Contents

Ta	ible oj	f Cases	$\boldsymbol{\varsigma}$	xvii
Ta	ible o	f Treat	ties and EU Legislative and Policy Instruments	xxix
Li.	st of A	Abbrei	viations	XXXV
In	trodi	action		1
	Ι	THE	E CONCEPTUAL AND NORMATIVE FRAMEWORK OF	
			EU FOREIGN INVESTMENT LAW	
1	The	Orig	ins, Definition, and Scope of EU Foreign Investment Law	7
		•		8
	1.1	1 1 1	origins of EU foreign investment law The rationale behind international regulation of	O
		1.1.1	foreign investment	8
		1.1.2	The emergence of international norms on foreign investment	12
			The evolution and development of EU foreign	
			investment law pre-Lisbon	16
	1.2	Defin	nition of foreign investment	20
			Definitions of foreign investment in international law	21
			1.2.1.1 The meaning of 'investment'	21
			1.2.1.2 Characteristics of investment	24
			1.2.1.3 The notion of 'foreign'	32
			1.2.1.4 Definition of foreign investment in the OECD and	
			the WTO	35
		1.2.2	Definition of foreign investment in EU law	36
			1.2.2.1 The notion of foreign direct investment under EU law	37
			1.2.2.2 Defining other (non-direct) forms of foreign investmen	
			under EU law	43
		1 2 2	1.2.2.3 The notion of foreign investments in EU IIAs	45 47
	1 2		Concluding remarks	
	1.3		regulatory scope of EU foreign investment law Outward and inward investments	49 49
			Admission of foreign investment	50
		1.3.2	1.3.2.1 Capital movements	50 50
			1.3.2.2 Establishment of foreign investors	52
		1.3.3	Post-admission treatment and operation of foreign investment	200
		1.0.0	1.3.3.1 General standards of treatment of foreign investment	53
			1.3.3.2 Specific issues of foreign investment operation	55
		1.3.4	Protection against expropriation and other political risks	58
			Dispute settlement	58
			Promotion of foreign investment	61
			Concluding remarks	61

II THE SCOPE, CONTENT, AND OBJECTIVES OF EU FOREIGN INVESTMENT LAW

2	EU	Competence over Foreign Investment	65
	2.1	General principles of EU external competence	67
		2.1.1 Existence of EU competence	67
	-	2.1.2 Exclusivity of EU competence	71
	2.2	EU competence over admission and	
		operation of FDI	75
		2.2.1 Competence over capital movements	76
		2.2.1.1 The scope of the capital movements provisions	76
		2.2.1.2 The relevance of the capital movements provisions for	
		establishment of FDI	78
		2.2.2 Competence over establishment and post-establishment	
		treatment of FDI under the EC Treaty	85
		2.2.2.1 Competence over initial establishment based on	
		Article 133 TEC	85
		2.2.2.2 Competence over initial establishment based on	
		implied powers	89
		2.2.2.3 Competence over post-establishment treatment	92
		2.2.3 Competence over establishment and post-establishment	
		treatment of FDI after the Lisbon Treaty	94
		2.2.3.1 The scope of FDI competence	94
		2.2.3.2 The exclusive nature of FDI competence	98
		2.2.4 Competence over specific issues relating to	0.0
		the operation of FDI	99
		2.2.4.1 Competence over performance requirements	99
		2.2.4.2 Competence over investment-related movement of	101
		natural persons	101
	2 2	2.2.4.3 Competence over investment guarantee	103
		EU competence over portfolio investment	104
	2.4	EU competence over foreign investment in the form of concession	
		contracts and state contracts	105
	2.5	EU competence to regulate protection of foreign investment	
		against expropriation and other political risks	108
		2.5.1 The scope of Member State exclusive competence under	
		Article 345 TFEU	108
		2.5.2 Competence based on Article 207 TFEU	111
		2.5.3 Competence based on Articles 114, 115, and 352 TFEU	113
		EU competence to regulate settlement of investment disputes	116
	2.7	EU competence to regulate foreign investment in association	
		and cooperation agreements	119
		2.7.1 Competence to conclude association agreements	119
		2.7.2 Competence to conclude development and technical	
		cooperation agreements	121
	2.8	Conclusions	122

