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# Financial Responsibility in the European International Investment Policy

Dr Jan Kleinheisterkamp\*

**Abstract:** Financial responsibility of the EU resulting from investor-state arbitration is a politically sensitive topic that is currently shaping the emerging European international investment policy. What degree of protection can be granted to foreign investors in negotiations of future EU investment treaties without compromising EU policy space, and how much review of its regulatory powers not by the CJEU but by arbitral tribunals is the EU willing to accept? Taking the Commission's recent draft Regulation on managing financial responsibility as the starting point, this paper analyses the implications that future EU investment agreements would have for the existing safeguards for balancing private and public interests in EU law. It discusses the latest reactions of the European Parliament to these issues (triggered by a previous version of this paper) and suggests a more scientific and sustainable approach towards ensuring that future EU agreements provide a maximum of legal certainty for both investors and host states.

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## I. INTRODUCTION

In June 2012, the European Commission presented its proposal for an EU Regulation ‘establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is a party’.<sup>1</sup> This is a further step in defining the emerging European international investment policy, clearing the path for the up-coming – and partially already on-going – substitution of the bilateral investment treaties (BITs) of the EU member states by EU agreements with non-EU countries on the protection of foreign investments.

This paper analyses the broader implications of financial responsibility under future EU international investment agreements beyond the mere allocation of liabilities and competences between the EU and its member states. After sketching the background and the context of the issue (II), the paper turns to the criteria for allocating responsibility for the purpose of discussing the assumptions underlying the emerging European investment policy (III). These assumptions are by no means unproblematic since they potentially open the door to significant changes to the principles of liability of the EU as elaborated by the Court of Justice of the EU (CJEU). The policy choices that have to be – and are currently being – made in the European institutions in this respect gravitate around the ultimate dependence of all financial responsibility on the future grounds for liability that the EU is willing to accept (IV). It becomes clear that the simple transposition of the conventional vague standards of investor protection in the existing BITs of the member states is not an option if investment treaty law is to be taken serious by the EU, as shown by the most recent shift in the European Parliament. The insertion of investor-state arbitration in EU investment agreements should not be automatic but chosen consciously in view of the circumstances in each negotiation; and EU investment treaties should not allow circumventing the safeguards defined by the CJEU to shield the Union’s legislative powers to decide economic policies nor the general balance of private and public interests struck by the EU law in its legal framework for guaranteeing the freedoms related to investments in Europe, be it by domestic or foreign investors. The paper concludes by resuming the findings and making a case for a slower and more sophisticated approach to the elaboration of the future EU investment treaties (V). Rather than approaching the risks of uncontrolled adjudication of disputes by arbitral tribunals by merely unilateralist attempts to impose EU law standards as a cap to future EU investment standards, it would be more coherent and sustainable to inform future negotiations by the elaboration of detailed principles of investor protection that are synthesized from the comparative public law experience of the

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<sup>1</sup> Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is a party (21 June 2012), COM(2012) 335 final, 2012/0163 (COD).

countries with the highest level of protection of private interests and their balancing with public interests. It is argued that this is the only means for taking seriously what is ultimately the justification of investment treaty law: legal certainty.

## II. BACKGROUND AND CONTEXT

The Commission initiated the institutional discussion with its 2010 communication ‘Towards a uniform European international investment policy’,<sup>2</sup> laying out its position regarding the new regime of international investment rules. This became necessary as the Union had obtained the new exclusive competence for foreign direct investments as part of the common commercial policy as redefined by the Treaty of Lisbon that entered into force in 2009.<sup>3</sup> Together with its communication, the Commission submitted a proposal for a Regulation on transitional arrangements for existing bilateral investment agreements of the Member States with third countries,<sup>4</sup> which led to extensive discussions in, and between, the European institutions and which, after considerable amendments, finally came into force in December 2012.<sup>5</sup> In parallel to these internal negotiations, the Commission sought and obtained a mandate from the Council to start negotiations of investment chapters in the context of free trade agreements with Canada, India and Singapore.<sup>6</sup> The negotiations with Canada are currently stagnating and now overshadowed by the even more ambitious project of negotiating a Transatlantic Trade and Investment Partnership (TTIP) with the United States of America;<sup>7</sup> and the negotiations of a bilateral investment treaty (BIT) with China are also imminent.<sup>8</sup>

In the internal negotiations over the first international investment Regulation, the Member States obtained – and the Commission ultimately accepted – a significant reduction of the Commission’s power as compared to the original proposal, in particular concerning the scrutiny of the Member States’ existing investment treaties. Already in the negotiations in the Parliament, a mechanism for ensuring the compatibility of existing treaties with European policies on

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<sup>2</sup> COM(2010) 343 final.

<sup>3</sup> Article 3(1)(e), 206, 207(1) TFEU.

<sup>4</sup> COM(2010) 344 final.

<sup>5</sup> Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, [2012] OJ L 351/40 (12 December 2012).

<sup>6</sup> See the leaked mandates approved by the Council at its 3109th meeting, 12 September 2011: <http://www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html>.

