commercial policy was to be replaced by that of a common policy of external economic relations, comprising in particular ‘economic and trade measures in respect of services, capital, intellectual property, investment, establishment and competition’ with the possibility of extension of that ambit. This policy was to fall within the exclusive competence of the Community [...] The Community was to be exclusively represented by the Commission in its relations with non-member countries and international organizations and at international conferences [...] The Commission is seeking in its request for an Opinion to have implemented by means of judicial interpretation, the proposals which were rejected at the intergovernmental conference on Political Union.”

(European Court of Justice, 1994, pp. I-5306)

The ECJ reprimands the Commission's attitude: The ECJ delivered its Opinion on this matter in November 1994. To the great surprise of most observers, the ECJ sided with the Member States. It found that the Union did not hold all necessary competences to conclude the WTO Agreement and its annexes either under the CCP or under other Treaty chapters.

Hence, the WTO Agreement and its annexes had to be concluded as mixed agreements.⁵¹ Although Opinion 1/94, at first sight, was perceived as an oburgation of the Commission, observers soon interpreted the quite startling ruling as a fierce wake-up call to the Member States to finally take up their responsibility and to make political decisions regarding the modernisation of the CCP (Dimopoulos, 2011, pp. 85–86; Koutrakos, 2006, pp. 46–48; Meunier and Nicolaidis, 1999, pp. 491–493). Like the submissions of the Member States and the Commission, the ECJ ruling did not examine in detail the Union’s competences in international investment policy. It, nevertheless, shed some light on the EU’s legal competences in this domain. First and foremost, Opinion 1/94 advanced a non-teleological, textual and thus narrow interpretation of the CCP. The ECJ thereby refuted the Commission’s claim that the *new trade issues*, including international investment regulation, already came under the scope of the CCP. Second, the ECJ ruled that GATS mode III – i.e. establishment – did not come under the scope of the CCP (Eeckhout, 2011, p. 30; Johannsen, 2009, p. 7). It followed from this clarification that investment liberalisation in general was unlikely to fall under exclusive Union competence under the CCP. And finally, the ECJ did not challenge the EU’s competence to conclude the TRIMs Agreement. The TRIMs Agreement regulated trade-related post-establishment treatment standards. The ECJ’s silence on this issue implied that the EU was, at least partly, competent under the CCP in this domain of international investment policy. In conclusion, Opinion 1/94 was a telling attempt by the Commission entrepreneurship to extend the EU’s legal competences to *new trade issues* including investment regulation, but the Member States and the ECJ determinedly rebuked the Commission for its activism.

⁵¹ For a detailed analysis see for instance Eeckhout, 2011, pp. 27–35; Koutrakos, 2006, pp. 40–48.

8.3.2 Opinion 2/92 – The Commission claims competence over post-establishment treatment

Opinion 1/94 had only indirectly touched on the EU's legal competences in international investment policy. Shortly after delivering Opinion 1/94, the ECJ rendered Opinion 2/92 in March 1995. Opinion 2/92 is of great interest to this study, because it essentially examined the EU's competence to regulate post-establishment treatment. Opinion 2/92 sought to identify the adequate competence basis for the EU's adhesion to the 'Third Revised Decision of the OECD on National Treatment' (hereinafter the 'Third Revised Decision'). The Third Revised Decision was a gentlemen's agreement among OECD countries, which stipulated that OECD countries should grant established investors from other OECD countries national treatment. The Commission and the Member States again disagreed over the competence basis for the EU's adhesion to the Third Revised Decision. This legal controversy translated into the more practical question of whether the EU alone or the EU and the Member States together should formally adhere to the Third Revised Decision. Belgium ultimately decided to refer this question to the ECJ in 1992 (Vedder and Folz, 1997, pp. 510–511).

The Commission invokes implied competences and the international trade agenda: The Commission advanced the view that the EU was exclusively competent to adhere to the Third Revised Decision. It presented several, highly interesting arguments to justify its position. First, the Commission argued that the Third Revised Decision was, in essence, a trade policy measure coming under the scope of the CCP. It elaborated that international investment was a modern form of trade. International investment, on the one hand, substituted traditional trade through local business and production activities. On the other hand, international investment complemented traditional trade as it generated intra-firm trade. The NT obligation enshrined in the Third Revised Decision, the Commission argued, sought to increase investment activity and hence trade in goods and services. The Commission's line of argument implied that all aspects of international investment policy – market access, post-establishment treatment and protection – were in essence trade policy

measures falling under the scope of the CCP. Second, the Commission advanced once again its well-known teleological interpretation of the CCP. The Commission explained that the main purpose of the CCP was to ensure the effective international representation of European interests and the Single Market at the international level. As international investment was a modern form of trade and becoming a standard agenda item of international trade negotiations, international investment regulation should come under the CCP. Finally, the Commission added that should the court disagree with the previous arguments, the EU nevertheless held an implicit, exclusive, external competence to adhere to the Third Revised Decision under Article 57 TFEU (capital movements) and Article 100 TFEU (approximation of legislation) (European Court of Justice, 1995, pp. I-543–546).

The Member States fight back: Several Member States refuted the Commission’s position and justifications. Their submissions to the ECJ draw an intriguing picture of Member State views on the EU’s role and competence in international investment policy, which in many regards complement missing information on detailed Member State positions from the IGC on the Maastricht Treaty. First, the Belgian, Greek, Spanish, French and British rejected the claim that the EU was competent to adhere to the Third Revised Decision under the CCP. Some Member States elaborated that international investment was not a modern form of trade and could thus not be regulated under the CCP. Other Member States added that the Third Revised Decision would not affect trade flows and could thus not be considered to be a trade policy measure falling within the scope of the CCP. Second, Belgium, Greece, France, the Netherlands and the United Kingdom explained that Article 57 TFEU (capital movements) was the more pertinent competence basis for the EU to adhere to the Third Revised Decision. They, however, discarded the Commission’s view that the EU held an implied, exclusive, external competence under this Article. The Third Revised Decision, rather, came under shared competence (European Court of Justice, 1995, pp. I-542–549).

The ECJ balances the views: The ECJ developed a nuanced argument. It ruled that the Member States and the EU were jointly competent to adhere to the Third Revised Decision for several reasons. First, the Third Revised Decision was indeed a trade policy measure coming under the CCP as regards its effects on extra-EU investment flows. Second, it was also a measure relating to the free movement of capital as regards its effects on intra-EU investment flows. Third, the ECJ clarified that the EU held not an implied exclusive but rather an implied shared competence under Article 67 TFEU (capital movements). The ECJ expanded that the EU could not assert such an implied competence under the *ERTA Doctrine*. European secondary legislation had not yet fully penetrated and covered this policy domain (European Court of Justice, 1995, pp. I-542-549). In summary, Opinion 2/92 clarified that the EU was indeed competent to regulate post-establishment treatment of extra-EU FDI under the CCP. Even more importantly, the ECJ seemed to implicitly recognise the Commission's claim that international investment was a modern form of trade. This implicit recognition did not, however, have consequences for policy-making. It is indeed noteworthy that the Member States continued concluding hundreds of BITs despite the EU's partial exclusive competence regarding post-establishment treatment.

Conclusion: Which theoretical lessons can one draw from the examination of Opinions 1/94 and 2/92? The section impressively demonstrated how the Commission sought to act as policy entrepreneur in order to have the Member States accept the EU's legal competence *inter alia* over international investment regulation. It had recourse to legal review through the ECJ to revise its Maastricht failure and invoked implied competences and the evolving trade agenda to that end. The Commission's policy entrepreneurship echoed functional and power-maximising behaviour. These observations lend support to the supranational hypothesis H₁. The Member States, however, determinedly and successfully fought back. They rejected the Commission's claims that the EU held an implied competence and that the EU had to hold competences for functional reasons. They, moreover, rebuked the Commission for its strategic recourse to legal review. The ECJ partly agreed with the Member States.

Hypothesis H₂ thus does not accurately depict integration dynamics in this policy-making instance.

8.4 The Treaty of Amsterdam

The debates on the scope of the EU's legal competences in foreign economic relations and international investment policy did not end with Opinions 1/94 and 2/92. In early 1995, the Member States arrived at the conclusion that they needed to amend the Treaty of Maastricht. The so-called Treaty of Amsterdam should enhance the democratic legitimacy and effectiveness of European policy-making in light of the future Eastern Enlargement. The Council of Ministers asked the Commission, as customary, to submit a report on necessary reforms of the EU and its Treaties. The Commission used this occasion to problematise once again the EU's legal competences in foreign economic relations, in general, and in international investment policy, in particular (European Commission, 1995b, pp. 1–7).

The Commission uses its agenda-setting powers, invokes the evolving trade agenda and de facto competences: The Commission's report of May 1995 analysed in considerable detail a reform of the CCP. It first lamented that the IGC on the Maastricht Treaty had missed the chance to modernise and to extend the legal scope of the CCP. The recent rulings of the ECJ had further narrowed the scope. The standard agenda of international trade negotiations largely exceeded the EU's legal competences. As the EU held, however, de facto competences over these issues, the legal situation considerably complicated the negotiating process and EU-internal decision-making. The Commission warned that this situation limited the effectiveness of European policy-making and harmed European interests in the world economy. Hence, the Commission advised the Member States to extend the scope of the CCP so as to bring it in line with the standard agenda of international trade negotiations and its de facto competences. It stressed that the CCP should cover, in particular, the regulation of services trade, intellectual property rights and FDI. It observed

that FDI had become increasingly important for the world economy and had a trade complementing and substituting effect. The Commission cautioned that the continuous conclusion of BITs between the Member States and third countries undermined the exercise of the EU's competences regarding the regulation of capital movements and the EU's trade policy interests. It explained that many third countries conditioned their market access commitments for trade in goods and services on the amount of received direct investment. Whereas other countries could easily adjust to the new importance of FDI in trade negotiations, the EU was paralysed (European Commission, 1995b, pp. 57–58).

The Commission explained its position regarding international investment regulation in even greater detail in a communication which it released only few weeks before the publication of the above-mentioned report. The communication was entitled “*A level playing field for direct investment world-wide*”. It clearly sought to influence EU-internal debates on the Treaty of Amsterdam, as well as the MAI negotiations, which were just beginning (see Chapter VI). The Commission underlined in this document that neither the EU nor the Member States possessed the necessary legal competences to negotiate NAFTA-like, state-of-the-art international investment agreements covering investment liberalisation, post-establishment treatment and protection. European investors therefore increasingly suffered from competitive disadvantages vis-à-vis Japanese and US investors in a key domain of international economic competition. The Commission derived from this analysis that the EU and the Member States had to closely cooperate and to pool their competences in international investment policy. The EU should, moreover, start negotiating state-of-the-art bilateral investment agreements i.e. BITs. In the long run, the EU and the Member States should jointly work toward the creation of a multilateral investment framework in the WTO or OECD (European Commission, 1995a, pp. 1–14). The Commission continuous campaigning for an extension of the EU's legal competences is in line with the supranational hypothesis H₁.

The Member States ring-fence their competences: The Member State positions regarding the Commission's proposal to reform and extend the CCP toward international investment policy are, unfortunately, less well documented. It is, nonetheless, possible to establish two important observations, which contradict the liberal intergovernmental hypothesis H₂. First and foremost, the Member States showed only marginal interest in a reform of the CCP during the IGC debates in 1996 and early 1997. Only the IGC submissions of Germany, Italy and Sweden mention the general intention to discuss the CCP (European Parliament, 1996a, 1996b, 1996c). Other Member States did not enumerate the CCP as a priority for IGC debates. Second, drawing on the above-examined Opinions 1/94, 2/92 as well as Member State behaviour during the MAI negotiations (see Chapter VI), one may safely conclude that most Member States met the Commission's proposal to extend the scope of the CCP, *inter alia*, to investment regulation with considerable hesitation. On these occasions, the broad majority of Member States refuted demands to reform the CCP both in order to preserve their national competences and because they considered these issues to be unrelated to international trade (European Court of Justice, 1995, pp. I-542 – I-549; Johannsen, 2009, p. 8).

The Irish Council Presidency, which chaired the IGC in the second semester of 1996, nonetheless tried to take the Commission's recommendations to reform the CCP into account. Its first discussion paper of 5 December 1996 proposed to the Member States the permanent empowerment of the Commission to negotiate on investment, services trade and intellectual property rights in the WTO. The Member States should remain competent to regulate these issues in domestic settings and to negotiate in other international fora like the OECD, IMF and World Bank (Conference of the representatives of the governments of the Member States, 1996, pp. 78–80). Despite this pragmatic approach, the Member States – and in particular France – remained determined to protect their competences against European encroachment. The proposal of the Presidency was quickly discarded in IGC debates. One may recall here that at the same time, the British, Dutch, French and German governments

went as far as to reject coordination with the Commission during the MAI negotiations on issues like investment protection clauses, because they were determined to stop European encroachment onto their competences (Interview, Brussels, 18 January 2012; Johannsen, 2009, p. 8). The Treaty of Amsterdam, which entered into force in 1999, did not reform the CCP. A new paragraph of Article 113 TEFU merely empowered the Council of Ministers to decide by unanimity to extend the scope of the CCP to the regulation of services trade and intellectual property rights. It did not provide for such a possibility regarding international investment regulation. The Council, however, never availed itself of this possibility so that the Treaty of Amsterdam did not have a noteworthy impact on the CCP or the EU's legal competences in international investment regulation (Koutrakos, 2006, pp. 59–60). These observations contradict the intergovernmental hypothesis H_2 and once more suggest that supranational thinking and hypothesis H_2 better account for integration dynamics in this domain.

8.5 The Treaty of Nice

The Treaty of Amsterdam was a more than humble agreement. Most experts agreed that the Treaty failed to enhance the democratic legitimacy of the EU or to streamline EU policy-making in light of the upcoming Eastern Enlargement. So as to prevent a paralysis of the EU after the Eastern Enlargement, the Member States soon decided to hold yet another IGC. The IGC should reform and streamline the European Institutions and European policy-making. The IGC on the Treaty of Nice started in February 2000 and came to an end in February 2001. As during the previous IGCs, the Commission pushed for a reform of the CCP and an extension of the EU's legal competences to international investment regulation.

The Commission uses agenda setting, invokes the evolving trade agenda and de facto competences: In early 2000, the Commission again submitted to the Council of Ministers a report on advisable reforms of the EU and its Treaties. The Commission further adapted its

rhetoric on a CCP reform to the overarching purpose of the IGC, namely to prepare the EU for the Eastern Enlargement. The Commission underlined that the CCP had to be extended toward the *new trade issues*, including international investment regulation, in order to ensure qualified majority voting on trade policy measures in the Council of Ministers. It expanded that as investment, services trade and intellectual property rights had become standard agenda items of trade negotiations the EU held de facto competences in these domains. But as the the CCP did not cover these issue areas, the EU had to conclude modern trade agreements as so-called mixed agreements, which required unanimous endorsement in the Council of Ministers as well as national ratification. In other words, the CCP had devolved during the 1980s and 1990s from a policy domain coming under the ‘community method’ and qualified majority voting toward a policy domain governed by intergovernmental processes and unanimity voting. The Commission warned that the ‘mixity’ of modern trade agreements would considerably complicate negotiations and slow down their ratification in an EU-25. A reform and extension of the CCP to, inter alia, international investment regulation was thus inevitable in order to keep the EU governable (European Commission, 2000, pp. 25–27).

The Member States stand firm against the Commission yet again: The Member States remained hesitant regarding the Commission’s recommendations. Unfortunately, the archive of the Council of Ministers again does not contain detailed information about specific Member State positions during the IGC. A series of progress reports nevertheless demonstrates how the proposed extension of the CCP to international investment regulation was gradually scrapped during the negotiating process. A first progress report of 3 November 2000 contained two reform options for the CCP, which still foresaw the extension of the EU’s legal competences to ‘investment’ regulation (Conference of the representatives of the governments of the Member States, 2000a, pp. 23–28). The reference to investment was consequently narrowed down to ‘direct investment’ and put into brackets in the following progress report of 23 November 2000 (Conference of the representatives of the

governments of the Member States, 2000b, pp. 34–37). The reference then was entirely deleted in the progress report of 30 November 2000, which contained the final wording of the CCP provisions of the Nice Treaty (Conference of the representatives of the governments of the Member States, 2000c, pp. 39–42).

Competence by accident: Despite the Member States persistent opposition to provide the EU with explicit legal competences in international investment policy, the Treaty of Nice, nevertheless, provided the EU with its first exclusive legal competences under the CCP to regulate certain international investment flows. Article 133 TFEU⁵² of the Treaty of Nice finally brought the regulation of trade in services and intellectual property rights under the scope of the CCP.

Soon after the conclusion of the IGC on the Nice Treaty, lawyers started discussing whether the notion of trade in services in the revised Treaty provisions was congruent with the notion of trade in services under GATS and therefore comprised the regulation of GATS mode III. At first, lawyers denied this assumption. They argued that the Treaty contained distinct chapters on establishment and capital movements, which had to be considered as the paramount competence basis for any EU measures in this domain (Johannsen, 2009, p. 9).

Later the *opinion juris* formed that the Member States had indeed intended to empower the EU to participate in GATS-like negotiations on services trade (Cremona, 2003, pp. 68–70; Koutrakos, 2006, pp. 61–62). It needs to be mentioned here that although the Nice Treaty brought the regulation of services trade and intellectual property rights under the scope of the CCP, relevant measures basically remained subject to unanimity voting. The Treaty contained numerous exceptions and carve-outs; notably for cultural, social, health and educational services.

⁵² The Nice Treaty changed the numbering of Articles. The CCP provisions shifted from Articles 110–116 TEC/TFEU to Articles 131–134 TFEU.

Policy substance and integration dynamics: The extension of the scope of the CCP to the regulation of services trade and intellectual property rights allows for two important conclusions. First, the Member States manifestly attached great importance to continuing their national BIT programmes and thus rejected the Commission's proposal to generaklly extend the CCP to investment regulation. Second, the Member States were less opposed to cooperating on the liberalisation of service-related investments, which was not covered by national BIT programs and moreover promised immediate welfare gains to national business. The outcome of the Nice Treaty thus suggests that polic substance indeed shaped integration dynamics and Member Stste preferences. The Treaty of Nice entered into force in 2003 and provided the EU with an exclusive competence to regulate market access for service-related investments (Koutrakos, 2006, pp. 61–62). To conclude, the section lends again support to the supranational hypothesis H_1 and casts doubts on the liberal intergovernmental hypothesis H_2 .

8.6 The Treaty of Lisbon

The Treaty of Nice, much like the Treaty of Amsterdam, was considered a failure. Policy-makers and lawyers agreed that it did not prepare the EU for the upcoming accession of 12 new Member States in 2004 and 2007. The signatures under the Treaty of Nice had not yet dried, when in December 2001, the European Council of Laeken therefore decided to embark on another attempt to reform the EU and the Treaties. The heads of state and government judged that the classic intergovernmental method of Treaty revisions had shown inefficient, ineffective and undemocratic. They decided to approach a further Treaty revision through the so-called 'Convention method', which had been conceived and successfully used for the elaboration of the Charter of Fundamental Rights of the European Union in 1999/2000 (Deloche-Gaudez, 2001; European Convention, 2003a).

The Convention method changes the dynamics of Treaty revisions: The ‘convention method’ considerably differed from the classic intergovernmental method of Treaty revisions. Instead of technocrats and high-ranking diplomats engaging in intergovernmental bargaining and exchanges of concessions behind closed doors, democratically legitimised politicians and generalists argued and deliberated in public over necessary reforms of the EU for the good of European citizens. The overarching objective, procedural rules, professional background and self-perception of the involved policy-makers of such a convention thus stood in stark contrast to classic IGCs (Deloche-Gaudez, 2001). As the following paragraphs will show, these procedural differences decisively promoted the extension of the EU’s legal competences to FDI regulation.

