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The European Union and the space-time continuum of investment agreements

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ABSTRACT
The 2009 Lisbon Treaty transferred the competence over Foreign Direct Investment policy from the national to the supranational level. This article analyses the impact of this transfer on the content of international investment agreements and, more broadly, the shape of the investment regime complex. Is the competence shift expected to have an independent impact or simply reproduce and continue existing trends? Exploring these two conjectures through a combination of text analysis, primary materials, and interviews, we are making a Historical Institutionalist argument focusing on the timing and sequencing of international investment negotiations. While the competence shift has allowed the EU to innovate in developing its own approach to negotiating international investment agreements, notably with the proposal to create an Investment Court System, the novelty may be only at the surface as the constraints of past, current, and future negotiations restrict the options available to EU actors – we call this the space-time continuum. The result of this learning-and-reacting process is a new European approach which simultaneously duplicates and innovates and could eventually favour greater centralisation within the investment regime complex.

KEYWORDS
Dispute settlement; European Union; FDI; investment; ISDS

Introduction

When hundreds of thousands German people descended in the streets of Berlin, Hamburg and Munich in September 2016 to protest against the ongoing negotiations for the Transatlantic Trade and Investment Partnership (TTIP), their main complaints were about threats to labour rights, health measures, consumer protection, and environmental standards arising in large part because of a treaty provision to settle investment disputes. Indeed, the politics of Foreign Direct Investment (FDI) have become highly salient and arguably more controversial than the politics of trade in Europe. It is a prominent case of 'contentious market regulation' (CMR) (Laursen and Roederer-Rynning, 2017).

Several times in the past foreign investment gave rise to controversy and protest in Europe – for instance against the challenge to European way of life from American multinational corporations in the 1960s and against the negotiation of the Multilateral Agreement on

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Investment (MAI) which failed spectacularly in 1998. By the early 2000s, the issue of FDI had dropped from the political radar. European countries have signed more than a thousand international investment agreements including the now decried investor-state dispute settlement mechanism (ISDS) with little public scrutiny or controversy. But foreign investment in Europe is now becoming politically controversial again, in part because the issues at stake have shifted from concern with Americanisation and neo-imperialism to concerns over the sovereign right to regulate in a new context where investment can now come from any country, including emerging economies. As Laursen and Roederer-Rynning (2017) argue, the more agreements focus on behind-the-border issues, the more politicised trade – and investment – politics becomes.

The salience and controversy over FDI politics are also compounded by a novel institutional context in Europe as a result of the shift in the competence to negotiate investment agreements with other countries from the member states to the European Union (EU) level with the 2009 Treaty on the Functioning of the European Union (TFEU, hereafter referred to as the Lisbon Treaty). It is now up to the EU to write the rules of investment agreements and negotiate with third countries, which is a task that belonged to the member states for the first 50 years of European integration. What has been the impact of the new EU competence on the shape of the investment regime complex?

The paper examines two competing answers to this central question. One answer is that the competence transfer has no independent impact on the international investment regime complex, mostly because the rules for investment protection and facilitation have been converging in recent years and institutions are resistant to change. An alternative answer is that the EU competence shift may ultimately disrupt the investment regime complex. As other systems of law, the investment regime complex tends to evolve incrementally by combining the reproduction of earlier elements or the introduction of new elements (Gordon and Pohl 2015; Morin, Pauwelyn, and Hollway 2017). While the EU has already declared its intention to introduce changes its in ongoing negotiations, the magnitude of these transformations and their impact on investment regime complex trajectory remain unclear.

Exploring these two conjectures through a combination of text analysis, primary materials, and interviews, we are making a Historical Institutionalist argument focusing on the sequencing of international investment negotiations and their contestation. In doing so, we answer the call of Laursen and Roederer-Rynning (2017) for studies on CMR that analyse feed-back loops linking institutions to societal actors, as they shape and are shaped by each other. More specifically, we argue that the EU found itself under pressure to come up with its own investment policy for both internal and external reasons. Internally, the competence shift led to a still unresolved political battle between the member states, the Commission and the European Parliament over who is responsible for setting the direction of EU investment policy and ratifying international investment agreements. Moreover, the competence shift enabled the mobilisation of transnational coalitions, which were not organised transnationally when policy was conducted at the national level, leading to greater salience and controversy. Externally, the competence shift in the EU gets implemented and argued vigorously in Europe just as the EU starts negotiating investment agreements with its main trade and investment partners, forcing a rapid yet controversial design for a new European approach to investment policy. A failure to design a new approach to investment would put at risk the entire European trade strategy. This new EU approach, however, is constrained by the existence of a regime complex of investment agreements consisting not only of past agreements but also current and future agreements – we call this the space-time continuum. The result of this learning-and-reacting process is a new European approach to investment agreements which simultaneously duplicates and innovates and could eventually favour a greater centralisation within the investment regime complex.

