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The European Union and Investment Facilitation at the WTO

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12.1 Introduction

Until recently, investment facilitation, which aims to ensure the transparency, predictability, and efficiency of the investment regulatory environment, was a niche topic promoted mostly by Brazil and a handful of economies of the Global South in their bilateral or regional agreements. In 2017, however, investment facilitation gained traction on the agenda of the World Trade Organization (WTO) and became the core theme of a Joint Ministerial Statement broadly circulated in the Buenos Aires Ministerial Conference in December. In all, seventy economies supported this call (the number had reached 112 by December 2021). The European Union (EU) was one of them, and it has since played an active role in developing this agenda and taking on an increasing leadership position in the negotiations. This stands in sharp contrast to the United States (US), which has until now chosen not to sign the Buenos Aires and the subsequent Shanghai Joint Statements on investment facilitation. The EU's espousal of the investment facilitation agenda takes place in an ambiguous policy context consisting of mixed political and economic signals. One the one hand, the last two decades have unquestionably ushered in a period of intensified global competition for foreign direct investment (FDI), with countries actively promoting themselves as attractive investment locations. On the other hand, investment issues have been the catalyst of widespread popular skepticism toward international trade and investment agreements, from the aborted Multilateral Agreement on Investment (MAI) in 1998 to the cancelled Transatlantic Trade and Investment Partnership (TTIP) between the EU and the United States in the mid-2010s. While Donald Trump's victory in the 2016 United States presidential elections blew the TTIP a fatal blow, in Europe intense popular discontent with the investor–state dispute

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settlement (ISDS) mechanism had already taken much steam out of the negotiations by 2014.[1]

Not all skepticism against FDI has originated at the grassroots level. EU member states themselves have been ill at ease with some potential risks for public order and security posed by recent FDI patterns. After repeated attempts from 2007 on, they finally managed in 2017 to convince the European Commission to propose a screening mechanism on Inbound FDI. In 2019, the EU adopted the first pan-European foreign investment screening mechanism.[2] In 2020, this mechanism entered into force, together with new restrictive EU rules on foreign subsidies and increased vigilance over merger control in the context of the COVID-19 pandemic. Last but not least, the European Commission on February 18, 2021, announced its new strategy of 'open strategic autonomy', with the aim of restoring multilateralism while asserting core EU values and interests.

This ambiguous context raises the following questions. Why has the EU espoused the investment facilitation agenda, an issue which could hardly be said to be part of the EU's priorities before 2017? And why has it become one of the foremost international proponents of this agenda? Our main goal in this chapter is to clarify and explain the circumstances under which the EU became a promoter of investment facilitation. Furthermore, we aim to probe the potential for the EU to become a rule-maker in the global investment regime by taking the leadership of the investment facilitation initiative.

We argue that the EU's embrace of investment facilitation takes place amid the post-Cold War transformation of the European trading states, which had crystallized after WWII under the twin constraints of United States-shaped multilateral trading regime and European integration.[3] This transformation is shaped by crisscrossing trends including new

[1] M. Bauer, 'The Political Power of Evoking Fear: The Shining Example of Germany's Anti-TTIP Campaign Movement' (2016) 15 *European View* 193–212; M. Caiani and P. Graziano, 'Europeanisation and Social Movements: The Case of the Stop TTIP Campaign' (2018) 57 *European Journal of Political Research* 1031–1055; S. Meunier and C. Roederer-Rynning, 'Missing in Action? France and the Politicization of Trade and Investment Agreements' (2020) 8 *Politics and Governance* 312–324.

[2] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union. Vol. Regulation (EU) 2019/452, online at: https://eur-lex.europa.eu/eli/reg/2019/452/oj (last accessed 13 June 2023).

[3] R. H. Steinberg, 'The Transformation of European Trading States', in J. D. Levy (ed.), *The State after Statism: New State Activities in the Age of Liberalization* (Cambridge: Harvard University Press, 2006), at 340–366.

economic and geopolitical realities testing the EU–United States relationship and the consolidation of the internal political–legal order of the EU empowering it to act in matters of foreign investment regulation. Embracing the WTO investment facilitation agenda serves EU strategic goals of reviving multilateralism, bringing the fractious United States–China relation back into the fold of multilateral disciplines, and asserting itself as a leader in the field of sustainable development.

We proceed in four steps. First, we trace the emergence of the investment facilitation agenda at the international level to the impasse of the WTO Doha Round negotiations and the compromise agreement reached in Bali around the 2013 trade facilitation agreement (TFA), which provided the template for moving on in the investment area under the impulse of developing countries. Second, we highlight the puzzling character of the EU's embrace of the multilateral investment facilitation for development (IFD) agenda by highlighting the low salience of the TFA and of investment facilitation in the EU. Third, we show that changing institutional and (geo)political conditions provided the EU with a window of opportunity to act in 2017. In the last part, we briefly discuss the key elements shaping the EU's preferences toward the IFD Agreement as well as the factors shaping its capacity to become a rule-maker.

12.2 Inventing 'Investment Facilitation' – The Critical Juncture of 2013

The emergence of the idea of 'investment facilitation' on the international agenda has multiple roots – multilateral, unilateral, bilateral, and regional.[4] In this section, we locate the rise of this agenda to the mid-2010s and trace it to the policy entrepreneurship of Brazil and China, as the EU and the United States failed to secure multilateral and regional support for more ambitious investment agreements. We outline the rise of this agenda from the 1996 Singapore WTO conference to the 2017 Buenos Aires Joint Statement, highlighting the 2013 Bali TFA as a critical juncture and the puzzling character of the conversion of the EU and its member states to the new agenda. The question of defining multilateral disciplines on international investment had gained broad prominence in the post-Cold War years, as part and parcel of a renewed and expanded global multilateral agenda, encompassing many more

[4] See Chapter 2 in this book.

economies and many more issues. From 1995, international investment kept popping up in various international organizations, migrating back and forth between the WTO and the Organisation for Economic Co-operation and Development (OECD), reflecting the fact that investment issues were seen as a key concern of developed countries, chief among them the United States and EU countries, as trade within companies in the mid-1990s represented 'about one third of the $6.1 trillion total for world trade in goods and services'.[5]

The WTO initially seemed poised to play a key role in these issues as investment was one of the four new salient issues highlighted in the first WTO ministerial conference held in Singapore in 1996 – from then on known as 'the Singapore issues'. The other Singapore issues were competition, government procurement, and trade facilitation. The inclusion of investment issues on the WTO's agenda epitomized the wish to 'further strengthen the WTO as a forum for negotiation' and deepen the 'liberalization of trade within a rule-based system'.[6] The Singapore declaration called for a potentially far-reaching examination of investment issues as they related to trade liberalization and established a new working group on 'trade and investment' dedicated to this agenda. This grand opening did not mention facilitation other than with reference to 'trade'. While trade facilitation was born, the term of 'investment facilitation' was not coined, and the idea had not even formed yet. As developing countries showed little appetite for the Singapore issues, a range of advanced economies set on to negotiate an ambitious Multilateral Agreement on Investment (MAI) in the OECD. The OECD's ambition was to reach a 'state-of-the-art agreement [that] would be an important step on the road to a truly universal investment regime'.[7] Some of the measures envisioned are now commonly understood as pertaining to investment facilitation (e.g., obligations of transparency in the establishment and post-establishment phases). However, they were

[5] WTO, 'Investment, Competition, Procurement, Simpler Procedures', online at: www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm (last accessed 13 June 2023), Figures for 1995. Trade within companies include trade 'between subsidiaries in different countries or between a subsidiary and its headquarters' (emphasis added).