The so-called Convention on the Future of Europe⁵³ met between 28 February 2002 and 20 July 2003 in order to elaborate the draft text for the Treaty establishing a Constitution for Europe (hereinafter the ‘Constitutional Treaty’). The draft text was then sent to the Member States for final discussions and ratification. The Convention comprised 15 delegates from the Member State governments, 13 delegates from the governments of the candidate countries⁵⁴, 30 delegates from the national parliaments, 26 delegates from the national parliaments of the candidate countries, 16 delegates of the European Parliament and 2 delegates from the Commission. The 102 delegates took decisions by consensus. The delegates of the candidate countries could fully participate in the debates, but could not block a consensus reached among the delegates of the current Member States. Most delegates were politicians i.e. not specialised technocrats. The Committee of the Regions, and the European Social and Economic Committee as well as its national counterparts, were invited to participate in the Convention as observers. A Praesidium of 12 delegates – led by former French President Valéry Giscard d’Estaing – chaired the Convention. The 102 delegates met two for days per

⁵³ For a first-hand report of a key delegate of the Convention – however in French – please see Lamassoure (2004).

⁵⁴ This group encompassed the 12 new Member States, which joined the EU in 2004 and 2007 as well as Turkey.

month in public plenary sessions and more often in 11 issue-specific working groups in order to discuss advisable Treaty changes (European Convention, 2003a).

8.6.1 Commission entrepreneurship in the open and behind the scenes of the Convention

At the beginning of the Convention, the main work was carried out in the working groups. The CCP came under the responsibility of working group VII on external action, whose delegates showed little interest in discussing a reform of the CCP. Most delegates were politicians and found trade and investment regulation dull and too technical. They primarily focused on issues of 'high politics'. The on-going Iraq War, moreover, deeply divided the European governments, citizens and the delegates of working group VII. Hence, the discussions in this working group mostly revolved around the Common Foreign and Security Policy (CFSP) and European Security and Defence Policy (ESDP) (European Convention, 2002a, p. 3; Interview, Brussels, 12 October 2011).

The Commission uses agenda setting, invokes the evolving trade agenda and de facto competences: On 15 October 2002, the Commissioner for Trade, Pascal Lamy, addressed working group VII. In accordance with the supranational hypothesis H₁, he used the Commission's agenda setting powers to point to the need to bring the CCP in line with the international trade agenda. He made a determined plea to convince the delegates of the necessity to finally bring all *new trade issues* under qualified majority voting and the scope of the CCP. Pascal Lamy stressed, in his rather non-technical speech, that the CCP was a major success story of European Integration. The EU had become an effective and accepted representative of Europe's trade policy interests in the world. He nevertheless warned that the current scope of the CCP increasingly undermined the efficient and effective representation of European interests in the world economy. Bilateral and multilateral trade negotiations increasingly focused on the regulation of investment, services trade and

intellectual property rights. While the EU spoke with a single voice on these issues i.e. held de facto competences, such modern negotiations and agreements were subject to unanimity voting within the Council of Ministers. Decision-making by unanimity made it easy for third countries to divide and paralyse an enlarged EU with 25 Member States. Decision-making by unanimity might thus translate into the exclusion of such provisions from European trade agreements, which would ultimately harm European interests in the world economy. Pascal Lamy urged the delegates to extend qualified majority voting to all modern trade policy issues. Lamy thus de jure demanded an extension of the scope of the CCP to investment regulation as well as a dismantling of the many carve-outs of Article 133 TFEU applying to services trade and intellectual property rights. Lamy stressed that such a reform was necessary to preserve the EU's ability to speak with a single voice in international trade negotiations. He did not mention at this occasion that the Commission had previously fought had to include these new trade issues into on-going WTO and bilateral FTA negotiations. Finally, he called on the delegates to extend the powers of the European Parliament under the CCP and to increase the involvement of civil society in CCP policy-making. The last request of Lamy arguably sought to calm down NGOs and civil society, which had violently expressed its discontent with the world trading system during the Seattle and Genoa ministerial meetings of the WTO and G8. (European Convention, 2002b, pp. 5–7; Interview, Brussels, 12 October 2011). It has also been speculated that Lamy thereby tried to strike a deal with the European Parliament, which should support his push for an extension of Union competences.

Lamy's efforts to convince the delegates of working group VII of the need for a comprehensive reform of the CCP were moderately successful. The final report on 'external action' of working group VII of 16 December 2001 recommended that all measures relating to services trade and intellectual property rights should in future be subject to qualified majority voting in the Council of Ministers. There was also support for the proposal to extend the involvement and powers of the European Parliament under the CCP. The final

report of working group VII, however, ignored Lamy's advice to extend the scope of the CCP to international investment regulation. The following plenary session approved the recommendations and sent them to the Praesidium. The Praesidium should then elaborate a first draft text of the Constitutional Treaty on the basis of the recommendations of the 11 working groups of the Convention (European Convention, 2002c, pp. 7–8).

The Praesidium acts on its own authority and adds the FDI reference: The Praesidium of the Convention convened for a decisive meeting on 23 April 2003. The purpose of this meeting, which took place behind closed doors, was to examine the recommendations of working group VII and to transpose them into a revised chapter on 'external action' for the Constitutional Treaty. With regard to the CCP, the Praesidium decided to divert from the recommendations of working group VII on an important point. The Praesidium proposed in its draft CCP articles to extend qualified majority voting also to the regulation of FDI. The proposal also extended the scope of the EU's legal competences to FDI regulation. The Praesidium briefly explained its diversion from the recommendations of working group VII by reiterating the Commission's longstanding argument that investment flows supplemented trade in goods and underlay a significant share of commercial exchanges today (European Convention, 2003b, pp. 53–55; Johannsen, 2009, pp. 9–10; Krajewski, 2005, pp. 102–106).

Commission entrepreneurship through agenda setting behind the scenes: How did the Praesidium arrive at this decision? It was reported that John Bruton, delegate of the Irish Parliament and Praesidium member, proposed extending qualified majority voting under the CCP to the regulation of FDI. He reportedly stressed that FDI disciplines had become a standard issue of multilateral trade negotiations in the WTO (see Chapters IV and VI) and bilateral FTA negotiations (see Chapter VII). It was necessary to extend qualified majority voting under the CCP to FDI regulation, as Bruton explained, in order to enable the Commission to effectively use its long-standing de facto competences and to represent the EU's interests in these fora. The President of the Convention, Valéry Giscard d'Estaing, and

the delegate of the Commission and Praesidium member, Michel Barnier, enthusiastically supported the proposal. In the discussion which followed, Michel Barnier, moreover, stressed that the revised CCP articles should not only extend qualified majority voting to measures regarding FDI but also contain a firm basis for exclusive Union competence in this domain (Interview, Brussels, 12 October 2011; Ceysens, 2005, p. 273; Meunier, 2013).

European investment policy experts have been puzzled about John Bruton's dedication to bringing FDI regulation under the scope of the CCP and exclusive Union competence. It is indeed surprising that a member of the Irish Parliament and former Irish minister proposed these modifications, since Ireland is the only Member State which has never concluded a single international investment agreement. What is more, the Irish government later showed to be among the most determined opponents to the FDI reference in the revised CCP articles. It is, moreover, remarkable that Bruton did not refer to the layman's concept of 'international investment' but used the expert concept of 'FDI'. Hence, one must wonder why John Bruton was so concerned with this issue and whether he acted on his own behalf. Many Member State and even Commission officials seem to believe that the Commission had, behind the scenes, asked John Bruton and Valéry Giscard d'Estaing to propose and support this modification as supposedly neutral, non-suspect parties. The observation becomes even more intriguing, if one takes into account that Bruton convinced his colleagues of the necessity to add a FDI reference by refereeing to the evolving WTO and FTA agenda and the EU's de facto competences in these fora. As reported in chapters VI and VII, the Commission had spared no effort to push investment on the agendas of the WTO and FTA negotiations. Now it arguably made Bruton point to these negotiations and the EU's role in them in order to extend the EU's legal competences. This reading of the outcome of the Praesidium meeting of 23 April 2003 would point to a decisive and elaborate instance of Commission entrepreneurship and strongly support the supranational hypothesis H₁.

The Member State delegates oppose the Praesidium decision: Following the drafting exercise of the Praesidium, the delegates of the Convention reconvened for plenary sessions to discuss the Praesidium's draft text of the 'external action' chapter. The delegates were highly interested in the draft chapter on 'external action' and even in the therein-included revised CCP articles. They tabled some 1,000 amendments regarding the entire chapter on 'external action' and 100 amendments regarding the revised CCP articles. Thirty-one amendments concerned the proposed extension of qualified majority voting and the scope of the CCP to FDI regulation. Almost all amendments demanded the deletion of the FDI reference. The amendments document broad opposition to the FDI reference across Member States, political camps and political institutions.⁵⁵

The delegates of the British, French, German, Irish and Spanish governments tabled 10 amendments regarding the FDI reference. The British government argued that FDI regulation was not a matter of trade policy or customs union and should thus be deleted. The French government stressed that the chapter on the movement of capital already assigned to the EU a shared competence in the domain of FDI regulation. The German and Spanish governments merely commented that investment promotion and protection was, and should remain, a national competence. The Irish government expressed criticism that the purpose of the FDI reference remained unclear and should be deleted (European Convention, 2003c). A Convention participant interviewed for this thesis recalled that only the delegate of the German government supposedly understood the implications of the FDI reference for Member States' international investment policies and their BIT programmes. The opposition of France, the United Kingdom and Ireland mostly reflected their intention to protect their competences and sovereignty against European encroachment. The Spanish delegate reportedly supported France so as to gain political capital in consequent discussions on voting rights in the Council of Ministers (Interview, Brussels, 12 October 2011). These

⁵⁵ For access to amendments please see the website of the European Convention <http://european-convention.europa.eu/>

observations cast strong doubts on the validity of the liberal intergovernmental hypothesis H₂.

Delegates of the European Parliament tabled 6 amendments regarding the FDI reference. A collective amendment of several Members of the European Parliament (MEPs) indicated that the FDI reference should be deleted, because FDI regulation was not a matter of trade policy and the reference would trigger an immense and probably unintended increase in EU competence. Several other amendments tabled by MEPs merely demanded the deletion of the FDI reference without explanation (European Convention, 2003c).

Delegates of the national parliaments tabled 8 amendments regarding the FDI reference. Most of these simply demanded the deletion of the FDI reference without explanation. Few amendments highlighted that FDI regulation was either a shared competence under the Treaty chapter on capital movements or should remain a national competence (European Convention, 2003c).

The large number of amendments regarding the draft chapter on 'external action' overwhelmed the Praesidium, which declared that it was impossible to discuss all of them within the timeframe of the Convention. Valéry Giscard d'Estaing therefore called upon the delegates to prioritise their demands. Only the most important amendments should be examined in the plenary session (Krajewski, 2005, pp. 104–105; Interview, Brussels, 12 October 2011). Valéry Giscard d'Estaing's demand de facto saved the FDI reference from deletion. No delegate considered the FDI reference to be sufficiently important to prioritise it and to demand further discussions. Joschka Fischer, the delegate of the German government and Minister of Foreign Affairs, reportedly decided, for instance, to ignore voices from the German Ministry of Economics in charge of international investment policy, which asked for the deletion of the FDI reference. Instead he invested his political capital into his favourite project – the creation of the post of a European Minister of Foreign Affairs (Interview,

Brussels, 12 October 2011). The example illustrates how technocrats' lack of access to the Convention debates shifted the focus of debates away from low politics toward high politics. As no delegate had prioritised the FDI reference and asked for further discussion, the Praesidium interpreted it as tacit agreement to the revised CCP articles and included them in the final draft text. The draft text of the Constitutional Treaty was adopted and sent to the European Council for concluding intergovernmental negotiations and ratification on 18 July 2003 (Interview, Brussels, 12 October 2011).

8.6.2 Sectorial preferences – ambivalent and divided

What role did European business play in these debates during the Convention? European business seemed generally little involved or interested in the debates on a reform of the CCP. What is more, the preferences of European business were ambivalent and divided. Business lobbying can neither account for the Praesidium's decision to add the FDI reference to the CCP articles nor for Member State preferences mostly opposing this decision. The observation casts considerable doubts on the validity of the liberal intergovernmental hypothesis H_1 .

Only UNICE – today BusinessEurope – voiced its support for an extension of the CCP to FDI regulation. On 28 February 2002, UNICE released, in its capacity as formal observer to the Convention, a position paper enumerating its views on the Constitutional Treaty. UNICE advised extending qualified majority voting, and thereby the scope of the CCP, to FDI regulation.

“In the context of the next Inter-Governmental Conference, UNICE strongly supports an extension of qualified majority voting to issues of major importance to business, such as

international negotiations and agreements on services, intellectual property rights and foreign direct investment.“

(UNICE, 2002, p. 6)

UNICE’s firm statement in support of an extension of the scope of the CCP to FDI regulation is quite remarkable. Many national member federations seemed much less interested and partly even opposed the proposed extension of the CCP to FDI regulation. The Confederation of British Industries (CBI), for instance, published its own position paper, in which it stressed that the EU should indeed play a role in international investment policy. It elaborated, however, that the Member States should remain competent in the core domains of international investment policy like investment protection.

“There is a good case for the extension of Community competence and [qualified majority voting] to cover negotiations on foreign direct investment. However, certain areas, such as bilateral investment treaties, decisions on inward and outward investment, export promotion and export financing would need to be ring-fenced.”

(CBI, n.d., p. 4)

German business was reportedly also critical (Tietje, 2009b). The German Federation of Industries (BDI) expounded its hesitation in detail in a position paper, which it released later on the occasion of the discussions on the Commission’s draft for the so-called ‘grandfathering regulation’.⁵⁶ The BDI explained that German business worried that future international investment agreements negotiated by the EU might not attain the high level of investment protection of German BITs. German business also feared that the competence transfer might raise question marks over the continued validity of German BITs and thereby

⁵⁶ See European Commission, 2010b.

increase investment risks and costs. German business, moreover, lamented that trade and investment disciplines should not be included in the same agreements. Investment negotiations were about setting legal standards, whereas trade negotiations were about bargaining over market access concessions. The BDI manifestly worried that high investment protection and post-establishment treatment standards might be traded off for enhanced market access commitments. Finally, interviewed BDI officials added that German business also generally preferred keeping policy-making at the national level, because they perceived the EU's political landscape as opaque and difficult to navigate (BDI, 2010; Interview, Berlin, 16 February 2012; Interview, Brussels, 26 January 2012a; Interview, 17 February 2012, Berlin).

Other major business federations, like the *Mouvement des Entreprises de France* (Medef), the Italian *Confindustria*, the Spanish *CEOE*, the Polish *Leviathan* or the *European Services Forum* (ESF), took little interest in the debates on the CCP and its extension to FDI regulation. The Medef, for instance, participated in the Convention in its role as social partner in collective wage bargaining. It almost exclusively focused on influencing debates on the Single Market and social policies and by and large ignored other policy areas. The Medef reportedly only took note of the debates on a reform of the CCP in regard to the proposed greater role of the European Parliament in this domain (Interview, Paris, 3 October 2013). *Confindustria* and the *CEOE* reportedly were sympathetic to a greater role for the EU in foreign economic relations, because Italy and Spain were gradually losing in influence on the international political economy. They did not, however, lobby for a strengthening of the EU in this domain at the national or European level and did not hold specific preferences regarding the extension of the CCP to FDI regulation (Interview, Brussels, 27 September 2013a; Interview, Brussels, 27 September 2013b). The Polish *Leviathan* also adopted a generally pro-European attitude during the Convention debates. Polish business sought to counterbalance the Eurosceptic attitude of the Polish government. The *Leviathan* did not, however, voice specific demands regarding the CCP. Many other policy areas were much

more important to Polish business than international trade and investment regulation (Interview, email, 4 September 2013). Finally, the ESF did not seek to influence the Convention debates on the CCP despite the investment intensiveness of international services trade. The ESF had been created in the mid-1990s to the end of representing European service providers in EU-internal debates on WTO and FTA negotiations. Its institutional mandate did not allow lobbying on Treaty revisions. The ESF was only indirectly involved in the Convention debates through its membership of UNICE (Interview, Brussels, 25 September 2013b).

How can one explain the quite determined position of UNICE in favour of a CCP reform and extension to FDI regulation in light of the ambivalent and divided preferences of its member federations? UNICE adopts its positions by consensus after consultation with its member federations. The UNICE position should have at least partly reflected the hesitation of the BDI and CBI and lack of interest of many other federations regarding an extension of the CCP to FDI regulation. It was reported that the UNICE Secretariat drafted the UNICE position paper and circulated it among its member federations prior to the Convention. The member federations did not take offense to the proposed UNICE position on the CCP reform on this occasion and endorsed the section without much discussion. It was only later in the process of drafting the Constitutional Treaty that certain member federations came to the conclusion – after having been alerted by their respective governments – that they actually preferred keeping international investment policy-making at the national level. These federations consequently tried to revise the official UNICE position regarding the extension of the CCP to FDI regulation. The UNICE Secretariat and other member federations showed, however, unwilling to reopen discussions. The UNICE Secretariat understood that the shifting of international investment policy-making from the national to the European level would strengthen its position and influence vis-à-vis member federations. Other member federations realised that even though they had not proactively pushed for an extension of the

CCP's scope to FDI regulation it was likely to benefit them (Interview, Brussels, 26 January 2012a).

In conclusion, the observations do not lend support to the liberal intergovernmental hypothesis H₂, which stipulates that European business lobbied the Member States into cooperating and delegating international investment policy-making to the EU. European business was generally little interested in these debates. What is more, European business held ambivalent and divided preferences on this matter.

8.6.3 The intergovernmental conferences on the Constitutional and Lisbon

Treaties

At the end of the Convention in summer 2003, the Constitutional Treaty – and the extension of the CCP to FDI regulation – were not yet set in stone. The Member States still had to give their formal blessing to the draft text in an IGC, which in principle allowed for the deletion of disagreeable articles. The European Council formally received the draft text of the Constitutional Treaty on 18 July 2003. It took the following intergovernmental conference almost a year, until 18 June 2004, to reach final agreement on the Constitutional Treaty. The work of the IGC was so time consuming for two reasons. First and foremost, the Convention had not resolved the most delicate disagreements over issues of high politics like national voting rights, the definition of the qualified majority for Council votes and the role and powers of the EU President and Minister of Foreign Affairs. Forging compromises on these issues proved to be a herculean task. Second, the Member States still disagreed over many technical provisions of the draft treaty. The Convention and its draft text, however, arguably possessed democratic legitimacy, which limited the room for manoeuvre for possible modifications and intergovernmental trade-offs (Interview, Brussels, 12 October 2011).

