

Article

Embedded Neoliberalism and the Legitimacy of the Post-Lisbon European Union Investment Policy

Bart-Jaap Verbeek^{1,2}¹ Centre for Research on Multinational Corporations (SOMO), The Netherlands² Department of Political Science, Radboud University, The Netherlands; bart-jaap.verbeek@ru.nl

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Abstract

Much has been written about the ongoing legitimacy crisis of the global investment treaty regime and the system of investor-to-state dispute settlement (ISDS). In the European Union (EU), the proposed inclusion of investment protection provisions and ISDS in negotiations on the Comprehensive Economic and Trade Agreement (CETA) with Canada and the Transatlantic Trade and Investment Partnership (TTIP) with the United States triggered unprecedented levels of contestation. This article seeks to explain why EU responses to such contestation, in the form of an investment court system and a multilateral investment court, did not bring about a clear break away from the traditional ISDS model. Drawing on critical political economy perspectives, it regards the EU investment policy following the entry into force of the Treaty of Lisbon as deeply embedded in a broader neoliberal project mediated by material, institutional, and ideological configurations. Several factors have inhibited possibilities for more fundamental changes. The European Commission construed the lack of legitimacy as stemming from ISDS' procedural features rather than questioning its social purpose. There has been no shift in the underlying social power balance, and no comprehensive counter-project has been proposed. The European Commission enjoys relative autonomy vis-à-vis other parts within the EU institutional ensembles and wider societal interests, allowing it to block more radical solutions. Finally, there were no clear signs of a fundamental departure from the neoliberal path in terms of wider EU economic regulation.

Keywords

CETA; crisis; embedded neoliberalism; European Union; investment court system; investment protection; ISDS; legitimacy; multilateral investment court; TTIP

Issue

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1. Introduction

Ever since the entry into force of the Treaty of Lisbon in 2009, ironically designed to enhance the negotiation powers of the European Union (EU) while simultaneously increasing its democratic legitimacy, EU trade and investment policy has suffered from a lack of political and popular support. Particularly, mega-regional projects such as the Comprehensive Economic and Trade Agreement (CETA) with Canada and the ill-fated Transatlantic Trade and Investment Partnership (TTIP) with the United States were met with widespread political and societal opposition. Key to the controversies were the proposed provi-

sions on investment protection and investor-to-state dispute settlement (ISDS), whereby foreign investors would receive exceptional legal privileges to bypass domestic courts and seek monetary compensation for damages incurred from government measures before an international tribunal. A wide variety of NGOs, trade unions, citizens, and political actors across Europe feared that the inclusion of ISDS in both trade deals would threaten democratic governance and the rule of law. This contributed to unprecedented levels of politicization to such an extent that EU Trade Commissioner Cecilia Malmström recognized that ISDS had become “the most toxic acronym in Europe” (Ames, 2015). Rather than

abandoning ISDS altogether, the European Commission presented the investment court system (ICS) to restore public legitimacy, with the aim of establishing a permanent multilateral investment court (MIC).

In EU studies, various scholars have examined the contentious politics surrounding TTIP and other EU trade negotiations (De Bièvre & Poletti, 2020; De Ville & Siles-Brügge, 2015), with several highlighting the crucial role of NGOs in driving the politicization of EU trade policy (Eliasson & Huet, 2018; Gheyle, 2020). Particularly, some looked at the political responses to the erosion of its legitimacy and subsequent politicization of the ISDS system and assessed whether the EU reforms had been able to restore the necessary legitimacy (Diependaele et al., 2019; Dietz et al., 2019; Herranz-Surrallés, 2020). Such studies often build on institutionalist approaches that refer to legitimacy as resting on the particular perceptions of relevant actors and the widely shared beliefs in the appropriateness of the purposes, procedures, and performance of an international institution. Accordingly, legitimacy gaps may exist in case of incongruence between the institutional features and generalized standards of appropriateness, and subsequent legitimacy crises may induce institutional change (Lenz & Viola, 2017; Tallberg & Zürn, 2019). However, these approaches say little about the circumstances under which such changes may occur and why certain solutions prevail over others at a specific moment in time. Likewise, the politicization literature refers to situations when the salience of an institutional arrangement increases, the range of involved actors expands, and their respective positions become polarized (de Wilde et al., 2016). However, such approaches are premised on the assumption of a plurality of actors and interests competing on equal terms without considering deeper structural inequalities in material, institutional, and ideological power. Constructivist approaches have revealed how the Commission managed to overcome the politicization of ISDS and generate support for the reforms through discursive strategies (Siles-Brügge, 2017) but do not explain why the EU did not abandon the ISDS regime altogether or choose more radical reforms.

