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The EU and the Reform of the Investment Protection Regime

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The EU and the Reform of the Investment Protection Regime

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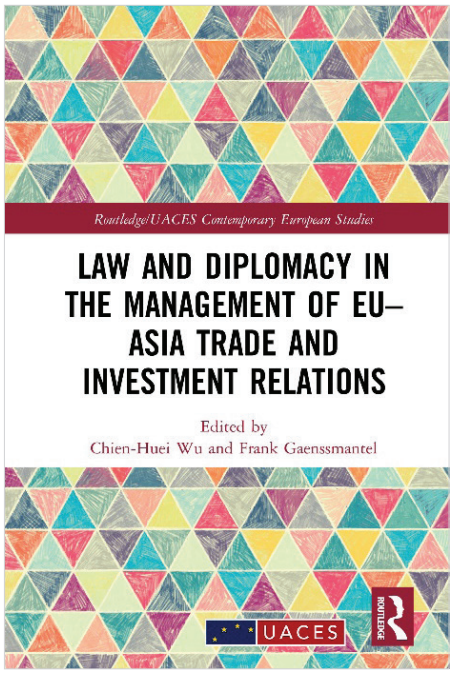
Basedow, Johann Robert

The EU in the Global Investment Regime: Commission Entrepreneurship, Incremental Institutional Change and Business Lethargy

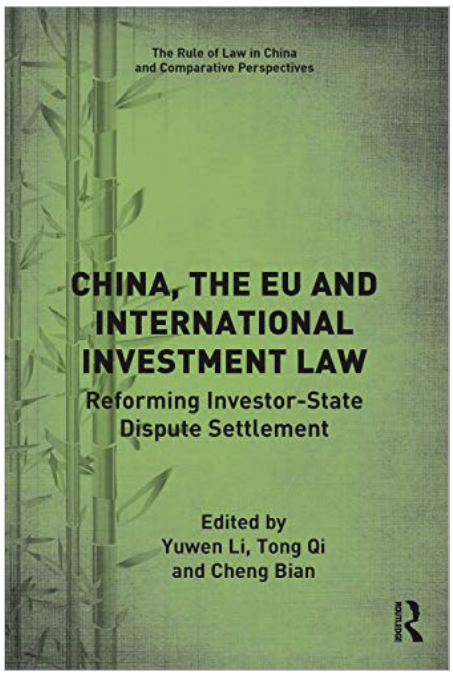
London and New York: Routledge, 2017.
247 pp.
ISBN: 9781138083370



Wu, Chien-Huei, Gaenssmantel, Frank (eds.)

Law and Diplomacy in the Management of EU-Asia Trade and Investment Relations

London and New York: Routledge, 2019.
260 pp.
ISBN: 9781138617469



Li, Yuwen, Qi, Tong, Bian, Cheng (eds.)

China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement

London and New York: Routledge, 2019.
248 pp.
ISBN: 9780367338466

The enlargement of the European Union's (EU) exclusive competence in foreign direct investment (FDI) through the Lisbon Treaty has had profound implications. The EU has become an actor in the global investment regime and has begun to develop its own investment policy, including by negotiating international investment and comprehensive trade and investment agreements with third parties. Considering the magnitude of the EU economy and the fact that the EU Member States have concluded almost 1,400 bilateral investment treaties (BITs) out of the roughly 3,300 BITs in force worldwide, Europe's potential influence over the international investment system is enormous. Consequently, an increasing number of lawyers and political scientists have become interested in the EU's role in FDI. Three studies published by Routledge during the last three years reflect this trend. And each study offers different and valuable perspectives on the EU's role in FDI.

In *The EU in the Global Investment Regime: Commission Entrepreneurship, Incremental Institutional Change and Business Lethargy*, Basedow traces the development of EU investment policymaking since the investment-related negotiations during the Uruguay Round in the 1990s. His book thus offers historical insights into the debates within the European institutions, particularly into the debates between the European Council and the European Commission. He focuses on investment policy in the context of the Word Trade Organisation and the negotiations on the Energy Charter Treaty, the Multilateral Agreement on Investment, and the investment disciplines in EU free trade agreements. He also recounts thehistorical events leading to the Lisbon Treaty and considers the significance of the EU's exclusive competence over free direct investment under Art. 207 of the Treaty on the Functioning of the European Union.