The Member States focus on high politics and unwillingly accept the CCP provisions:

The revised CCP articles were of little interest during the IGC on the Constitutional Treaty. The high politics of founding a European federal state clearly downgraded the CCP to a secondary issue. The Member States focused on other more important issues and unwillingly accepted the FDI reference as part of a bigger package deal. The IGC, nevertheless, introduced two changes to the revised CCP articles. Both amendments clearly reflect the preoccupation of the Member States to safeguard their influence, and thus indirectly their sovereignty in international investment policy, against European encroachment. First, France insisted on preserving the Treaty of Nice's exception clause regarding cultural and educational services. Article 133(6) TFEU of the Nice Treaty indicated that measures touching upon trade in cultural and educational services had to be adopted by unanimity in the Council. Sweden and Finland consequently insisted on keeping the same clause for trade measures affecting health and social services. Second, Portugal and Ireland were still opposed to the FDI reference, while some new Member States reportedly welcomed the extension of the CCP to FDI regulation. Portugal and Ireland were unwilling to invest a lot of political capital in attaining its deletion. Instead they ultimately struck an alliance with the like-minded German and French governments. This alliance of small and big Member States managed to include a clause providing for the unanimous adoption of FDI-related measures in the Council of Ministers (Krajewski, 2005, pp. 104–106; Krenzler and Pitschas, 2005, pp. 801–802; Interview, Brussels, 12 October 2011). Both amendments ran counter to Lamy's plea to strengthen qualified majority voting to ensure the effective and efficient operation of the CCP in an enlarged EU.

The Constitutional Treaty was signed on 29 October 2004. The final wording of Articles III-314 and III-315 of the Constitutional Treaty on the CCP finally brought FDI regulation under the scope of the CCP and exclusive Union competence. It empowered the EU to pursue a full-fledged international investment policy. The joy among European policy-makers over this 'milestone' in modern European history was albeit short-lived. In spring

2005, the French and Dutch public opted in referenda to reject the Constitutional Treaty. The negative outcomes of these votes in allegedly pro-European founding Member States made it politically impossible to further pursue the ratification of the Constitutional Treaty. After a reflection period, European policy-makers came to the conclusion that the EU had, nevertheless, to be reformed in order to keep it governable after the Eastern Enlargement. They decided to hold another IGC on the so-called Reform Treaty, which is today known as the Treaty of Lisbon.

The intergovernmental conference on the Treaty of Lisbon was held between 23 July 2007 and 13 December 2007. The objective of the IGC was to preserve most technical revisions while cutting back on the symbolic elements of the Constitutional Treaty. In consequence, the IGC decided not to reopen discussions on the – in relative terms – uncontroversial and technical CCP provisions. It was, moreover, reported that the leadership of DG Trade admonished its officials not to draw the attention of the Member States or NGOs to the FDI reference of the revised CCP articles. The Commission hoped that the IGC would not ‘rediscover’ the reference and simply nod it through (Interview, Brussels, 12 October 2011). And indeed, in the end Articles 206 and 207 TFEU of the Lisbon Treaty simply copied former Articles III-314 and III-315 of the Constitutional Treaty. The Treaty of Lisbon entered into force on 1 December 2009 and finally provided the EU with a firm legal competence to pursue a full-fledged international investment policy (Interview, Brussels, 12 October 2011).

Conclusion – The particularities of the Convention method explain the sudden success of Commission entrepreneurship: In conclusion, which factors best account for the extension of the EU’s legal competences under the CCP to FDI regulation in the Lisbon Treaty? Why did the Commission finally succeed in extending the CCP to FDI regulation after so many unsuccessful attempts?

The observations from the drafting process of the Lisbon Treaty clearly lend support to the supranational hypothesis H_1 and oppose the liberal intergovernmental hypothesis H_2 . European business was ambivalent and divided over the benefits of integrating international investment policy at the EU-level. The Member States clearly opposed such steps. The Commission, however, acted as policy entrepreneur in the open and behind the scenes. Yet again, it used its agenda setting powers and invoked the evolving trade agenda and the EU's de facto competences to emphasise the need to bring FDI regulation under the scope of the CCP. While these strategies had delivered only mixed results in previous IGCs, the Commission finally succeeded in the drafting of the Lisbon Treaty by skilfully exploiting three procedural particularities of the Convention. First, the Convention method structurally strengthened the Commission vis-à-vis the Member States. Whereas national technocrats were largely locked out of the drafting process, the Commission with its considerable technical expertise had direct access to the debates and the Praesidium sessions. Its agenda setting powers were thus arguably more important than in classic IGCs. Second, the delegates of the Convention were meant to engage in deliberations about advisable reforms rather than in customary non-transparent intergovernmental bargains about competences. So once the FDI reference had made its way into the CCP provisions – arguably due to Commission entrepreneurship and agenda setting behind the scenes – it was impossible to simply demand its deletion in the Convention or the following IGCs without an open debate. The normal time constraints of such big gatherings meant that only issues of political salience could be discussed. Third, the Convention delegates were generalists and politicians, who had the self-conception to be the founding fathers of a European federal state. They did neither have the technical expertise, nor wanted to waste time and political capital to engage in discussions about technicalities such as the FDI reference in the CCP provisions. A similar logic also applied in the IGC debates, which continued to focus on high politics and should change as little as possible in the transparently and democratically drafted treaty text. Hence, the Commission finally succeeded and managed to extend the CCP to FDI regulation despite business lethargy and Member State opposition.

8.7 Conclusion

The chapter traced the evolution of the EU's legal competences in international investment policy. Despite the considerable timespan covered in this chapter, a remarkably homogenous picture emerges from the analysis. It lends strong support to the supranational hypothesis H₁ and stands in opposition to the liberal intergovernmental hypothesis H₂. European business generally was little interested in debates on the EU's legal competences in international investment policy. It did not seek to shape policy-maker preferences in this policy domain. The Member States persistently opposed the creation of a EU international investment policy and sought to protect their competences against European encroachment. The Commission, on the other hand, acted as policy entrepreneur promoting an extension of the EU's legal competences so as to establish EU international investment policy. It used its agenda setting powers, pointed to the evolving trade agenda and the EU's de facto competences, invoked implied competences and had strategic recourse to legal review in order to make the Member States concede to an institutionalisation of cooperation and permanent delegation of international investment policy-making to the EU-level. The Commission's policy entrepreneurship reflected functionalist considerations as well as power considerations. It sought to remain the effective single voice in the EU's foreign economic policy despite an evolving trade agenda and was generally concerned with the Member States interfering with the EU's foreign economic policy through national BIT programs.

Commission entrepreneurship was only moderately effective before the Convention on the Future of Europe. Until the drafting of the Lisbon Treaty, the EU's legal competences mostly grew due to unintended institutional interactions and spill-overs (creation of external capital regime, extending CCP to the regulation of services trade). And while the Commission's recourse to legal review in Opinion 2/92 formally recognised the EU's exclusive competence under the CCP to regulate certain aspects of post-establishment treatment, it did not change

the situation on the ground as the Member States continued concluding hundreds of BITs with post-establishment treatment provisions. The Commission's policy entrepreneurship – based on agenda setting, invoking the evolving trade agenda and the EU's de facto competences – was ultimately successful due to the particularities of the Convention method, which increased the Commission's agenda setting powers, locked out national technocrats and prevented opaque intergovernmental bargaining. In this unique context, the Commission finally managed to get its way and to extend the CCP to FDI regulation.

In the light of the previous chapters on the evolution of the EU's de facto competences, it needs emphasis that in particular the EU's growing de facto competences motivated the Praesidium of the Convention to add an FDI reference to the CCP articles. John Bruton – arguably on behalf of the Commission – suggested that the CCP should encompass FDI regulation as the EU had been representing the Member States in relevant WTO and FTA negotiations but that the mismatch between the EU's de facto and legal competences threatened the effectiveness of the EU's representation. Taking into consideration that the Commission had previously spared no efforts to put investment provisions on the agenda of these talks and to consolidate the EU's de facto competences, the full extent of Commission entrepreneurship becomes visible.

The EU's use of its new competences in the recent past by and large confirms the findings of this chapter. The Commission has been criticised for its heavy-handed and competence-asserting behaviour in international investment policy-making, for instance in the context of debates on the 'grandfathering regulation'. Business, moreover, was mostly absent from these debates. For many decades, it did not undertake any serious attempts to shape policy-making. A high-ranking Commission official commented to the effect that international investment policy-making felt like a 'blind flight', because business was almost completely disengaged from debates (Interview, Brussels, 25 July 2012). Business woke up to investment policy issues only recently and has tentatively sought to make its voice heard in

the heated debates on the Transatlantic Trade and Investment Partnership (TTIP) with the USA and the Comprehensive Economic and Trade Agreement (CETA) with Canada. Many Member State governments, finally, remain distrustful vis-à-vis the Commission in TPC debates. Several governments still argue with the Commission over the scope of the EU's new exclusive competence. It seems likely that several governments will, sooner rather than later, ask the ECJ to examine the scope of the EU's exclusive competence under Article 207 TFEU, notably regarding investment protection and the regulation of portfolio investments. These more recent observations yet again suggest that supranational rather liberal intergovernmental thinking account for the European cooperation and integration in this domain.

Chapter IX – Assessing business lobbying and global regulatory competition through trends in Member States’

BIT practices

The analytical framework developed two competing hypotheses regarding the emergence of the EU’s international investment policy. Hypothesis H₁ builds on supranational thinking and stipulates that the Commission acted as policy entrepreneur and pushed for the communitarisation of international investment policy-making for functional and power considerations. Hypothesis H₂, on the other hand, builds on liberal intergovernmental thinking and stipulates that European business lobbied the Member States for a communitarisation of international investment policy-making in order to get access to competitive state-of-the-art IIA. The previous chapters draw a surprisingly homogenous picture. They mostly lend support to hypothesis H₁ and challenge hypothesis H₂. The findings in particular suggest that business lobbying did not play an important role in the emergence of the EU’s international investment policy. The clarity of this finding is unexpected. It runs counter mainstream assumptions on the role of business in international investment and foreign economic policy-making and therefore deserves additional attention.

The chapter seeks to cross-validate the finding through simple quantitative methods. How does the chapter embark on this endeavour? Hypothesis H₂ in essence stipulates that growing international regulatory competition motivated business to lobby for a communitarisation of international investment policy-making. It is, however, reasonable to assume international regulatory competition did not merely materialise in the form of the EU’s growing role in

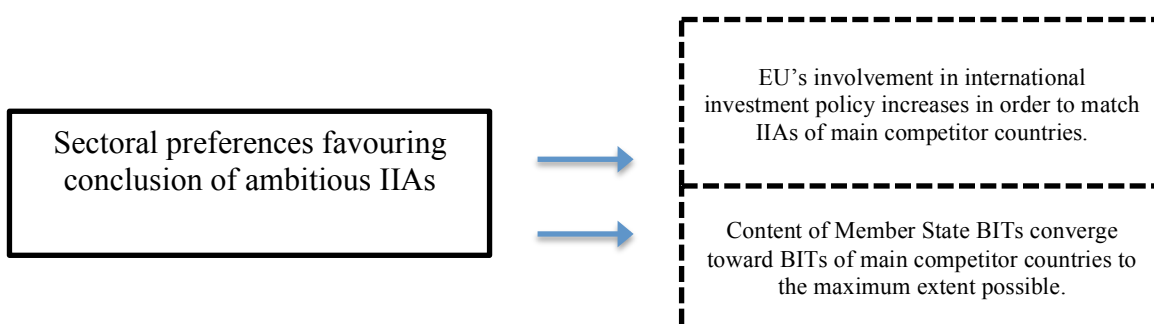
international investment policy, but equally manifested itself in Member States' international investment policies before the entry into force of the Lisbon Treaty. In other words, business lobbying for internationally competitive IIAs should also have affected the content of Member States' bilateral investment treaties (BITs) as far as possible under the distribution of competences prior to the Lisbon Treaty. This reasoning allows for a cross-validation of the propositions that business pushed for a communitarisation of international investment policy-making by examining whether the BITs of Member States and major competitors bear the traces of international regulatory competition.

So how should the content of Member State BITs have evolved over time in the context of intensifying international regulatory competition and consequent business lobbying for competitive IIAs? To answer this question, one must briefly examine the alleged purpose of BITs. BITs arguably seek to enhance the profitability and competitiveness of national companies on international markets by lowering the risk premiums for international investment activities. By the same token, BITs seek to help countries to attract foreign investment, technology and know-how. BITs therefore qualify as 'regulatory subsidy'. The amount of 'regulatory subsidy' afforded under a BIT should be determined through the level of post-establishment treatment and protection standards enshrined in agreements. The amount of the 'regulatory subsidy' should increase or decrease as post-establishment treatment and protection standards increase or decrease. It follows from this conceptualisation that competing countries should seek to match the amount of 'regulatory subsidies' afforded under their respective BITs so as to maintain a level playing field on international markets. The bulk of the literature on EU foreign economic and trade policy suggests that the Union's main competitors on international markets are other major OECD economies and in particular the USA. EU foreign economic policy and trade policy is seen to form in response to, and to mitigate, the effects of US foreign economic and trade policy (Baccini and Dür, 2012; R. Baldwin, 2006; Dür, 2007; Manger, 2009). This train of thought allows formulating a liberal intergovernmental sub-hypothesis $H_{2,1}$: *If regulatory competition*

indeed fuelled business lobbying and ultimately shaped state behaviour in the international investment regime, it should have manifested itself not only through growing Member State cooperation in international investment policy within the EU but also in a gradual convergence of the content of BITs concluded by the Member States and other major OECD countries since the 1980s.

This chapter seeks to test hypothesis H_{2.1}. As an analysis of the approximately 3,500 BITs signed by the Member States and OECD countries would go beyond the scope of this thesis, the chapter examines 475 BITs⁵⁷ signed by Germany, Great Britain, the Netherlands, Poland, Austria, Slovakia, Canada and the USA since 1980. The findings suggest that the content of Member State, US and Canadian BITs did not converge over time, but diverged. This observation casts doubts over the assumption that international regulatory competition and consequent business lobbying decisively shaped national BIT programs and promoted the emergence of the EU's international investment policy. The first section develops the research design and describes its operationalisation. The second and third sections present the empirical findings and draw theoretical conclusions.

Figure 9.1 Independent and dependent variables



⁵⁷ Since the 2000s, the US and Canada negotiated fewer BITs, but started including BIT-like chapters into their free trade agreements. The study thus also examines US and Canadian FTAs with investment chapters.

9.1 Research design and operationalisation

How does one measure convergence or non-convergence of BITs? And taking into consideration the sizeable number of existing BITs signed by the Member States and their major competitor countries, how does one select an unbiased sample of BITs for analysis? The following paragraphs answer these questions.

9.1.1 Variables for measuring convergence in BIT practices

BITs are complex legal documents. Convergence or non-convergence cannot be simply ‘read off’ these agreements. It is necessary to identify variables which make it possible to detect convergence or non-convergence in BITs over time. Which variables are suitable for this purpose? It is helpful to recall that the chapter seeks to evaluate whether the ‘regulatory subsidies’ provided under Member State BITs and under BITs of their main competitors converged since 1980. The amount of the ‘regulatory subsidy’ afforded under a BIT to investors should be equivalent to the level of post-establishment treatment and protection under each agreement. Convergence or non-convergence in BIT practices should thus come to the fore in the articles which, by and large, determine the level of post-establishment treatment and protection afforded to investors under a BIT. It follows that this study needs to focus and analyse variations in these articles across BITs and over time so as to draw conclusions on convergence or non-convergence in countries’ BIT practices. It is fortunate for the purpose of this study that BITs are relatively easy to compare. Due to several attempts to establish multilateral investment agreements and to develop model IIAs in the past⁵⁸, BITs are similarly structured, tackle the same regulatory issues and contain equivalent articles. Countries, however, use diverging formulations and legal standards in their agreements, which arguably affects the level of post-establishment treatment and protection afforded to investors.

⁵⁸ See, for instance, the Abs-Shawcross Draft Convention on Investments Abroad of 1959 or the draft of the failed Multilateral Agreement on Investment of 1998.

It is impossible to analyse the entirety of articles in BITs. Hence, it is necessary to select certain key articles for the purpose of this study. Three criteria guide the selection of key articles as parameters. First and foremost, the examined articles should have a significant impact on the level of post-establishment treatment and protection afforded to investors. In other words, they should jointly determine the amount of the ‘regulatory subsidy’ afforded under a BIT.⁵⁹ Second, the examined articles should be known to vary across countries’ BIT practices and thus be prone to variation across BIT practices and over time. Third, the examined articles should clearly fall into the pre-Lisbon scope of Member State competences so as to make valid comparisons between Member State and third country agreements. Finally, the articles should be relatively easy to compare and to code across BITs. Lengthy, complex norms are unsuitable for a large-n analysis.

Drawing on these criteria, the following key articles lend themselves as variables for measuring convergence or non-convergence in BITs over time. First, BITs contain articles which define the term ‘investment’. While some BITs advance very broad definitions, other agreements contain limited definitions. These articles are crucial as they function as gatekeepers. They determine the economic activities falling under the protection of a BIT. The broader the definition of ‘investment’ in BITs, the broader the applicability of investment protection provisions. Second, BITs contain articles which define the minimum treatment standard afforded to foreign investors. In contrast to most-favoured nation (MFN) and national treatment (NT), the minimum treatment standard is typically an absolute treatment standard. It stipulates that host countries must not treat foreign investors worse than is acceptable under a specific international standard. BITs typically refer to either the ‘fair and equitable treatment’ (FET) standard or treatment in accordance with ‘customary international law’ (CIL) (Fontanelli and Bianco, 2013, p. 5). Some BITs also refer to both standards albeit in hierarchical order. Such agreements stipulate that CIL encompasses FET;

⁵⁹ For guidance see (Dolzer and Schreuer, 2012)

this, however, is not generally accepted amongst investment lawyers. FET is sometimes seen to provide for a higher minimum treatment standard than CIL. Third, many BITs contain so-called ‘umbrella clauses’. Umbrella clauses oblige the contracting states to honour contractual obligations vis-à-vis foreign investors including commercial contracts. Depending on the economic sector of an investment, such umbrella clauses can be of great significance to foreign investors. Some BITs do not contain umbrella clauses, while other agreements contain limited or unlimited clauses (Fontanelli and Bianco, 2013, pp. 7–8; Kommerskollegium, 2011, p. 41). Fourth, BITs contain articles which define the terms direct and indirect expropriation. While some BITs advance very broad definitions of these terms, others contain narrow definitions. Narrow definitions, in particular of the term ‘indirect expropriation’, limit the number of possible scenarios in which states may have to pay compensation for expropriation to foreign investors (Fontanelli and Bianco, 2013, p. 7; Lavranos, 2013, p. 1,3). Fifth, most BITs provide for investor-to-state arbitration. The accessibility of arbitration for a harmed investor, however, considerably varies. The ease of access to arbitration influences costs for investors in seeking compensation. Some BITs do not impose any obligations on investors who seek to launch an arbitration proceeding. Other BITs require investors to first seek compensation through domestic courts. Many BITs oblige investors to formally waive their rights to seek compensation through any other dispute settlement mechanisms in the event that they launch international arbitration (Fontanelli and Bianco, 2013, pp. 9–10; Lavranos, 2013, p. 3). Sixth, some BITs contain carve-outs for economic sectors or activities from MFN treatment, NT or the entire agreement. The more carve-outs a BIT contains, the fewer investments enjoy the benefits of the agreement (Fontanelli and Bianco, 2013, p. 7; Lavranos, 2013, p. 3). Finally, the length i.e. word count of BITs varies considerably (Lavranos, 2013, p. 3). While some BITs are concise and count merely eight pages, other BITs count fifty. This is not merely the consequence of diverging linguistic styles. It arguably reflects underlying differences in substance. Lengthy agreements seek to spell out the rights and obligations of states and investors in detail, which lowers the level of post-establishment treatment and protection in

comparison to short, non-specific BITs. The word count of BITs might thus serve as a proxy for convergence or non-convergence in content of BITs. The thesis examines these variables in order to establish the level of investment protection under BITs and to compare them over time.