[6] WTO, 'Singapore Ministerial Declaration', 18 December 1996, online at: www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm (last accessed 13 June 2023).

[7] OECD Committee on International Investment and Multinational Enterprises (CIME) and Committee on Capital Movements and Invisible Transactions (CMIT), 'Multilateral Agreement on Investment: Documentation from the Negotiations', May 1995, online at: www.oecd.org/daf/mai/htm/cmitcime95.htm (last accessed 13 June 2023).

still not labeled as such, and it would not have made sense to do so for the simple reason that the MAI's essence was not about singling out specific aspects of investment issues for multilateral discipline but about fleshing out a comprehensive multilateral investment regime, enmeshing various issues together. The negotiations had started out behind closed doors. However, public opposition soon formed around growing mobilization from labor groups to environmental activists, after an early draft was leaked to a rights advocacy citizen organization.[8] In December 1998, the negotiations collapsed and the French government 'suggested a change of venue, such as the WTO, to address investment concerns'.[9] This venue change was caught in the difficult travails of the Millenium round, expected to be launched at the 1999 Ministerial Conference in Seattle. Outside the WTO, activists protested the secretive character of the discussions, which, they argued, biased the agenda as the round was 'being prepared in a quite similar way as the MAI negotiations, with a strong influence from business which excludes citizen concerns'.[10] Inside the WTO, a North–South division increasingly cleaved the discussions.[11] The Millennium round of the WTO collapsed in the face of deadlocks on the Singapore issues, agricultural liberalization, and the differential treatment of developing countries.[12]

In September 2003, the rescue of the now-dubbed Doha round collapsed amid massive opposition from the developing world, amplified by 'deep-seated tensions within the WTO's institutional framework, both in terms of the processes that underlied its working and the substance of its agreements'.[13] The only part of the Doha Development Agenda and the Singapore 1996 declaration that outlived the chaotic process of

[8] S. J. Kobrin, 'The MAI and the Clash of Globalizations' (1998) 112 *Foreign Policy* 97–109; A. Walter, 'Unravelling the Faustian Bargain: Non-State Actors and the Multilateral Agreement on Investment', in D. Josselin and W. Wallace (eds.), *Non-State Actors in World Politics* (London: Palgrave Macmillan, 2001), at 150–168.

[9] Meunier and Roederer-Rynning, 'Missing in Action?'.

[10] M. vander Stichele, 'The TEP and the Millennium Round in the WTO. Paper Presented for the Conference at the European Parliament', Transnational Institute (TNI), 28 April 1999, online at: www.tni.org/es/node/7362 (last accessed 13 June 2023).

[11] G. R. Winham, 'The Evolution of the World Trading System – The Economic and Policy Context', in D. Bethlehem, I. van Damme, D. Mc Rae, and R. Neufeld (eds.), *The Oxford Handbook of International Trade Law* (Oxford: Oxford University Press, 2009), at 5–29.

[12] F. Laursen and C. Roederer-Rynning, 'Introduction: The New EU FTAs as Contentious Market Regulation' (2017) 39 *Journal of European Integration* 763–779; I. F. Fergusson, 'World Trade Organization Negotiations: The Doha Development Agenda', Congressional Research Service, 12 December 2011, online at: https://fas.org/sgp/crs/misc/RL32060.pdf (last accessed 13 June 2023).

[13] A. Narlikar and R Wilkinson, 'Collapse at the WTO: A Cancun Post-Mortem' (2004) 25 *Third World Quarterly* 447–460.

the 2000s was the 'trade facilitation' agenda, around which the WTO members found an agreement at the 2013 Ministerial Conference in Bali – the so-called Bali Trade Facilitation Agreement. The lesson was that the trade liberalization agenda could be fractured along issue segments and that multilateral support could be found in favor of a very narrow and rather shallow agreement. The TFA not only sealed the fate of deep and comprehensive multilateral trade agreements, it also helped fashion a new type of multilateral investment agenda. The idea of 'investment facilitation' was born.

A few months after Bali, the BRICS highlighted 'trade and investment' as two priority areas and announced an action plan in the field of trade and investment facilitation building on the diverse experience of their members.[14] The BRICS spearheaded the new investment agenda in the context of the G20[15] and UNCTAD[16] but also soon in the WTO. Brazil and China moved to the forefront of these and subsequent initiatives. From 2015, Brazil started embedding its approach to investment facilitation in a range of cooperation agreements with Latin American countries and African countries.[17] In 2016, China initiated a working group on trade and investment at the G20, where it held the presidency, tasked with the formulation of 'guiding principles for global investment policymaking'. These guidelines included 'facilitation efforts that promote transparency and are conducive for investors to establish, conduct, and expand their businesses',[18] the issues that formed the core of the Buenos Aires Joint Statement. Not all developing countries have welcomed the facilitation agenda. India and South Africa have opposed the inception of WTO talks on investment facilitation for various reasons – among them not to be 'handing over policy space to decide on things such as the foreign direct investment norms and arbitration clauses'.[19] Among

[14] BRICS, 'BRICS Trade and Investment Facilitation Plan', 22 July 2014, online at: www.tralac.org/news/article/5916-brics-trade-and-investment-facilitation-plan.html (last accessed 13 June 2023).

[15] G20, 'Guiding Principles for Global Investment Policymaking' (2016), at 20. http://www.g20chn.org/English/Documents/Current/201609/t20160914_3464.html.

[16] UNCTAD, 'Global Action Menu for Investment Facilitation', September 2016, online at: https://investmentpolicy.unctad.org/uploaded-files/document/Actionpercent20Menupercent2001–12-2016percent20ENpercent20lightpercent20version.pdf (last accessed 13 June 2023).

[17] See Chapters 2 and 11 in this book.

[18] G20, 'Guiding Principles for Global Investment Policymaking'.

[19] S. Chakraborty, 'Why India Has Opposed Investment Facilitation Talks at WTO', *Business Standard*, 15 May 2017, online at: www.business-standard.com/article/economy-policy/why-india-has-opposed-investment-facilitation-talks-at-wto-117051400826_1.html (last accessed 13 June 2023).

developed countries, the United States has held an open attitude and not been supportive, while the EU, Canada, Australia, and Japan have joined the initiative.