Contents	X11

3	Cor	ıclusio	on and (Content of EU International Investment Agreements	125
	3.1	Conc	clusion	of EU IIAs	127
				ural requirements for the conclusion of EU IIAs	128
				Negotiation of EU IIAs	128
			3.1.1.2	Conclusion of EU IIAs: decision-making in	
				the Council	130
				Conclusion of EU IIAs: the role of the Parliament	133
		3.1.2		ision of EU IIAs in practice	136
				The choice of legal basis	136
				EU IIAs as mixed agreements	138
				Conclusion of EU IIAs after the Lisbon Treaty	139
	3.2	_		ontent of EU IIAs	140
		3.2.1		A provisions on capital movements	140
			3.2.1.1	Determining capital movements: exclusion of	
				portfolio investment	141
				Scope of liberalization of capital movements	142
			3.2.1.3	Compatibility of capital movement provisions of	1//
			TTTTTA	EU IIAs with primary EU law	144
		3.2.2		provisions on establishment and post-establishment	1 //
				ent of FDI	146
			3.2.2.1	The main characteristics of EU IIAs distinguishing them from BITs	146
			2 2 2 2	The scope of EU IIA provisions on establishment of FDI	
				The scope of EU IIA provisions on post-establishment	140
			J. L. L. J	treatment of FDI	152
			3224	Standards of treatment of foreign investment	154
				EU IIA provisions on specific issues relating to the	1)1
				operation of FDI	167
				Exceptions and limitations to establishment and	10/
			0.2.2.	post-establishment treatment	171
			3.2.2.7	Compatibility of establishment and post-establishment	
				provisions of EU IIAs with primary EU law	173
		3.2.3	EUIIA	provisions on foreign investment in the form of	
				sion contracts	175
		3.2.4	EUIIA	provisions on investment protection against expropriation	177
		3.2.5	EUIIA	provisions on dispute settlement	178
			3.2.5.1	Political settlement of investment disputes	178
				Interstate dispute settlement	180
				Investor-state arbitration	182
				A provisions on investment promotion	184
		3.2.7		ntent of future EU IIAs	185
				Defining foreign investment	186
				Admission and operation of foreign investment	187
				Protection against expropriation and other risks	189
				Dispute settlement	190
				Balancing investment and public policy considerations	191
		2 2 0		Investment promotion	191
		5.2.8	Conciu	iding remarks	192

ŀ	The	Principles and Objectives of EU Foreign Investment Law	195
	4.1	The legal and political framework determining the objectives	
			197
		4.1.1 Investment-related objectives of	
			199
		4.1.1.1 The primary EU law-mandated objectives of	
			201
		4.1.1.2 The primary EU law-mandated objectives of	
		the internal market	207
		4.1.1.3 The investment policy objectives in light of the general	
		objectives of international regulation of	
	V.	foreign investment	209
		4.1.1.4 A policy preference towards multilateralism?	212
		4.1.2 Linking foreign investment and development objectives	214
		4.1.2.1 The primary EU law provisions on	
		development cooperation	214
		4.1.2.2 The role of development objectives in EU	
		policy making in the field of foreign investment	217
		4.1.3 Integrating the objectives of EU foreign investment law in the	
		broader EU external relations	220
		4.1.3.1 Primary EU law rules ensuring coherence and	
		consistency in pursuance of the objectives of	
			221
		4.1.3.2 The general values, principles, and objectives of EU	
			223
		4.1.3.3 Linking foreign investment with broader EU external	
			226
		1	229
	4.2	The objectives of EU foreign investment law in practice:	
			230
		4.2.1 The investment-related objectives of EU IIAs	231
		4.2.1.1 The objectives of market openness and	
			231
		4.2.1.2 The objectives of investment protection	233
		4.2.1.3 Investment objectives and	
			234
		4.2.2 The development objectives of	
			236
		4.2.2.1 Sustainable development as	
			236
		4.2.2.2 The development orientation of the substantive	
			238
		4.2.2.3 The development dimension of	
			240
		4.2.3 The political objectives of the	
		r	241
	4.3	Conclusions	2.44