The first section presents the competence shift from the national to the supranational which occurred following the implementation of the Lisbon Treaty in 2009. Section Two presents the two alternative conjectures about the impact of the competence shift on the investment regime complex. Section Three explores the internal constraints on the development of a new EU approach to investment agreements, including the power struggle between the various European actors, and the emergence and mobilisation of new transnational, pan-European coalitions. Section Four analyses the external constraints on the development of a new EU approach to investment agreements, including the pull of past, present, and future negotiations. The conclusion argues that the competence shift allows the EU to shape the investment regime complex through both duplication and innovation and suggests that an unanswered question going forward is where the sources of inspiration for institutional innovation come from.

The new EU competence over international investment policy

Even though trade and investment are intimately linked, the institutional framework regulating their international flows has been quite different. Trade is mostly regulated at the multilateral level through the World Trade Organisation (WTO), which counts 164 member countries as of 2016, and at the bilateral, regional, and plurilateral levels through preferential trade agreements. By contrast, foreign investment does not have an overarching multilateral organisation creating rights and obligations. Instead, the international investment regime complex consists of several thousands of bilateral investment treaties (BIT) and other international investment agreements, which typically regulate the rights of establishment, protection, and dispute settlement of investors between two sovereign states.

For over fifty years, the institutional framework for regulating trade and investment in the European Community, and then the European Union, mirrored this institutional decoupling at the international level. While trade was at the core of the European integration project and thus the Common Commercial Policy (CCP) was the first policy to be supranationalized, the competence over FDI policy remained at the national level. However, the institutional context in Europe was transformed as a result of the Lisbon Treaty, which folded FDI under the CCP and granted new trade – and thus investment – policy powers to the European Parliament. This section presents the main institutional changes introduced by the treaty reform, as well as the institutional ambiguities that abound during the current implementation period.

The division of competences prior to the Lisbon Treaty

Since FDI policy was not addressed by the Treaty of Rome in 1957, member states therefore each developed their own network of BIT with third countries and their own national regulations for vetting FDI at home over several decades. European countries have been the world's most active users of BITs to regulate their foreign investments. Indeed, the modern international investment agreements were pioneered by EU member states (the first BIT in the world was signed between Germany and Pakistan in 1959) and many of their standard provisions, such as the ISDS, were European creations. By 2013, more than 1200 out of the 2857 international investment agreements in existence were signed between a country member of the EU and a country from outside the EU (UNCTAD 2017).

However, the clear initial grant of competence over foreign investment policy to the national level had become increasingly ambiguous as a result of the explosion of FDI worldwide since the 1980s and the growing blurriness between trade and investment. While the formal EU rules governing international investment policy had not changed, the practice had become quite complex. Member states were still responsible for concluding their own investment agreements, but the Commission had started, in practice, to handle the investment chapters including market access and pre-establishment conditions for European investments in the multilateral and bilateral free trade agreements it was negotiating collectively with a 'single voice' (Meunier and Nicolaidis 1999; Elsig 2002; Young 2002; Meunier 2005; Kerremans 2006; Dür and Zimmermann 2007). Thus, competence had 'crept' in practice to the EU as foreign investment was increasingly regulated through specific chapters of broader free trade agreements (Niemann 2013; Meunier, 2017). Member states retained, however, clear competence over the post-establishment treatment of investment.

Moreover, in multilateral trade negotiations, the European Commission was in charge of negotiating the Agreement on Trade-Related Investment Measures (TRIMS), the General Agreement on Trade in Services (GATS), and the so-called 'Singapore issues' including 'trade and investment' – even if Member States contested in practice that delegation. Alongside the member states, the EU had negotiated the failed MAI in the OECD and is a member of the Energy Charter Treaty – a multilateral investment treaty with 47 contracting parties designed to protect investments in the energy sector.

Hence by the end of the 2000s, the competence over FDI policy in the EU had become characterised by confusion and cacophony (Meunier 2014). As Ramon Torrent has argued less charitably, the contradictory overlapping of national, supranational, bilateral and multilateral rules on FDI had become a total 'mess' (Torrent 2011).

The competence transfer in the Lisbon Treaty

The December 2009 Lisbon Treaty, which amended the constitutional basis of the EU, created two major institutional changes regarding international investment policy. First, FDI policy was subsumed under the CCP by adding the three word 'foreign direct investment' to its articles on trade policy.[1] Therefore, the power to regulate and negotiate international investment policy was transferred from the member states to the supranational level.