This article seeks to contribute to an understanding of the structural conditions under which institutional and regulatory change may occur in the face of a legitimacy crisis. It sets out to explain how and why EU actors have responded to politicization and why this has not resulted in a fundamental break away from the traditional ISDS model. Taking a critical political economy perspective, the starting point is to consider the social foundations of the ISDS regime and to place its “legitimate social purpose” (Ruggie, 1982, p. 382) in the context of broader social power relations. Particularly, it takes the post-Lisbon EU investment policy, crystallizing in EU free trade agreements (FTAs), as materially, institutionally, and ideologically embedded in a broader neoliberal project aimed at transnational market expansion and strengthening the global position of the EU as an eco-

nomical powerhouse (Verbeek, 2021). Although the eroding legitimacy reveals the political limits of the neoliberal project, the article aims to explain the ability of the Commission to seize moments of crisis to reinvent and reinforce dominant modes of foreign investment regulation. Following Wigger and Buch-Hansen (2014), it is argued that institutional change is conditioned by the ways in which crisis moments are interpreted, whether there is a shift in the underlying social power balance, whether there is a clear counter-project that can challenge existing arrangements, the ways in which regulatory institutions respond, and whether there are similar changes in wider forms of regulation.

The article is structured as follows. Section 2 conceptualizes the social embeddedness of regulatory and institutional arrangements and sets out the preconditions for change in the face of a crisis. Section 3 analyses the making of the post-Lisbon EU investment policy and its contestation in the wake of the TTIP and CETA negotiations while critically examining the EU responses in the form of the ICS and MIC proposals. Section 4 explains the lack of a fundamental break away from the neoliberal project in the field of EU foreign investment regulation.

2. Legitimacy, Crisis of Authority, and Regulatory Change

From a critical political economy perspective, regulatory and institutional regimes should be taken as deeply embedded in broader social power relations underpinning the capitalist system (Jessop, 2002). Hence, regulation must not be understood as imposed in a fixed and pre-given way but rather as political practices that are deeply engrained in and mediated through an ensemble of class-based, institutional, and ideological configurations in relation to dominant patterns of capital accumulation (Cahill, 2014; Polanyi, 2001). Materially, social power balances emanate from the unequal position that different classes and class fractions have in relation to capital accumulation structures. Institutionally, the state and state-like structures such as the EU form the social terrain in which social groups and classes struggle for the recognition and pursuit of their strategic interests. And ideologically, regulatory and institutional arrangements are informed by discourses as structured sets of ideas that social classes might draw from when formulating and legitimating their political strategies (Hay & Rosamond, 2002, p. 151). Ideas and discourses are crucial rallying devices around which social groups can mobilize and forge alliances with other social groups while at the same time helping to legitimize their specific interests as the general interest. The hegemonic power of a dominant social group or class is not simply obtained from its dominant economic position but has to be constructed and compromised (Gramsci, 1971). Social and political power can then be considered legitimate if, according to Beetham (1991, pp. 16–17), it not only conforms to established rules but, more importantly, those

rules can be justified by reference to beliefs shared by both dominant and subordinate groups, and if there is evidence of consent by the subordinate to the power relation. Hence, legitimation is a “tool of social control” (Hurd, 2019, p. 723) to produce consent for particular regulatory and institutional regimes that serve a particular social purpose bound up with the particular class nature of a hegemonic project.

