Business lobbying and international investment agreements

Abstract: Does business lobby for international investment agreements? Although most research endorses the assumption that business is the main stakeholder of the international investment regime, hardly any study has evaluated the role of business in shaping this key domain of global economic governance. The paper uses basic quantitative and qualitative methods in order to shed light on the significance of business lobbying behind the conclusion of IIAs. It finds that apart from investment liberalisation, business takes little interest in international investment regulation. The findings of this paper suggest that the international investment regime is primarily the result of bureaucratic politics, which has implications for policy-makers and future research.

Does business lobby for international investment agreements? Most observers are inclined to believe that business lobbying is a key driver behind the conclusion of international investment agreements (IIAs). IIAs are depicted as regulatory subsidy of states given to business. The investment liberalisation, post-establishment treatment and provisions of IIAs should unlock profitable investment opportunities, lower risk premiums of investment projects and ultimately increase profits. The paper, however, argues that business is surprisingly little interested in IIAs. Business is known to lobby over investment liberalisation but seems hardly interested in post-establishment treatment and protection provisions. The paper draws on methodological triangulation in order to underscore this argument. In a first part, it evaluates whether the content of some 485 IIAs concluded by selected OECD countries since 1980 has been converging or diverging over time. It finds that the content of the examined IIAs has been diverging, which challenges the assumption that IIAs are expression and manifestation of strong regulatory competition and underlying business lobbying. In a second part, the paper draws on 50 semi-structured interviews with business representatives, national and international policy-makers in order to explain the lack of interest of business in international investment policy. The findings of this paper suggest that the international investment regime is a state- rather than business-driven regime. It ties into a nascent but growing literature, which critically evaluates the political and economic benefits of IIAs and notably bilateral investment treaties (BITs).

1. The state of research

The role of business lobbying in the proliferation of IIAs has received surprisingly little attention in the literature. A sizeable number of econometric studies evaluate the question whether IIAs and BITs actually affect the volume and direction of international investment flows. Overall, their findings are ambivalent. Some studies suggest that IIAs have little to no impact, while others conclude that IIAs

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might indeed affect investment flows.\footnote{2} For the purpose of this study, it is crucial to underline that these studies build on the ex ante assumption that IIAs and BITs might affect the risk premiums and profits of international investors and thus their investment decisions. In reverse, this assumption implies that business might hold a financial interest in the conclusion of IIAs and thus lobby for the conclusion of such agreements with potential host countries. These studies, however, remain silent on the question whether business proactively shapes the global investment regime.

Some studies directly examine the interest of business in IIAs and BITs. Poulsen evaluates whether business takes the existence of IIAs and BITs into account when investing abroad. He finds that business takes little to no interest in such agreements when taking an investment decision.\footnote{3} The European Commission, the European Chamber of Commerce in China and Copenhagen Economics jointly conducted a survey among European investors so as to evaluate whether the existence of BITs had affected their investment decision and operation in China. The survey found that these agreements hardly affected the investment decisions and operation of European investments in China.\footnote{4}

So while studies seem to implicitly assume that business is the main stakeholder of the international investment regime, very few studies actually seek to assess the interest of business in IIAs and BITs. The state of research barely allows for any conclusions on how business preferences shape the international investment regime.

2. IIAs – manifestations of regulatory and economic competition?

The lack of research on whether and how business actually shapes the international investment regime inter alia stems from methodological challenges. Some 3500 IIAs and BITs make up today’s international investment regime. Some 180 countries have signed such agreements. It is obviously impossible to monitor and assess the relevance of business preferences and lobbying behind the conclusion of each agreement.

This section draws on a large-n comparison of IIAs in order to evaluate the relevance of business preferences and lobbying. As discussed above, the literature implicitly stipulates that IIAs and BITs are manifestations of regulatory competition. IIAs are depicted as regulatory subsidies. They lower the risk premiums and increase the profits and competitiveness of national investors on international markets. As with trade agreements, one may assume that the main beneficiaries of IIAs – namely international investors – push governments to match the concessions granted under IIAs between third countries in order to maintain a level playing field on world markets. Investors are thus implicitly seen as the drivers of international regulatory and economic competition in form of IIAs. It follows that if investors were indeed so interested in maintaining a level playing field through the conclusion of


\footnote{3} Poulsen, “The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence.”