Second, the Treaty strengthened the role of the European Parliament in trade policy – making, a policy domain in which it had enjoyed almost no input in the past. The Parliament became a co-legislator on trade policy together with the Council of Ministers and has to give its consent to all international trade agreements in the internal ratification procedure. The European Parliament was also granted additional consultation and information powers regarding the progress of international trade negotiations. Because the Lisbon Treaty folded FDI under trade policy, the Parliament thus has become an actor of European investment policy.

Remaining ambiguities about the FDI competence

This transfer of competences is not merely an institutional or legal detail; rather it is eminently political. It is moving what has been the backbone of economic globalisation under the reach of the EU, away from national sovereignty. As Meunier (2017) has argued, this competence shift occurred 'by stealth', without much prior political debate. As a result, implementation has been difficult and fraught with political and legal ambiguities, which are being played out in the first investment negotiations where the EU speaks with a single voice – notably the EU-Singapore Free Trade Agreement, the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, the EU-Vietnam FTA, the TTIP with the United States, and the BIT between the EU and China.

The main remaining ambiguity concerns the nature of the investment agreements negotiated, in particular the question of mixed vs. exclusive competence (Kleimann and Kubek 2016). Whether investment agreements are deemed as 'mixed' or 'exclusive' determines who gets to ratify them ultimately – a mixed agreement needs to be ratified both by the EU as a whole and by each member state individually according to its own domestic procedures (which may involve regional parliaments); an exclusive agreement needs only to be ratified collectively by the EU, which now involves the Council voting according to qualified majority and the European Parliament.

The challenge to the nature of competence hinges on the exact meaning of the three-word mention 'foreign direct investment', which the Lisbon Treaty did not define (Bischoff 2011; Chaisse 2012; Reinisch 2014). Should 'foreign direct investment' be restricted to the widely accepted OECD 'benchmark' definition of FDI as a lasting interest of 10% or more in a foreign enterprise (OECD 2008), or should it also, by extension, cover portfolio investment, both of which are typically addressed in international investment agreements? The Commission and Parliament argue that the scope of the new competence also encompasses portfolio investment, based on the doctrine of implied powers. The Member States claim in a restrictive interpretation that it does not, because 'foreign direct investment' has a standard, accepted definition first issued in 1983; any trade or investment treaty covering both direct and portfolio investment should therefore be of mixed competence. After years of ambiguity and ratification of signed agreements kept in limbo, in May 2017 the European Court of Justice (CJEU) in its Opinion 2/15 ruled on the EU-Singapore FTA that the EU has exclusive competence over all aspects of the agreement except for provisions on portfolio investment and ISDS. Other legal ambiguities, notably surrounding the compatibility of such agreements with EU law, have not been lifted yet.

An additional ambiguity concerns the policies governing inward investment, in particular the vetting of particular investment deals. Right now each country has its own national procedures (or has none), whether based on national security or on economic criteria. While the strongest supporter of a common approach has been the European Parliament (European Parliament 2012), the Commission has been divided regarding the necessity of establishing a common vetting system for FDI into the EU. As for the member states, not one for now has openly supported this proposal.

Linkages between the EU competence shift and the investment regime complex

The political debate on the transfer of competence over FDI policy is happening just as the EU is involved in major negotiations with some of its largest trade and investment partners. This creates many opportunities for linkages between the development of a new EU approach to investment policy and the existing set of treaties and rules forming the FDI regime complex. This section considers alternative ways in which the EU competence shift could end up affecting or not the shape and direction of the investment regime complex.

No independent impact of the competence shift on the investment complex

It could be that no matter what the CJEU rules on the nature of competence, the subsuming of FDI under the CCP will not have any independent impact on the international investment regime complex, mostly because international rules for investment protection and facilitation have been converging in recent years; at best, the competence shift may accelerate this convergence.

A regime complex is commonly defined as a set of institutions with partially overlapping mandates and memberships (Aggarwal 1998; Raustiala and Victor 2004; Alter and Meunier 2009; Orsini, Morin, and Young 2013). The investment complex is characterised by the lack of an overarching international institution and instead by the existence of thousands of BITs, investment chapters of FTAs, and other regional, plurilateral and multilateral investment agreements – such as the WTO Agreement on TRIMS and the GATS, the Energy Charter, soft law instruments like UN resolutions and OECD codes of conduct, as well as several rulings and awards, adopted either under the Convention on the Settlement of Investment Disputes, the United Nations Commission of International Trade Law or another dispute resolution mechanism. These various institutions are profoundly embedded in a coherent system: BITs provide highly standardised rules, they are based on the same set of norms and principles, they are tied together by Most Favoured Nation clauses, they are negotiated and implemented in the shadow of each other, and they are adjudicated by a closed circle of arbitrators. We consider the dense network of investment agreements as a polycentric form of de facto multilateralism (Morin and Gagné 2007; Schill 2009; Pauwelyn 2014; Meunier and Morin 2015).