Basedow convincingly identifies the European Commission as the actor behind the EU's growing role in international investment policy. Building on empirical

research findings, he demonstrates how the European Commission used agenda--setting, informational asymmetries, international forum-shopping, and invoking the EU's implied and fringe competences before the Court of Justice of the European Union(CJEU) to consolidate its role and influence in international investment negotiations at the expense of the EU's Member States. His term "creeping competence" to describe the European Commission-driven expansion of the EU's policy agenda into new policy areas is not a new term.[1] His book, however, is the first study to analyse this phenomenon in the field of foreign direct investment. But the EU's ascendancy in asserting exclusive competence over investment policy was recently halted by the CJEU's Opinion 2/15 on the EU's competence to conclude the EU-Singapore Free Trade Agreement. Contrary to the European Commission's position, this decision confirmed shared competence in the fields of portfolio investment and investor-state dispute settlement (ISDS).[2]

The other two books, *Law and Diplomacy in the Management of EU-Asia Trade and Investment Relations* and *China, the EU and International Investment Law*, adopt a regional approach focusing on investment relations between the EU and Asian countries. These relations are highly important because they have been advancing in the shadow of the EU's negotiations over the Comprehensive Economic and Trade Agreement (CETA) with Canada and the Transatlantic Trade and Investment Partnership Agreement (TTIP) with the United States. This development's significance is further underlined by East Asia having become a global economic and geopolitical hub and active in investment treatymaking. Accordingly, some authors speak of the "Dawn of an Asian Century in International Investment Law".[3]The investment negotiations with Asian partners are therefore more important today than before because we might be witnessing the rise and collapse of mega-regionals such as the TTIP and the Trans--Pacific Partnership (TPP)[4] as a consequence of rising protectionism.

The EU has steadily progressed at varying paces with third countries in Asia by beginning trade and investment negotiations with Singapore, Vietnam, Myanmar, China, India, Thailand, the Philippines, and Indonesia, among others. Moreover, the EU already persuaded the first countries in this region to accept its novel approach to investment protection because of their strong motivation to conclude agreements with the EU that will "modernise" and "harmonise" the existing investment protections. On

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1 Mark A. Pollack,"Creeping Competence: The Expanding Agenda of the European Community," Journal of Public Policy 14, no. 2 (April 1994): 95–145.

2 Opinion A-2/15 Singapore FTA ECLI: EU: C:2017:376.

3 Stephan W. Schill, "Special Issue: Dawn of an Asian Century in International Investment Law?" *Journal of World Investment & Trade* 16, no. 5–6. (2015): 765–71; Stephan W. Schill, "Changing geography: prospects for Asian actors as global rule-makers in international investment law," *Columbia FDI Perspectives* 177 (2016): 1–3.

4 Later transformed to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) but without the United States' participation.

the other hand, challenges persist as it remains to be seen in which direction Asian actors will turn in their push for the development of global investment governance.

To better understand the bilateral relations between the EU and each of its partners in Asia, the edited volume by Wu and Gaenssmantel offers interesting interdisciplinary studies based on well-researched analyses of the bilateral trade and investment talks and other forms of interaction. It starts by providing a systematic approach to the various considerations that influence the EU's choice between diplomatic and legal approaches. Within this theoretical framework, the book's fourteen chapters discuss the legal and diplomatic options available to policymakers in the context of trade and investment negotiations and disputes. They also show that Asian governments have mixed legal and diplomatic approaches in their economic relations.[5] This dynamic creates a challenge for EU policymakers.

The biggest challenge, however, is China, which the EU recently identified as a "systemic rival."[6] In 2013, the EU and China launched negotiations for a Comprehensive Agreement on Investment. In 2016, they agreed that the agreement's scope would go beyond a traditional investment protection agreement's scope by covering, for example, market access for investment and sustainable development. As of this book review's writing, the most recent round of negotiations, the 27th round, took place between 3–6 March 2020.

These negotiations have been described as "one of the most important bilateral economic cooperation initiatives between China and the EU at this time."[7] The contributions collected by Li, Qi, and Bian spotlight them. Their seventeen-chapter book offers a comprehensive analysis of the negotiations and their implications for the reform of the investor-state dispute resolution system. The book's contributors tackle the pressing issues of today's investment arbitration: the establishment of a multilateral investment court and/or appellate body, the role of domestic courts, the transparency of proceedings, the status of state-owned enterprises, corruption, human rights protection, and the protection of the victims of foreign investors' operations. Considering that China is currently the most active negotiator in the investment treaty system outside Europe, any potential agreement will likely significantly change the whole system's future direction. Therefore, contributors' fresh perspectives on the book's topics is welcome.