12.3 Why Did the EU Embrace the Investment Facilitation Agenda?

Since the Buenos Aires Joint Statement of December 2017, the WTO members have now completed the phase of preparation leading to the opening of formal negotiations. This initial phase was devoted to specifying the shape that an agreement on investment facilitation could take. This was done essentially through developing a checklist of elements that could be part of such a framework and sharing textual examples of bilateral agreements in order to transform these elements into more concrete language and sets of rules. With this preparatory phase finished, the members in December 2019 expressed the need to move into negotiations. The negotiations started formally in September 2020 with the two most comprehensive proposals presented by Brazil and the EU, as well as other less comprehensive proposals from a host of countries or regions, including China, Chinese Taipei, Turkey, Japan, Canada, Argentina, and Korea. Unlike the EU, the United States has not made any proposals under the Trump administration. While attending the meetings,[20] the United States delegation never took the floor or issued a formal statement on this initiative. It is thus particularly interesting that, while not one of the original sponsors of the IFD initiative, the EU has become one of its foremost promoters today, together with Brazil, its original sponsor. Why has the EU taken such a prominent role in developing this new international agenda?

To be sure, the EU and its member states had developed investment facilitation instruments before joining the multilateral negotiations in 2017, and they had incorporated such instruments in third-country agreements, though under different names, before the term became *en vogue* in the late 2010s. In fact, this kind of measure is arguably as old as the European bilateral investment treaties (BITs) themselves, as evidenced by data from the World Trade Institute's Electronic Database on Investment Treaties (EDIT).[21] Besides the fact that some of the

[20] This is unlike the delegations from South-Africa and India, which do not attend meetings.
[21] We would like to thank Rodrigo Polanco from the World Trade Institute for his help with retrieving the relevant data. The database's categorization is made automatically using investment facilitation keywords. While this means that we must interpret these data with

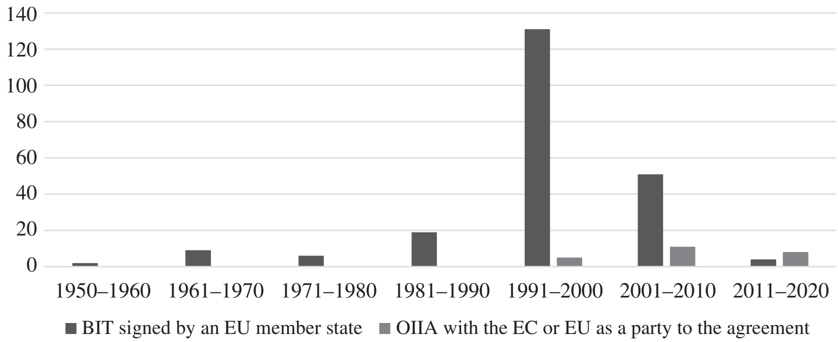

Figure 12.1 Number of international agreements entered by the EC/EU or its member states, with investment facilitation provisions (1950–2020).
Source: Authors, based on EDIT, online at: https://edit.wti.org/document/investment-treaty/search (last accessed 13 June 2023).

measures identified as 'investment facilitation' stretch back to the first BITs, several other points emerge, based on these preliminary data. Clearly, investment facilitation provisions surged in the 1990s (see Figure 12.1). The rise of investment facilitation measures in this decade is perhaps not very surprising, bearing in mind the particular context of the immediate post-Cold War years. We know that these years incepted a twenty-year long 'golden age of globalization' during which 'the scale and scope of such [international] investment increased dramatically . . . growing twice as fast as international trade did'.[22] Therefore, a steep rise in 'investment facilitation' measures corresponded with a period of rapid expansion of international investment. This does not mean, however, that EU member states had become particularly interested in 'investment facilitation' as such – in fact, talking about investment facilitation measures for this period would be an anachronism, as we showed in the previous part. More likely, the increasing number of investment facilitation measures during the 1990s and 2000s is simply a mechanical effect of a steep rise in international investment agreements.

care, since they might contain some errors, the method has the advantage that it enables us to capture 'investment facilitation' measures before the label was coined.

[22] House of Commons, 'UK Investment Policy: Government Response to the Committee's Seventh Report of Session 2017–19 – International Trade Committee – House of Commons', July 2019, online at: https://publications.parliament.uk/pa/cm201919/cmselect/cmintrade/126/12602.htm (last accessed 13 June 2023).

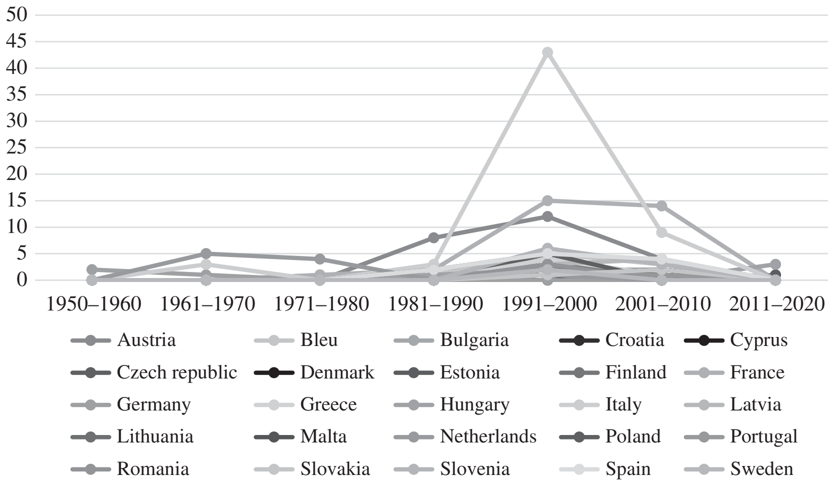

Figure 12.2 Number of BITs signed by EC/EU member states, including investment facilitation provisions, by country (1950–2020).
Note: 'Bleu' refers to Belgium–Luxembourg economic union.
Source: Authors, based on EDIT, online at: https://edit.wti.org/document/investment-treaty/search (last accessed 13 June 2023).

A relatively limited number of European players drove this trend (see Figure 12.2). In the 1990s, these players mostly consisted of a handful of (contemporary or future) member states. This reflects the fact that the EU prior to 2009 did not have any policy competences in the area of international investment and mostly got involved in that area indirectly, through agreements of cooperation, association, or stabilization with third countries. Among the member states, the most active were Italy, France, Austria (joining the EU in 1995), and Slovenia (joining the EU in 2004), as well as the Netherlands (which had already experienced a surge in the 1960s). Again, we need to be careful with the interpretation of these results because we only have absolute figures. It is clear from the EDIT data, however, that member states and the EU itself had practiced some form of investment facilitation long before the concept of 'investment facilitation' was 'invented' and became fashionable on the international agenda.

In sum, in all likelihood, as the EDIT data show, the EU and its member states had developed some elements of investment facilitation before the 2010s. Like Molière's Monsieur Jourdain famously spoke prose without knowing it, the EU member states had just tackled investment facilitation 'without knowing it': because it was anachronistic to speak of investment facilitation and because, as a corollary, these elements were not thought to have an independent existence. In fact, the perception, probably widely shared in the European Commission, is that the member states' BITs did not deal at all with the regulatory aspect of investment, a fortiori investment facilitation concerns which did not exist before the mid-2010s.[23]

The EU started becoming involved in international investment agreements (IIAs) after the mid-1990s, most notably with the important Cotonou Agreement, signed in 2000 with seventy-nine countries situated in Africa, the Caribbean, and the Pacific. As Polanco[24] writes, the Cotonou Agreement went 'further [than previous EC agreements which were mostly focused on promotion and protection investment cooperation] to develop a model investment treaty: The Cotonou Agreement even provides an overview of the content of such model agreement, including fair and equitable treatment, most-favored-nation, protection against expropriation, transfer of capitals and profits, and investor-state arbitration'. Significantly, it is also one of the 'very few IIAs [to] include provisions on investment facilitation through direct financing of investment projects', specifically the Investment Facility set up in 2003 and managed by the European Investment Bank (EIB).[25] Cotonou therefore stands out not only as a successful case of international investment agreement between the EU and developing countries, it also stands out as an ambitious toolkit of measures bringing together a broad range of distributive and regulatory instruments. In this sense, Cotonou is the exception that confirms the overall lack of prominence of the investment facilitation in the EU prior to the late 2010s.