One important feature of the investment regime complex is the use of templates for investment agreements. Some BITs are marginally tailored to a particular pair of countries, but a large part of the text is copied and pasted from earlier agreements, based on a formal or an informal model agreement (Allee and Elsig 2015). This practice suits negotiators with bounded rationality who cannot calculate *ex ante* the optimal investment protection for a given pair of countries but can incrementally improve their model agreement *ex post* based on prior experience (Skovgaard Poulsen 2015).

Moreover, these templates have increasingly converged between countries over time. BITs started historically as agreements between a developed and a developing economy, but all kinds of pairings exist nowadays, which has favoured policy diffusion and led to convergence (Elkins, Guzman, and Simmons 2006; Jandhyala, Henisz, and Mansfield 2011). When two countries with templates have negotiated together, they may have learned from each other's experience, including their legal experience from ISDS, and adapted their own template. As a result, empirical studies have found convergence around a number of core rules in investment agreements across countries (Schill 2009; Pauwelyn 2014; Alschner and Skougarevskiy 2016a).

Evidence suggests, in particular, that recent trends in the convergence within the polycentric investment regime complex were not about maximising investment flows, which are difficult to attribute to the presence of a BIT, let alone its specific design,[2] but about minimising litigation risks, which are the main sources of contestation. Each new BIT generation includes additional safeguards for host countries, limiting risks of frivolous and illegitimate claims. These additional safeguard result from a better understanding of their legal liability, gained from the experience of controversial claims (Gagne and Morin 2006; Jandhyala, Henisz, and Mansfield 2011). Under this perspective, contestation has led to incremental adaptation rather than grand ruptures, favouring the stability and resilience of the investment regime complex (Gordon and Pohl 2015; Stone Sweet, Chung, and Saltzman 2017).

One could therefore expect the competence shift over FDI to the EU not to affect the investment complex in any significant way. The EU's room for manoeuvre for including novel provisions in its new investment agreements is significantly limited by this growing international convergence. Moreover, the EU does not have sufficient experience with the investment regime complex to operate a normative revolution and go against the collective learnings gained incrementally from the last sixty years. At best the competence shift could be expected to accelerate this convergence by replacing all the individual BITs of member states with BIT negotiated collectively by the EU, and therefore upgrading the investment provisions of old agreements to modern standards.

Some of the observable implications of the conjecture that the competence shift will have no independent impact may be: a growing overlap between the text of IIAs negotiated by the EU and existing recent IIAs by non EU partners; and the development of an EU template that is either an average of the existing templates of EU member states or an assortment of 'best practices' from member states.

A transformative impact of the competence shift on the investment complex

Alternatively, one could expect the EU competence shift from the individual member states to the supranational EU to have a potentially transformative effect on the investment regime complex. The transfer of competence might provide an opportunity for 'institutional innovation', defined as the introduction of institutions that are normatively different from the regime complex's existing institutions (Morin, Pauwelyn, and Hollway 2017). Disruptive innovations are rare in the investment regime complex, as previous agreements and existing models creates expectations of behaviours and favour stability (Gordon and Pohl 2015). The EU, however, is free from the constraints of an existing model and may seek to develop its own distinctive approach to international investment policy. In turn, because of the bargaining leverage gained from the consolidation of disparate national approaches into a collective template, the EU may try to impose its new model to the rest of the world and shape the investment regime complex as a result.

The EU may wish to develop its own approach to international investment policy for several reasons. First, EU actors have their own interests which are distinct from those of the member states. As the current legal fight over the definition of FDI reveals, political competition between different levels of governance over the investment competence runs deep.

Having its own template would be a way for the EU to assert that it is now in charge and establish clearly the exact contours of competence. Likewise, parliamentary actors, such as the European Parliament Committee on International Trade (INTA), may wish to assert this new power by contributing to the development of a signature approach to international investment agreements. If both the Commission and the Parliament want to make their mark on EU investment agreements, divergence in their preferences may lead to innovative compromises.

Moreover, the competence shift has also enabled the emergence of the transnational mobilisation of economic and social interests. Prior to the shift, the negotiation and ratification of international investment agreements by individual European countries were typically considered a technical and non-political issue, on which little transparency or spotlight was shed. The competence shift transformed that perception. Suddenly, the stakes became commonly shared by all in the EU, so interest groups started to mobilise transnationally. Alasdair Young argues that transnational, transatlantic mobilisation has been a distinctive feature of the TTIP negotiations (Young 2016). Here we argue that the competence shift over FDI enabled the mobilisation of pan-European groups. The result may be a transformation of the policy options available to the EU – treaty provisions, such as the ISDS mechanism, which may have been acceptable in the past when few people were paying attention become off the table once interest groups start to mobilise across borders.

