Interaction between Bilateral Investment Treaties and EU law

A major change in the regulation of foreign investments is underway in the European Union involving a transfer of (certain) competences within the field from Member States to the EU, all being a part of a wider initiative with the ultimate goal of establishing a common European investment policy, which, it is argued, might eventually replace the network of bilateral investment treaties concluded between Member States and third countries.

Starting with the entry into force of the Lisbon Treaty, the EU is exclusively competent to regulate extra-EU foreign direct investments since the term "foreign direct investment" was introduced in Article 207 (1) TFEU dealing with the common commercial policy, in which, in accordance with Article 3 (1) (e) TFEU, the EU shall have exclusive competence.

Even though the wording is seemingly simple, certain issues, especially concerning the scope of the new EU competence, have been raised and are still not settled.

First, the issue of the scope of forms of foreign investments which are to be covered by the EU regulation is unclear. It has been argued that the exclusive competence extends only over direct investments, while other forms, if they are to be covered, would fall under shared competence. This would result in complex future EU IIAs having to be concluded in the form of mixed agreements.

Second, the scope of post-entry regulation is unclear. The interpretation ranges from a very restrictive one, limiting the new competence to the regulation of market access and liberalization. A more generous approach admits that the competence might extend even over post-entry regulation, which would, however, be limited by the so called "parallelism clause", meaning that external action of the EU is permissible only in cases when there is a corresponding internal competence. Applied to the field of foreign investments, protection against expropriation and coverage of fair and equitable treatment, as it is argued, is ruled out. Based primarily on *effet utile* principle, a very comprehensive competence is advocated, which would in fact covered the entire regulation of foreign investments as it provided for by bilateral

investment treaties, i.e. the competence, under the mentioned interpretation, would cover both pre- and post-entry regulation, standards of treatment, protection against expropriation as well as a dispute resolution mechanism providing for investor-state arbitration.

The present thesis compares and contrasts both regulatory systems (i.e. the regulation provided for by bilateral investment treaties and EU law) in an attempt to identify the differences and, ultimately, draw a conclusion on whether the new EU competence actually has the potentially to replace the current network of bilateral treaties concluded between Member States and third countries.