The pattern emerging from this cursory overview highlights some puzzling aspects in the decision of the EU to embrace the international agenda on investment facilitation, for even though the EU and its member states had developed some instruments of investment facilitation before the 2010s, there is no suggestion that they meant to make it an independent, let alone central, pillar of their FDI policy – on the contrary, they were probably best thought of as 'corollary' measures in a more comprehensive agenda on investment liberalization, good

[23] Interview 22 January 2021.
[24] See Chapter 2 in this book.
[25] See Chapter 2 in this book.

governance, and sustainable development. Even now, investment facilitation remains only one leg of the broader triptych of investment policy principles guiding the EU and its member states, including the weighty principles of 'investment liberalization' and 'investment protection'. In this light, pursuing an international agenda on investment facilitation explicitly and contentiously disconnected from investment protection and market access issues seems to short-change the EU's strategic priorities and strengthen the hand of emerging countries, like Brazil.[26]

Moreover, it is not clear what benefits the EU would reap from such an agreement. For one, arguments in support remain vague, including references to the 'EU sensing an interest', seeing a 'clear benefit for all', or seeing this initiative as 'really a development initiative'.[27] More specific arguments refer to the need to modernize the multilateral agenda to make it more fit for an economy increasingly based on investment flows. However, looking back at the case of trade facilitation, the results of the Bali TFA seem to be meager, raising the question of whether pursuing this kind of segmented agendas is worth the effort. The preliminary assessments of the TFA have highlighted its very narrow scope, its soft commitment methodology – with a preference for best endeavor language – and its highly flexible implementation scheme.[28] This suggests that 'it seems myopic to consider that the ATF [sic!] will bring significant economic impacts' even though the TFA can still be considered 'a tool of trade facilitation reform in the long-run'.[29] Arguably, the same might be likely to happen with a narrow investment facilitation agreement, raising the question of why the EU would bother the effort. Importantly, there is no impact assessment of the IFD to this date, meaning that arguments about its benefits and its costs lack an evidentiary basis at the EU level.[30]

Even if the multilateral agreement were to succeed, the relative benefits derived by the EU would be smaller than the benefits for other parties to the agreement. While the potential gains are estimated to be large for many developing economies, the expected gains are more modest for the EU and for other developed economies. According to the Investment Facilitation Index, EU countries already have good regulatory practices

[26] See Chapter 11 in this book.
[27] Interview on 17 December 2020.
[28] S. Hamanaka, 'WTO Agreement on Trade Facilitation: Assessing the Level of Ambition and Likely Impacts' (2014) 9 *Global Trade and Customs Journal* 341–351.
[29] Ibid., at 348–349.
[30] Interview on 22 January 2021.

facilitating investment. Fifteen EU member states – Germany, the UK (which was still an EU member until 2020), the Netherlands, Denmark, Austria, Sweden, France, Luxembourg, Finland, Belgium, Poland, Ireland, Estonia, Slovenia, and Spain – were among the top thirty countries with the best performance in terms of existing investment facilitation.[31] This is also perceived by Commission officials who acknowledge that the investment facilitation agenda does not make a difference for the EU (interview on January 22, 2021). The study by Balistreri and Olekseyuk estimates that the EU would gain modestly from the successful conclusion of an agreement.[32] In fact, one possibility is that the investment facilitation agenda sharpens the global competition for FDI by making developing and emerging countries more attractive recipients of FDI.

12.4 Seizing a Window of Opportunity

To explain this puzzling EU embrace of the multilateral investment facilitation agenda, we need to understand the evolving economic, institutional, and political factors shaping the 'European trading states', which crystallized in the Cold War at the intersection of the multilateral trade regime and European integration. Externally, the European trading states pursued policies of embedded liberalism in the GATT and later multilateralism through the WTO. Internally, the process of European integration supported this orientation by fostering notably the upward shift of trade policy competences to the supranational level[33] and the abandonment of egregious policies of industrial subsidization and protection,[34] coupled with the development of other policies pursuing

[31] A. Berger, A. Dadkhah, and Z. Olekseyuk, 'Quantifying Investment Facilitation at Country Level: Introducing a New Index', German Development Institute, 19 January 2021, online at: www.idos-research.de/uploads/media/DP_23.2021.pdf (last accessed 13 June 2023).

[32] See Chapter 5 in this book.

[33] S. Meunier, 'Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment' (2017) 55 *Journal of Common Market Studies* 593–610; A. R. Young, 'Trade Policy: Making Policy in Turbulent Times', in H. Wallace, M. A. Pollack, C. Roederer-Rynning, and A. R. Young (eds.), *Policy-Making in the European Union*, 8th ed. (Oxford: Oxford University Press, 2020), at 363–387.

[34] M. Thatcher, 'Competition Policy: The Politics of Competence Expansion', in H. Wallace, M. A. Pollack, C. Roederer-Rynning, and A. R. Young (eds.), *Policy-Making in the European Union*, 8th ed. (Oxford: Oxford University Press, 2020), at 130–151.

economic and social welfare goals.[35] This section traces key post-Cold War changes that have opened up a window of opportunity for the EU to simultaneously assert leadership at the global level and 'rescue' multilateralism from globalization backlash.

12.4.1 Changing Economic Stakes: The Legacy of the Economic and Financial Crises

For the EU, whose very essence depends on participating in and defending an open world economy, the stakes of developing some semblance of international regime governing FDI are high. Today the EU is arguably a world leader in trade and investment in a rapidly changing environment. While in 1948, the United States' GDP represented two-thirds of the total GDP of all GATT members, in 2000, it represented only one-third of the total GDP of all WTO members – roughly at the same level as the EU (31 percent),[36] and in 2017, China, the United States, and the EU were the three largest economies with 16.4 percent, 16.3 percent, and 16 percent of the world GDP (expressed in purchasing power standards, PPS), respectively.[37] FDI has played an increasing role in the world economy since 2000, with the share of FDI stock rising from roughly one-fifth of the world GDP in 2000 to a little more than one-third today.[38] There too, the EU has grown to become a major global power – in fact the leading power, judging by the official statistics posted on the European Commission's website. These pages cultivate the image of a global leader in matters of trade and investment. One can read that the EU is: 'the largest economy in the world'; the 'world's largest trading bloc'; the 'top trading partner for 80 countries', whereas 'by comparison the United States is the top trading partner for a little over 20 countries'; and in fact 'the most open to developing countries. Fuels excluded, the

[35] C. Roederer-Rynning, 'The Common Agricultural Policy: The Fortress Challenged', in H. Wallace, M. A. Pollack, C. Roederer-Rynning, and A. R. Young (eds.), *Policy-Making in the European Union*, 8th ed. (Oxford: Oxford University Press, 2020), at 182–207.

