

# Contents

<i>Acknowledgments</i>	v
<i>Table of Cases</i>	xi
<i>Table of Legislation</i>	xix
<i>Abbreviations</i>	xvii
1 Introduction: EU Legal Integration in the Field of Foreign Direct Investment	1
I Setting the Scene: European Integration and FDI	2
II European FDI Policies and the Liberalisation of FDI	6
III European Integration and Investment Protection	9
IV Definitions of FDI in Different Types of International Instruments	12
V International Rule-making in the Field of FDI	17
VI Scope and Structure of this Study	20
2 The Operation of the Internal Market Mechanism in relation to Direct Investment	23
I Internal Market Integration in the Field of Direct Investment	24
A Terminology and Integrative Strategy	24
B External Dimension of Articles 49/54 and 63 TFEU	30
II Admission of Third-Country Direct Investment Into the Single Market and Issues of Demarcation between Articles 49/54 and 63 TFEU	36
A A Protection-based Approach in the Application of Articles 49/54 and 63 TFEU?	36
B 'Centre of Gravity' Approach in the Application of Articles 49/54 and 63 TFEU	42
III Post-Establishment Treatment of Third-Country Direct Investment in the Single Market	50
A Rights of Intra-EU Mobility for Third-Country Direct Investors as Distinguished from their Participation in the Internal Economy of one of the Member States	51
B Scope for Inconsistencies between Article 49/54 TFEU and Relevant Union and Member State Treatment	57
IV Conclusion	65

3 The Lisbon Reform of the Common Commercial Policy: Implications for Union Competence and Practice in the Field of FDI	67
I Union External Competence in the Field of FDI Before and After Lisbon	68
A Limited Community Competence in the Field of FDI under the Pre-Lisbon Provisions on the CCP	68
B Alternative Legal Bases for Assuming Commitments with Third Countries in the Field of FDI	73
C The Lisbon Reform of the Provisions on the CCP as regards FDI	78
II Implications of the Lisbon Reform of the CCP for the Union's Treaty-making Practice in the Field of FDI	90
A Pre-Lisbon External Practice in the Field of FDI	90
B Union Treaty-making Practice in the Field of FDI in the Post-Lisbon Era	100
III The Lisbon Reform of the CCP and Inward FDI into the Single Market	120
A The Common International Investment Policy and the Initial Establishment of Third-Country Direct Investors in the Single Market	120
B The Common International Investment Policy and Secondary Rights of Mobility for Third-country Direct Investors in the Single Market	128
IV Conclusion	135
4 The Interplay between EU Law and Member State Bilateral Investment Agreements with Third Countries	137
I Member State Practice of Concluding BITs and their Substantive Interaction with EU Law	138
A Historical Background to the Conclusion of BITs by the Member States	138
B Substantive Interaction of Member State External BITs with EU Law	143
II The EU Legal Framework that Governs the Interplay between EU Law and Member State BITs with Third Countries	150
A Pre-accession BITs and Article 351 TFEU	151
B EU Law and Post-accession BITs	160
III Post-Lisbon Developments with Regard to the Member States' Practice of Concluding BITs with Third Countries	166
A The Replacement Mechanism under Regulation 1219/2012 for Existing Member State BITs with Third Countries	167
B Issues Pertaining to the Need for Authorisation to Amend Existing BITs or to Conclude New BITs	179
IV Conclusion	185

5 The Interplay between EU Law and Intra-EU Bilateral Investment Agreements	187
I Historical Background to the Phenomenon of Intra-EU BITs	188
II The EU Legal Order and Investment Protection	193
A The TFEU Freedoms and Investment Protection	194
B The EU Fundamental Right to Property	197
C The Protection of ‘Legitimate Expectations’ in the EU Legal Order	204
III EU Law and Intra-EU BITs: Constitutional Aspects	210
A The Validity of Intra-EU BITs is Not in Issue	210
B The Operation of the Principle of Primacy in Relation to Intra-EU BITs	214
IV Intra-EU BITs and the EU Principle of Equal Treatment	223
A Dispute Settlement under Intra-EU BITs and MFN Treatment	224
B Dispute Settlement under Intra-EU BITs and NT	229
V Investor-State Arbitration under Intra-EU BITs and the Autonomy of the EU Legal Order	237
A The Autonomy of the EU legal order	237
B EU Law in Investor-State Arbitration under intra-EU BITs	244
VI Conclusion	249
6 Conclusion	251
I The Union’s Post-Lisbon FDI Competence and its Exercise	252
II The Internal Market Freedoms and Inward FDI	254
III EU Law and Member State BITs	257
IV Future Direction of EU Legal Integration in the Field of FDI	260
<i>Bibliography</i>	263
<i>Index</i>	277