An additional mechanism through which the competence shift may affect the investment regime complex is by enhancing the bargaining leverage of the EU in international investment negotiations. The leverage gained from the consolidation of disparate national approaches into a collective template may facilitate the imposition by the EU of its new approach to investment agreements to the rest of the world (da Conceição-Heldt and Meunier 2014). Under this perspective, the competence shift might be conceptualised as an exogenous event that propels the regime complex on investment toward a different trajectory.

Some of the observable implications of the conjecture that the competence shift may have a transformative impact may be: a brand new EU template breaking from prior model agreements on many key points and the gradual diffusion of the EU template internationally.

Internal constraints on the development of a new European approach

In developing its new approach to investment, the EU can learn from different, not mutually exclusive sources, such as the models already put in place over decades by its member states, both through the negotiation of agreements and through the practice of dispute resolution. This section explores the internal constraints on the development of a new EU approach to investment agreements, including the power struggle between the various European actors and the emergence and mobilisation of new transnational, pan-European coalitions.

The power struggle between the various European actors

The competence shift was not a policy change designed and explicitly approved by member states, as Meunier (2017) has argued elsewhere. As a result, the political debate is happening in the implementation phase, which creates constraints on what the EU can include in its new approach. Notably, ever since member states realised the potential scale of the shift after the entry into force of the Lisbon Treaty in December 2009, they have been trying to get some control back, or at least to circumscribe the sphere of action devolved to the EU. The contentious debate over competence, which delayed the design and implementation of the new EU approach initially, heated up as the first two agreements were signed, with Singapore and Canada. In 2015 the Commission was forced to ask the Court of Justice for clarification on the scope and nature of these competences, so as to determine who would actually be ratifying the EU-Singapore FTA. In July 2016, in the face of insurmountable pressure from the member states, especially France and Germany, Commission President Juncker decided to treat the CETA with Canada as a mixed agreement so as to speed up its provisional application and ratification, while the CJEU was considering the case. The provisional signing of CETA introduced regional institutional actors into the complicated debate over competence, especially the Parliament of Wallonia in Belgium which eventually managed to suspend the provisional application of the investment clauses in exchange for the conclusion of CETA. Even after the Court ruled on Opinion 2/15 in May 2017, the competence fights between the various European institutional actors may not be over, especially since Belgium announced that it would seek the opinion of the CJEU on a different issue, that of the compatibility between the new proposed Investment Court System (ICS) to settle investment disputes and EU law.

The emergence and mobilisation of new transnational, pan-European coalitions

Except for occasional outbursts from time to time, such as the OECD MAIs which failed in 1998 in face of public protest (Kobrin 1998; Young 2002), investment negotiations used to be seen as largely technical, legal, and politically uncontroversial. It has recently become a prominent case of CMR (Laursen and Roederer-Rynning, 2017). We argue that the recent explosion of public contestation against the investment regime complex in Europe results from the emergence of pan-European transnational coalitions, fuelled by controversial disputes and enabled by the competence shift.

The main sources of dissatisfaction regarding the investment regime complex are endogenous and result from a mechanism known as ISDS, which enables a private investor to sue a state for compensation as a result of state actions which have allegedly caused damage to the investor. These claims are adjudicated by a three-person ad hoc arbitral tribunal, which can order the state to compensate the investor without the possibility of appeal. Chronologically, the level of contestation grew proportionally with the exponential rise of these disputes (Skovgaard Poulsen 2015). Geographically, the regime is more heavily contested in countries subjected to investors' claims. It became highly controversial in Canada in the 1990s after the Ethyl and Myers cases (Gagne and Morin 2006), in Argentina in the 2000s in the aftermath of a number of ISDS cases, and more recently with the Vattenfall case in Germany and the Philip Morris case in Australia.

After the EU gained competence over FDI with the Lisbon Treaty, it embarked on a series of trade and investment negotiations, which started off as depoliticized and out off the public spotlight. The first negotiation to be concluded under the new competence was the CETA between the EU and Canada in August 2014, which included ISDS provisions inspired from NAFTA. The second agreement to be signed was the EU-Singapore FTA (EUSFTA). The Goods and Services Agreement was completed in 2012 and the Investment Protection

Chapter in October 2014, including ISDS provisions. The EU also was negotiating during that period an FTA with Vietnam (concluded in January 2016), a BIT with China (launched in November 2013), and FTAs with multiple nations, including many from the ASEAN community.