[36] Steinberg, 'The Transformation of European Trading States'.

[37] Eurostat, 'China, US and EU Are the Largest Economies in the World', News Release, 19 May 2020, online at: https://ec.europa.eu/eurostat/documents/2995521/10868691/2-19052020-BP-EN.pdf/bb14f7f9-fc26–8aa1–60d4–7c2b509dda8e (last accessed 13 June 2023).

[38] F. Carril-Caccia and E. Pavlova, 'Foreign Direct Investment and Its Drivers: A Global and EU Perspective', 4 Economic Bulletin Articles, 2018, online at: www.ecb.europa.eu//pub/economic-bulletin/articles/2018/html/ecb.ebart201804_01.en.html (last accessed 13 June 2023); the exact figures are 22 percent of world GDP in 2000 and 35 percent in 2016.

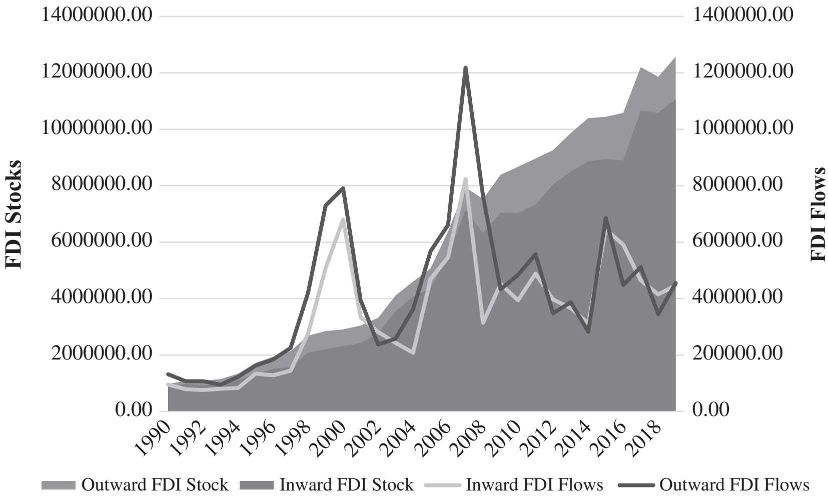

Figure 12.3 EU FDI stocks and flows, inbound and outward, 1990–2018.
Note: The number of member states increased from 12 to 28 during the period covered by the data, as a result of successive EU enlargements.
Source: UNCTAD 2020. Own compilation. We are grateful to Lauren Konken for her research assistance.

EU imports more from developing countries than the United States, Canada, Japan, and China put together' – last but not least, the EU 'ranks first in both inbound and outbound international investments'.[39]

In the last decade, the economic development of the European trading states has taken place against an increasingly volatile context and amid an intensified global competition for FDI. EU FDI flows were significantly affected by the economic and financial crises, as Figure 12.3 shows. The relative decline in EU FDI flows following the crisis has now been compounded by the COVID-19 pandemic, which has depressed FDI flows worldwide and challenged the organization of global supply chains, while simultaneously making foreign investment essential to the post-pandemic economic recovery. In 2020, while global FDI flows shrunk by more than 40 percent, the EU was particularly hard-hit by the squeeze

[39] European Commission, 'EU Position in World Trade', online at: https://ec.europa.eu/trade/policy/eu-position-in-world-trade/ (last accessed 13 June 2023).

with inbound FDI flows falling by more than 60 percent,[40] compared with a roughly 50 percent drop in the United States, and 30 percent drop in the ASEAN region.[41] Developing countries performed better, although the better performance primarily reflected the continued rise of FDI in China and India; Africa and much of Latin and South America, including Brazil, witnessed a contraction of FDI flows.[42] Developing countries now account for 70 percent of global FDI flows.[43]

12.4.2 *Changing Geopolitical Environment: The Turning Point of the Trump Presidency*

The leading role now played by the EU in investment facilitation also comes from its assessment of recent geopolitical transformations, notably the assertiveness of China and the disengagement of the United States from multilateral governance. The most significant development in FDI flows worldwide over the past decade has been the rise of China as an outward investor.[44] From a small player in the early 2000s, China became one of the world's top three investors. Internally, this rapid rise of Chinese investment has presented both challenges and opportunities for the EU. This new source of foreign investment in the EU has brought economic opportunities, in particular to EU countries that have been suffering from high unemployment and low growth in the wake of the Eurozone crisis.[45] The new influx of Chinese investment has also ushered in a series of political challenges, mostly centered on issues of national

[40] UNCTAD, 'Investment Trends Monitor, No.38', January 2021, online at: https://unctad.org/webflyer/global-investment-trend-monitor-no-38 (last accessed 13 June 2023). The situation was even worse for Europe as a whole, i.e., including non-EU countries, UNCTAD describing incoming flows to Europe as having 'dried up completely to -4 billion [dollars] (including large negative flows in several countries)' – down to null in the United Kingdom.

[41] Ibid.

[42] Ibid.

[43] Ibid.

[44] J. Chaisse, *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (Oxford: Oxford University Press 2019); J. M. F. Blanchard, 'Chinese Outward Foreign Direct Investment (COFDI): A Primer and Assessment of the State of COFDI Research', in K. Zheng (ed.), *Handbook on the International Political Economy of China* (Cheltenham: Edward Elgar Publishing, 2020), at 76–97.

[45] S. Meunier, 'Chinese Direct Investment in Europe: Economic Opportunities and Political Challenges', in K. Zheng (ed.), *Handbook on the International Political Economy of China* (Cheltenham: Edward Elgar Publishing, 2020).

security and technology transfers.[46] As a result of these challenges, the political context for FDI has become less hospitable in Europe in recent years. For the first time in its history, in 2019, the EU adopted a supranational foreign investment screening mechanism, which became operational in October 2020,[47] after pressure by key Western member states.[48] In 2020, in the early days of the pandemic, the EU also adopted restrictive rules on foreign subsidies.[49] In 2021, the Commission presented a new anti-coercion instrument to enable the EU to respond to the weaponization of trade by third countries. Simultaneously, however, the EU concluded the protracted negotiation of the EU–China Comprehensive Agreement on Investment (CAI) in December 2020,[50] though it has not been ratified as of writing.

Externally, the rise of China as a major investor worldwide also presents the EU with challenges and opportunities. One major challenge is the competition to European investments represented by Chinese FDI in many developing countries, especially those with little transparency, which may give Chinese investors an edge. Another challenge is the norm-bending effect of the growing assertiveness of China internationally as an alternative political model and the market distortions introduced by its state subsidies and state-owned enterprises. Multilateral investment negotiations, which would entail greater transparency worldwide, might restore a level-playing field for European investors.