<sup>7</sup> ‘Statement from United States President Barack Obama, European Council President Herman Van Rompuy and European Commission President José Manuel Barroso’, European Commission memo (13 February 2013), [http://europa.eu/rapid/press-release\\_MEMO-13-94\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-94_en.htm); see also below nn 12 and 13.

<sup>8</sup> ‘Commission proposes to open negotiations for an investment agreement with China’, European Commission press release (23 May 2013), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=900>.

investments was taken out of the Regulation's text.<sup>9</sup> The final text of the Regulation, which now assures the continuation in force of all existing investment treaties of the Member State until they are superseded by new agreements negotiated by the Union with third countries, includes a mention that these future EU agreements shall provide 'for high standards of investment protection'.<sup>10</sup> In its mandate given to the Commission for negotiating FTA investment chapters with Canada, India and Singapore, the Council insisted that such agreements 'shall provide for the highest possible level of legal protection and certainty for European investors' and stipulated that 'its respective provisions shall be built upon the Member States' experience and best practices regarding their bilateral investment agreements'.<sup>11</sup> The same language can be found in the latest Commission's draft mandate for the negotiations of the TTIP,<sup>12</sup> and the final report of the EU-US High Level Working Group that initiated the TTIP process went as far as recommending 'that a comprehensive U.S.-EU trade agreement should include investment [...] protection provisions based on the [...] highest standards of protection that both sides have negotiated to date'.<sup>13</sup>

## 1. THE DRAFT REGULATION FOR MANAGING FINANCIAL RESPONSIBILITY

The Commission's draft for a second international investment Regulation appears to be the logical continuation of the Commission's effort to establish a broader legal framework for the EU's emerging international investment policy. The problems arising from the Member States' own international investment programmes have now been (partially) settled and the negotiations with Canada might set a precedent for future investment agreements of the Union (if they are not steamrolled by the prioritized TTIP efforts). The present Commission proposal now aims at tackling the challenges of managing the financial responsibilities that may result from claims brought by foreign investors against the Union and/or its Member States under the new EU agreements. These internal arrangements on the apportionment of financial responsibility are tied with the question as to who – the EU or the concerned Member State – shall externally (a) be liable as a potential award debtor and, thus previously, (b) act as the respondent in arbitral proceedings brought by investors from third countries

<sup>9</sup> For more detail see J Kleinheisterkamp, 'European Policy Space in International Investment Law' (2013) 27:2 ICSID Review 416-431 [hereinafter: *Policy Space*].

<sup>10</sup> Recital 6 of Regulation (EU) No 1219/2012 (n 5); on the background of this recital see Kleinheisterkamp, *Policy Space* (n 9) 427-428.

<sup>11</sup> Article 3A of the negotiating mandate given by the Council to the Commission (n 6).

<sup>12</sup> See the leaked 'Recommendation for a Council Decision authorising the opening of negotiations on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America' COM(2013) 136, 12 March 2013, [http://www.s2bnetwork.org/fileadmin/dateien/downloads/EU\\_Draft\\_Mandate\\_-\\_Inside\\_US\\_Trade.pdf](http://www.s2bnetwork.org/fileadmin/dateien/downloads/EU_Draft_Mandate_-_Inside_US_Trade.pdf) (Annex ¶ 15).

<sup>13</sup> Final Report of High Level Working Group on Jobs and Growth, 11 February 2013, [http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc\\_150519.pdf](http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf).

on the bases of treatment suffered in the European Union. The proposal, by including rules on the conduct of investor-state dispute settlement procedures, thus also anticipates, and indirectly frames, the rights that future EU investment agreements will grant non-EU investors, who will have to accept that they cannot choose against whom to bring their claim – a choice that, according to the proposal, should largely be at the Commission's discretion. Moreover, the proposal includes rules on the practically important questions of settling investor claims and the payment of arbitral awards.

## **2. EU COMPETENCE FOR REGULATING INTERNATIONAL INVESTMENT PROTECTION**

The rules proposed by the Commission in this draft Regulation, over all, reflect the Commission's understanding that the EU must exercise its exclusive competence regarding international investment. The Commission puts strong emphasis in its explanatory memorandum on its long-standing claim that the Union has exclusive competence not merely in regulating 'foreign direct investment', as worded in Article 207(1) TFEU, but much more broadly in all aspects of the protection of international investments in the EU's external relations with third countries.<sup>14</sup> This position is far from being uncontested, especially by the Member States, which partially have insisted that the EU powers in this context should be interpreted restrictively.<sup>15</sup> Accordingly, a study commissioned by INTA to Professor Tietje on the draft Regulation is cautiously prefaced with the observation that '[t]he question of the correct legal basis of the proposed regulation is not within the scope of this study'.<sup>16</sup> The ultimate clarification of the legal basis for the EU's competence can be expected to be brought about by the Court of Justice following likely requests for a legal opinion on the matter. In the meanwhile, it is worth noting that the Commission's justification of the EU competences are rather convincing in the light of the past positions taken by the Court of Justice for analogous situations and likely be sufficiently solid so as to carry its efforts for establishing a legal framework for the emerging EU international investment policy and, in particular, the current draft Regulation for managing financial responsibility.<sup>17</sup>

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<sup>14</sup> COM(2012) 335 final (n 1) 1.2.