9.1.2 Case selection

It is impossible to examine the entirety of the approximately 2,000 BITs signed by the Member States and other OECD countries. Hence, it is necessary to select a representative sample of BITs. This raises the question of how to choose an unbiased sample. Several criteria must guide the selection of BITs. First, the study must examine the BITs of the main competitors of the European economy on international markets. The BITs of major competitor countries should have converged toward Member State BITs and vice versa. Second, the study must examine BITs signed by countries of different economic and political clout. It is sometimes assumed in IR, IPE and economics, that the economic and political clout of countries shapes their foreign economic policies and thus, potentially, their BITs. So regulatory competition might differently affect states. Third, the study must examine BITs of countries which have signed a considerable number of agreements. A high number of BITs signals that countries dedicated resources to, and pursued a proactive and conscious strategy in international investment policy. Taking these criteria into account, the study analyses the BITs signed by the following countries since 1980: the US, Canada, Germany, the United Kingdom, the Netherlands, Poland, Austria and Slovakia. It needs mention here that the study only examines BITs which are freely accessible through the UNCTAD database and government websites (Deutsche Institution für Schiedsgerichtsbarkeit (DIS) e.V., 2014; Government of Canada, 2014; Office of Trade Agreements Negotiation and Compliance, 2014; UNCTAD, 2014a). In total, the study examines 475 BITs.

9.2 Findings – No convergence but divergence in BIT content

The findings⁶⁰ suggest that the content of countries' BITs has diverged rather than converged over time. While European BITs have by and large maintained a high level of investment protection, Canadian and US BITs have gradually lowered the level of investment protection afforded to investors. The finding contradicts the liberal intergovernmental sub-hypothesis H_{2,1} and casts further doubts over the allegedly central role of business lobbying in international investment policy-making. The following paragraphs discuss the findings for each variable.

Definition of investment: The articles defining the term investment diverged. In the 1980s, all BITs contained short and broad definitions of investment. In the 1990s, first Canada and then the USA started including more detailed and narrower definitions of investment into their agreements. The inclusion of such narrow definitions reduces the scope of BITs. Germany, the Netherlands and Poland did not follow this American innovation. The United Kingdom, Austria and Slovakia concluded very few BITs with narrow definitions of investment, mostly with third countries like Mexico. It seems unreasonable to assume that these BITs thus marked a change in their BIT practices, but rather constitute a concession to third countries wishing to follow the American approach.

Minimum treatment standard: The articles defining the minimum treatment standard afforded to foreign investors also diverged over time. Throughout the 1980s and 1990s, all examined BITs obliged states to afford at least 'fair and equitable treatment' to foreign investors. Often the FET standard was combined with other standards like 'full protection and security'. In the early 2000s, the USA started concluding BITs which stressed that the contracting states had to treat foreign investors no worse than required under customary international law. The standard formulation in US BITs would indicate that CIL

⁶⁰ Annexe II contains the codebook and tables of findings.

encompassed the FET as well as ‘full protection and security’ standards while adding restrictive and controversial definitions of these standards. Many experts therefore argue that the new US standard provides for a lower minimum treatment standard than old-fashioned BITs. Canada started following the US innovation in the second half of the 2000s. Germany, the Netherlands, Poland and Austria did not follow this trend and maintained the FET as minimum treatment standard. The United Kingdom and Slovakia signed very few BITs with the new CIL standard in the second half of the 2000s, with countries like Canada, Mexico, Colombia and Kenya. Hence, it is again unlikely that these BITs constitute a reorientation in their BIT practices, but rather concession to their US-influenced negotiating partners.

Umbrella clauses: The examination of umbrella clauses demonstrates that BIT practices have always been diverse in this domain across Member States and third countries. An examination of umbrella clauses does not produce clear-cut patterns of convergence or divergence in the BIT practices of the Member States, the US and Canada. Germany and the United Kingdom included unlimited umbrella clauses into almost all of their BITs since 1980. Austria and the Netherlands included unlimited or limited umbrella clauses into most – albeit not all – of their BITs. US, Polish and Slovakian BITs frequently contained umbrella clauses in the past, but they gradually stopped including such clauses into their agreements in the course of the 1990s. Finally, Canada never signed a BIT with an umbrella clause.

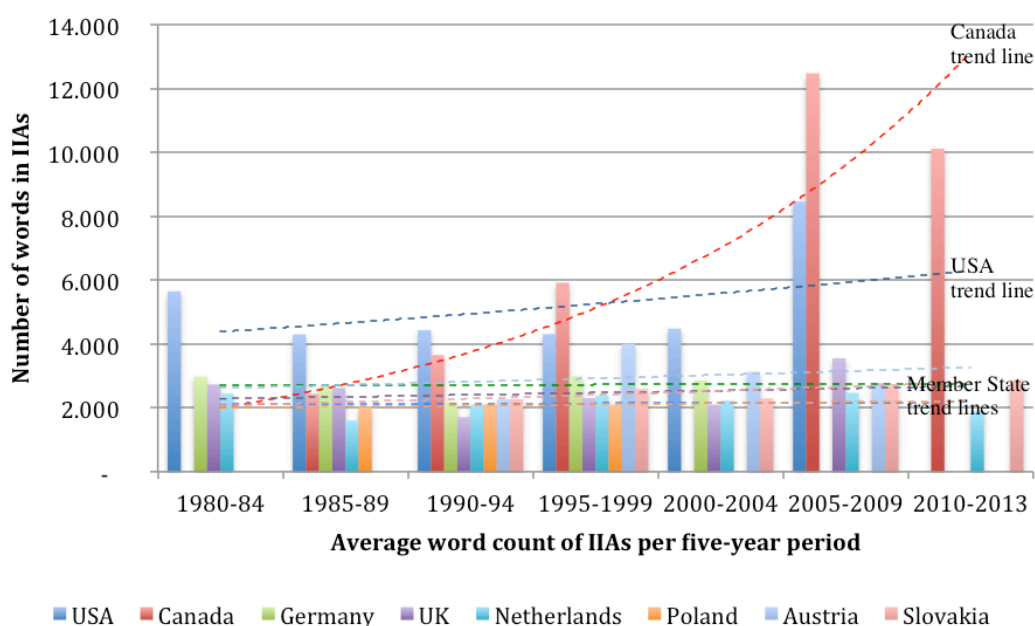
Definition of expropriation: The BIT practices of the examined countries markedly diverged in regard to the articles defining ‘expropriation’ since the 1980s. In the 1980s and 1990s, all BITs contained broad and vague definitions of the term ‘expropriation’. In the 2000s, the US and Canada started signing BITs with precise and narrow definitions. European countries, on the other hand, continued using broad and vague definitions in their BITs. Only the United Kingdom and Slovakia concluded very few BITs with narrow and precise definitions of ‘expropriation’. These few BITs cannot necessarily be considered as a

reorientation in their BIT practices, but rather seem to be concessions to their negotiating partners – namely Mexico, Canada and India.

Ease of access to international arbitration: A similar pattern emerges with regard to the provisions on investor-to-state arbitration in the examined BITs. European BITs initially provided for unlimited access to investment arbitration. Since the 1990s, some European BITs repeatedly included some minor limitations on access to investment arbitration. Investors are often required to first engage in conciliation procedures for three to nine months. In cases where investors submit a claim to a local court, they might have to withdraw the claim and file a request for arbitration before the local court has ruled on the matter. Or investors might have to wait for a ruling of first instance from a local court before being allowed to submit a claim to arbitration. US and Canadian BITs rarely provide for unlimited access to arbitration, but they initially imposed only minor conditions on investors seeking arbitration. Since the 1990s, US and Canadian BITs have, however, further restricted access to arbitration under their BITs. They often require investors to provide written waivers not to pursue claims through any other dispute settlement mechanisms in the event that they wish to seek arbitration ('fork-in-the-road clause'). They also frequently exclude arbitration in cases where investors have already submitted a claim to local courts. A few BITs even require the exhaustion of local legal remedies. Summarising, there is a general trend toward limiting access to arbitration since 1980, but US and Canadian BITs have taken a more restrictive approach than European BITs during the last 20 years.

Carve-outs: An examination of carve-outs from BIT obligations draws a picture of constant disparity between European and American BITs. All US BITs contain several carve-outs from the NT and MFN treatment obligations. Except for Canada's very first BITs, all Canadian agreements contain carve-outs. European BITs, on the other hand, do not contain any carve-outs. Hence, the BIT practices of the examined Member States, the USA and Canada have not converged or diverged, but have continued to be different.

Figure 9.2: Average word count of BITs per five-year period with trend lines



Word counts: Finally, an examination of the length of BITs confirms the trend of divergence (see Figure 9.2).⁶¹ US and Canadian BITs are, on average, longer than European BITs. What is more, US and Canadian BITs grew in length during recent decades, while European BITs remained relatively stable in length. As explained above, the word count of BITs is a useful – albeit obviously limited – proxy for measuring similarity or disparity across agreements. The marked differences in length do not only reflect linguistic differences but also echo substantive differences. Long agreements arguably contain more detailed provisions and carve-outs, which supposedly limit investor rights in comparison to short agreements.

⁶¹ An automatic word count was impossible with a considerable number of BITs due to the available electronic format. This reduces the robustness of the findings.

9.3 Conclusion

The findings suggest that Member State, US and Canadian BIT practices did not converge since 1980. As Table 9.1 summarises, most variables point to a divergence in BIT practices of the examined Member States and the USA and Canada.

Table 9.3: Summary of findings per parameter

Definition of investment	Divergence
Minimum treatment standard	Divergence
Umbrella clauses	Growing disparity
Definition of expropriation	Divergence
Access to ISDS	Divergence
Carve-outs	Constant disparity
Word count	Divergence

The finding contradicts the liberal intergovernmental sub-hypothesis $H_{2.1}$. It suggests that international regulatory competition did not decisively shape states' BIT programmes. The level of investment protection – and thus the amount of regulatory subsidies – afforded under the examined 475 BITs clearly started diverging in the 1990s. The USA and Canada lowered the level of 'regulatory subsidies' provided to their investors, which should have translated into lesser competitive pressures in the EU to communitarise international investment policy-making. These findings suggest that business lobbying does not decisively shape the international investment regime – at least with regard to post-establishment and protection standards. Other factors must have shaped states' BIT programmes. If international regulatory competition and business lobbying were not sufficiently intense to affect states' BIT programmes, one must indeed wonder whether it fuelled increasing Member State cooperation in this domain. The chapter thereby lends further support to the finding of the preceding chapters that business was little interested in international investment policy in general and even less in the communitarisation of international investment policy-making.

The findings of this chapter deserve some further reflections. Why did the BIT practices between Northern American and European countries start diverging in the 1990s? Put differently, why did the USA and Canada increasingly lower the level of investment protection, while European countries clung on to the traditional ‘invisible’ model BIT of the OECD community? The answer to these questions lies in the different experiences of European and Northern American governments with investment protection and investor-to-state arbitration. Most European countries have hardly faced investment arbitration and paid compensation to foreign investors or experienced a limitation of their regulatory space due to arbitration awards. The USA and Canada, on the other hand, have repeatedly faced arbitration proceedings. Canada has moreover paid significant awards and has started feeling the infamous ‘regulatory freeze’. In response to these experiences, Canadian and US policy-makers started circumscribing the rights of investors under their agreements so as to maintain their regulatory space and to limit their financial exposure under investor-to-state arbitration (see Alvarez, 2009, pp. 301–314).

Taking into consideration that until the 1990s the USA, Canada and European countries signed by and large identical agreements, one must ask what caused the difference in experiences with investor-to-state arbitration. The main reason seems to be the selection of partner countries and consequently the different structural exposure to investor-to-state arbitration. European countries signed more BITs with third countries but mostly with capital-importing developing economies. Hence, investor-to-state arbitration is unlikely to hit European states due to the direction of investment flows. The USA and Canada, on the other hand, signed agreements with BIT-like provisions including with major capital-exporting countries – and, most notably, through NAFTA among themselves. The covered investment flows are thus bidirectional, which structurally increases the risk of getting sued by foreign investors. European policy-makers should carefully evaluate the experiences and mitigation strategies of Northern American policy-makers in negotiations on CETA and

TTIP with the USA and Canada. The emergence of new economic powers – formerly developing countries – and the consequent reconfiguration and reversal of global investment flows will render a reform of the European approach to international investment policy, and notably investment protection, inevitable.

Chapter X – Conclusion

The thesis seeks to explain the emergence of the EU's international investment policy since the 1980s. It tests two competing theoretical approaches and hypotheses so as to account for this instance of European Integration. Hypothesis H₁ builds on supranational thinking. It stipulates that the Commission acted as resourceful policy entrepreneur to advance the communitarisation of international investment policy-making. Hypothesis H₂ builds on liberal intergovernmental thinking. It suggests that European business lobbied Member State governments to communitarise international investment policy-making so as to ensure access to ambitious, state-of-the-art international investment and trade agreements. The Member States should have given into such demands so as to increase their domestic and international capabilities ultimately leading to the permanent delegation of international investment policy-making to the EU.

To assess the validity of the two competing hypotheses, the thesis examined policy-making instances, which decisively shaped the EU's de facto and legal competences in international investment policy. The study traced the EU's involvement in investment-related negotiations during the Uruguay Round, on the Energy Charter Treaty, on the Multilateral Agreement on Investment and in negotiations on the EU's first comprehensive FTAs with Mexico and Chile. On the other hand, it examined internal debates on the EU's legal competences in

international investment policy in the context of IGCs, legal proceedings and the Convention on the Future of Europe. What is the outcome of this comprehensive analysis?

The chapter first provides a brief empirical account of the findings. The second section discusses in depth the validity of the two hypotheses and the theoretical implications of the empirical observations. The third section extends to analytical focus to questions beyond European Integration.

10.1 A brief empirical summary

The Uruguay Round: The thesis finds that the EU got first involved in international investment policy-making in the Uruguay Round of the GATT. The USA strongly pushed for the opening of a new round with an extensive agenda encompassing talks on multilateral investment provisions. The Commission after initial hesitation became a strong proponent of these plans and tried to convince European business and the Member States with the help of its agenda setting powers. While a critical mass of Member States came to endorse the plans, European business was little receptive to the Commission's campaigning. In 1986, the Member States empowered the Commission to negotiate on their behalf in the Uruguay Round including on service-related investment liberalisation and certain post-establishment treatment provisions. They felt that speaking with a single voice in the GATT negotiations would increase their bargaining power and deliver a better deal for Europe. The Member States nevertheless put on record in Council debates that their decision to delegate negotiating on *new trade issues* such as investment provisions to the Commission did not prejudice any competence questions. The EU played only a marginal role in the consequent TRIMs negotiations, as the Commission, European business and the Member States expected no significant gains in this domain. The EU, however, played pivotal role in the GATS negotiations notably with regard to investment-related provisions. The EU's central

role reflected the Commission's proactive stance and to a lesser degree Member State interest. European business remained disengaged.

The ECT negotiations: The EU and the Commission acquired an even more important role in international investment policy during the ECT negotiations. In 1991, the Dutch government proposed to establish a European Energy Community comprising the socialist Eastern European and capitalist Western European countries. The Member States welcomed the project and agreed to cooperate and to speak with a single voice in the ECT negotiations for economic and geopolitical reasons. Confronted with the faltering Soviet superpower on their borders, they wanted to maximise their bargaining power and influence on Moscow. They, moreover, perceived the ECT negotiations as a unique project, which would not set precedence for other negotiations neither for policy substance nor policy process. While the Council Presidency initially acted as lead negotiator and the Commission played a supportive role, the Commission gradually took over the role as lead negotiator – including in negotiations on investment liberalisation, post-establishment treatment and protection provisions – due to its proactive attitude, expertise, administrative resources and its pivotal role in the construction of the Single Market for energy. The ECT was in essence the external relations component of this milestone project of the Commission. For this very reason, European utilities opposed the ECT project, whereas other parts of the European business community were uninterested. European utilities perceived the ECT project as a Commission-led attempt to dismantle their monopolies and to introduce third-party-access to energy networks. In 1995, the EU ratified the ECT including its investment provisions. The ECT is today the only agreement allowing investors to launch arbitration procedures against the EU.

The negotiations on the MAI and Singapore Issues: The chapter on the negotiations on the MAI and Singapore Issues drew a particularly intriguing picture. The USA pushed for the launch of the MAI negotiations in the early 1990s to increase pressure on developing

countries to adopt a more cooperative stance in GATT/WTO talks on investment provisions. While the Member States endorsed the project, the Commission was hesitant. The EU/Commission would have to participate in the MAI talks due to fringe competences, but the Commission disliked that it would have to negotiate alongside the Member States – as customary in the OECD – and would not act as single voice like in the GATT/WTO. European business showed some but no strong interest in the MAI project. Observers reported that the MAI negotiations were a government- rather than business-driven project. Shortly after the launch of the OECD talks in 1995, the Commission managed in EU-internal and international debates to ensure the creation of a WTO working group on investment as part of the so-called Singapore Issues. It should ensure the continuation of investment debates in the WTO and hopefully serve as nucleus for veritable investment negotiations in the future. Cooperation between the Commission and the Member States was confrontational during the MAI talks. Many Member States accepted the EU's involvement in talks on issues of shared competence such as investment liberalisation and post-establishment treatment but refused cooperation with the Commission on questions of investment protection. Under the impression of the Maastricht IGC and Opinion 1/94, the Member States' investment policy officials sought to keep the Commission at bay and to stop it from encroaching onto their competences. When the MAI negotiations ran into stalemate in 1997, the USTR and the Commission reportedly promoted the collapse of the negotiations so as to upgrade the deliberations in the WTO working group on investment to proper negotiations. This strategic choice and exploitation of international negotiating fora indeed considerably consolidated the EU's involvement in international investment policy. The Commission consequently acted as proactive single voice in the short-lived investment talks of the Doha Round in the WTO. The Commission's role as the EU's single voice in investment negotiations in the Doha Round later helped to justify the inclusion of investment disciplines into FTA negotiations and ultimately informed the critical decision of the Praesidium of the Convention on the Future of Europe to propose the extension of the CCP to FDI regulation. The Commission's strategic choice of negotiating fora for the consolidation of the EU's role

in international investment policy was thus an essential building block in the emergence of the EU's new policy.

The EU in bilateral investment negotiations as part of FTAs: The thesis, moreover, examined how the EU came to negotiate on investment provisions as part of bilateral FTAs. The thesis analysed the negotiations on the EU-Mexico FTA (1996-2000) and EU-Chile FTA (1999-2002), which constitute the beginning of the EU's bilateral investment strategy. The EU-Mexico FTA negotiations were launched as a reaction to the conclusion of NAFTA in 1995. NAFTA caused European firms to lose market share in Mexico, while it increased at same time the attractiveness of Mexico as an entry point to the US economy. In consequence, the Commission, European business and the Member States started supporting the conclusion of a EU-Mexico FTA of NAFTA-parity. The Member States empowered the Commission to seek negotiations on the liberalisation of service-related investments, post-establishment treatment and capital movements. The Commission thus agreed with Mexico on an ambitious negative list for the liberalisation of service-related investments and a comprehensive capital movement clause. Toward the end of the negotiations, France and other Member States, however, started worrying about the implications of these provisions for their competences. They claimed that the Commission had overstepped its mandate and declared to block the conclusion of the FTA unless the Commission deleted the most controversial commitments. The Commission had to bow in. The EU-Chile FTA started shortly before the clash in the EU-Mexico negotiations. The Commission, European business and the Member States alike pushed for the EU-Chile FTA in order to pre-empt an envisaged US-Chile FTA. Yet again, the Member States initially agreed in the mandate to include service-related investment commitments – however on the basis of a positive list. Once the competence clash in the EU-Mexico negotiations had happened, the Commission and the Swedish Council Presidency devised a strategy to ensure the continued support for investment provisions in the EU-Chile talks. They started touring Member State capitals and in particular Paris to build trust. They argued that the EU could not credibly push for

ambitious services and investment disciplines in the Doha Round of the WTO – as the Council had previously decided – if the EU's FTAs did not contain such commitments. The Member States agreed with the Commission's line of argument and the EU-Chile FTA became the first EU FTA to comprise a proper investment chapter with liberalisation and post-establishment treatment provisions. The EU-Chile FTA thereby set a new standard. All following European FTAs contain similar chapters. It, moreover, triggered in-depth thinking about the EU's general strategy to investment regulation, which led to adoption of the so-called EU's Minimum Platform on Investment in 2006.