Hegemonic projects are not static or everlasting but tend to follow particular trajectories during their “life course” due to the contradictory and crisis-ridden nature of global capitalism and changing social power constellations (van Apeldoorn & Overbeek, 2012, pp. 6–8). Hegemonic crises may occur when the underlying material, institutional, and ideological configurations of a hegemonic project are disrupted, and dominant social classes are no longer able to manufacture consent for the implementation of their policies, whereby prevailing institutional and economic arrangements are subject to eroding legitimacy. This may lead to a “crisis of authority” that leaves an ideological void and offers moments of opportunity for different crisis solutions whereby alternative projects are explored and shaped (Babic, 2020, p. 772; Gramsci, 1971, pp. 210–211). Such “moments of disjunction and relative openness” are marked by the “trial-and-error search for new institutional fixes to restore accumulation and restabilize social relations” (Jessop & Sum, 2006, p. 326). At the same time, the socially embedded nature of regulatory and institutional arrangements also makes them highly resistant to retrenchment, and crisis moments also generate political opportunities for institutional reinvention and reinforcement, thereby showing that threats to their survival can be exploited as opportunities for expansion (Cahill, 2014, p. xi; Jessop, 2016, p. 417). Hence, struggles over crisis interpretations and solutions are open-ended as they are discursively, and thus politically, mediated.

Wigger and Buch-Hansen (2014, pp. 115–119) offer a useful framework for assessing the likelihood of regulatory and institutional change in the face of a crisis and identify five interrelated factors that condition how governments respond and prefer certain solutions over others. First, the ways in which the nature of a crisis is construed crucially shape how governments respond and intervene. Incremental change is likely to take place if a moment of crisis is mainly perceived as derived from certain elements of an institutional regime rather than from its underlying social purpose or objective. In contrast, systemic or paradigmatic reform is to be expected when a crisis is considered in more structural terms and an institution’s underlying rationale is questioned (e.g., Roberts, 2018). Second, regulatory shifts are likely if there is a fundamental shift in the underlying social power balance concerning newly emerging accumulation structures. Capitalist crises may disrupt and challenge previously dominant accumulation structures and associated social power constellations and give rise to new ones with different fractions of capital and

labor becoming hegemonic (i.e., productive/financial or transnational/national; Van der Pijl, 2012). These new fractions may also have different preferences regarding the organization of the economy and may promote regulatory and institutional change. Third, existing institutional arrangements are more likely to change or be replaced in the presence of a concrete counter-project that enjoys the support of contending social forces. Increased social contestation may point to eroding legitimacy of a particular regulatory regime, but social forces need to articulate solutions beyond their narrow material interest to generate necessary political support and popular legitimacy for an alternative regime. Fourth, regulatory and institutional change can either be facilitated or blocked by the dominant state institutions and agencies that control a designated policy area. The state should be understood as the material condensation of the underlying social power balance (Poulantzas, 1978, p. 132). Therefore, the state is not a neutral terrain nor is it equally accessible to all social groups. Rather, it enjoys a relative autonomy vis-à-vis societal pressure and exhibits a “strategic selectivity” that makes it more open to some types of political strategies and class fractions than others (Jessop, 2002, p. 40). In turn, regulatory and institutional arrangements may not necessarily always favor the interests of dominant social groups. And fifth, regulatory and institutional arrangements are more likely to change if there are broader changes in other parts of the regulatory architecture. State structures and regulatory and institutional regimes do not necessarily constitute a homogenous block, but a certain coherence can nevertheless emerge and institutionalize over time. Regulatory shifts in trade and investment policy may therefore be informed by similar shifts in other regulatory fields, such as competition or tax policy, or vice versa.

3. The Post-Lisbon EU Investment Policy and the Resilience of Neoliberalism

Neoliberalism as a hegemonic project—in Europe and elsewhere—emerged in the context of the collapse of the post-war order of “embedded liberalism” (Ruggie, 1982) in the 1970s, the subsequent processes of transnationalizing production and finance, and the shift in the underlying social power balance in favor of transnational fractions of capital (van Apeldoorn & Overbeek, 2012). Neoliberalism is rooted in a liberal philosophy and based on the assumption that “human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade” (Harvey, 2005, p. 2). Bilateral investment treaties and FTAs with investment provisions are key components of the neoliberal project as they offer a broad set of legally binding and enforceable property rights to foreign investors, which shield them from certain types of adverse state action and bind future

generations to market disciplines, thereby contributing to the “encasement” of the economy from democratic processes (Schneiderman, 2008; Slobodian, 2018). These treaties typically consist of broad and vague rules on non-discrimination, fair and equitable treatment, and protection against uncompensated expropriation, with unrestricted access to ISDS to resolve and “depoliticize” investment disputes (Bonnitcha et al., 2017). Throughout the 1980s and 1990s, governments worldwide massively adopted bilateral investment treaties, rooted in neoliberal imaginations of foreign investment relations that dated back to the 1950s (Perrone, 2021), to promote and protect cross-border capital flows.