The second major development in the geopolitics of investment negotiations is the disengagement of the United States from multilateral governance during the Trump administration. On the one hand, the United States proved to be no longer a reliable partner for the EU by withdrawing from a variety of international negotiations and organizations and even by accusing the EU, in President Trump's words, of being the 'biggest foe' of the United States. Moreover, this confrontational

46 S. Meunier, ''Beggars Can't Be Choosers': The European Crisis and Chinese Direct Investment in the European Union' (2014) 36 *Journal of European Integration* 283–302.

47 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union.

48 Z. T. Chan and S. Meunier, 'Behind the Screen: Understanding National Support for a Foreign Investment Screening Mechanism in the European Union' (2022) 17 *The Review of International Organizations* 513–541.

49 European Commission, 'EU and China Reach Agreement in Principle on Investment', 30 December 2020, online at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2541 (last accessed 13 June 2023).

50 Ibid.

'America First' agenda weakened multilateralism itself. During the Cold War, multilateral institutions were molded under quasi-unilateral United States hegemony; later, from the 1970s, they evolved in response to increasingly shared EC–United States governance.[51] Yet without United States support or presence, progress and even activity in the WTO faltered, such as the appointment of judges to the Appellate Body or the nomination of a new director-general. With Trump's switch to tit-for-tat trade relations and dispute resolution, it is the very concept of multilateralism and rules-based trade that has been challenged. This weakening of multilateralism represents an existential threat to the EU, whose very project is itself based on rules and enforcement to transcend nationalism and protectionism.

On the other hand, the absence of the United States from the multilateral negotiating scene also created an opening for the EU to take on a leadership role, which may achieve two objectives. For one, European leadership in the negotiation on investment facilitation could protect the multilateral trading system by delivering an easy win after so many years of stunted progress in the WTO, notably the failure of the Doha Development Agenda. A successful agreement, even if not very consequential, could boost confidence in the strength of multilateralism, while waiting for the United States to rejoin. Second, a successful negotiation could assert further the international power of the EU, both by showing that it can deliver a positive outcome when it takes the lead and by taking the normative 'high ground' in displaying its respect for rules even if there is not a lot at stake for itself.

12.4.3 Changing Institutional Competence: Clarified EU Competences after 2017

Finally, the emergence of investment facilitation at the WTO has coincided with the emergence of the EU as the main actor in investment policy in Europe. For decades after the creation of the European Economic Community, the EU did not have competence over FDI policy. Unlike trade, foreign investment is not governed by a multilateral institution, for historical reasons going back to the breakdown of the Havana Charter in 1950. The 1957 Treaty of Rome did not bring foreign investment under supranational reach, leading member states to negotiate their

[51] Steinberg, 'The Transformation of European Trading States'.

own investment deals over the next fifty years, including over a thousand Bilateral Investment Treaties.

This changed fundamentally with the 2009 Lisbon Treaty, which formally transferred the competence to negotiate agreements on FDI from the national to the supranational level. Indeed, Article 207 of the Treaty on the Functioning of the European Union explicitly folded 'foreign direct investment' under the Common Commercial Policy. After the competence transfer, the EU found itself able to take over the negotiation of all international investment agreements for the member states in order, notably, to liberalize foreign markets, protect European investments abroad, and harmonize the rules for screening inward investments in Europe. Indeed, the EU has been actively using this newfound competence by engaging in investment negotiations with a multitude of partners through bilateral trade and investment negotiations (such as Singapore, Canada, Vietnam, Japan, and the United States) and specific investment negotiations (with China).

This competence transfer, however, was controversial, and the exact scope of the EU's newfound powers remained uncertain until about 2017. As Meunier[52] has analyzed, the competence transfer was not the result of a long, publicly debated policy decision; rather, it happened 'by stealth', with most member states not realizing the implications of this transfer. Therefore, the initial implementation was mired in political and legal controversies over the exact scope of the EU's competence over FDI.

A series of judicial rulings sorted out the issue of EU competence, both at the external and internal levels. Externally, the Court of Justice of the European Union (CJEU) ruled in 2017 in Opinion 2/15 on the EU–Singapore Agreement that the EU has exclusive competence over investment treaties, though some provisions fall under mixed competence, notably ISDS provisions.[53] In 2019, the CJEU ruled in Opinion 1/17 about the EU–Canada CETA that the Investment Court System, a new institutional creation to deal with investment protection and disputes, was compatible with EU law.[54] Internally, the 2018 Achmea ruling led to the termination of intra-EU BITs after the CJEU declared investor–state

[52] Meunier,'Integration by Stealth'.

[53] Opinion 2/15 of the Court of 16 May 2017. ECLI:EU:C:2017:376, online at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN (last accessed 13 June 2023).

[54] Opinion 1/17 of the Court of 30 April 2019. ECLI:EU:C:2019:341, online at: http://curia.europa.eu/juris/document/document.jsf?docid=213502&doclang=EN (last accessed 13 June 2023).

arbitration between member states incompatible with EU law.[55] After 2019, once the competence disputes were sorted out, it was clear that the EU could engage fully in international negotiations over foreign investment (but not ISDS), and thus negotiate investment facilitation.

The timeline of the investment facilitation negotiations has coincided with the timeline of the judicial and political resolution of the competence issue in the EU. Even though member states are present in the room during the negotiations in Geneva, investment facilitation is the first multilateral investment agreement collectively negotiated by the EU on behalf of its members. They are an important step for the EU to assert its newly gained authority, especially by trying to deliver on such a noncontroversial issue.

12.5 A Stepping Stone toward the Broader 'Open Strategic Autonomy' Agenda of EU Trade Policy

The European Commission on February 18, 2021, announced its new strategy of 'open strategic autonomy' to guide its trade policy over the next five years.[56] This strategy aims at a more assertive promotion of EU values and interests in the world through multilateralism and the reinforcement of strategic partnerships. It also singles out *investment facilitation* as one of the EU's priorities in the modernization of the WTO's rules. We argue that investment facilitation serves these strategic goals by rescuing multilateralism one step at a time, thereby containing the centrifugal forces of power shift rivalries, and by asserting soft power leadership through the EU's distinctive commitment to the rule of law and long-standing engagement in support of sustainable development.

12.5.1 Rescuing Multilateralism

A cornerstone aim of the Commission's new trade strategy is to reinforce the various components of the multilateral trading system in order to

[55] Case C-284/16 Slowakische Republik (Slovak Republic) v. Achmea BV, ECLI:EU:C:2018:158 (6 March 2018), online at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=8334142 (last accessed 13 June 2023).