The evolution of the EU's legal competences: The analysis of the debates on the EU's legal competences drew an intriguingly homogenous picture. Since the 1970s, the Commission pushed for the extension of the EU's legal competences in international investment policy. It generally problematized the EU's role in this domain and either claimed that the EU was already competent or pointed to the EU's de facto competences and the evolving trade agenda in order to convince the Member States in IGCs to extend the CCP to investment regulation. The Commission also repeatedly used recourse to legal review in order to force the Member States to acknowledge the EU's competence, however, only with limited success. The Member States persistently opposed to extend the EU's competences in international investment policy. They saw no need to sacrifice competences in this domain. Business did not shape the preferences of European or national policy-makers. It was little interested and/or divided over the benefits of a communitarisation of international investment policy-making. After decades of unsuccessful attempts of the Commission to acquire legal competences, it finally succeeded in the Convention on the Future of Europe. While it drew on similar strategies as before to win over the Member States (agenda setting; invoking of de facto competences; pointing to the evolving trade agenda), it were the procedural particularities of the Convention, which made the difference. The Member States and notably national technocrats had only limited access to the Convention, which facilitated Commission entrepreneurship and paved the way toward the extension of the CCP to FDI

regulation. The Lisbon Treaty thus finally established a firm legal Union competence to regulate international investment flows.

10.2 A theoretical assessment

This section evaluates the theoretical implications of the empirical findings. It first clarifies to what extent and how the empirical observations challenge liberal intergovernmentalism and hypothesis H₂. The section then assesses to what extent the observations confirm supranational thinking and hypothesis H₁.

10.2.1 The limits of liberal intergovernmentalism

Hypothesis H₂ builds on liberal intergovernmental thinking. It reads: *European business lobbied Member State governments for a communitarisation of international investment policy-making so as to ensure access to ambitious, state-of-the-art international investment and trade agreements. The Member States gave into such demands so as to increase their domestic and international capabilities ultimately leading to the permanent delegation of international investment policy-making to the EU.* The empirical observations challenge hypothesis H₂ and liberal intergovernmentalism in several regards. The preceding discussion demonstrated that business played only a marginal role in the emergence of the EU's international investment policy. It cannot be considered as the driver behind European Integration in this domain. The Member States, on the other hand, occasionally favoured cooperation and delegation of international investment policy-making to the EU-level, but primarily sought to contain the EU's involvement in this policy domain. The following paragraphs compare step-by-step the propositions formulated in the analytical framework to the empirical observations.

Business preferences and lobbying: An extensive literature seeks to explain EU foreign economic policy and thereby indirectly European Integration in this policy domain through business preferences and lobbying (Baccini and Dür, 2012; M. Baldwin, 2006; R. Baldwin, 2006; De Bièvre and Jappe, 2010; Dür, 2007; Manger, 2009; Young, 2001, 2002; Woolcock and Bayne, 2007). Building on this literature, the analytical framework suggested that in particular service providers from old and big Member States should have taken an interest in international investment policy. They have statistically the highest propensity to outward investment, which implies that international investment policy should have the highest welfare impacts on them. In a similar vein, they should have shown stronger interest in questions related to investment liberalisation than in questions related to post-establishment treatment and protection. Investment liberalisation arguably has immediate welfare impacts in the form of increased profit opportunities, while post-establishment treatment and protection provisions should only have distant and uncertain welfare effects. Finally, they should have pushed for procedural shifts in the form of a communitarisation of international investment policy-making as the pooling of competences and bargaining power at the EU-level might have promised to positively affect policy substance in the form of competitive state-of-the-art IIAs between the EU and third countries.

The empirical observations challenge the theoretical propositions on the formation of business preferences and business lobbying at a fundamental level. European business – regardless of economic sectors and home countries – was mostly uninformed, disengaged, unorganised and unable to shape policy-making. The thesis casts doubts on the widespread assumption in the IPE literature that business generally understands what is beneficial, has the political resources to influence policy-makers and ultimately determines countries' foreign economic policies. To the contrary, Chapters IV, V, VI and VIII reported on numerous instances, where policy-makers sought to mobilise European business on questions of international investment policy-making including a permanent competence transfer. As already described by Woll (2008), policy-makers lobbied businesses rather than

the other way round. A particularly striking example is the foundation of the European Services Forum. The Commission called on European service providers and investors throughout the 1980s and 1990s to get organised, to develop informed positions and to provide expertise and input to policy-makers on questions related to services trade and investment regulation. It was only in the late 1990s that European service providers finally came around and founded the European Services Forum after the Commissioner for trade Leon Brittan had warned business leaders that service providers would get traded off against manufacturers and agriculture in the upcoming Doha Round in case service providers and investors remained passive in policy-making debates (Interview, Brussels, 25 September 2013b).

In accordance with the analytical framework, however, the empirical chapters demonstrated that in the very rare occasions where business showed genuine interest in investment policy, it cared about investment liberalisation rather than post-establishment treatment and protection provisions. Chapter VII on the EU-Mexico and EU-Chile FTA negotiations showed that European business pushed for European action to ensure NAFTA-parity in investment access to the Mexican and Chilean economy but was uninterested in questions of post-establishment treatment and protection. It needs to be mentioned though that the varying interest of business in European action might also be due to the Member States' proactive BIT programs already dealing with questions of post-establishment treatment and protection. The findings of chapter IX, nevertheless, imply that business was equally no decisive driver behind national BIT programs. Or at least other – mercantilist and political – considerations seem to have been of greater importance. The econometric literature on the impact of BITs on investment activities partly supports and partly challenges this reading (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).

Member State preferences: The analytical framework developed the liberal intergovernmental argument that Member State governments should have been receptive to business demands for greater cooperation and delegation in international investment policy-making to the extent that cooperation and delegation indeed promised to maximise domestic and/or international capabilities. The framework, however, cautioned that the receptiveness of the Member States for business demands should have hinged on policy substance and the international negotiating context. While the examination of business preferences already by and large invalidated the hypothesis H_2 , it is appropriate for the sake of completeness to examine the role of Member State preferences in the emergence of the EU's international investment policy and the validity of the propositions formulated in the analytical framework.

First and foremost, the Member States occasionally supported cooperation and delegation of international investment policy-making to the EU-level (see chapters IV, V, VI and VII), but nonetheless primarily sought to contain the EU's role in this domain. They only unwillingly accepted for instance the extension of the EU's legal competences under the Lisbon Treaty as part of a package deal (see chapters VI and VIII). All in all, Member State preferences cannot be considered as drivers behind the emergence of the EU's international investment policy. Yet, the proposition of the analytical framework that policy substance shaped Member State preferences on cooperation and delegation was by and large correct. The Member States were generally more inclined to cooperate on questions of investment liberalisation than on questions of investment protection (see in particular chapter VI). On the one hand, the Member States' hesitation to cooperate on investment protection reflected their intention to safeguard their competences and national BIT programs from European encroachment. On the other hand, investment protection and notably ISDS may limit the regulatory sovereignty of states, which is more sensitive and controversial than investment liberalisation in the current neoliberal era. What is more, the proposition of the analytical framework that the international negotiating context might have affected Member State

preferences has also shown to be by and large correct. The Member States were generally eager to cooperate in investment regulation in the ECT and GATT/WTO negotiations (see chapters IV, V and VI). The Member States sought to maximise their international bargaining power. They were less eager to cooperate in ‘friendlier’ policy-making fora such as in the MAI or FTA negotiations as well as in EU-internal debates on the distribution of legal competences where the gains of cooperation and delegation were less manifest (see chapters VI, VII and VIII).

In conclusion, hypothesis H₂ and liberal intergovernmentalism do not accurately depict the emergence of the EU’s international investment policy. The empirical observations do not, however, invalidate liberal intergovernmentalism per se. They merely suggest that European business and the Member States did not consider the communitarisation of international investment policy-making to be a welfare and capability maximising step. Hence, this instance of European Integration cannot be considered as a business- or government-driven process.

10.2.2 Supranationalism and the conditions for successful Commission entrepreneurship

Hypothesis H₁ builds on supranational thinking. It reads: *The Commission acted as policy entrepreneur pursuing the creation of a EU international investment policy since the 1980s. The Commission built support and/or pressured the Member States into cooperation in international investment policy by exploiting its agenda-setting powers, the evolving trade agenda, by pushing investment negotiations into certain international fora, by invoking fringe and implied competences and using legal recourse.* Most empirical observations from this thesis lend support to hypothesis H₁ and supranational thinking on European Integration. Commission entrepreneurship must be considered as the main driver behind the emergence of the EU’s international investment policy. It persistently sought to consolidate the EU’s

role in international investment policy and drew on various strategies to pressure and/or to convince the Member States of the benefits of cooperating and delegating international investment policy-making to the EU-level. While these strategies decisively promoted the consolidation of the EU's de facto competences in international investment negotiations, it was only in combination with the procedural particularities of the Convention on the Future of Europe that the Commission finally succeeded in extending the EU's legal competences. The following paragraphs discuss the effectiveness of the Commission's various strategies in consolidating the EU's de facto and legal competences.

Agenda setting powers: The Commission holds so-called agenda setting powers in EU foreign economic policy and Treaty revisions. As a sizeable literature on the principal-agent relationship between the Commission and the Member States suggests (see inter alia Pollack, 2003; De Conceição-Heldt, 2009; Kerremans, 2004; Delreux and Kerremans, 2008), the Commission can shape the European policy-making debate through its right to initiate trade measures, its technical expertise, informational advantages and administrative resources as well as its prerogative to submit reports on the functioning of the EU's various policies to IGCs. The agenda setting powers enable the Commission to stir the debate and to potentially convince the Member States of the necessity to extend cooperation to new areas.

The empirical observations from this thesis suggest that the Commission's agenda setting powers were instrumental in consolidating the EU's de facto and legal competences in international investment policy. All empirical chapters reported that the Commission pushed for debates on the EU's role in investment regulation and sought to convince the Member States to cooperate and to delegate either on a temporary or a permanent basis international investment policy-making. The EU's agreement to the comprehensive agenda of the Uruguay Round and its ability to consequently speak with a single voice in investment-related negotiations for instance echoed the Commission's campaigning and use of its agenda setting powers in EU-internal policy-making debates. The Commission successfully

used its agenda setting powers also during the ECT, MAI and FTA negotiations as well as the Doha Round in order to strengthen the EU's role in investment-related talks. While the use of agenda setting powers to consolidate the EU's de facto competences was fairly successful in international investment negotiations (see chapters IV, V, VI and VII), the Commission's use of agenda setting powers to extend the EU's legal competences produced only mixed results (see chapter VIII). The Commission problematized the EU's lack of legal competences in international investment regulation in all IGCs since the 1980s but the Member States did not follow its recommendation to extend the CCP. It was only during the Convention on the Future of Europe (2002/2003) that the Praesidium – but not the delegates – showed receptive to the Commission's pleas to extend the CCP to investment regulation. The consequent decision of the Praesidium to extend the CCP provisions to FDI regulation, however, reflects not only the Commission's insistent campaigning and agenda setting in the open and behind the scenes but also the procedural particularities of the Convention, which are discussed in further detail below.

Invoking the evolving standard agenda of trade policy: The analytical framework developed the second and closely related proposition that the Commission problematized and exploited the evolving standard agenda of international trade negotiations in the GATT/WTO and FTAs to consolidate the EU's de facto and legal competences in international investment policy. The Commission should have problematized in EU-internal debates the need to adjust the EU's de facto and legal competences to the evolving and broadening standard trade agenda in order to ensure the effective representation of the EU and competitive deals in GATT/WTO and FTA negotiations. The Commission should have pointed out that a failure to adjust the EU's de facto and legal competences in fora where it normally speaks with a single voice might impose high opportunity costs in the form of foregone bargaining power and suboptimal negotiating outcomes (Young, 2002, 2003). What is more, following the logic of Putnam's two-level game (1988) the Commission might even have encouraged third countries to push for investment disciplines in the GATT/WTO

and FTA negotiations in order to thereby increase pressure on the Member States to intensify cooperation and delegation.

The empirical observations indeed suggest that the Commission frequently invoked the evolving trade agenda in order to convince and to pressure the Member States into cooperation and delegation of investment policy-making to the EU-level. Chapter IV on the Uruguay Round reported that the Commission quickly started sympathising with the USA and its plan to launch a comprehensive GATT round including talks on multilateral investment disciplines. Hence, it underlined in EU-internal debates the need to study the US proposal and to develop an informed joined position and strategy to ensure a good deal for the EU. In a similar vein, chapter VII reported how the Commission very effectively pointed out that the standard agenda of FTAs had come to include investment disciplines. Hence, the EU-Mexico and EU-Chile FTAs had to match this development in order to mitigate negative effects of third country FTAs on the European economy. Finally, chapter VIII documented how the Commission repeated almost *ad infinitum* in ECJ proceedings, IGC debates and in the Convention that the standard agenda of international trade negotiations had evolved and broadened, which required the adjustment of the EU's legal competences to ensure the effective operation of the CCP and representation of the EU. While invoking the evolving trade agenda was effective in extending the EU's de facto competences, it had only mixed impact on the Member States' readiness to extend the EU's legal competences.

Strategic use of international negotiating fora: Along similar lines, the analytical framework developed the proposition that the Commission might have pushed for international investment negotiations to be held in specific international fora to consolidate the EU's role in foreign economic policy. The EU traditionally speaks with a single voice in some, nonetheless, not all international trade policy fora. The Member States for instance still speak on their own behalf on most policy issues, which do not clearly fall under Union competence, in the OECD or UNCTAD. So if international negotiations on so-called 'new

trade issues' such as investment take place in the OECD, the Member States are likely to negotiate on their own behalf. If similar negotiations take place in the GATT/WTO, the Member States are likely to delegate negotiating to the Commission. The Commission may have exploited these dynamics to its benefit.

The empirical chapter of the thesis indeed lend support to this proposition. Chapter VI reported that the Commission persistently and successfully pushed multilateral investment negotiations out of the OECD and back into the WTO. It was weary about its limited role in the MAI negotiations within the OECD and favoured WTO-based negotiations where it would act as the EU's single voice. To that end, it built EU-internal and international support to create an investment working group in the WTO in 1996. When the MAI negotiations stalled in 1997, the USTR and the Commission reportedly promoted their collapse in order to push negotiations back to the WTO and to upgrade the deliberations in the investment working group to veritable negotiations. The Commission's efforts were successful and indeed crucial for the further consolidation of the EU's role in this policy domain. The Commission acted as single voice in the consequent investment negotiations in the Doha Round. Chapter VII, moreover, reported that the Commission could convince the Member States to include a proper investment chapter into the EU-Chile FTA by pointing out that the EU was no credible actor if it pushed for investment talks in the WTO but did not include equivalent investment provisions into its FTAs. What is more, the EU's involvement in investment negotiations in the Doha Round and then FTAs showed later decisive for the Praesidium's decision to propose the extension of the CCP to FDI regulation. In hindsight, the Commission's strategic use of different negotiating fora was thus highly effective so as to extend the EU's de facto and legal competences.

Invoking fringe, implied and de facto competences: The analytical framework formulated the proposition that the Commission might have invoked fringe, implied and de facto competences to consolidate the EU's involvement in international investment policy. The

term ‘fringe competences’ refers to competences, which are of undisputable yet of indirect importance for the regulation of an issue area. The term ‘implied competences’ refers to the legal reasoning that for the sake of regulatory coherence the EU must hold implied external competences to regulate an issue area, if it is competent to regulate the same issue area within the EU. The term ‘de facto’ competences refers to policy-making arrangements where the EU is already strongly involved in a policy domain but does not yet hold firm legal competences. If the Commission invokes ‘de facto competences’ to justify the EU’s involvement in international investment policy-making, it basically refers to precedencies and demands for continued cooperation and delegation for the sake of regulatory coherence. Invoking fringe, implied or de facto competences should have increased pressure on the Member States to cooperate and to delegate international investment policy-making at least partly to the EU.

The empirical chapter of the thesis repeatedly uncovered instances, where the Commission successfully invoked fringe, implied and de facto competences to consolidate the EU’s role in international investment policy-making. Chapter V on the ECT negotiations reported that the Commission stressed its legal and de facto competences in trade and energy policy to ensure and to extend its role in the ECT talks including on investment disciplines. Chapter VII on the MAI negotiations documented that the Member States only unwillingly accepted the Commission and EU’s involvement in this negotiating forum but had to give in as the Commission invoked legal fringe competences. Similarly, chapter VIII reported that the Commission argued in numerous ECJ proceedings, IGCs and in the Convention that the EU already held implied and de facto competences over international investment regulation, which required formalisation to ensure the continued effectiveness of EU policy-making. Invoking such competences was rather successful as the chapters on the ECT, MAI and FTA negotiations as well as debates on the EU’s legal competences demonstrated.

Strategic recourse to legal review: The analytical framework finally developed the proposition that the Commission might have used strategic recourse to legal review in order to make the Member States cooperate and delegate international investment policy-making to the EU. In case of dispute over the EU's legal competences with the Member States, the Commission should have called on the ECJ to recognise the EU's full or partial competences in this domain.

Chapter VIII on the evolution of the EU's legal competences identified three instances, where the Commission had strategic recourse to legal review in order to have the ECJ recognise the EU's legal competences and thereby to force the Member States to cooperate and to delegate international investment policy-making to the EU-level. The empirical observations, however, suggest that legal recourse was the least effective tool to advance the EU's involvement in international investment policy. In 1975, it asked for Opinion 1/75 in order to increase pressure on the Member States to accept its proposal for European export policy including a EU BIT program. While the ECJ recognised a general Union competence in this domain, it clarified that the CCP provisions only provided for a harmonisation of national export policies rather than the creation of a European policy. In 1994, the Commission asked for Opinion 1/94 to confirm its highly comprehensive teleological interpretation of the CCP so as to ratify the WTO Agreement. While Opinion 1/94 only indirectly touched on the EU's competence to regulate investment flows, the Commission's teleological interpretation of the CCP implied that investment regulation would fall sooner rather than later under Union competence. It came as a surprise when the ECJ sided with the Member States and advanced a restrictive literal interpretation of the CCP. The Opinion implied that the CCP was unlikely to generally cover investment regulation. Finally, the Commission sought to establish the Union's legal competence over post-establishment treatment of international investments in Opinion 2/92 in 1995. It argued that international investment flows were a modern form of trade. The regulation of international investments should therefore be dealt with under trade policy. Many Member States rejected this claim,

but the ECJ agreed with the Commission's line of argument with regard to extra-EU investment flows. The Commission was, however, politically unable and/or unwilling to use its legal victory to consolidate the EU's role in international investment policy. The Member States continued concluding hundreds of BITs with post-establishment provisions despite Opinion 2/92.

Assessing the conditions for successful Commission entrepreneurship: The empirical assessment suggests that supranational thinking and the concept of Commission entrepreneurship accurately describe the emergence of the EU's international investment policy since the 1980s. The preceding paragraphs suggest that the Commission drew on various strategies to consolidate the EU's role in international investment policy. So which strategies were most effective in extending the EU's de facto as well as legal competences?