The entry into force of the Treaty of Lisbon in 2009 brought about important institutional and discursive opportunities for contesting the global investment treaty regime in the European context. Most notably, it brought the exclusive competence over foreign direct investment (FDI) into the framework of EU trade policy, allowing the Commission to negotiate trade and investment agreements on behalf of EU member states and develop rules regarding FDI regulation. At the same time, the global financial and economic crisis of 2008–2009 posed major challenges to the survival of the neoliberal project. The turmoil in financial markets and the worldwide economic downturn led to sharp plunges in FDI primarily in the form of divestment, including repatriated investment, dwindling intra-firm loans, and the geographical relocation of activities to emerging markets that maintained relatively high economic growth rates (Poulsen & Hufbauer, 2011). EU member states adopted interventionist measures to keep capital at home that resulted in (partial) nationalization of domestic financial institutions, protectionist trade measures, foreign investment screening, and newly introduced obstacles to outward FDI (United Nations Conference on Trade and Development, 2009). Rather than moving away from neoliberalism, the Commission sought to counter such protectionist trends and presented the expansion of the external role of the EU in global markets as a key element of its post-crisis strategy to restore EU competitiveness and foster economic growth (De Ville & Orbie, 2014; European Commission, 2010a). Subsequently, the Commission started to push for an ambitious investment policy through a new generation of FTAs with investment chapters that should “follow the available best practices to ensure that no EU investor would be worse off than they would under Member States’ BITs [bilateral investment treaties]” (European Commission, 2010b, p. 11).

Since the mid-2000s, however, the global investment treaty regime has increasingly shown signs of a legitimacy crisis (Franck, 2005; Waibel et al., 2010), with the number of ISDS cases worldwide skyrocketing to over 1,100 at the time of writing. Some of these cases dealt with sensitive areas of public regulation, such as human rights, environmental protection, and financial crisis management, and delivered multimillion-dollar awards against states primarily in the Global South (Poulsen,

2015). Critics started to point to the overly expansive interpretations of investment treaty standards by arbitrators prioritizing the protection of property and economic interests of transnational investors at the expense of governments’ capacity to regulate in the public interest (Van Harten & Schneiderman, 2010). Through the threat of debilitating investment claims and awards, ISDS became conceived of as a serious threat to democratic choice, providing foreign investors with a tool to bend policy-making to suit their interests, thereby contributing to “regulatory chill” (Tienhaara, 2011). Others have pointed to a wide range of procedural concerns, including, among others, the lack of independence and impartiality among arbitrators, their wide margin of discretion and inconsistent decisions, the lack of transparency and possibility of appeal, and limited avenues for affected third parties to intervene in an investment dispute (Eberhardt & Olivet, 2012; Van Harten, 2007). Such criticisms have led a growing number of governments to reconsider their investment treaties in more recent years, with the United Nations Conference on Trade and Development (2018, p. 88) concluding in 2018 that “for the first time, effective treaty terminations exceeded the number of new treaty conclusions.” In addition, societal opposition and contestation to ISDS in the context of mega-regional trade projects worldwide, such as the Trans-Pacific Partnership and the Regional Comprehensive Economic Partnership, further underscored the eroding legitimacy of the neoliberal investment regime.