III THE LEGAL EFFECTS OF EU FOREIGN INVESTMENT LAW

	Inte	ernatio	onal Law Effects of EU IIAs	249
	5.1	respo	nguishing between the international obligations and onsibility of the EU and its Member States Setting out the <i>problematique</i> International obligations arising out of EU IIAs 5.1.2.1 Distinguishing between EU IIAs that include references to the division of competence and those that do not	250253254
		5.1.3	5.1.2.2 Union, Member State, or joint and several responsibility? Attribution of wrongful conduct breaching obligations under EU IIAs	255259
			5.1.3.1 EU responsibility for the conduct of EU organs 5.1.3.2 EU responsibility for the conduct of	259
			Member State organs 5.1.3.3 Member States' responsibility for	260
			the conduct of their organs 5.1.3.4 Member States' responsibility for the conduct of EU organs	265266
		5 1 <i>l</i> :		
	r 2			268
	5.2		Relation between bilateral EU IIAs and the WTO Agreement	272
			and the ECT	274
			5.2.1.1 The relation between EU IIAs and the GATS	274
			5.2.1.2 The relation between bilateral EU IIAs and the ECT	277
	~	5.2.2	The relation between EU IIAs and Member State BITs	278
			5.2.2.1 EU IIAs making explicit reference to Member State BITs	279
			5.2.2.2 EU IIAs making reference to Member State IIAs in general 5.2.2.3 EU IIAs that do not make reference to	281
			Member State BITs	282
			5.2.2.4 Future EU and Member State IIAs	285
	5.3	Conc	lusions	285
5	EU	Law I	Effects of EU Foreign Investment Law	287
	6.1		Jnion law obligation and responsibility to perform EU IIAs The scope of the Union law obligation to perform and comply	288
			with the provisions of EU IIAs that are mixed agreements 6.1.1.1 The link with the scope of EU law 6.1.1.2 Are the investment provisions of EU IIAs within	289 289
		6.1.2	the scope of EU law? The limitations on the existence and exercise of Member State	291
		6.1.3	powers in the areas covered by EU IIAs Enforcing EU IIAs under EU law: review of legality and direct	293
			effect of EU IIAs	296

6.1.3.1 The conditions for judicial review	296
6.1.3.2 The binding nature, the purposes, and	
the structure of EU IIAs	298
6.1.3.3. The nature of the investment provisions of EU IIAs	302
6.2 Compatibility of Member State BITs with EU Law	305
6.2.1 The legal framework on the compatibility of Member State	
BITs with EU law	305
6.2.1.1 BITs concluded after the accession of	
Member States to the EU	305
6.2.1.2 BITs concluded prior to the accession of	
Member States to the EU	309
6.2.2 The fields of substantive incompatibility between	
BITs and EU law	310
6.2.2.1 Incompatibilities regarding capital movements	312
6.2.2.2 Incompatibilities regarding the admission of	
foreign investment	312
6.2.2.3 Incompatibilities regarding	
post-establishment treatment	313
6.2.2.4 Incompatibilities arising from the need for equal	
treatment of all EU nationals in EU Member States	314
6.2.2.5 Incompatibilities arising from the need for equal	
treatment of all EU nationals in third countries	317
6.2.3 The transition from Member State BITs to EU IIAs	318
6.2.3.1 The long-term objective of replacing Member	
State BITs with EU IIAs	319
6.2.3.2 Authorizing existing and future Member State BITs	321
6.3 Compatibility of EU IIAs with EU law	325
6.3.1 The obligation of EU institutions to	0-5
respect the primacy of EU law	326
6.3.2 The obligation of Member States to respect the primacy and	
autonomy of EU law	326
6.3.2.1 The application of the GATS in disputes between	
Member States	328
6.3.2.2 The application of the ECT in disputes between	
Member States	329
6.3.3 Do investment tribunals have an obligation to respect the	
primacy and autonomy of EU law?	332
6.4 Conclusions	334
Conclusions	337
Building a comprehensive EU common investment policy	337
Does an EU common investment policy better serve the	
regulatory interests of the stakeholders involved?	342
regulatory filteresis of the stakeholders filvorved:	JTZ
Ribliography	349
Bibliography Index	369
riuex	309