Commission entrepreneurship to extend the EU's de facto competences in international investment policy was fairly effective and relied on all above discussed strategies. The most effective strategies to consolidate the EU's role in international investment negotiations were, however, agenda setting, invoking the international trade agenda and fringe competences as well as the strategic use of international negotiating fora. The Commission always used its agenda setting powers and invoked the changed realities of world trade in order to convince the Member States of the necessity to cooperate. The Commission also frequently invoked fringe and implied competences in order to force the Member States to cooperate and to delegate international investment policy-making. At least once – but with considerable success – the Commission made strategic use of different negotiating fora. In contrast to studies by Schmidt (1998) and Woll (2006), strategic recourse to legal review was little helpful to foster cooperation and delegation. It did neither create new effective legal obligations on the Member States to cooperate and to delegate, nor shift Member State preferences in favour of cooperation. To the contrary, the Commission's attempts to use

legal review manifestly deteriorated the working atmosphere and undermined trust as the chapters on the MAI and FTA negotiations reported.

Commission entrepreneurship to extend the EU's legal competences was only little successful for many years. The Commission used its agenda setting powers, pointed to the evolving trade agenda, invoked the EU's long-lasting de facto competences and used legal review to extend the Union's legal competences. However, the Member States resisted the Commission's arguments and pressure to extend the EU's legal competences in numerous IGCs and ECJ proceedings. Only classic spill-overs occasionally extended the EU's legal competences into fringe areas of investment regulation. It was only due to the procedural particularities of the Convention on the Future of Europe (2002/2003) that the Commission's policy entrepreneurship finally succeeded.

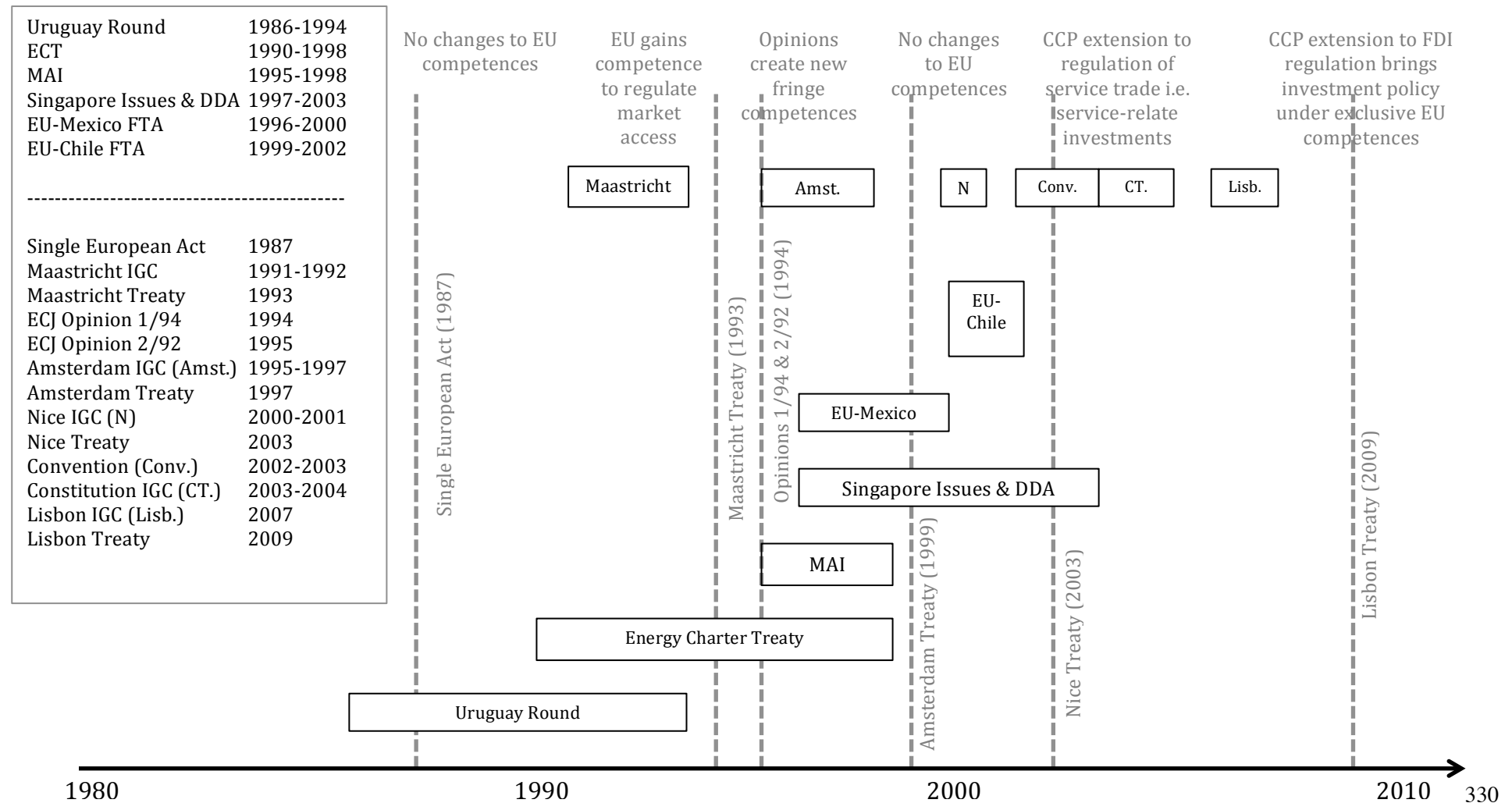
The procedural particularities of the Convention come to play: Yet again, the Commission used agenda setting, referred to the evolving trade agenda and the EU's long-standing de facto competences in international investment regulation during the Convention. As discussed in chapter VIII, the Praesidium followed the Commission's arguments – presented by an allegedly neutral Praesidium member – and decided on its own authority to include a FDI reference into the CCP provisions. Once the reference was in the Treaty draft, it showed difficult to delete it. The transparent, democratic ambition of the Convention required a discussion on the deletion of the reference. Time for discussion was, however, notoriously short and was allocated under investment of considerable political capital. The delegates were mostly politicians and perceived themselves as the founding fathers of a European federal state. They focused on questions of high politics and were unwilling to spend their time and political capital on the many technical demands from domestic administrations. Once the FDI reference had made its way into the final draft treaty, the political costs of deleting it in the consequent IGCs even rose. The draft treaty was after all the product of a democratic process. Hence, the Member States unwillingly accepted the

revised CCP provisions without significant amendments. In conclusion, the Convention method limited Member State and technocratic control over Treaty revisions, which facilitated Commission entrepreneurship.

Table 10.1 Summary table of findings

	Uruguay Round	Energy Charter Treaty	MAI & Singapore Issues	Free Trade Agreements	Legal competences
Sectorial preferences	Limited business interest in investment-related negotiations. Business is hardly informed, organised and mobilised.	No business interest in ECT project. European utilities opposed to liberalisation commitments, limited support for protection provisions.	Limited business interest in MAI negotiations, as European investors primarily want improved investment climate in non-OECD countries.	Moderate business interest in seeing NAFTA-parity in investment liberalisation commitments in EU-Mexico FTA. Strong business interest in EU-Chile FTA to lock in openness of service sectors.	Limited business interest in IGC and legal debates. Mostly generic statements demanding effectiveness of CCP. Partly ambivalent voices for preserving Member State competences.
Government preferences	Strong government interest in cooperation so as to take advantage of collective bargaining power and coherent representation.	Strong government interest in cooperation so as to exert greater influence on transition of Soviet Union and unlock Soviet energy resources.	Limited government interest in cooperating in MAI talks. They prefer speaking on their own behalf as customary in OECD. Moderate government support for cooperation as customary in WTO-based negotiations	Ambivalent government preferences. At first supportive of Commission plan to reach for NAFTA-parity for services and investment; than suddenly sovereignist backlashes.	No government support for an extension of the CCP to investment regulation. The procedural particularities of the Convention significantly weaken Member State opposition and pave the way to a complex package deal comprising an extension of the CCP to FDI reference.
Commission entrepreneurship & employed strategies	Agenda-setting: Campaigning vis-à-vis Member States and business to endorse US proposal for comprehensive round. Evolving trade agenda: Commission invokes evolving trade agenda to justify mandate.	Agenda-setting: Proactive attitude and high ambition enable Commission to acquire a central role in negotiating process. Fringe competence: Commission successfully underlines the EU's fringe and de facto competences over trade and energy policy.	Agenda-setting: Proactive and ambitious attitude enable Commission to play a central role in MAI and WTO. Fringe competences: Commission invokes fringe competences in trade and capital movements to ensure participation in MAI talks. Strategic use of negotiating fora: Commission pushes negotiations into WTO to consolidate its influence and the EU's role in investment policy.	Agenda-setting: Commission is proactive and ambitious to build and then to maintain consensus for ambitious investment disciplines in FTAs with Mexico and Chile. Evolving trade agenda: Commission invokes evolving trade agenda to justify NAFTA-parity with regard to services and investment. It invokes the previously shaped WTO agenda to ensure continued support for investment provisions.	Agenda-setting: Commission puts reform of investment on agenda of IGCs, Convention and ECJ proceedings. Implied competences: Claim that EU is already competent under CCP. Evolving trade agenda: Emphasis on need to bring CCP in line with evolving trade agenda. De facto competences: Insistence on the EU's long-lasting involvement in investment regulation. Legal Review: Attempts to force recognition of EU's legal competences through ECJ.

Figure 10.2: A chronology of the emergence of the EU's international investment policy



10.3 The contributions of this thesis beyond the study of European Integration

The preceding section summarised the empirical observations and assessed the validity of the ex ante hypotheses and of their underlying theoretical schools. So far the thesis focused on the classic supranationalism versus intergovernmentalism debate. The present section extends the analytical debate beyond this narrow focus.

10.3.1 Agency and the transmission of systemic pressures into foreign policy outcomes

The thesis shed light on a remarkable period of Commission entrepreneurship. The Commission's instrumental role in the emergence of the EU's international investment policy and reform of the CCP allows for an important theoretical finding and contribution. It relativises the significance of systemic pressures like the evolving international trade agenda on foreign economic policy. A sizeable neo-realist and merchantalist IPE literature focuses on systemic explanations for countries' foreign economic policy choices (Keohane, 1984; Krasner, 1976; Krasner and Web, 1989, Oatley, 2011; Ravenhill, 2008). Many scholars also seek to explain the EU's foreign economic policy through systemic pressures from third countries, international regimes and global markets (see for instance Dür, 2007; Manger, 2009). They typically suggest that the EU emulates and elaborates on the foreign economic policy approaches of major competitor countries. Many scholars do not examine in detail the causal mechanisms, which link the global economy and foreign economic policies of third countries to changes in EU foreign economic policy. They simply assume that actual or predicted losses in competitiveness and market share on third markets shake up European business and government administrations to adjust EU foreign economic policy in order to mitigate and ward off welfare losses.

The thesis discussed in detail how systemic pressures in the form of an evolving international trade agenda shaped the EU's foreign economic policy. While it lends support to the fundamental assumption that structural pressures shape the EU's foreign economic policy, it adds a new causal 'layer'. The thesis demonstrated how the Commission transmitted such systemic pressures into EU policy-making. The Commission drew the attention of national policy-makers and business communities to systemic pressures and underlined the need to accordingly adjust the EU's foreign economic policy. It seems unlikely that the systemic pressures would have affected EU foreign economic policy to the same degree, if the Commission had not problematised them in EU-internal debates. Chapter VII on the FTA negotiations with Mexico and Chile is a case in point. While the Member States ultimately blocked ambitious investment disciplines in the EU-Mexico FTA negotiations despite strong competitive pressures deriving from the entry into force of NAFTA, they accepted such disciplines in the EU-Chile FTA thanks to the Commission's pedagogical campaigning. The thesis thereby underlines the importance of agency in the transmission of systemic pressures into policy-making debates and, lastly, policy outcomes. Business and governments do not necessarily realise or recognise the need to adjust EU foreign economic policy to changes in the international environment. The Commission – as negotiator and administrator of EU foreign economic policy – must occasionally mobilise decision-makers and stakeholders. In more theoretical terms, systemic pressures emanating from the world economy do not get automatically transmitted but may require agency and policy entrepreneurship to affect policy outcomes.

10.3.2 Historical institutionalism and endogenous agency-driven institutional change

Establishing the significant role of the Commission in the transmission of systemic pressures into foreign economic policy outcomes does not only enhance our understanding of EU foreign economic policy-making. The findings also ameliorate our knowledge of how

institutions like the CCP change over time. The thesis suggests that the Commission not only ‘faithfully’ transmitted structural pressures into policy-making debates and outcomes. It proactively cultivated and reinforced systemic pressures in order to advance its policy and institutional agenda despite Member State hesitation. It for instance pushed multilateral investment negotiations out of the OECD into the WTO so as to consolidate the EU’s role in international investment policy. The Commission then successfully argued that – as the EU was dealing with and pushing for investment disciplines in the WTO – the EU also had to reach for ambitious investment disciplines in bilateral FTA negotiations in order to stay a credible trade actor. Ultimately, the Commission then claimed during IGCs and the Convention that the international trade agenda – as enshrined in the WTO and FTA agendas – had come to include investment disciplines, which required a modernisation of the CCP. So the Commission strategically transmitted, cultivated and manipulated systemic pressures in order to see the EU’s legal competences extended and increase its powers.

These findings are of great value for historical institutionalist research. Historical institutionalism seeks to explain institutional stability and change. Institutions are defined as rules of the game, which shape the preferences and structure the interactions of agents and thereby shape policy outcomes. Historical institutionalism draws on concepts like critical junctures, path dependence and, in particular, positive feedback processes in order to account for episodes of institutional change as well as stability. The concept of positive feedback refers to self-reinforcing social processes and institutions. The proliferation of new technologies like QWERTY keyboards illustrates the argument. The more people get used to QWERTY keyboards, the more difficult it gets over time to change the layout of keyboards. For many years, scholars of historical institutionalism suggested that positive feedback processes should increasingly stabilise institutions over time and keep them on a stable development path. They assumed that institutional change could only come about due to exogenous shocks from the extra-institutional environment. Only exogenous shocks could arguably trigger the breakdown of positive feedback processes and thereby trigger

institutional change (Pierson, 2004; Pierson and Skocpol, 2002; Pollack, 2004; Thelen, 1999). According to this view, the CCP – as an institution in political science terminology – should only change if the international trade regime or adjacent policies change.

Scholars of historical institutionalism have increasingly challenged the assumption that institutional change is necessarily the consequence of exogenous shocks. They express criticism that the analytical focus on ‘exogeneity’ externalises the explanatory challenge. Instead of examining why certain institutions are more prone to change than others, scholars look for explanations elsewhere. Several scholars have therefore developed theorems of endogenous institutional change. Pierson, for instance, has pointed out that the endogenous properties of institutions are crucial in shaping institutional change. He suggests that the trigger of institutional change may lie outside of an examined institution, but that the endogenous properties of this institution consequently determine how it changes (Pierson, 2004, pp. 83–87). Deeg goes one step further. He argues that positive feedback processes might stabilise institutions in the short- and medium-term. They might, however, cause institutional change in the long run. Deeg illustrates his argument with regard to the German and Italian financial system. He argues that the intimate ties and cross-ownership between banks and industry in these countries stabilised the German and Italian financial system in the short and medium-term, but caused a steady decline in banking profits in the long run. In consequence, German and Italian banks started looking for new business opportunities, which ultimately set the German and Italian financial sector on entirely new development paths (Deeg, 2005, 2001). Streeck, Thelen and Mahoney, finally, underline that institutions are competitive, social systems. They govern the interactions of agents. While some agents might feel that the institutional status quo benefits them, others might favour institutional reform in order to enhance their power and/or welfare. It follows from this ‘social’ view that institutions are likely to be subjected to endogenous contestation and pressure for reform (Mahoney and Thelen, 2010; Streeck and Thelen, 2005).

The observations from the emergence of the EU's international investment policy confirm Streek, Thelen and Mahoney's argument on endogenous contestation and institutional reform. The observations, moreover, shed light on how change-oriented agents might pursue their objective and push for a reform of institutions. The Commission clearly contested the setup of the CCP prior to Lisbon. It wanted to reform the CCP for functional reasons but also in order to extend its powers vis-à-vis the Member States in foreign economic policy. The Member States, on the other hand, were unwilling to reform the CCP and to cede powers to the Commission and the EU in this domain. In order to attain its objective, the Commission consequently shaped the extra-institutional environment – and in particular the international trade agenda – to increase functional pressures on the Member States to accept a reform of the CCP. In more abstract terms, the Commission acted as a reform-oriented agent, which exploited and promoted shifts in the extra-institutional environment in order to advance a reform of the contested institution.

10.3.3 A note on methodology – Integration as a process of daily policy-making and intergovernmental bargaining

The thesis documented an intriguing episode of Commission entrepreneurship. As discussed above, it ameliorates our theoretical understanding of EU foreign economic policy-making, institutional change and European Integration. A brief methodological note is advisable here. The thesis could not have delivered these insights if it had opted for the methodological standard approach in European Integration research. Most scholars typically seek to explain either Member State cooperation in daily policy-making or outcomes of grand intergovernmental bargains on Treaty revisions during IGCs. They seek to disentangle these two policy-making spheres in order to lower the level of 'noise'. As this thesis showed, Member State cooperation in daily policy-making indeed follows a different logic than grand intergovernmental bargains in IGCs. The analytical separation of these spheres thereby allows for the generation of more elegant and parsimonious theories of European Integration

like Moravcsik's liberal intergovernmentalism. At the same time, however, researchers trade off empirical depth.

This thesis opted for greater empirical depth. It deliberately combined the analysis of daily policy-making and grand intergovernmental bargains on Treaty revisions. It built on the assumption that temporary Member State cooperation in daily policy-making and grand intergovernmental bargains are interdependent. The EU's de facto competences should shape the evolution of the EU's legal competences in a given policy-domain. Put differently, focusing only on IGC debates is likely to blur the long-term causalities shaping the EU's legal competences. What is more, if the purpose of research is to explain European Integration and the EU's growing role in new policy domains, it is misleading to only focus on grand intergovernmental bargains in IGCs. European Integration progresses most of the time through informal policy-making and temporary Member State cooperation rather than grand intergovernmental bargains in IGCs and Treaty revisions (see Klein, 2013).

The greater empirical depth and comprehensive analytical approach of this thesis drew a diverse and intriguing picture of all examined explanatory factors. Most significantly, it unveiled a whole array of Commission attempts and strategies to extend the EU's de facto and legal competences. It found a remarkable level of business lethargy and pointed to decisive while ambivalent government preferences. The methodological standard approach could not have produced these insights. It would have led to incomplete or even erroneous conclusions regarding the emergence of the EU's international investment policy. This thesis thus makes the plea to approach European Integration through a broader analytical lens. A broad analytical approach is, in particular, necessary if our empirical understanding of a policy domain – as is the case for the EU's involvement in international investment policy – is as yet limited. Theoretical parsimony is certainly to be welcomed, but only if it allows us to formulate correct assumptions about reality.

10.3.4 Business and the international political economy

After this excursion to questions of methodology and research design, it is appropriate to dwell more on the remarkable lethargy of European business in international investment policy and the theoretical implications of this finding. The thesis showed that business was little interested in international investment policy per se and even less in debates on the communitarisation of international investment policy-making. Only negotiations on investment liberalisation commitments occasionally mobilised European investors and triggered business lobbying. Negotiations on post-establishment treatment and investment protection did not trigger any noteworthy business interest.