In Europe, a wide range of NGOs, trade unions, and other public interest groups opposed the TTIP and CETA negotiations. They argued that the proposed investment provisions were overly biased in favor of transnational corporations and potentially constrained the regulatory capacities of governments to implement policies to advance the public interest, thereby undermining democratic governance and the rule of law (Eberhardt et al., 2014; Seattle to Brussels Network et al., 2013). The ISDS mechanism was considered a “trojan horse,” allowing corporations to sue governments in “secret corporate courts” in case new government regulations negatively affected their profits (Friends of the Earth Europe, 2014; Seattle to Brussels Network et al., 2013), meaning nothing less than a “full-frontal attack on democracy” (Monbiot, 2013). These concerns were underlined by a number of high-profile ISDS cases against Western states that started to make headlines. These included the case by tobacco producer Philip Morris against Australia (2011) for introducing anti-smoking legislation and the cases by Swedish energy company Vattenfall against Germany (2009, 2012) for imposing environmental obligations in the construction of a coal-fired power plant and for the decision to phase-out nuclear energy. Other groups that were more embedded within the EU institutional ensembles did not reject the negotiations but joined the opposition to ISDS (European Trade Union Confederation, 2013). Such cross-linkages were pivotal

in the contestation of TTIP and CETA that centered on widely shared concerns regarding transatlantic market expansion and the concentration of corporate power to the detriment of public policy objectives and democratic accountability. The successful mobilization behind a European citizens' initiative (ECI) against TTIP and CETA helped to transform the NGO-led opposition into a broader societal backlash against ISDS, with hundreds of thousands of citizens participating in street protests across Europe.

The increased involvement of the European Parliament in EU trade policy under the Treaty of Lisbon, with its consent now required to conclude international trade and investment agreements, also opened up new institutional avenues for contestation with various political groups opposing the ISDS mechanism. Particularly, the Socialists & Democrats, holding a key position in the European Parliament, rejected ISDS in CETA and TTIP (S&D Group, 2015), while opposition also grew among social-democratic trade ministers and parliamentarians in various EU member states, most notably in Germany and France (Barbière, 2015). Against the backdrop of escalating opposition, the Commission had already temporarily suspended the TTIP negotiations to launch an online public consultation on its investment chapter, which attracted 150,000 often collectively submitted responses overwhelmingly rejecting the ISDS mechanism. Rather than fully abandoning ISDS, the Commission developed reform proposals that gained traction within social democratic circles (Siles-Brügge, 2017). After the majority of the S&D Group supported a controversial resolution adopted by the European Parliament in July 2015, which recommended replacing ISDS with a new system for resolving investment disputes (European Parliament, 2015), the Commission published its proposal for an ICS in November 2015 that would replace the existing ISDS mechanism in all ongoing and future EU investment negotiations.

The ICS sets up a semi-permanent system composed of a tribunal of first instance and an appeal mechanism consisting of adjudicators selected from a fixed roster set up by treaty parties. Adjudicators receive a monthly retainer fee and are subject to ethical requirements, including the prohibition from "double-hatting" as counsel or expert witness. A so-called "no U-turn" provision requires investors to withdraw from any domestic proceedings before submitting a claim to ICS with the purpose of prohibiting parallel claims. Transparency is enhanced through open hearings, access to documents, and the participation of third parties as *amicus curiae*. Clarification of substantive standards on fair and equitable treatment and indirect expropriation should provide better guidance for arbitral tribunals, with a novel provision reaffirming the right to regulate in the public interest.

Despite these innovations, the ICS continues to provide a preferential legal avenue only available to foreign investors and still allows them to bypass domestic courts and seek compensation for public measures

despite the emphasis on the right to regulate (Vastardis, 2018). These extensive investor rights are not equated with a meaningful set of corresponding obligations, while provisions on labor, sustainable development, and corporate social responsibility are addressed through soft law mechanisms that rely on dialogue and consultation (Bernasconi-Osterwalder & Mann, 2019). Further, the ICS/MIC model does not foresee legal standing for third parties whose rights or interests may be at stake in investment disputes (Perrone, 2019). EU FTAs still require the adjudicators to have expertise in international investment law and in the resolution of trade and investment disputes, with future cases under EU FTAs likely to be handled by the same "clubby crowd of investor-friendly arbitrators" that has thus far dominated ISDS (Van Harten, 2016).