The investment provisions in these negotiations did not become controversial until the EU launched the negotiations with the US over the TTIP in February 2013, which shed spotlight on the ISDS mechanism and stoke public dissatisfaction. ISDS erupted as a major public issue for a variety of reasons (Meunier and Poulsen 2016), including the size of the American economy and anti-Americanism.

An additional important cause of this eruption is the dispute opposing Vattenfall to the German government since 2012. When Germany decided to phase-out of nuclear energy in the aftermath of the Fukushima disaster, the Swedish energy company Vattenfall filed an arbitral claim against Germany under the Energy Charter. As Pelc notes, Vattenfall had every incentive to make this challenge salient to deter 'other countries that might consider following suit' and 'chose to publicize the amount of compensation sought, over USD $ 5 billion' (2016). The German public reacted strongly to this lawsuit, perceived as a fundamental threat to an important public policy. Yet, German civil society groups neither targeted the German government, who had signed the Energy Charter, nor the Swedish corporation Vattenfall. Instead, as a result of the Lisbon competence shift, German discontent built on existing transnational advocacy networks on trade issues, grew into a pan-European mobilisation, and targeted the European Commission.

This, added to the transatlantic mobilisation enabled by TTIP (Young 2016), forced the issue of ISDS on the table and prompted the European Commission to stop all negotiations for several months in 2014 while it engaged in a vast consultation throughout Europe over ISDS. The Commission received about 150,000 replies from civil society showing massive scepticism towards the ISDS instrument.

As a result of this vast consultation with civil society, both online and in formal settings with various stakeholders, the EU decided in November 2015 to modify its approach to the settlement of investment disputes (Schill 2016). Instead of the traditional ISDS instrument, the EU proposed the creation of an ICS, which includes a tribunal of first instance and an appeals tribunal, composed of a permanent roster of impartial and independent judges appointed ahead of time by the two parties to the treaty (unlike the arbitrators appointed on an ad hoc and bilateral basis in ISDS). The proceedings would be transparent, most documents would be publicly available, and the tribunal would be subjected to time constraints to render decisions. Ultimately, the objective of the ICS is to transform into a permanent multilateral investment court.

One can therefore argue that this potentially impactful proposal would not have seen the day if not for the massive public protests against ISDS that erupted throughout Europe. In turn, this public contestation resulted from the transnational mobilisation of various interest groups, which were enabled as a result of the competence shift.

External constraints on the development of a new European approach

The new EU approach to international investment policy is also not developed in an international vacuum. This section analyses the external constraints exerted by past, present, and future negotiations on the shape and substance of the EU's policy towards international investment negotiations.

The pull of past agreements

In developing its own distinctive approach to investment policy, the EU is not starting from a blank slate. Negotiations take place in the context of a very dense, polycentric global investment regime complex made up of thousands of bilateral, plurilateral, and multilateral agreements. What the EU can do and where it can learn from today is dependent on past arrangements which constrain the policy options available.

Prior agreements provide a baseline for what is acceptable in a new agreement. For instance, when currently negotiating the BIT with China, the EU cannot go back on the investment protections and market access provisions already included in the existing 26 BITs between China and individual EU member states. Another example is found in TTIP: while the EU and the US are not bound by a free trade agreement or an investment treaty, they are joint parties to many transatlantic dialogues and institutions and the US has signed BITs with 9 EU member states (before they joined the EU)[3] – this provides a minima of what must be included at least in TTIP.

Prior agreements also determine what the EU could borrow from in developing its new model. On one hand, European states have far more experience in negotiating international investment agreements than other countries, as they invented both BITs and ISDS. On the other hand, the North American model, developed with NAFTA and revised since, could serve as source of inspiration for the best accepted practices in investment protection and promotion. The US model, in particular, was revised in 2004 and in 2012 to better protect governments' right to regulate in light of controversial NAFTA cases, an issue that is now of particular interest for the European Union (Gagne and Morin 2006). This might even give rise to a 'boomerang' effect where the EU adopts a model influenced by the American model, which itself was influenced by European models.

The pull of current negotiations

The involvement in simultaneous negotiations with different partners also determines the range of options available to the EU. First, negotiating several parallel agreements at once may put a severe constraint on the resources available to carry out effectively another set of international negotiations, notably manpower issues and personnel shortage (Meunier and Morin 2015). This may delay the course of negotiations or introduce sequencing between negotiations. It also creates an obligation of consistency between parallel agreements – it would be difficult politically to justify why ISDS clauses must be included in an agreement with Singapore but not with the US, for instance. The negotiation of several parallel agreements may also create opportunities, as for instance DG Trade sectoral experts monitor several negotiations simultaneously and therefore enable the flow of information back and forth.