\footnote{4} See Copenhagen Economics, EU-China Investment Study (Copenhagen, 2012).
competitive IIAs, the content of IIAs should have converged toward a global ‘gold standard’ over time. One promising research strategy to assess the existence and significance of business preferences and lobbying behind the conclusion of IIAs is therefore to evaluate the evolution of the content of IIAs. A convergence in the content of IIAs would indeed support the assumption that IIAs are primarily manifestations of regulatory and economic competition, while a divergence in the content of IIAs would challenge this assumption.

So how to measure convergence or divergence in the content of IIAs? The study focuses on the key post-establishment and protection provisions, which by and large determine the level of investment protection and treatment in host countries. While the exact wording of these provisions is known to vary across agreements, the provisions figure in almost all IIAs and notably BITs. The study seeks to measure convergence or divergence in the content of IIAs on the basis of variation in the following provisions: definition of investment, the minimum treatment standard, umbrella clauses, definition of expropriation, ease of access to ISDS and finally – and as an obviously rough proxy – the word count. It codes variations in these provisions according their relative impact on the level of investor protection and treatment in host countries. The study cannot examine all ca. 3500 IIAs in force. Instead, the study evaluates the content of the 485 IIAs concluded since 1980 by the USA, Canada, the United Kingdom, Germany, the Netherlands, Poland, Austria and Slovakia. This sub-sample includes IIAs negotiated by small, medium-sized and big economies, which import and export capital alike. The sub-sample should allow for conclusions on whether IIAs are indeed primarily a manifestation of regulatory and economic competition or not.

**Definition of investment:** The articles defining the term investment diverged over the last thirty years. In the 1980s, all BITs contained short and broad definitions of investment. In the 1990s, Canada and then the USA started including more detailed and narrow definitions of investment into their agreements. The inclusion of such narrow definitions reduces the scope of BITs. IIAs with a narrow definition cover fewer investments. 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 following 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’ (FET) 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 not worse than required under customary international law (CIL). The standard formulation in US BITs would indicate that CIL encompassed the FET as well as ‘full protection and security’ (FPS) standards while adding restrictive and controversial definitions of these standards. Some lawyers 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 unlikely that these BITs constitute a reorientation in their BIT practices, but rather concession to their US-influenced negotiating partners.
**Umbrella clause:** The examination of umbrella clauses demonstrates that BIT practices have always been diverse in this domain and further diverged since the 1990s. Umbrella clauses stipulate that states have to observe all contractual obligations vis-à-vis foreign investors. They transform private law obligations into international public law obligations. An examination of national BIT practices regarding umbrella clauses does not produce clear-cut patterns of convergence or divergence. Germany and the United Kingdom included unlimited umbrella clauses into almost all 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 of the term ‘expropriation’. 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 case investors submitted 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 case they wish to seek arbitration. They also frequently exclude arbitration in case investors have already submitted a claim to local courts. Few BITs even require the exhaustion of local legal remedies. So 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.

**Word counts:** Finally, an examination of the length of BITs confirms the trend of divergence (see graph below). US and Canadian BITs are on average longer than European BITs. What is more, US and Canadian BITs grew in length during the last 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 contain detailed provisions and carve-outs, which supposedly limit investor rights in comparison to short and unspecific agreements.
Summary: The findings suggest that IIA practices of the examined countries diverged rather than converged. This finding indirectly suggests that business preferences and lobbying are not decisive in the conclusion and shaping of IIAs and the international investment regime. If IIAs were indeed expression and manifestation of intense international economic and regulatory competition, then one should expect these agreements to converge in content in order to match economic concessions in competing agreements. Put differently, one would expect states to match and adjust the regulatory subsidies provided under their IIAs to the subsidies offered by competitors. As the content of these IIAs albeit diverged during the last 20 years – with the USA and Canada gradually lowering the level of post-establishment and protection standards – regulatory and economic competition seems to be a marginal force in the international investment regime.