The post-Lisbon EU investment policy crystallizing in response to heightened contestation should be understood as a key manifestation of "embedded neoliberalism" (Verbeek, 2021). Following van Apeldoorn (2009), embedded neoliberalism is the hegemonic articulation of a still dominant neoliberal discourse that seeks to advance and legitimize the neoliberal project by incorporating and neutralizing different elements of alternative discourses. While embedded neoliberalism constitutes an inherently neoliberal political project aimed at the expansion of capitalist class power, the "embeddedness" component refers to the role of the state in sustaining and reproducing markets by "protecting society from the destructive effects of the self-regulating market" (Polanyi, 2001, p. 138; van Apeldoorn, 2009, p. 24). By presenting ICS as "a new, modernized system of investment courts, subject to democratic principles and public scrutiny" (European Commission, 2015a), the Commission successfully managed to co-opt certain center-left elements within the EU's power bloc with the European Parliament ratifying agreements including ICS with Canada, Vietnam, and Singapore. Meanwhile, the EU has been actively pursuing the establishment of a MIC under the auspices of the United Nations Commission on International Trade Law since 2017, which would go a step further by moving towards a system of fully tenured adjudicators to enhance independence and impartiality (United Nations Commission on International Trade Law, 2019). By focusing merely on procedural reforms rather than the underlying substantive standards and social purpose, the currently envisaged MIC would then become "a device for neoliberal rules of investment protection with even greater authority" (Sornarajah, 2016).

4. Explaining the Lack of a Fundamental Break Away From Investor-to-State Dispute Settlement

This brings us to the question of why the contestation of the post-Lisbon EU investment policy did not bring about a more fundamental break away from the neoliberal discourse regarding investment protection and ISDS. Returning to the five conditioning factors

identified in Section 2 helps answer this question. First, the Commission never questioned the neoliberal investment regime and its underlying purpose but rather confirmed that “the basic objective of investment protection remains valid since bias against foreign investors and violations of property rights are still an issue” (European Commission, 2015b, p. 15). As expanding the EU’s presence in global markets was a key tenet in the Commission’s crisis management strategy, it perceived investment protection as “a tool for states around the world to attract and maintain FDI to underpin their economy,” which was in turn promoted as a “critical factor for growth and jobs” (European Commission, 2013, pp. 3–4). The Commission construed the legitimacy crisis as primarily stemming from the ad hoc nature of dispute settlement rather than from the underlying substantive rules on investment protection. Bringing permanency in dispute settlement was expected to produce more stability and predictability for states, investors, and other actors, reducing the potential for a regulatory chill (Brown, 2018). Particularly, it was considered crucial that justice had to be “seen to be done,” indicating that the Commission was more concerned with changing the perception of ISDS than with addressing its structural problems while reiterating that the main purpose of the proposed reforms was to “rebuild trust in the system and, consequently, improve the recognition and implementation of its decisions” (European Commission & Government of Canada, 2017, p. 3).

Second, there has been no significant shift in the underlying social power balance. The post-Lisbon EU investment policy continues to cater to the interests associated with transnational capital, and new generation EU FTAs further incentivize transnational accumulation structures rather than curbing them. Indeed, transnationalization strategies were a key response to the global financial and economic crisis of 2008–2009, reflected in a surge in FDI flowing out of crisis-ridden European economies targeting large (emerging) markets (Hunya & Stöllinger, 2009). Transnational capital actors such as the European Roundtable of Industrialists, BusinessEurope, and European Services Forum strongly called for the expansion of EU FTAs to ensure broad-based market access and effective protection for EU companies abroad (BusinessEurope, 2009; European Roundtable of Industrialists, 2010; European Services Forum, 2010). Following the entry into force of the Treaty of Lisbon, these groups rapidly mobilized and were highly influential in driving and sustaining much of the neoliberal content of EU FTAs due to their privileged institutional access to the Commission (Verbeek, 2021). They demanded that EU FTAs grant as good, if not better, protection than existing EU member state bilateral investment treaties, whereby the investment chapters in CETA and TTIP should serve as “golden standards” for future investment protection negotiations with key partners. In their views, investment protection was not to be traded off against public policy objectives, including human and

labor rights and environmental protection, and ISDS was to be retained in future agreements (European Services Forum, 2014; Letter to Karel De Gucht, February 22, 2012, courtesy of BusinessEurope). They did not unequivocally support the EU reforms and feared that references to the right to regulate, in combination with perceived restrictions on the fair and equitable treatment and indirect expropriation standards, would limit the scope of investment protection. Also, moving away from a system in which the investor was given the opportunity to choose one of the three arbitrators towards a system based on a fixed roster of publicly appointed arbitrators who would be randomly assigned to cases raised concerns about potential bias in favor of states (BusinessEurope, 2015; European Services Forum, 2016). At the same time, they often acknowledged that some changes were required to save the investment protection system from sinking, and voiced overall support for the new EU approach. Other capital fractions representing small- and medium-sized enterprises condemned the ISDS mechanism for being too expensive and cumbersome and, therefore, only benefiting transnational corporations with the resources to litigate (Ohoven, 2014).