The sequencing of negotiations also might have its own implications on substance. The first agreement to be concluded under the new EU competence was the EUSFTA with Singapore in 2014. The EU shortly thereafter finished negotiating with Canada. Both agreements, which each include ISDS clauses, have subsequently been in the 'legal scrubbing' phase while the EU was negotiating other agreements in parallel, including TTIP, the EU-China BIT, and FTAs with several ASEAN countries. Neither could be formally ratified until the CJEU hands back its ruling on Opinion 2/15 on the issue of competence in the EUSFTA, though the EU and the member states signed in October 2016 the provisional application of CETA (minus the investment provisions). In the meantime, just a few weeks after 150,000 people demonstrated in Berlin and a petition against TTIP listed 3,300,000 names, the EU announced its proposal for a new ICS to replace the classic ISDS in November 2015.

The announcement also came a few days before the EU was due to conclude the last round of negotiations for the EU-Vietnam FTA. Thanks in part to their asymmetrical power over Vietnam, EU negotiators persuaded Vietnamese negotiators to replace the ISDS clauses which were already in the draught agreement text with new model provisions on dispute settlement.[4] The EU-Vietnam agreement became the first agreement ever concluded (but neither yet signed nor ratified) to include 'permanent appeal tribunal' as well as a commitment to 'enter into negotiations for an international agreement providing for a multilateral investment tribunal[5]'.

With this Vietnamese precedent and while CETA was still officially under 'legal scrubbing', as the EU was waiting for the CJEU to rule on the competence issue, the Commission went back to Canada and asked to replace the ISDS clauses with a permanent investment tribunal and an appellate tribunal. Convincing the Canadian government was an important step for the Commission, as its bargaining power with Canada is less asymmetrical than with Vietnam. It was also a necessary step if it ever hoped to convince the US government in the course of TTIP negotiations. The opportunity had to be seized as the new liberal government in Ottawa did not seem opposed to the idea of a permanent tribunal (see Hübner, Balik, and Deman, 2017). Investor-state disputes have long been controversial in Canada as a result of a number of NAFTA cases (Gagne and Morin 2006). Until Vattenfall filed a complaint against Germany in 2012, Canadian civil society groups were in fact more mobilised than their European counterparts against the inclusion of an ISDS in CETA (Duchesne and Morin 2013, 21). Moreover, recent Canadian investment agreements typically include a number of safeguards similar to the ones now championed by the European Commission, including on the right to regulate, on the definition of indirect expropriation, on transparency of legal proceedings. In fact, the Canada-Korea agreement concluded in March 2014 includes a provision making it clear that the Canadian government was already open to the idea of an appellate tribunal: 'Within three years after the date this Agreement enters into force, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards'.[6] The permanent appeal tribunal suggested by the European Commission seemed to flow logically from the evolution of Canadian investment agreements. Nevertheless, as Alschner and Skougarevskiy observe, CETA 'legal scrubbing' was tantamount to a renegotiation: 'The EU has played its cards smartly, integrating its updated investment policy preferences into an already finalized text and thereby improving its negotiation position vis-à-vis the United States' (2016b).

The Commission was not the only actor to have the parallel TTIP talks in mind when it completed its negotiations with Canada. The pan-European mobilisation of European civil society groups against the inclusion of an ISDS in CETA appeared relatively late in the negotiation process. It emerged only in 2013, when negotiations with Canada were almost over, and grew until October 2016, with Wallonia nearly blocking the signature process. The launch of TTIP negotiations in 2013 largely explains this odd sequence of events. As Hübner, Balik, and Deman (2017) observe, 'TTIP and CETA became increasingly interconnected, and were often seen as more or less two agreements stemming from the same flesh'. The energy deployed by civil society groups and the Wallonia government in their resistance to CETA can largely be attributed to the fact that they saw it as dangerous precedent for TTIP. Sequencing clearly did matter in this case.

The pull of future negotiations

Future negotiations may also impact the range of options available to the EU today as it develops its new approach to investment. Provisions may be included today with one partner, even if they do not seem necessary, to serve as precedent when negotiating in the future with a different partner. This may slow down the current negotiating process as the provisions that negotiators may want to include now to influence future agreements are, by nature, controversial. So instead of delaying the fight until later, negotiators with this strategic, forward-looking outlook are provoking the public debate at an earlier time, which may slow down or even stall the negotiations (Meunier and Morin 2015).