[56] European Commission, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy* (Luxembourg: Publications Office of the European Union, 2021), online at: https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159541.0270_EN_05.pdf (last accessed 13 June 2023).

defend EU values and interests more effectively. This means relaunching the negotiation pillar of the WTO, while insisting on a tougher and stricter implementation of international trade agreements. The EU's diagnosis is that the WTO's 'crisis' which 'affect all three functions: negotiations . . ., the dispute settlement . . ., and the monitoring of trade activities' is detrimental to EU interests because it promotes lawlessness and expediency. This situation plays into the hand of China and the United States, which have trodden out of the disciplines of the WTO to manage their conflict. Barring the reform of the WTO, 'the trade relationship between the US and China, two of the three largest WTO members [will continue to be] largely managed outside WTO disciplines'.[57]

This unmanaged rivalry also spills over into other realms than the immediate cause of trade conflicts between the two, by weakening the alliances and partnerships that are central to the EU, that is, 'the transatlantic partnership' and partnerships with 'neighboring countries and Africa'.[58] The COVID-19 pandemic has already highlighted growing concerns in Europe that 'China may use its 'mask diplomacy' to further its influence in Europe' where it already has established strong ties, particularly in some Central and Eastern member states.[59] Africa, where FDI has plummeted in the wake of the COVID-19 pandemic, has also become the object of growing attention from emerging and developed countries – Brazil – since 2015,[60] but also China, as part of the One Belt One Road (OBOR) initiative launched in 2013, a major infrastructure development strategy later renamed Belt and Road Initiative (BRI). In January 2017, China accelerated its engagement in Africa by announcing, in the context of the Forum on China–Africa Cooperation, ten cooperation plans organized with trade and investment facilitation as one

[57] Ibid.

[58] European Commission, 'Commission Sets Course for an Open, Sustainable and Assertive EU Trade Policy', Press Release, 18 February 2021, online at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_644 (last accessed 13 June 2023).

[59] A. Bhatnagar, 'Is the EU's COVID-19 Response Losing Central and Eastern Europe to China?', *World Politics Review*, 8 May 8 2020, online at: www.opinionglobal.cl/is-the-eus-covid-19-response-losing-central-and-eastern-europe-to-china/ (last accessed 13 June 2023).

[60] M. R. Sanchez Badin and F. Morosini, 'Navigating between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs)', in F. Morosini and M. R. Sanchez Badin (eds.), *Reconceptualizing International Investment Law from the Global South* (Cambridge University Press, 2017), at 188–217; R. Polanco, 'Investment Facilitation Provisions in International Investment Agreements and Their Relation with the Multilateral Framework on Investment Facilitation for Development' (2020).

of three strategic pillars of cooperation (the other ones being: human resource development and infrastructure development).[61]

In this respect, the fact that the current negotiations are embedded in the WTO is certainly one of the major attractions of the current investment facilitation agenda. It provides the EU with a chance to 'rescue' multilateralism, one small building block at a time. The Trump administration's hollowing out of the WTO has not been the only source of danger to trade and investment multilateralism. The multilateral trade agenda has suffered from its ambition to be broad and comprehensive, which has led to a series of failures and a seeming inability to deliver results. The IFD negotiations provided an opportunity for the EU to revitalize and reform trade multilateralism by breaking down broad ambitions (such as creating a multilateral investment regime) into small, manageable chunks that can actually produce results. This is consistent with French president Emmanuel Macron's recent argument that 'the enemy of multilateralism [. . .] is slowness and ineffectiveness' and that 'the key is multilateralism that produces results'.[62] Investment facilitation is a low-hanging fruit to get started on this revitalization agenda because its noncontroversial nature may show that the WTO can again be the place where developing, emerging, and developed countries can make compromises. More generally, the European Commission will take center stage in the negotiations and can be expected to be one of the most ardent supporters of this initiative since it gives it a relatively easy way to showcase its newly clarified competence under Lisbon.

Given the liberal *ethos* of the Directorate-General (DG) for Trade,[63] the part of the European Commission services in charge of the investment facilitation negotiations at the WTO, the EU negotiators can be expected to prioritize such concerns as the coherence of the emerging investment facilitation initiative with cognate elements of the multilateral trade and investment regime – out of the motto that 'no one wants an agreement that creates new legal uncertainties'.[64] Accordingly, whatever

[61] N. Basu, 'China Pushes for Africa on Board OBOR Bandwagon – Analysis', *South Asia Monitor*, 5 February 2017, online at: www.eurasiareview.com/05022017-china-pushes-for-africa-on-board-obor-bandwagon-analysis/ (last accessed 13 June 2023).

[62] R. Khalaf, V. Mallet, and B. Hall, 'Emmanuel Macron: "For Me, the Key Is Multilateralism That Produces Results', *Financial Times*, 18 February 2021, online at: www.ft.com/content/d8b9629a-92b1-4e02-92b7-41e9152d56ea (last accessed 13 June 2023).

[63] G. Siles-Brügge, *Constructing European Union Trade Policy: A Global Idea of Europe* (London: Palgrave Macmillan, 2014).

[64] Interview 17 December 2020.

the EU negotiates here, according to Commission officials, it 'has to be careful that it does not diminish obligations under the GATT and avoids legal uncertainty. These concerns are playing an important role in the active negotiation phase. The capitals look at this. Possible interactions with other agreements raise concerns.'[65] Thus, much of the Commission's emphasis is about assessing gaps, shortcomings, loopholes, and, where possible, finding horizontal rules.

12.5.2 Asserting the EU's Distinctiveness

While enabling the EU to rejuvenate multilateralism, the investment facilitation agenda also gives the EU an opportunity to upload to the global level many of the institutional practices and know-how that have long been ingrained in the DNA of its European trading states and that have shaped the core of the EU's development policies with countries in Africa and the Caribbean (ACP). Those very practices and know-how can form the core of the EU's soft power in the Xi Jinping and post-Trump era. No EU member states dispute the investment facilitation multilateral agenda founded on the promotion of transparency and the rule of law,[66] even though some Visegrad countries (Poland and Hungary especially) can be expected to be foot-dragging when EU or international agendas threaten the grip of their illiberal rulers on domestic politics.[67]

Side by side with the WTO initiative, investment facilitation has been an integral part of the EU's international development policies, although these measures were not labeled as such until 2018 or 2019.[68] Since 2017, these measures have been grouped under the so-called Pillar 3 of the European External Investment Plan (EIP) with developing countries in the Neighborhood and Sub-Saharan Africa,[69] and they have been referred to as policies aiming at creating a good 'investment climate'.[70]

65 Ibid.
66 Interview 22 January 2021.
67 F. Schimmelfennig and U. Sedelmeier, 'The Europeanization of Eastern Europe: The External Incentives Model Revisited' (2020) 27 *Journal of European Public Policy* 814–833.
68 Interview on 2 March 2021.
69 European Commission, 'EU External Investment Plan', September 2019, online at: https://ec.europa.eu/eu-external-investment-plan/about-plan_en (last accessed 13 June 2023); Pillar 1 deals with financial instruments; Pillar 2 deals with technical assistance.
70 Interview on 2 March 2021.

These policies have been spearheaded by other services of the Commission, in particular the DG for International Partnerships (INTPA, formerly known as DEVCO). They have given birth to a discourse of European distinctiveness, which relies not only on its financial muscles but above all on the value its policies and private–public partnerships add for the societies of developing economies – for example, through a sustained focus on job creation, inclusiveness, and transparency – and summed up by the axiom 'We invest where others don't'.[71] To accompany this investment facilitation narrative, the EU has steadily stepped up its financial commitment. In the current negotiations on the long-term budget framework of the EU for 2021–2027, the EU has agreed to establish a Neighborhood, Development, and International Cooperation Instrument (NDICI), which should provide for a tenfold increase in the EU's development budget, now channeled through the flexible European Fund for Sustainable Development + (EFSD+).[72]

All of this is taking place simultaneously to the renewal of the Cotonou Agreement, originally signed in 2000. In December 2020, the signatories of the previous agreement reached a political deal on a post-Cotonou agreement, which has yet to be adopted, ratified, and enter into force. As mentioned earlier, the 2000 Cotonou Agreement stood out by its level of ambition in the field of investment and wove 'investment facilitation' into a far-reaching set of distributive and regulatory tools.