Third, the formation of a widespread movement against TTIP and CETA has not resulted in a clearly defined counter-project around which a new constellation of social forces could coalesce. A point of reference is the Alternative Trade Mandate developed by an alliance of more than 50 European NGOs, trade unions, farmers, and fair trade networks calling for an overhaul of the neoliberal trade regime, which envisions workable alternatives for a democratic, fair, and sustainable trade regime (Alternative Trade Mandate, 2013). This initiative successfully mobilized a broad range of different perspectives sharing common values centered on broad principles such as an increased role for governments in regulating trade and investment in pursuit of industrial and (sustainable) development strategies, prioritizing local and regional markets, universal access to public services, high labor and environmental standards, inclusiveness, and transparency. Several political groups in the European Parliament endorsed these principles, particularly in the run-up to the European elections in 2014. However, they were unable to further develop the Alternative Trade Mandate into a powerful alternative project that could challenge the neoliberal trade and investment regime. Different individual NGOs have developed similar proposals (Friends of the Earth Europe, 2018), although they have largely failed to establish the necessary political linkages and generate wider support. Meanwhile, social groups were unable to generate TTIP levels of mobilization and contestation to other ongoing and concluded EU FTA negotiations, such as with Singapore, Vietnam, Mexico, and Indonesia. Opposition to the EU FTAs became effectively reduced again to a handful of specialized NGOs criticizing particular elements of the EU trade agenda rather than challenging the neoliberal trade discourse as a whole.

Fourth, the Commission continues to enjoy significant powers reflected in its strategic selectivity vis-à-vis other parts within the EU institutional ensembles and wider societal interests. The Commission occasionally sidestepped recommendations from the European Parliament, for example, to exclude ISDS from the CETA negotiations and to maintain a state-to-state dispute settlement to address investment disputes (European Parliament, 2011, para. 11). In relation to EU member states, the Commission claimed exclusive competence on both FDI and portfolio investment under the Treaty of Lisbon and sought to present CETA as an “EU-only” deal. It was only after fierce pressure by member state governments that the Commission presented CETA as a “mixed agreement,” with the exclusion of investment protection from the scope of the provisional application prior to national ratification (Siles-Brügge, 2017, p. 478). After the Court of Justice of the EU (CJEU) found in its Opinion 2/15 on the EU’s powers to conclude the EU-Singapore FTA, delivered in May 2017, that portfolio investment and ISDS do not fall under the exclusive competence of the EU, the Commission started to separate out the investment protection provisions from the EU-only trade parts as a means of facilitating the ratification of trade agreements. Whereas the Commission refused to request that the CJEU check the compatibility of CETA’s investment provisions with EU law (Crisp, 2015), such a request came from the Belgian government as part of the compromises reached in the wake of the tumultuous CETA signing in October 2016. By the time the CJEU delivered its Opinion 1/17 in April 2019 confirming such compatibility, 12 EU member states had already ratified the agreement. Importantly, the Commission ignored the many voices calling for a withdrawal of ISDS from EU FTAs, and its ICS/MIC model was considered a “slap in the face of public opinion” (Seattle to Brussels Network, 2015, p. 3) or a mere “rebranding exercise” (Eberhardt, 2016, p. 18). The Commission further limited citizens’ participation by blocking the ECI, despite sufficient signatures having been collected, thereby restricting the democratic potential for citizen participation in EU trade policy. The CJEU ruled in May 2017 that the Commission had no legitimate reason to block the ECI and annulled the decision, after which the Commission registered the ECI in July 2017, long after CETA had been signed and ratified by the European Parliament and the TTIP negotiations had stalled (European Court of Justice, 2017).

