

Table of Contents

List of Abbreviations	xiii
CHAPTER 1	
International Investment Agreements and EU Law: Introduction	1
CHAPTER 2	
Protection of Investment in International Agreements and in EU law	11
2.1 International Investment Agreements	11
2.1.1 Scope of Application: Concepts of 'Investor' and 'Investment'	17
2.1.1.1 Investor	17
2.1.1.2 Investment	20
2.1.2 Substantive Rights of Investors	23
2.1.2.1 Admission and Establishment of Investments (Entry Stage)	23
2.1.2.2 NT and MFN: Relative Standards of Treatment	26
2.1.2.3 Expropriation	30
2.1.2.4 FET and Full Protection and Security: Absolute Standards of Treatment	33
2.1.2.5 Free Transfers of Funds	40
2.1.2.6 Umbrella Clause	40
2.1.3 Settlement of Disputes between Investors and States and Remedies in International Investment Law	43
2.1.3.1 Mixed Investment Treaty Arbitration	43
2.1.3.2 Remedies	49
2.2 Investment and Its Protection in EU Law	54
2.2.1 Diffused Rules of the EU Investment Regime	54
2.2.1.1 In Search for Intersections	54
2.2.1.2 Right of Establishment	57
2.2.1.3 Free Movement of Capital	58

Table of Contents

2.2.2	Notion of Investment as an Interest Protected under EU Law	61
2.2.2.1	Investments within the Scope of the Free Movement of Capital	61
2.2.2.2	Direct Investment and the Exercise of the Right of Establishment	64
2.2.2.3	Cross-Border Element	65
2.2.3	Ambit of Protection under Internal Market Rules: A Theoretical Framework	67
2.2.4	Specific Examples from the CJEU's Case Law	73
2.2.4.1	Acquisition, Disposal, and Enjoyment of Property	73
2.2.4.2	Company Law and the 'Golden Shares' Cases	78
2.2.4.3	Direct Taxation	81
2.2.4.4	Free Movement of Capital and Third Countries	84
2.2.5	General Principles of EU Law	87
2.2.5.1	Application of the General Principles to Member States' Measures	88
2.2.5.2	Principle of Proportionality	92
2.2.5.3	Principle of Legal Certainty and Protection of Legitimate Interests	93
2.2.5.4	Right to Property	95
2.2.5.5	Procedural Rights	98
2.2.6	Procedural Issues and Remedies Available to Individuals	99
2.2.6.1	Getting the Individual Involved: Doctrines of Direct Effect and Supremacy of EU Law	99
2.2.6.2	Decentralized Enforcement of EU Law and Procedural Autonomy of Member States	101
2.2.6.3	The CJEU's Role in the Process of Individual Enforcement of EU Law: Preliminary Reference Procedure	103
2.2.6.4	State Liability for Breaches of EU Law and Compensation for Damage	105
2.2.6.5	Review of EU Measures and Liability of the EU for Damage Caused to Individuals	108
2.3	EU Regime for Investment and IIAs: A Comparison	110
2.3.1	Objectives	111
2.3.2	Legal Interests Protected and Scope of Application	111
2.3.3	Substantive Rules	113
2.3.4	Procedural Aspects and Remedies	115
2.3.5	Conclusion	118
2.4	Potential Conflicts between IIAs and EU Law	120
2.4.1	Sources, Character, and Context of Potential Conflicts	120
2.4.2	Conflicts in Competence	121
2.4.3	Incompatibilities of Substantive Provisions	122
2.4.3.1	Free Transfers of Funds in Connection with Investments	122

2.4.3.2	Unqualified MFN and NT Obligations	123
2.4.3.3	Specific Incompatibilities the IIAs Based on the American Model: Admission of Investment and Performance Requirements	124
2.4.3.4	Potential Impact of IIAs on the Regulatory Measures Adopted by the EU and Their Implementation by Member States	125
2.4.4	Discrimination on Grounds of Nationality	128
2.4.5	Jurisdictional Conflicts	129
2.4.5.1	EU Law and Commercial Arbitration: An Indifferent Relationship	129
2.4.5.2	Investment Treaty Arbitration and Commercial Arbitration as Equivalents?	134
2.4.5.3	Resistance of the CJEU to Settlement of Disputes within the Scope of EU Law before Other Fora	138
CHAPTER 3		
	EU Investment Agreements	141
3.1	Treaty of Lisbon: Foreign Direct Investment as the Part of the Common Commercial Policy	141
3.2	External Competence of the Union: An Excursus	144
3.2.1	Common Commercial Policy	147
3.2.2	Implied Powers	153
3.2.3	Association Agreements	165
3.2.4	Theory and Practice of Mixed Agreements	166
3.3	EU and Foreign Investment before the Treaty of Lisbon	168
3.3.1	Limited External Competence of the Union	168
3.3.2	Treaty Practice	173
3.4	Competence of the Union after the Entry of the Lisbon Treaty into Force	178
3.4.1	Policy Arguments for the Transfer of the External Competence to the Union	178
3.4.2	The Scope of the Union External Competence: Foreign Direct Investment and Other Forms of Investment	182
3.4.2.1	Notion of Direct Investment and Distinction from Other Forms of Investment	182
3.4.2.2	Implied External Competence for Portfolio Investment?	186
3.4.2.3	Investment in Form of Contractual Rights and Public Law Licenses	192
3.4.3	Foreign Direct Investments: Rules and Measures Covered by the Common Commercial Policy	192
3.4.3.1	Starting Point: Parallelism of Internal and External Powers versus Common Commercial Policy as a Dynamic Concept	193
3.4.3.2	Liberalization or Post-establishment Protection?	194