12.5.3 Balancing Potentially Conflicting Goals

The European trading states, however, are no longer dominated by executive actors (Commission and member states) as they were just a decade ago; this changing political context adds pressure on the Commission to stake out a more developmentally ambitious leadership.

71 Interview on 2 March 2021; finally, to complete the picture of contemporary investment facilitation policies in the EU, it is noteworthy that the European Commission has been working on an internal EU investment facilitation directive aimed at reconstituting the legal framework rendered obsolete by the termination of intra-EU BITs. Given the deeply ingrained character of 'investment facilitation' measures in the DNA of the European trading states, the domestic EU investment facilitation legislation is expected to be more ambitious than that pursued in the WTO.

72 European Commission, 'EU Welcomes Political Agreement on €79.5 Billion for NDICI', December 2020, online at: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2453 (last accessed 13 June 2023).

One of the most significant recent institutional trends has been the legislative empowerment of the European Parliament and the growing assertion of the national parliaments. The European Parliament has gained real decisional power in the successive treaties of the 1990s and 2000s.[73] It is now a co-legislator with the Council on domestic trade- and FDI-related legislation. It also has extensive information and consent powers in matters related to the negotiation of international agreements. As the only directly elected EU legislature, the European Parliament has had an incentive to represent the broader set of ideas and interests displayed in the European citizenry at large as well as traditional producer interests. In trade and FDI matters, this means that diffuse citizen interests can find allies in the European Parliament. In the TTIP and CETA negotiations, for example, the European Parliament joined the cause of social activists by pushing for greater transparency of the EU decision-making process and requesting a reformulation of the ISDS mechanism.[74] Even though the clarification of the issue of competences means that national parliaments are not required to ratify the IFD Agreement, we can expect them to continue to be vigilant and relay a variety of local and national concerns articulated in civil society organizations.

Some of these concerns are already articulated in the various consultative fora established by the European Commission to 'take the temperature' of civil society. The January 2020 civil society dialogue meeting organized by the European Commission on the topic of investment facilitation provides a preliminary indication of societal concerns. After a brief presentation of the negotiations at the WTO, European Commission officials were asked questions ranging from how to deal with the issue of 'phantom investment'?[75] Would the EU not endorse this phenomenon by participating in international discussions on investment

[73] Rosen, Guri, 'The Impact of Norms on Political Decision-Making: How to Account for the European Parliament's Empowerment in EU External Trade Policy' (2017) 24 *Journal of European Public Policy* 1450–1470.

[74] C. Roederer-Rynning, 'Parliamentary Assertion and Deep Integration: The European Parliament in the CETA and TTIP Negotiations' (2017) 30 *Cambridge Review of International Affairs* 507–526.

[75] 'Phantom Investment Calls for an Exorcism', *The Financial Times*, 10 September 2019, online at: www.ft.com/content/44de0898-d2fb-11e9-a0bd-ab8ec6435630 (last accessed 13 June 2023). "Phantom investments" are investments that do not carry a productive business purpose with lasting interest, but rather locate in preferential tax jurisdictions to reduce the parent company's tax bill. It is estimated that 40 percent of the world's FDI stock is actually phantom investment.

facilitation? And how would one make sure that international measures really served sustainable development? Would these measures apply to the extractive industries? And why was the United States not supporting these negotiations? These were some of the questions that were raised by the participants, suggesting an at best unconvinced public.[76]

12.6 Conclusion

This chapter has shown that since 2017, the EU has embraced the multilateral investment facilitation agenda, even though it had originated in a group of countries primarily located in the Global South. We have argued that the EU has now emerged as one of its foremost proponents at the global level because it serves its broader agenda of 'open strategic autonomy'. In particular, investment facilitation is seen as a small, non-controversial building block in the EU's broader strategy to 'rescue' multilateralism – from United States disengagement, from the rise of China, and from past multilateral failures to deliver because of unrealistic ambitions. The main attraction of the investment facilitation agenda is that it enables the EU to take the lead of a multilateral negotiation that will deliver results, since it is a low-hanging fruit given the common interests between emerging and developed countries. The strategic goals are to assert global leadership in sustainable development by drawing on the distinctiveness of the EU's long-standing involvement in international development action and, in the longer term, to bring the fractious United States–China relationship back to the fold of multilateral disciplines, by rejuvenating the WTO. A successful investment facilitation agreement could also further the opportunity for WTO reform, with a new momentum provided by the election of Joe Biden in the United States and the election of Ngozi Okonjo-Iweala as the new WTO Director-General – though the new United States stance remains to be tested.

We have embedded this argument in a broader analysis of the post-Cold War evolution of the 'European trading state', a concept coined by Steinberg[77] to refer to the historically specific set of institutional structures and decision-making procedures shaping the trading activities of

[76] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union.

[77] Steinberg, 'The Transformation of European Trading States'.

European states, as they engaged in the twofold postwar process of multilateral trade regime formation and European integration. The EU's embrace of investment facilitation takes place at a time of deepening and reassessment of the European trading state, opening a window of opportunity for uploading at the global level an agenda where European trading states excel, and enabling the EU to promote its new policy of 'open strategic autonomy'.

A challenge for the EU will be to 'put its money where its mouth is' and match 'soft power' with 'hard capabilities', as China has pressed it to do since 2009 on the issue of climate change.[78] It is unclear what such bargaining could entail in the multilateral investment facilitation negotiations – a form of redistributive instrument à la Cotonou, transfers of know-how and technology as in the climate change negotiations, or some institutional capacity building along the lines of the European Ombudsman.

The COVID-19 pandemic poses major challenges but also presents opportunities, for the EU strategy. The pandemic has accelerated the urgency of clarifying rules for international investment, undertaking structural reforms to facilitate FDI flows, and solving issues multilaterally. FDI has plummeted worldwide with the pandemic, collapsing by more than 42 percent in 2020.[79] Estimates are very pessimistic for 2021 as well, especially in developed economies, except in the healthcare and technology sectors. Investment flows may look different in the post-COVID-19 world, as global value chains are reorganized and the economy becomes increasingly digitized. The EU is therefore willing to enact any measure that will facilitate investment, both at home and abroad, and will stave off the protectionist impulses currently popular in the political discourse of many developed economies.

[78] J. Holslag and D. Freeman, 'China Challenges Europe's Climate Change Leadership', *euobserver*, 28 September 2009, online at: https://euobserver.com/opinion/28733 (accessed 13 June 2023).

[79] UNCTAD, 'Global Foreign Direct Investment Fell by 42 percent in 2020, Outlook Remains Weak', News, 24 January 2021, online at: https://unctad.org/news/global-foreign-direct-investment-fell-42-2020-outlook-remains-weak (last accessed 13 June 2023).