The finding has a noteworthy theoretical implication for IPE research. The international investment regime seems to be a bureaucracy-driven, neo-mercantilist rather than business-driven, liberal regime. Many critiques of the international investment regime assume that multinational enterprises (MNEs) are the main shapers and promoters of IIAs (Gus Van Harten, 2007; Monibot, 2013; Pauly et al., 2014; Yackee, 2009). MNEs arguably push governments into signing IIAs in order to encounter better investment conditions abroad and to bring claims against host countries before international arbitration bodies rather than national courts. The findings of this thesis suggest – at least with regard to European companies – that this claim is not valid. Government administrations seem to quite freely determine the content and partner countries for IIAs. National investment policy officials interviewed for this thesis confirmed this assessment. They reported to hardly ever talk to business representatives on IIAs. To determine potential partner countries for IIAs, they reported to examine national outward investment statistics. They also indicated that if they received applications for investment guarantees, they checked whether a BIT with the concerned host country was in place. If not, the officials would approach the country and propose the conclusion of a BIT in order to keep the exposure of the taxpayer under national

investment guarantee schemes low (Interviews, Berlin, 16 & 17 February 2012). While these findings on the drivers behind the conclusion of BITs are only of a preliminary nature, they raise important questions for future IPE research. How can one explain the existence of some 3,500 IIAs today? If not business, who pushes for the conclusion of these agreements within and outside governments? Who defines the content of these agreements? Why do governments of capital-exporting economies pursue BIT programs and arguably limit their regulatory space under public international law, if business does not care? And finally, and perhaps more importantly, what is the role of international investment lawyers and arbitrators in the proliferation of IIAs and the evolution of the international investment regime?

The finding also has important policy-making implications. The lack of business interest in international investment policy – and in particular in post-establishment treatment and protection standards – suggests that policy-makers can re-balance state and investor rights under IIAs without facing high opportunity costs in the form of foregone investment activity and economic growth. This insight is important for the EU's approach to IIAs in general and to the negotiations on TTIP and CETA in particular. Some Member States cling onto their old-fashioned approaches to investment protection and demand the Commission to copy their 'gold standard' BITs. The Commission, on the other hand, cautions that the EU as a whole is also a capital importer. It must ensure that European agreements are not exclusively tailored to the needs of capital-exporting Member States, but also protect the right to regulate of capital-importing Member States. The findings of this thesis may mediate in this – at times heated and ideological – controversy. They imply that the EU might indeed re-balance state and investor rights without having to fear a negative impact on investment activity.

Finally, the fact that business was little informed and implicated in international investment policy-making arguably *inter alia* due to its technicality raises generally questions about the role of business in today's global political economy. All major barriers to international trade

and economic integration are of considerable technicality nowadays and their dismantling may have only uncertain welfare effects. If business is unable to apprehend their economic importance and/or unwilling to invest resources so as to develop and to defend informed positions on such questions, one must indeed rethink our current perception of the global political economy as a classic liberal regime. Rather it seems that we live in a neo-mercantilist era, where powerful government administrations design the global political economy without proactive societal input and initiative. To conclude, more research on the preference formation and influence of societal groups and business in modern ‘regulatory’ foreign economic policy is needed.

10.3.5 Concluding thoughts and outlook

The EU’s international investment policy is bound to become a major external policy of the EU in the coming years. Even though the EU is now indisputably in the driver’s seat and the Member States have lost their legal ability to individually act in this policy domain, many legal issues and political questions remain unanswered as yet. What will be the main priorities of the EU’s future international investment policy? What will future European IIAs actually look like? How will the EU deal with questions of shared financial liability between Member States and the EU under ISDS in practice? Are other Member States liable in case one Member State – in the context of a sovereign default for instance – refuses to pay compensation following an ISDS award? How can interpretative coherence of EU law in ISDS proceedings be ensured, if the Member States insist on defending their own cases? And how should the customary screening of inward investments for national security purposes be dealt with? These questions may appear dry and technical – notably to political scientists – but might prove to be of considerable political salience in the years to come.

What is more, not only the EU’s new policy but also the international investment regime per se is likely to move much more into the focus of the academic and political debate in the

coming years. The current debates on investment regulation under TTIP are likely to be only a foretaste. The steady increase in investment arbitration proceedings also against OECD countries since the mid-1990s, the undeniable flaws of today's ISDS procedures and the sizeable awards to investors will transform international investment regulation into a fashionable academic and 'hot' political issue. The pending case of *Vattenfall (Sweden) vs Germany (II)* (Bernasconi-Osterwalder and Hoffmann, 2012), concerning the country's nuclear phase-out, as well as the recent enormous award of some \$50bn in the case *Yukos Universal Limited (Isle of Man) vs Russia* (ITA Law, 2014) show the general public quite plainly the significant power of arbitration bodies and influence of the international investment regime on domestic politics. In the light of this increased attention, the international investment regime is likely to undergo profound changes in the next few years. The EU is bound to play an important role in this process as the world's biggest emitter and recipient of international investment flows.

The thesis is likely to help us better understand both issue areas – the further development of the EU's international investment policy and the EU's role in the evolving global investment regime. It closes a significant gap in the IPE literature and research on EU foreign economic policy. It comprehensively documented and explained the EU's role in international investment regulation since the 1980s. It shed light on the key actors, their structural preferences and strategies in international investment policy-making. This knowledge should be a solid basis for responding to some of the questions raised, and facilitate future IPE research and political discussions.

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Annexes

Annexe I: Confidential list of interviewees

Date	Country / Organisation	Institution	Location of interview	Position	Name
05.10.11	EU	European Commission, DG Trade	Brussels		
12.10.11	EU	European Commission, DG Trade	Brussels		
14.10.11	France	Sciences Po	Paris		
19.10.11	USA	State Department & American Chamber of Commerce	Brussels		
19.11.11	OECD	Economics Department	Paris		
11.01.12	EU	European Commission, DG Trade	Brussels		
12.01.12	Belgium	Wilmer Hale	Brussels		
13.01.12	EU	European Commission, DG Trade	Brussels		
18.01.12	EU	European Commission, DG Trade	Brussels		
26.01.12a	EU	BusinessEurope	Brussels		
26.01.12b	Sweden	Ministry of Foreign Affairs	Telephone		
16.02.12	Germany	German Federation of Industries	Berlin		
17.02.12	Germany	German Ministry of Economics	Berlin		
18.07.12	EU	European Commission, Cabinet (trade)	Brussels		
24.07.12a	EU	European Commission, DG Trade	Brussels		
24.07.12b	EU	European Commission, DG Trade	Brussels		
25.07.12	EU	European Commission, DG Trade	Brussels		
01.10.12a	OECD / USA	Investment Department / State Department	Paris		
01.10.12b	OECD	Investment Department	Paris		
12.06.13	United Kingdom / France	International Chamber of Commerce	London		
13.06.13	EU	European Commission, DG Trade	Telephone		
17.06.13	Germany	Ministry of Economics	Telephone		
03.07.13	Austria	Ministry of Economics	Telephone		
04.09.13	Poland	Leviathan	Email		
24.09.13	EU	European Commission, DG Trade	Brussels		

25.09.13a	EU	European Commission, DG Relex	Brussels		
25.09.13b	Belgium	European Services Forum	Brussels		
26.09.13	United Kingdom	Confederation of British Industries	Telephone		
27.09.13a	Spain	Confederación Española de Organizaciones Empresariales	Brussels		
27.09.13b	Italy	Confindustria	Brussels		
03.10.13	France	Mouvement des entreprises de France	Paris		
11.10.13	United Kingdom / EU	University of Oxford / DG Trade	Oxford		
28.10.13	EU	European Commission, DG Relex	Telephone		
04.11.13	OECD	Trade Department	Paris		
14.11.13	EU	European Commission, DG Trade	Telephone		
13.01.14	OECD	Investment Department	Email		
16.01.14	EU	DG Energy	London		
27.01.14	Belgium	European Commission, DG Trade	Telephone		
04.02.14a	Norway	Ministry of Finance	Telephone		
04.02.14b	Energy Charter Treaty	Secretariat, Legal Unit	Telephone		
02.04.14	United Kingdom	CityUK	London		

Annexe II: Code book for Chapter IX

Definition of investment: The following labels are attributed to articles on the minimum treatment standard. Unlimited asset-based definition = 1; Open-list definition with exceptions = 2.

Minimum treatment standard: The following labels are attributed to articles on the minimum treatment standard. CIL = 1; CIL + other standard = 2; FET + other standard = 3; FET = 4; Any other standard = 5.

Expropriation: The following labels are attributed to articles on expropriation. Prohibition of direct and indirect expropriation on the basis of a broad definition of expropriation = 1; Prohibition of direct and indirect expropriation on the basis of a restrictive and detailed definition = 2.

Umbrella clauses: The following labels are attributed to the diverging casts of umbrella clauses. No umbrella clause = 1; conditional umbrella clause = 2; generally unconditional umbrella clause = 3. If countries have concluded several BITs in one year, the aggregate label reflects the average label.

Access to investor-to-state arbitration: The following labels are attributed to the articles on ISDS provisions. Unlimited access to arbitration = 1 ; Limited access to arbitration = 2 (e.g. fork in the road clause, wait for until ruling or first instance court of host country before access to arbitration, only possible to file arbitration request before first ruling of host country court, exhaustion of local remedies); No access to arbitration = 3.

Sectoral carve-outs: The labels are cardinal numbers. The label of a BIT is the count of economic sectors and economic activities excluded from NT and MFN obligations under the BIT or the overall scope of the agreement. For instance: if a BIT does not contain sectoral

carve-outs, the label is 0. If a BIT excludes financial services and maritime transport from the MFN and NT obligation, the label is 2. If a BIT contains a complex schedule of carve-outs, it is indicated in the form of x.

Word count of BITs: The labels are cardinal numbers and results of word counts. All words of the BIT are counted. For instance: if a BIT contains 2,000 words, the label is 2,000. While many BITs are available in the form of text-enabled PDF or word documents allowing for a quick word count, some BITs are only available in plain PDF documents excluding an automatic word count. Such BITs are ignored in the database and carry the label 0.

Asterisk (*): It indicates that the observations refer to the investment chapter of an FTA rather than an alone-standing BIT.

US BITs

<u>Year of signature</u>	<u>Country</u>	<u>Word Count</u>	<u>Definition of investment</u>	<u>Minimum treatment</u>	<u>Umbrella clause</u>	<u>Expropriation</u>	<u>Access to ISDS</u>	<u>Carve-outs</u>
1983	Senegal	5614	1	3	3	1	2	14
1984	DR Congo	5685	1	3	3	1	2	16
1985	Morocco	3985	1	3	1	1	2	13
1985	Turkey	3654	1	3	3	1	2	11
1986	Bangladesh	5700	1	3	3	1	2	13
1986	Cameroon	4688	1	3	3	1	2	13
1986	Egypt	5679	1	3	1	1	2	13
1986	Grenada	3051	1	3	3	1	2	13
1990	Congo	5057	1	3	3	1	2	16
1990	Poland	6223	1	3	3	1	2	19
1990	Tunisia	3431	1	3	3	1	2	15
1991	Argentina	4710	1	3	3	1	2	12
1991	Slovakia	5617	1	3	3	1	2	20
1991	Sri Lanka	4407	1	3	3	1	2	20
1992	Armenia	3249	1	3	3	1	2	17
1992	Bulgaria	3938	1	3	3	1	2	20
1992	Kazakhstan	3756	1	3	3	1	2	19
1992	Panama	4578	1	3	3	1	2	11
1992	Romania	5528	1	3	3	1	2	21
1993	Ecuador	4452	1	3	3	1	2	22
1993	Kyrgyzstan	3700	1	3	3	1	2	21
1993	Moldova	4585	1	3	3	1	2	21
1994	Estonia	3866	1	3	3	1	2	20
1994	Georgia	3768	1	3	1	1	2	9
1994	Jamaica	3865	1	3	3	1	2	20
1994	Mongolia	3599	1	3	3	1	2	18
1994	Trinidad and Tobago	4389	1	3	3	1	2	12
1994	Ukraine	4200	1	3	3	1	2	22
1995	Honduras	4105	1	3	1	1	2	17
1995	Latvia	3993	1	3	3	1	2	16
1995	Albania	3984	1	3	1	1	2	13
1996	Croatia	4438	1	3	1	1	2	12
1997	Azerbaijan	5108	1	3	1	1	2	6
1997	Bahrain	3961	1	3	1	1	2	7
1997	Jordan	4238	1	3	1	1	2	10
1998	Lithuania	4314	1	3	3	1	2	18
1998	Mozambique	4138	1	3	3	1	2	10
2001	Bolivia	4226	1	3	1	1	2	4
2003	Czech Republic	5157	1	3	3	1	2	19
2003	Chile*	3319	2	2	1	2	2	x
2003	Singapore*	3926	2	2	1	2	2	x

2004	Australia*	4394	2	2	1	2	3	x
2004	Costa Rica*	5363	2	2	1	2	2	x
2004	Morocco*	4691	2	2	1	2	2	x
2004	Nicaragua *	5901	2	2	1	2	2	x
2005	Uruguay	7873	2	2	1	2	2	x
2006	Colombia*	5215	2	2	1	2	2	x
2006	Oman*	7118	2	2	1	2	2	x
2007	South Korea*	5953	2	2	1	2	2	x
2007	Panama*	6058	2	2	1	2	2	x
2007	Peru*	5686	2	2	1	2	2	x
2008	Rwanda	13439	1	2	1	2	2	x

Canadian BITs

<u>Year of signature</u>	<u>Country</u>	<u>Word Count</u>	<u>Definition of investment</u>	<u>Minimum treatment</u>	<u>Umbrella clause</u>	<u>Expropriation</u>	<u>Access to ISDS</u>	<u>Carve-outs</u>
1989	Russia	2437	1	3	1	1	1	0
1990	Poland	2519	1	3	1	1	1	0
1991	Argentina	2937	1	3	1	1	2	0
1991	Hungary	2637	1	3	1	1	1	0
1994	Ukraine	5655	2	3	1	1	2	11
1995	Philippines	5990	1	3	1	1	2	7
1995	Trinidad and Tobago	5726	2	3	1	1	2	7
1996	Barbados	3223	2	3	1	1	2	6
1996	Ecuador	5631	2	3	1	1	2	7
1996	Egypt	5702	2	3	1	1	2	7
1996	Panama	5842	2	3	1	1	2	5
1996	Venezuela	6142	2	3	1	1	2	11
1997	Armenia	5554	2	3	1	1	2	7
1997	Croatia	5784	2	3	1	1	2	11
1997	Lebanon	5945	2	3	1	1	2	10
1997	Thailand	6332	2	3	1	1	2	11
1997	Uruguay	5720	2	3	1	1	2	10
1998	Costa Rica	6370	2	3	1	1	2	11
1999	El Salvador	6191	2	3	1	1	2	10
2006	Peru	14929	2	2	1	2	2	2
2009	Czech Republic	6561	1	2	1	2	2	1
2009	Jordan	15696	2	2	1	1	2	x
2009	Latvia	8774	2	2	1	2	2	7
2009	Romania	9081	2	2	1	2	2	7
2010	Slovakia	6303	1	2	1	2	2	1
2011	Kuwait	10738	2	2	1	1	2	x
2012	China	10012	2	2	1	2	2	x
2013	Tanzania	13828	2	2	1	2	2	x

2013	Benin	12965	2	2	1	2	2	x
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German BITs

<u>Year of signature</u>	<u>Country</u>	<u>Word count</u>	<u>Definition of investment</u>	<u>Minimum treatment</u>	<u>Umbrella clause</u>	<u>Expropriation</u>	<u>Access to ISDS</u>	<u>Carve-outs</u>
1980	Papua New Guinea	0	1	3	3	1	3	0
1981	Bangladesh	0	1	3	3	1	3	0
1982	Lesotho	2641	1	3	3	1	3	0
1982	Mauretania	0	1	3	3	1	3	0
1982	Panama	0	1	3	3	1	1	0
1984	Burundi	3311	1	3	3	1	3	0
1984	Dominica	0	1	3	3	1	3	0
1984	Somalia	0	1	3	3	1	3	0
1985	Saint Lucia	3077	1	3	3	1	1	0
1986	Bulgaria	1235	1	3	3	1	1	0
1986	Nepal	0	1	3	3	1	1	0
1986	Saint Vincent and Grenadines	0	1	3	3	1	3	0
1987	Bolivia	3471	1	3	3	1	1	0
1987	Uruguay	0	1	3	3	1	1	0
1989	Guyana	0	1	3	3	1	1	0
1989	Hungary	0	1	x	3	1	1	0
1989	Poland	2475	1	3	3	1	1	0
1989	Russia	3167	1	3	3	1	1	0
1989	Serbia	3025	1	3	3	1	1	0
1990	Cape Verde	2168	1	3	3	1	1	0
1990	Czechoslovakia	0	1	3	3	1	X	x
1990	Swaziland	0	1	3	3	1	1	0
1991	Albania	2100	1	3	3	1	1	0
1991	Argentina	0	1	3	3	1	2	0
1991	Chile	4102	1	3	3	1	1	0
1991	Mongolia	2042	1	3	3	1	1	0
1992	Estonia	0	1	3	3	1	1	0
1992	Jamaica	0	1	3	3	1	1	0
1992	Kazakhstan	2012	1	3	3	1	1	0
1992	Lithuania	872	1	3	3	1	1	0
1992	Slovakia	0	1	3	3	1	1	0
1993	Belarus	2025	1	3	3	1	1	0
1993	Georgia	0	1	3	3	1	1	0
1993	Latvia	1324	1	3	3	1	1	0
1993	Paraguay	0	1	3	3	1	1	0
1993	Slovenia	0	1	3	3	1	1	0
1993	Uzbekistan	0	1	3	3	1	1	0

1994	Barbados	0	1	3	3	1	1	0
1994	Costa Rica	2134	1	3	3	1	1	0
1994	Kuwait	0	1	3	3	1	1	0
1994	Moldova	3249	1	3	3	1	1	0
1994	Namibia	0	1	3	3	1	1	0
1995	Armenia	0	1	3	3	1	1	0
1995	Azerbaijan	0	1	3	3	1	1	0
1995	Ghana	2211	1	3	3	1	1	0
1995	Honduras	0	1	3	3	1	1	0
1995	India	0	1	3	2	1	1	0
1995	Peru	3096	1	3	3	1	1	0
1995	South Africa	0	1	3	3	1	1	0
1995	Zimbabwe	0	1	3	3	1	1	0
1996	Algeria	0	1	3	3	1	1	0
1996	Burkina Faso	0	1	3	3	1	1	0
1996	Cuba	0	1	3	3	1	1	0
1996	Ecuador	0	1	3	3	1	1	0
1996	Hong Kong	2568	1	3	3	1	1	0
1996	Kenya	0	1	3	3	1	1	0
1996	Laos	0	1	3	3	1	1	0
1996	Nicaragua	0	1	3	3	1	1	0
1996	Qatar	0	1	3	3	1	1	0
1996	Romania	0	1	3	3	1	1	0
1996	Saudi Arabia	0	1	3	3	1	1	0
1996	Ukraine	2139	1	3	3	1	1	0
1996	UAE	0	1	3	3	1	1	0
1996	Venezuela	0	1	3	3	1	1	0
1996	Vietnam	0	1	3	3	1	1	0
1997	Croatia	0	1	3	3	1	1	0
1997	El Salvador	0	1	3	3	1	1	0
1997	Kyrgyzstan	0	1	3	3	1	1	0
1997	Lebanon	3724	1	3	3	1	1	0
1997	Philippines	0	1	3	3	1	1	0
1997	Turkmenistan	0	1	3	3	1	1	0
1998	Antigua and Barbuda	0	1	3	3	1	1	0
1998	Gabon	0	1	3	3	1	1	0
1998	Mexico	3249	2	3	2	1	2	0
1999	Cambodia	0	1	3	3	1	1	0
2000	Botswana	0	1	3	3	1	1	0
2000	Nigeria	0	1	3	3	1	1	0
2000	Sri Lanka	0	1	3	3	1	1	0
2001	Bosnia-Herzegovina	0	1	3	3	1	1	0
2001	Morocco	0	1	3	3	1	1	0
2001	Mozambique	0	1	3	3	1	1	0
2002	Ethiopia	0	1	3	3	1	2	0