Table of Contents

3.4.3.3	Article 207(6) TFEU: Different Interpretations and Likely Meaning	196
3.4.3.4	Entry Stage	200
3.4.3.5	Post-establishment Stage: Relative Standards of Treatment	200
3.4.3.6	Post-establishment Stage: Absolute Standards of Treatment	201
3.4.3.7	Protection against Direct Expropriation and Article 345 TFEU	205
3.4.3.8	Investor-to-State Dispute Settlement Mechanism	210
3.4.4	Mixed Agreements as a Necessity?	216
3.5	Responsibility for Breaches of Investors' Rights and Procedural Issues	218
3.5.1	Setting the Scene	218
3.5.2	Responsibility for Breaches of International Agreements Concluded by the Union: General Issues	220
3.5.3	Regulation on Financial Responsibility	230
3.5.3.1	Subject Matter and Basic Principles of the Regulation	230
3.5.3.2	International Responsibility of the Union and the Scope of Application of the Regulation	234
3.5.3.3	Mechanism for Allocation of Financial Responsibility	241
3.5.3.4	Conduct and Management of Disputes	243
3.5.3.5	Settlement	246
3.5.3.6	Payment of Final Awards and Settlements	248
3.5.3.7	Overall Appraisal of the Regulation	250
3.6	Shaping the New Union International Investment Policy	253
3.6.1	Policy Challenges for the New EU Investment Agreements	253
3.6.2	Changing Approach of Some Developed Third States to International Protection of Investment	259
3.6.2.1	NAFTA States	260
3.6.2.2	Australia	263
3.6.2.3	Norway	266
3.6.3	Inter-Institutional Trialogue between the Commission, the Council and the Parliament	267
3.6.3.1	Communication of the Commission: Towards a Comprehensive European International Investment Policy	268
3.6.3.2	The Council Conclusions on a Comprehensive European International Investment Policy	271
3.6.3.3	European Parliament Resolution on the Future European International Investment Policy	271
3.6.3.4	Commission's Follow Up to the Parliament Resolution	275
3.6.3.5	Adjusted Position of the Commission: Fact Sheet on Investment Protection and ISDS in EU Agreements	276
3.6.3.6	Appraisal of the Discussion	279

3.6.4	Reflection in the Ongoing Negotiations with Third Countries	281
3.6.4.1	TTIP and Negotiations with Other Countries: The Laboratory of the New EU International Investment Policy	281
3.6.4.2	Investment in the Negotiated Texts of CETA and FTAs with Singapore and Vietnam	291
CHAPTER 4		
	IAs between EU Member States and Third Countries	311
4.1	Status of BITs Concluded between EU Member States and Third Countries: Introductory Remarks	311
4.2	Member States' International Agreements with Third Countries and Their Relationship with EU Law	313
4.2.1	Perspective of General International Law: The Pacta Tertiis Principle	314
4.2.2	EU Law Perspective: Meaning, Scope, and Limits of Article 351 TFEU	316
4.2.2.1	Article 351 TFEU: A Special Rule of EU Law for Pre-accession International Agreements of Member States	316
4.2.2.2	Paragraph 1: Priority of Incompatible Pre-accession Agreements	317
4.2.2.3	Paragraph 2: Duty of Member States to Eliminate Incompatibilities of Pre-accession Agreements with EU Law	320
4.2.2.4	Status of Incompatible Post-accession Agreements	322
4.2.2.5	Incompatibilities Resulting from Changes in Allocation of Competence or from Exercise of Competence by the Union	323
4.3	Compatibility of the Member States' IAs with EU Law and Article 351 TFEU	325
4.3.1	Memorandum of Understanding: A Political Solution for the BITs of the New Member States with the USA	325
4.3.1.1	The Content of the Memorandum	327
4.3.1.2	Significance of the Memorandum	329
4.3.2	Incompatibility of the Free Transfer of Payments Clauses in the CJEU's Case Law (<i>Commission v. Austria, Sweden, and Finland</i>)	330
4.3.2.1	The Cause of Action and the Parties' Pleadings	331
4.3.2.2	Opinion of AG Maduro	332
4.3.2.3	Decision of the Court	335
4.3.2.4	Commentary	337
4.3.3	Priority of the Member States' Pre-accession BITs with Third Countries (<i>Commission v. Slovakia</i>)	340