Table 1 – Summary of findings per variable

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<th>Definition of investment</th>
<th>Divergence</th>
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<tr>
<td>Minimum treatment standard</td>
<td>Divergence</td>
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<td>Umbrella clauses</td>
<td>Growing disparity</td>
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<td>Definition of expropriation</td>
<td>Divergence</td>
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<td>Access to ISDS</td>
<td>Divergence</td>
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<td>Word count</td>
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3. The domestic politics of IIAs – The German and the European case

The preceding section drew on a large-n comparative analysis of IIAs. While the section allows for preliminary conclusions that business did not push policy-makers in matching regulatory subsidies provided under IIAs, the finding remains probabilistic. It does not provide any detailed insights into the domestic policy-making processes underlying the conclusion of IIAs. This section draws on 50 semi-structured interviews with policy-makers and business representatives in order to uncover the policy-making processes at the domestic level, which underlie the conclusion of IIAs. The section focuses in particular on the German and European case. Germany has been the most active country in the international investment regime. Business lobbying – if important – should have come to the fore in this case. The EU, on the other hand, is bound to become a major actor in the international investment regime due to its significant economic size and as such merits our scientific attention.

3.1 The German BIT program and business input

Germany has traditionally been one of the most active states in the international investment regime. Since 1958, Germany concluded more than 130 BITs with third countries. Germany thereby disposes of the most comprehensive BIT network of any country in the world. Germany’s significant interest in BITs arguably reflects the outward-orientation of its economy. Germany is the world’s biggest exporter. German investors account for 16% of the EU’s total outward FDI stock. These facts suggest that the German government and business should have been in close contact over the German BIT program.

Interviews with German business representatives suggest the contrary. Several representatives of the German Federation of Industries (BDI) commented on the question whether and how often they approached the German government with demands regarding the conclusion of BITs that they were rarely in touch with the German government for this purpose. They replied to the question whether German investors approached the BDI with demands for lobbying that this was exceptional. They added that they considered it to be the duty of the German government to be proactive in this domain. The German government should monitor developments in the international investment regime, accordingly conclude BITs and in case of doubt approach German business for input. The BDI representatives underlined that the BDI had no sufficient resources to monitor and lobby on all aspects of international economic policy. The general impression from interviews with business representatives from Germany and other countries suggested that the technicality of international investment regulation indeed made it difficult for business organisations to proactively shape policy in this domain.

Interviews with officials of the German Ministry of Economics confirmed the reports of business representatives. Government officials stated that they were only rarely in touch with German business organisations or multinational enterprises (MNEs) so as to discuss the conclusion and content of IIAs. They argued that the German government indeed perceived its BIT program as a service provided to German investors and taxpayers. When asked how the German government decided which countries to target for the conclusion of BITs, German officials explained that they monitored the geography and volume of German outward investment activities. If a third country received a lot of German FDI and no BIT was in place, the German government would approach the government and ask for the conclusion of such an agreement. What is more, they stressed that the German BIT program formed integral part of German export policy. The main purpose of BITs was to minimise the default risk

under investment guarantees. So if a German investors applies for an investment guarantee for a large-scale project in a third country, which has not signed a BIT with German yet, the German government would again approach the third country with the request for the conclusion of a BIT. In other words, the German government perceived its BIT program as a mean to limit its financial exposure under its national investment guarantee scheme. The content of the German model BIT, finally, by and large reflected texts of the Abs-Shawcross Convention of 1959 and other plurilateral attempts to develop a global model IIA. Concluding, business preferences and lobbying did not shape the German BIT program.