And fifth, there were no signs of a fundamental departure from the neoliberal path within the EU. The post-crisis EU regulatory landscape has rather shown the “strange non-death” of neoliberalism, revealing its resilience in times of crisis and its flexibility to venture into new pathways (Crouch, 2011). Developments in the field of EU industrial and competition policy and broader EU macroeconomic and structural adjustment strategies have generally been pointing towards a further deepening of neoliberalism, often through processes under-

stood in terms of “authoritarian neoliberalism” (Bruff, 2014; Wigger, 2019). A major break away from neoliberalism in the field of EU trade and investment policy would seem rather out of sync with such wider developments. Instead, the post-Lisbon EU investment policy sets out to further institutionalize and entrench neoliberalism by recalibrating and mutating the system of investment protection in response to the challenges emanating from a growing dissatisfaction with the system’s institutional design.

5. Conclusions

The article has argued that despite the eroding legitimacy and increased contestation of the global investment treaty regime, no fundamental regulatory or institutional shift in the post-Lisbon EU investment policy has occurred. In response to mounting social and political opposition, EU solutions in the form of ICS and MIC proposals reflect a strategic attempt to keep as much of the system intact by incorporating procedural concessions rather than abolishing ISDS altogether and tackling the deeper structural problems that underpin the neoliberal governance of FDI. Although the global financial and economic crisis offered moments of opportunity for a break away from neoliberalism, the prevailing responses, in fact, revealed the resilience and reinforcement of neoliberalism and showed its flexibility and organicity to venture into new pathways. Conceptualized as “embedded neoliberalism,” the content and form of the post-Lisbon EU investment policy suggest that neoliberalism should not be taken as a static and automatic system but rather as “an earthly process, realized through political action and institutional reinvention” (Peck, 2010, p. 33). It is precisely because of its constructed and negotiated nature that embedded neoliberalism proved capable of co-opting key oppositional forces within the EU power bloc and regaining political support and legitimacy for continued transnational market expansion and investment protection in the context of EU FTAs. The five constraining factors identified in the article help explain the absence of a more radical transformation of EU investment policy in the wake of various crises.

At the same time, the embedded neoliberal compromise remains highly fragile and continues to be contested. No single EU agreement with ICS has yet been fully ratified due to internal opposition in a number of EU member states, while externally, the Commission is struggling to generate worldwide support for its MIC proposal. Meanwhile, foreign investors continue to lodge controversial ISDS cases, for example, against climate policy measures, that have mobilized climate justice movements and grassroots campaigns to further contest and delegitimize ISDS. Although the resurgence of right-wing populist and nationalist forces enabled the Commission to re-legitimize the embedded neoliberal project, the broader crisis of the liberal international order and associated geopolitical challenges may

bring certain discursive shifts, with some speaking of a “geopoliticization” of EU trade and investment policy (Meunier & Nicolaidis, 2019). The adoption of new unilateral instruments such as the 2019 FDI Screening Regulation and other trade defense measures are the first signs of a move away from a focus on free markets and the free flow of capital towards more strategic and geopolitical discourses. Following this, the renewed EU trade strategy, framed in ambiguous terms of “open strategic autonomy,” aims to strengthen the EU economically and geopolitically by committing to open trade and investment regimes, sustainability and responsibility, and increased assertiveness to enforce its trade and investment interests. Although it is still too early to make definitive statements, such shifts may point to just another creative reinvention of the neoliberal project. The new trade strategy primarily reflects efforts to alter the forms and tactics through which the EU seeks to pursue its commercial interests by reconfiguring the role of the state in enforcing the neoliberal project on a global scale rather than bringing about a strategic reorientation of EU trade and investment policy and its underlying social purpose. Hence, we may find ourselves then at a critical juncture that bears a resemblance to what Gramsci (1971, p. 276) referred to as a situation in which “the old is dying and the new cannot yet be born; in this interregnum a great variety of morbid symptoms appear.”

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About the Author



Bart-Jaap Verbeek works as a researcher on trade and investment law and policy at the Centre for Research on Multinational Corporations (SOMO) in Amsterdam. He is also a research fellow at the Department of Political Science of the Radboud University in Nijmegen, where he successfully defended his PhD dissertation entitled *The Making of the EU Investment Policy: A Critical Political Economy Perspective* in August 2021.