The TTIP negotiations provide an example of this dynamic. If one judges by public protest, ISDS is one of the most controversial aspects of TTIP. Many have questioned whether any dispute settlement is needed in the transatlantic agreement in the first place. After all, these clauses were created to protect investors in polities with untrustworthy legal and political system. It would certainly be easier in the current public opinion context in Europe to remove ISDS altogether and sign a TTIP without dispute settlement. The benefits of including an ISDS in TTIP are even doubtful, as most analysts believe that it will not increase transatlantic investment flows in itself. The bottom line is that an ISDS in TTIP seems politically costly, legally risky, and economically worthless, if analysed in isolation from the global context. But others have been forcefully arguing that dispute settlement needs to be in today so that it can serve as precedent tomorrow, when the EU negotiates with less trusted partners.

Conclusion: the space-time continuum of investment agreements

This paper has argued that a novel institutional framework is shaping the new politics of foreign investment policy in the EU, which in turn allows the EU to attempt to make its mark on the investment regime complex. However, while the competence shift has allowed the EU to innovate in developing its own approach to negotiating international investment agreements, notably with the proposal to create an ICS, the novelty may be only at the surface as the constraints of past, current, and future negotiations restrict the options available to EU actors – we call this the space-time continuum. Indeed, the core of our argument hinges on the timing and sequencing of international investment negotiations, which limit the possibilities for true institutional innovation unless there is a critical disruption. The result of this learning-and-reacting process is a new European approach to investment agreements which simultaneously duplicates and innovates and could eventually lead to the adoption of a multilateral instrument, which would disruptively create centralisation within the investment regime complex.

It is too early to tell if the EU proposal for a permanent investment court is a disruptive innovation or nothing more than incremental adaptation. If established, this court might be no substantially and procedurally radically different from the existing polycentric system and might still rely on bilateral commitments. Moreover, the US has been in favour of a multilateral appellate body on investment for decades and even includes an explicit reference to this non-existing multilateral court it in its own BITs. Even if the EU proposed court were to eventually turn into a formal multilateral institution, it might not be such a drastic shift. First, the procedures would be new, but the key governing norms and principles would remain in place. Second, the investment regime complex is already based on polycentric multilateralism, as negotiators and arbitrators are reading one another and adjusting to each other. Third, it would not be the materialisation of a European idea, as others has promoted this idea for a long time before the EU. A possible scenario is that the regime complex will evolve toward greater multilateralism as a result of the efforts of various actors, including the EU but also the US, Canada, Australia and even China (Sauvant 2017).

The greatest obstacle in the way of a more centralised investment regime complex might not be foreign negotiators, but concerns of civil society groups regarding the sovereign right to regulate and the risk of regulatory chill. The proposal for a permanent court may not suffice to reassure civil society groups, in Europe and elsewhere. This is the irony of current CMR: while negotiators from various countries draw similar lessons and lean in the same direction, they have never been so intensely criticised by their own constituents. As a result, the greatest divide in the age of CMR does not seems to be between negotiating parties, but the divide opposing the transnational network of negotiators, who are converging on a set of regulations, and the transnational network of civil society groups, who increasingly distrust their own regulators.

This distrust for regulators was manifested in the Brexit and the election of Donald Trump, two events that increase the uncertainty over the development of a new EU approach to investment. For one, the Brexit process may delay the ratification of already signed agreements, as well as the process of ongoing negotiations, thereby delaying the potential impact of the new EU approach to international investment policy. Moreover, when Brexit actually happens, it may weaken the bargaining leverage of the EU by removing as a member state a major home state and host state for FDI, making it more difficult to assess the actual impact of the competence shift. As for the Trump election, it might on one hand reinforce and accelerate the EU drive to create an investment court that may de facto turn into a multilateral system eventually if the new American administration puts the brakes on further bilateral or regional agreements. On the other hand, the Trump election, like the Brexit vote, have revealed the political limits of further globalisation and heightened public opinion awareness about CMR.

Finally, an interesting unanswered question going forward is the investigation of the sources of adaptation in political institutions. Where does inspiration for institutional innovation come from? This unusual case of a quasi-overnight competence shift would enable researchers to study whether adaptation to a new institutional environment occurs mostly through selection or through learning processes.

Notes

1. Consolidated version of the TFEU – Part Five: External Action by the Union – Title II: CCP – Article 207 (ex Article 133 TEC).
2. Yet, Elkins, Guzman and Simmons have found that investment agreements 'are significantly more likely to be signed during years in which signatory states appear to be benefiting (in

terms of FDI) from the treaties than when they are not' (2006, 840). See also Büthe and Milner (2014) on the link between treaty design and investment flow.
3. Bulgaria, 1992; Croatia, 1996; Czech Republic, 1991; Estonia, 1994; Latvia, 1995; Lithuania, 1998; Poland, 1990; Romania, 1992; Slovak Republic, 1991.
4. Personal author interview with Vietnamese official, August 2016.
5. EU-Vietnam Free trade agreement, agreed text as of January 2016, Article 15 of the investment chapter.
6. Annex 8-E.

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