Table of Contents

4.3.3.1	The Cause of Action and the Parties' Pleadings	341
4.3.3.2	Opinion of AG Jääskinen	342
4.3.3.3	The Court's Decision	345
4.3.3.4	Commentary	347
4.3.4	Status of Incompatible BITs Concluded by Member States after Their Accession to the EU	354
4.4	Treaty of Lisbon, Exclusive Competence of the EU and the Future of the Existing Third-Country IIAs	356
4.4.1	New Exclusive External Competence of the EU and Existing Member States' BITs	356
4.4.2	Transitional Regime for the Existing BITs with Third Countries: Regulation No. 1219/2012	359
4.4.2.1	The Commission Proposal and the Authorization Concept	359
4.4.2.2	Regulation No. 1219/2012	362
4.4.3	External Dimension of the ECT	368
CHAPTER 5		
	Intra-EU International Investment Agreements	371
5.1	Intra-EU IIAs: Between Law and Politics	371
5.1.1	Desirable Complement or Anomaly within the Internal Market?	371
5.1.2	Legal Questions of Intra-EU IIAs	378
5.2	Various Aspects of Interplay between Intra-EU IIAs and EU Law	381
5.2.1	General International Law Perspective: Rules on Conflicts of International Treaties	382
5.2.1.1	Incompatibilities between Intra-EU BITs and EU Law Seen as Conflict of International Treaties	382
5.2.1.2	Article 59 VCLT: Implicit Termination of an Earlier Treaty	384
5.2.1.3	Article 30 VCLT: Partial Incompatibility of Treaties	386
5.2.1.4	When the Treaties Relate to the 'Same Subject Matter'?	388
5.2.2	EU Law Perspective: Supremacy Over <i>Inter Se</i> International Treaties of Member States	390
5.2.3	From the Conflict of Norms to the Conflict of Perspectives: To What Extent Is the International Law Perspective (In) Compatible with the EU Law Perspective?	392
5.2.4	ECT: Specific and (Particularly) Complicated Case	395
5.2.5	Duty of Arbitral Tribunals to Apply EU Law	400
5.2.5.1	Law Applicable in Investment Treaty Arbitration	400
5.2.5.2	Role of EU Law in Investment Treaty Arbitration	406
5.2.6	Possibilities for Review of Arbitral Awards in Terms of Their Compatibility with EU Law	413
5.2.6.1	ICSID Arbitrations	416
5.2.6.2	Non-ICSID Arbitrations	419

5.2.6.3	Union Public Policy: The Eco Swiss Doctrine and Its Weaknesses	422
5.3	Intra-EU IIAs from the International Law Perspective: The Key Arbitral Awards	428
5.3.1	Intra-EU BITs Are Valid and Applicable (<i>Eastern Sugar v. Czech Republic</i>)	428
5.3.1.1	Arguments of the Czech Republic	428
5.3.1.2	The Commission's Letter and the Reaction of the Tribunal	429
5.3.1.3	The Tribunal's Analysis on Jurisdiction	430
5.3.1.4	Applicable Law and the Decision on Merits	432
5.3.2	Staying the Course (<i>Eureko v. Slovakia</i>)	433
5.3.2.1	Arguments of Slovakia	434
5.3.2.2	Observations of the Netherlands Government	437
5.3.2.3	Observations of the Commission	438
5.3.2.4	The Tribunal's Analysis	441
5.3.2.5	Development of the Dispute after the Award on Jurisdiction	446
5.3.3	Applicability of the ECT between Member States and the Role of EU Law (<i>Electrabel v. Hungary</i>)	447
5.3.3.1	Introduction	447
5.3.3.2	Applicable Law	451
5.3.3.3	Jurisdiction	460
5.3.3.4	Decision on Merits	463
5.3.4	Commentary to the Tribunals' Decisions	464
5.4	Intra-EU IIAs from the EU Law Perspective	474
5.4.1	Discrimination on Grounds of Nationality	474
5.4.2	Intra-EU Investment Arbitrations, Autonomy of EU Law and Exclusive Jurisdiction of the CJEU	484
5.4.2.1	Exposition of the Problem	484
5.4.2.2	International Dispute Settlement Mechanisms in the Intra-EU Context and the CJEU	486
5.4.2.3	Possibility for Tribunals to Make Preliminary References to the CJEU as the Solution?	505
5.4.3	Intra-EU Investment Arbitrations and Mutual Trust between Member States	508
5.4.4	Conclusion: Are Intra-EU IIAs Compatible with EU Law?	519
5.5	Where Do We Go from Here?	521
5.5.1	Infringement Proceedings and Sequel of the <i>Eureko/Achmea v. Slovakia Arbitration</i> : The Gateways for the CJEU	521
5.5.2	The Consequences of Eventual Incompatibility of Intra-EU BITs with EU Law	524

Table of Contents

5.5.3 Are Intra-EU BITs Appropriate Instruments for Protection of EU Investors?	527
CHAPTER 6	
Conclusion	535
Bibliography	541
Table of Cases	561
Index	571