2002	Iran	0	1	3	3	1	2	0
2003	China	2857	1	3	3	1	1	0
2003	Indonesia	0	1	3	3	1	2	0
2003	Tajikistan	0	1	3	3	1	1	0
2004	Libya	0	1	3	3	1	1	0
2004	Thailand	0	1	3	3	1	1	0
2005	Afghanistan	0	1	3	3	1	1	0
2005	Egypt	0	1	3	3	1	1	0
2005	Timor Leste	0	1	3	3	1	1	0
2006	Guinea	0	1	3	3	1	1	0
2006	Madagascar	0	1	3	3	1	1	0
2006	Trinidad and Tobago	0	1	3	3	1	2	0
2007	Bahrain	0	1	3	3	1	1	0
2007	Jordan	0	1	3	3	1	1	0
2007	Oman	0	1	3	3	1	1	0

British BITs

<u>Year of signature</u>	<u>Country</u>	<u>Word count</u>	<u>Definition of investment</u>	<u>Minimum treatment</u>	<u>Umbrella clause</u>	<u>Expropriation</u>	<u>Access to ISDS</u>	<u>Carve-outs</u>
1980	Bangladesh	0	1	3	3	1	1	0
1980	Philippines	0	1	3	3	1	1	0
1980	Senegal	0	1	3	3	1	1	0
1980	Sril Lanka	0	1	3	3	1	1	0
1981	Malaysia	0	1	3	3	1	1	0
1981	Papua New Guinea	0	1	3	3	1	1	0
1981	Paraguay	0	1	3	3	1	1	0
1982	Belize	0	1	3	3	1	1	0
1982	Cameroon	0	1	3	3	1	1	0
1982	Costa Rica	2733	1	3	3	1	1	0
1982	Yemen	0	1	3	3	1	1	0
1983	Panama	0	1	3	3	1	1	0
1983	Saint Lucia	0	1	3	3	1	1	0
1985	Haiti	0	1	3	3	1	1	0
1986	China	0	1	3	3	1	1	0
1986	Malta	2625	1	3	3	1	1	0
1986	Mauritius	0	1	3	3	1	1	0
1987	Antigua and Barbuda	0	1	3	3	1	1	0
1987	Benin	0	1	3	3	1	1	0
1987	Dominica	0	1	3	3	1	1	0
1987	Hungary	0	1	3	3	1	1	0
1987	Jamaica	0	1	3	3	1	1	0
1988	Bolivia	0	1	3	3	1	1	0
1988	Grenada	0	1	3	3	1	1	0

1989	Ghana	0	1	3	3	1	1	0
1989	Guyana	0	1	3	3	1	1	0
1989	Congo	0	1	3	3	1	1	0
1989	Russia	0	1	3	3	1	1	0
1989	Tunisia	0	1	3	3	1	1	0
1990	Argentina	0	1	3	3	1	2	0
1990	Burundi	0	1	3	3	1	1	0
1990	Czech Republic	0	1	3	3	1	1	0
1990	Mozambique	1713	1	3	3	1	1	0
1990	Nigeria	0	1	3	3	1	1	0
1991	Bahrain	0	1	3	3	1	1	0
1991	Mongolia	0	1	3	3	1	1	0
1991	Turkey	0	1	3	3	1	1	0
1992	UAE	0	1	3	3	1	1	0
1993	Armenia	0	1	3	3	1	1	0
1993	Barbados	0	1	3	3	1	1	0
1993	Honduras	0	1	3	3	1	1	0
1993	Lithuania	0	1	3	3	1	1	0
1993	Nepal	0	1	3	3	1	1	0
1993	Peru	0	1	3	3	1	1	0
1993	Trinidad and Tobago	0	1	3	3	1	1	0
1993	Ukraine	0	1	3	3	1	1	0
1993	Uruguay	0	1	3	3	1	2	0
1994	Albania	0	1	3	3	1	1	0
1994	Belarus	0	1	3	3	1	1	0
1994	Ecuador	0	1	3	3	1	1	0
1994	Estonia	0	1	3	3	1	1	0
1994	India	0	1	3	3	1	1	0
1994	Kyrgyzstan	0	1	3	3	1	1	0
1994	Latvia	0	1	3	3	1	1	0
1994	Pakistan	0	1	3	3	1	1	0
1994	Tanzania	0	1	3	3	1	1	0
1995	Bulgaria	0	1	3	3	1	1	0
1995	Cote d'Ivoire	0	1	3	3	1	1	0
1995	Cuba	0	1	3	3	1	1	0
1995	Georgia	0	1	3	3	1	1	0
1995	Kazakhstan	0	1	3	3	1	1	0
1995	Laos	0	1	3	3	1	1	0
1995	Oman	0	1	3	3	1	1	0
1995	Swaziland	0	1	3	3	1	1	0
1995	Turkmenistan	1179	1	3	3	1	1	0
1995	Venezuela	0	1	3	3	1	1	0
1995	Zimbabwe	0	1	3	3	1	1	0
1996	Azerbaijan	0	1	3	3	1	1	0
1996	Chile	0	1	3	3	1	2	0

1996	Moldova	0	1	3	3	1	1	0
1996	Nicaragua	2978	1	3	3	1	1	0
1996	Slovenia	0	1	3	3	1	1	0
1997	Croatia	0	1	3	3	1	1	0
1997	South Africa	0	1	3	3	1	1	0
1997	Tonga	0	1	3	3	1	1	0
1998	Hong Kong	2443	1	3	3	1	1	0
1998	Uganda	0	1	3	3	1	1	0
1999	El Salvador	2867	1	3	3	1	1	0
1999	Ethiopia	3053	1	3	3	1	2	0
1999	Kenya	0	1	3	3	1	1	0
1999	Lebanon	1971	1	3	3	1	1	0
2000	Angola	2183	1	3	3	1	1	0
2000	Sierra Leone	1595	1	3	3	1	1	0
2002	Bosnia-Herzegovina	1749	1	3	3	1	1	0
2002	Vietnam	3165	1	3	3	1	1	0
2003	Vanuatu	1952	1	3	3	1	1	0
2006	Mexico	3552	2	2	1	2	2	0
2010	Colombia	0	2	2	1	1	2	0

Dutch BITs

<u>Year of signature</u>	<u>Country</u>	<u>Word count</u>	<u>Definition of investment</u>	<u>Minimum treatment</u>	<u>Umbrella clause</u>	<u>Expropriation</u>	<u>Access to ISDS</u>	<u>Carve-outs</u>
1984	Sri Lanka	2390	1	3	1	1	1	0
1984	Malta	2498	1	4	1	1	1	0
1985	Yemen	1107	1	3	1	1	1	0
1985	Philippines	1883	1	3	3	1	1	0
1986	Turkey	1585	1	3	3	1	1	0
1987	Hungary	1904	1	3	3	1	1	0
1988	Uruguay	1353	1	3	3	1	2	0
1988	Pakistan	1958	1	3	1	1	1	0
1989	Russia	1287	1	3	3	1	1	0
1989	Ghana	1508	1	3	3	1	1	0
1991	Slovakia	1827	1	3	3	1	1	0
1991	Jamaica	2312	1	3	3	1	1	0
1991	Czech Republic	2187	1	3	3	1	1	0
1991	Cape Verde	2299	1	4	3	1	1	0
1992	Poland	2349	1	3	3	1	1	0
1992	Paraguay	2164	1	3	3	1	1	0
1992	Nigeria	2078	1	3	3	1	1	0
1992	Hong Kong	2067	1	3	3	1	1	0
1992	Estonia	2123	1	3	3	1	1	0
1992	Bolivia	2203	1	3	1	1	1	0

1992	Argentina	2672	1	4	3	1	2	0
1993	Venezuela	1974	1	3	3	1	1	0
1994	Vietnam	1947	1	3	3	1	1	0
1994	Ukraine	1345	1	3	3	1	1	0
1994	Romania	1917	1	3	3	1	2	0
1994	Peru	2279	1	3	3	1	1	0
1994	Lithuania	2036	1	3	3	1	1	0
1994	Latvia	1695	1	3	3	1	1	0
1994	Indonesia	2884	1	3	3	1	1	0
1994	Bangladesh	1990	1	3	3	1	1	0
1994	Albania	2263	1	3	3	1	1	0
1995	South Africa	2663	1	3	3	1	1	0
1995	Mongolia	1774	1	3	3	1	1	0
1995	Moldova	2251	1	3	3	1	1	0
1995	India	2518	1	3	2	1	1	0
1995	Belarus	2087	1	3	3	1	1	0
1996	Zimbabwe	2613	1	3	3	1	1	0
1996	Uzbekistan	2060	1	3	3	1	1	0
1996	Slovenia	2490	1	3	3	1	1	0
1996	Egypt	2363	1	3	3	1	1	0
1997	Jordan	2369	1	3	3	1	1	0
1998	Tunisia	1782	1	3	3	1	1	0
1998	Mexico	2711	2	3	2	1	2	0
1998	Macedonia	2202	1	3	3	1	1	0
1998	Georgia	2257	1	3	3	1	1	0
1998	Croatia	2248	1	3	3	1	1	0
1998	Chile	2831	1	3	2	1	2	0
1998	Brazil	2640	1	3	3	1	2	0
1998	Bosnia- Herzegovina	2647	1	3	3	1	1	0
1999	El Salvador	2524	1	3	3	1	2	0
1999	Ecuador	1749	1	3	3	1	1	0
1999	Cuba	2527	1	3	3	1	1	0
1999	Costa Rica	2916	1	3	3	1	2	0
1999	Bulgaria	2876	1	3	3	1	2	0
2000	Uganda	1872	1	3	3	1	1	0
2000	Panama	2350	1	3	3	1	1	0
2000	Nicaragua	1968	1	3	3	1	1	0
2000	China	2250	1	3	3	1	1	0
2000	Burkina Faso	2232	1	3	3	1	1	0
2001	Tanzania	0	1	3	3	1	1	0
2001	Mozambique	2187	1	3	3	1	1	0
2001	Kuwait	2834	1	3	3	1	1	0
2001	Honduras	2478	1	3	3	1	1	0
2001	Guatemala	2244	1	3	3	1	1	0

2001	Benin	2210	1	3	3	1	1	0
2002	Tajikistan	2118	1	3	3	1	1	0
2002	Namibia	2211	1	3	3	1	1	0
2002	Lebanon	2457	1	3	3	1	1	0
2002	Kazakhstan	2237	1	3	3	1	1	0
2002	Gambia	1772	1	3	3	1	1	0
2002	Belize	2272	1	3	3	1	1	0
2003	Zambia	2360	1	3	3	1	1	0
2003	South Korea	1626	1	4	1	1	3	0
2003	Mali	2498	1	3	3	1	1	0
2003	Malawi	1973	1	3	3	1	1	0
2003	Laos	2305	1	3	3	1	1	0
2003	Ethiopia	2208	1	3	1	1	1	0
2003	Eritrea	0	1	3	3	1	1	0
2003	Cambodia	2386	1	3	3	1	1	0
2005	Suriname	0	1	3	3	1	1	0
2005	Armenia	2441	1	3	3	1	1	0
2006	Dominican Republic	0	1	3	3	1	1	0
2007	Serbia	2981	1	3	3	1	1	0
2007	Burundi	0	1	3	3	1	1	0
2007	Bahrein	2289	1	3	3	1	1	0
2007	Algeria	2239	1	4	3	1	1	0
2009	Oman	1903	1	3	1	1	1	0

Polish BITs

<u>Year of signature</u>	<u>Country</u>	<u>Word count</u>	<u>Definition of investment</u>	<u>Minimum treatment</u>	<u>Umbrella clause</u>	<u>Expropriation</u>	<u>Access to ISDS</u>	<u>Carve-outs</u>
1987	Belgium & Luxembourg	0	1	3	1	1	1	0
1987	Great Britain	0	1	3	3	1	1	0
1988	Austria	0	1	4	3	1	1	0
1988	China	1904	1	3	1	1	3	0
1989	France	0	1	3	1	1	1	0
1989	Germany	3644	1	3	3	1	1	0
1989	Italy	0	1	4	1	1	1	0
1989	South Korea	1534	1	3	1	1	1	0
1989	Sweden	0	1	3	1	1	1	0
1989	Switzerland	1401	1	4	3	1	1	0
1990	Canada	2519	1	3	1	1	1	0
1990	Denmark	3050	1	3	3	1	1	0
1990	Norway	0	1	3	1	1	1	0
1990	USA	4927	1	3	2	1	2	0
1991	Argentina	0	1	3	1	1	1	0
1991	Australia	3782	1	3	1	1	2	0

1991	Uruguay	2597	1	4	1	1	1	0
1992	Greece	0	1	5	1	1	1	0
1992	Hungary	2746	1	4	3	1	1	0
1992	Lithuania	0	1	4	1	1	1	0
1992	Netherlands	2349	1	3	3	1	1	0
1992	Spain	0	1	3	1	1	1	0
1992	Thailand	0	1	3	1	1	1	0
1993	Estonia	0	1	4	1	1	1	0
1993	Latvia	0	1	4	1	1	1	0
1993	Portugal	0	1	4	1	1	1	0
1993	UAE	0	1	3	1	1	1	0
1994	Bulgaria	0	1	3	1	1	1	0
1994	Kazakhstan	1500	1	4	1	1	1	0
1994	Morocco	0	1	3	1	1	1	0
1994	Vietnam	0	1	3	1	1	1	0
1995	Chile	2447	1	4	1	1	1	0
1995	Croatia	1105	1	4	1	1	1	0
1995	Egypt	0	1	4	1	1	1	0
1995	Mongolia	0	1	3	1	1	1	0
1996	Finland	0	1	4	1	1	1	0
1996	India	2721	1	4	1	1	1	0
1997	Jordan	1766	1	4	1	1	1	0

Austrian BITs

<u>Year of signature</u>	<u>Country</u>	<u>Word count</u>	<u>Definition of investment</u>	<u>Minimum treatment</u>	<u>Umbrella clause</u>	<u>Expropriation</u>	<u>Access to ISDS</u>	<u>Carve-outs</u>
1985	China	0	1	4	3	1	3	0
1985	Malaysia	0	1	4	3	1	1	0
1988	Hungary	0	1	4	3	1	1	0
1988	Poland	0	1	4	3	1	1	0
1988	Turkey	0	1	4	2	1	1	0
1990	Czech Republic	0	1	4	1	1	1	0
1990	Russia	0	1	4	1	1	1	0
1990	Slovakia	2217	1	4	1	1	1	0
1991	Cape Verde	2356	1	4	3	1	1	0
1991	South Korea	2260	1	4	3	1	1	0
1992	Argentina	0	1	4	3	1	1	0
1992	Morocco	0	1	4	3	1	1	0
1993	Albania	0	1	4	3	1	1	0
1993	Paraguay	0	1	4	3	1	1	0
1994	Estonia	0	1	4	3	1	1	0
1994	Latvia	0	1	4	3	1	1	0
1995	Tunisia	0	1	4	1	1	1	0
1995	Vietnam	0	1	3	2	1	1	0

1996	Kuwait	0	1	5	3	1	1	0
1996	Lithuania	0	1	4	3	1	1	0
1996	Romania	0	1	4	3	1	1	0
1996	South Africa	0	1	3	2	1	1	0
1996	Ukraine	0	1	3	2	1	1	0
1997	Bolivia	2555	1	3	3	1	1	0
1997	Bulgaria	0	1	3	1	1	1	0
1997	Chile	3302	1	4	3	1	1	0
1997	Croatia	3247	1	4	3	1	1	0
1998	Mexico	4988	2	3	2	1	2	0
1999	India	0	1	4	3	1	1	0
2000	Bosnia-Herzegovina	3155	1	3	3	1	1	0
2000	Azerbaijan	0	1	3	3	1	1	0
2000	Bangladesh	2114	1	3	3	1	1	0
2000	Cuba	3176	2	3	3	1	1	0
2000	Uzbekistan	3311	1	3	3	1	1	0
2001	Armenia	3281	1	3	3	1	1	0
2001	Belarus	3611	1	4	3	1	1	0
2001	Belize	4506	1	3	3	1	1	0
2001	Egypt	2659	1	4	3	1	1	0
2001	Georgia	4132	2	3	3	1	1	0
2001	Iran	2341	1	3	3	1	1	0
2001	Jordan	3133	1	3	3	1	1	0
2001	Lebanon	3778	1	3	3	1	1	0
2001	Moldova	1972	1	4	3	1	1	0
2001	Mongolia	2550	1	3	3	1	1	0
2001	Oman	2965	1	3	3	1	2	0
2001	Saudi Arabia	2399	1	4	3	1	1	0
2001	Serbia	2047	1	4	2	1	1	0
2001	Slovenia	3056	1	3	3	1	1	0
2001	Macedonia	2800	1	3	3	1	1	0
2001	UAE	2151	1	3	3	1	1	0
2002	Libya	3246	1	3	3	1	1	0
2002	Malta	3038	1	3	3	1	1	0
2002	Philippines	2965	1	4	3	1	1	0
2002	Yemen	2200	1	3	3	1	1	0
2003	Algeria	1993	1	3	1	1	1	0
2003	Namibia	4046	1	3	3	1	1	0
2004	Ethiopia	3841	1	3	1	1	1	0
2006	Hong Kong	2782	1	3	3	1	1	0

Slovakian BITs

<u>Year of signature</u>	<u>Country</u>	<u>Word count</u>	<u>Definition of investment</u>	<u>Minimum treatment</u>	<u>Umbrella clause</u>	<u>Expropriation</u>	<u>Access to ISDS</u>	<u>Carve-outs</u>
1990	Finland	0	1	3	3	1	1	0
1990	France	3277	1	3	3	1	1	0
1990	Switzerland	1541	1	3	3	1	1	0
1991	Norway	0	1	3	1	1	1	0
1993	Hungary	2280	1	3	1	1	1	0
1994	Indonesia	2097	1	3	1	1	1	0
1994	Netherlands	1886	1	3	3	1	1	0
1994	Romania	2395	1	3	3	1	1	0
1995	Portugal	0	1	3	1	1	1	0
1997	Cuba	2453	1	4	1	1	1	0
1997	Egypt	2240	1	3	1	1	1	0
1998	North Korea	2142	1	4	1	1	1	0
1999	Israel	2845	1	3	1	1	1	0
2004	Serbia	2294	1	3	1	1	1	0
2005	Belarus	2898	1	4	3	1	1	0
2005	Bulgaria	0	1	3	1	1	1	0
2005	China	0	1	3	1	1	1	0
2005	South Korea	2819	1	3	1	1	1	0
2006	India	3479	1	3	1	2	1	0
2007	Mexico	2436	2	2	1	2	1	0
2007	Morocco	0	1	3	1	1	1	0
2008	Bosnia-Herzegovina	2469	1	3	1	1	1	0
2008	Croatia	2753	1	3	1	1	1	0
2009	Lebanon	0	1	3	1	1	1	0
2009	Turkey	1972	1	4	1	1	1	0
2010	Canada	0	1	2	1	2	2	1
2011	Kenya	2868	1	3	3	1	1	0