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5 Leila Choukroune, "EU-Asia investor-state disputes: Assertive legalism for economic and political autonomy," in *Law and Diplomacy in the Management of EU-Asia Trade and Investment Relations*, eds. Chien-Huei Wuand Frank Gaenssmantel (London and New York: Routledge, 2019) 75–92.

6 European Commission and High Representative of the Union for Foreign Affairs and Security Policy, *EU-China—A strategic outlook*, 12.3.2019 JOIN (2019) 5 final 1.

7 Axel Berger, "The China-EU investment agreement negotiations: Rationale, motivations, and contentious issues," in *China, the EU and International Investment Law*, eds. Yuwen Li, Tong Qi and Cheng Bian (London and New York: Routledge, 2019) 12.

To become an influential actor in the global investment regime, the EU had to overcome several internal challenges, including the challenges related to the division of competences between the EU and its Member States. Basedow successfully shows how, since the 1980s, the European Commission has acted as a "resourceful and persistent policy entrepreneur to extend the Union's de facto and legal competence under the CCP to the regulation of international investment despite Member State hesitation."[8] However, exercising the competence over FDI might be more difficult than gaining it.

The EU had to develop a specific approach towards investment protection and the investment dispute mechanism that deviated from the initial parameters. According to the initial documents, such as the European Commission's Communication *Towards a comprehensive European international investment policy*, the EU wanted to follow the available best practices of the Member States.[9] But during the first bilateral negotiations with Canada and Singapore, commentators observed a variety of deviations from the "gold standard," the former approach of the EU Member States. The pivotal moment in constituting the EU investment policy came with the public consultation on investment protection in the TTIP. As a response to the results of the public consultation, the European Commission was forced to radically change its approach to the ISDS. It envisaged "the path for reform" with its goal being a Multilateral Investment Court (MIC).[10]

Regarding the third states in bilateral negotiations and under a multilateral background of international organisations such as the OECD, ICSID, and UNCTAD, the EU now must employ a new framework to promote its new approach towards investment protection. The EU is not a dominant rule-maker anymore. The economic relations between the EU and Asian countries have become more balanced. Against this background, the EU needs to employ combinations of legal and diplomatic approaches, maintaining a steady trend towards further legalisation.[11] The EU's progress in negotiations in Asia is indeed crucially important to achieve the overall success of its reform approach. This is recognised by the EU itself, as illustrated by its trade strategy slogan since 2015: "Trade for All." The European Commission claims that "[t]his Asia strategy will need to be pursued, consolidated and enriched over the next few years."[12]

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8 Johann Robert Basedow, *The EU in the Global Investment Regime: Commission Entrepreneurship, Incremental Institutional Change and Business Lethargy* (London and New York: Routledge, 2017) 230.

9 European Commission, *Towards a comprehensive European international investment policy* (COM(2010)343).

10 European Commission, Investment in TTIP and beyond—the path for reform (May 2015).

11 Wu Chien-Huei and Frank Gaenssmantel, "Conclusion," in *Law and Diplomacy in the Management of EU-Asia Trade and Investment Relations*, eds. Chien-Huei Wu and Frank Gaenssmantel (London and New York: Routledge, 2019) 250.

12 European Commission, *Trade for All: Towards a more responsible trade and investment policy* (2015) 31.

It may be too soon to assess if the Union has succeeded in its "Asia strategy" through its investment negotiation and reform promotion.[13] Nevertheless, the EU already has succeeded in shifting the paradigm in the debate about reforming the global investment protection system. And it succeeded despite facing difficulties in persuading its negotiation partners to accede to its positions.

In conclusion, the three books reviewed here provide a colorful picture of the EU's effort from various perspectives. Collectively, they offer their readers a timely source for studying the EU investment policy from its inception to its latest challenges. As such, they offer considerable value to academics and practitioners of international investment law and to researchers of EU integration and its actorness in international relations.

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13 See also Ondřej Svoboda, "The EU Investment Policy in Asia in the Light of 'Dawn of An Asian Century in International Investment Law,'" *Juridical Tribune Journal* 10, no. 2 (2020).

Оглядове Есе: ЄС та Реформа Режиму Захисту Інвестицій

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