3.2 The EU’s IIA program and business input

The EU is the single biggest emitter and recipient of foreign direct investment in the world economy. It is thus bound to become a major actor in the international investment regime. The EU, however, only acquired the necessary competences to conclude IIAs with post-establishment and protection provisions in 2009. While a lot has happened in the time since then, the EU has not really used its new competences in this domain. The EU negotiates on several comprehensive FTAs and IIAs in the moment, but has not concluded a single agreement. Hence, it is difficult to estimate the influence of business lobbying on the EU international investment policy. Nevertheless, it is possible to examine how business has sought to shape policy-making so far.

European business federations in Brussels do not consider investment regulation as a key priority. In autumn 2013, representatives of inter alia the Confederation of British Industries, the Italian Confindustria, the Spanish CEOE, the Polish Leviathan, the French Medef, the International Chamber of Commerce and BusinessEurope confirmed this evaluation in interviews. They pointed to the limited resources of business federations, the heterogeneous membership and the significant technicality of international investment regulation to explain the lack of attention in this domain. Civil society meetings organised by the Directorate General for Trade of the Commission on salient investment policy issues like the EU-China investment agreement, various FTA negotiations and EU-internal measures like the grandfathering financial liability regulation lend further support to this assessment. Business representatives were little implicated in such investment debates.

Reports of Commission officials by and large confirm the impression that European business is often absent from international investment policy-making. In 2012, a senior Commission official complained that business and civil society hardly sought discussions with the Commission on international investment policy issues. Policy-making felt like a ‘blind flight’ in which the Commission had to guess the preferences of citizens and business. The lack of input from civil society

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6 See Poulsen, “The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence.”
9 See http://trade.ec.europa.eu/civilsoc/doclist_all.cfm
and business complicated debates with the Member States in the Council of Ministers, as the alleged stakeholders did not express their views. In the absence of business input, the Commission decided in 2010 to seek the inclusion of investment provisions into pending FTA negotiations (Canada, India, Mercosur, Singapore). What is more, it declared to seek negotiations on alone standing IIAs with China and Russia. The plan to negotiate on investment disciplines with these countries reflects practical consideration (on-going negotiations) as well as economic and legal concerns. The identified countries attract a lot of European FDI but partly represent challenging investment environments. With regard to the content of European IIAs, the Commission explained to draw on the best practice of Member State BITs. It announced to maintain the high level of investment protection offered under Member State BITs while strengthening state rights and aiming for ambitious liberalisation commitments.10

The situation has arguably started changing with the discussions on the Transatlantic Trade and Investment Partnership (TTIP). In particular media and non-governmental organisations draw attention to the planned investment provisions of TTIP and thereby triggered a lively public debate notably on investor-to-state dispute settlement (ISDS).11 Minutes of civil society meetings on the TTIP negotiations indeed point to business interest with regular demands regarding the planned investment chapter. But it seems fair to say that other aspects of TTIP still receive significantly more attention within the business community.

4. Conclusion

The paper sought to tentatively probe the influence of business on the conclusion and content of IIAs. It found that business takes little interest in international investment policy – apart perhaps from investment liberalisation – and exerts little influence on policy-makers. While the debates on TTIP may gradually change this, the findings imply that the international investment regime is yet the product of bureaucratic politics rather than private initiative. This paper constitutes only first tentative research on this question. Further research is required to increase leverage and detail of these findings.

The preliminary findings, nevertheless, have important theoretical implications. First, the finding that business takes little interest in international investment policy and IIAs raises the question whether these agreements indeed affect investment activities and thus economic growth. Econometric studies have tried to shed light on this question but results are probabilistic yet. Second, they challenge the often implicit assumption in public debates and in academic writings on foreign economic policy that private stakeholders are ultimately the drivers of policy-making. As business seems to have little influence in the here examined policy domain, scholars of foreign economic policy should critically evaluate the actual influence of business in other foreign economic policy domains. Third, the findings also have policy-making implications. As business is little implicated and interested in notably in

12 See http://trade.ec.europa.eu/civilsoc/doclist_all.cfm
investment protection provisions, the US and European policy-makers should have considerable leeway in dealing with the controversial investment protection and arbitration rules in the planned TTIP. They might indeed rebalance and strengthen state vis-à-vis investor rights without risking deteriorating investment relations.

Bibliography