<sup>15</sup> See, *eg*, the negotiation mandate given to the Commission by the Council (n 6), which affirms that matters of portfolio investment, dispute settlement, property and expropriation aspects would be mixed competences.

<sup>16</sup> Tietje *et al* (n \*) 4.

<sup>17</sup> See also A Reinisch, 'The EU on the Investment Path – Quo Vadis? The Future of EU BITs and other Investment Treaties' (20 March 2013) 24-25, <http://ssrn.com/abstract=2236192>; in general A Dimopoulos, *EU Foreign Investment Law* (OUP 2011) 122-124.

### 3. THE BROADER CONTEXT OF PUBLIC INTERNATIONAL LAW AND COMPARATIVE PUBLIC LAW

The study by Tietje *et al* opens with a general outline on the principle of state responsibility for wrongful acts. In this context, it is worth highlighting that the affirmation that '[u]nder public international law, a contracting state has liability for any wrong committed by the state'<sup>18</sup> lends itself to misunderstanding. Under the classical conception of international law, it is difficult to affirm that there is a rule of customary international law or a general principle of law under which states would generally be liable for damages caused to individuals by state action. Beyond exceptional situations of egregious abuses and violations, the state liability concerned in the context of international investments is created merely by treaty obligations voluntarily entered into by states for the purposes of attracting investments.<sup>19</sup> Today's international regime of protection of foreign investments is based on policy choices – and not on the basis of some pre-existing legal obligations under international law or even natural law to protect foreign investments and to grant investors actionable rights for perceived breaches.<sup>20</sup>

Once the legal basis for state liability is created – on the basis of such a policy choice – through the ratification of international investment agreements, the question of repartition of operational, financial and procedural responsibilities arises especially for international organisations and federal states. As Tietje *et al* correctly point out, the EU is difficult to characterize in this respect as it is more than a simple international organisation and not yet a federal state. They affirm that 'the division of competences within a federal system may be clearer than the one in the EU' and that this would constitute a 'key difference between the

<sup>18</sup> Tietje *et al* (n \*) 7.

<sup>19</sup> See, eg, M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013).

<sup>20</sup> For the underlying logic of creating a special legal regime providing for such protection under international law that received its greatest impetus from the World Bank's decision to offer states a mechanism of settlement of disputes with foreign investors that is today operative and based on the 1965 ICSID Convention of Washington (without which the system of bilateral investment treaties would not exist in its current form) see the words of the drafter of the ICSID Convention A Broches, 'Opening Address at the First Consultative Meeting of Legal Experts, Addis Ababa' (16-20 Dec 1963) in: *Convention on the Settlement of Investment Disputes between States and Nationals of Other States – Documents Concerning the Origin and the Formulation of the Convention* (vol 2, World Bank 1968) 239:

'International Investments are universally recognized as a factor of crucial importance in the economic development of the less developed parts of the world... Unfortunately, private capital is not being transferred in sufficient volumes to the areas in need of capital, one of the most serious impediments for its transfer being the fear of investors that their investments will be exposed to political risks such as expropriation, government interference and the non-observation by the host government of the contractually assumed obligations on the basis of which the investments were made [...]. The Bank thus asked itself if, in view of its reputation of integrity and its position of impartiality, it could not help in the task of removing these obstacles to private investments... The Bank concluded that the most promising option would be to tackle the problem of the unfavorable investment climate by the creation of a machinery offered on a voluntary basis for the conciliation and arbitration of investment disputes.'

solutions found in federal states in comparison with the EU'.<sup>21</sup> Decades of experience with the evolution of the repartition of competences between the Union and the Member States and a very dense body of case law of the Court of Justice in this respect, however, suggest that there is a highly elaborate – albeit, like in virtually all federal states, not uncontroversial, let alone simple – system of the repartition of competences in the EU. Accordingly, the interesting point to note from the comparative study by Tietje *et al* on federal systems and on the principles of responsibility of international organisations is that the models of the former are much more likely to be suitable for the EU than the latter. This suggests that the Commission has chosen the correct starting point for elaborating its criteria of apportionment of responsibility between the EU and its Member States, as will become clearer below.

### III. THE CRITERIA FOR ALLOCATING RESPONSIBILITY

#### 1. EXTERNAL RESPONSIBILITY IN RESPONDING TO AND DEALING WITH THE FOREIGN INVESTOR

The Commission stresses that the external responsibility must be determined 'on the basis of the competence for the subject matter of the *international* rules in question, as set down in the Treaty', and notably without considering whether 'a Member State has competence under the rules on the internal market allowing it to legislate in its domestic sphere'.<sup>22</sup> It is useful to clarify firstly, as the Commission does,<sup>23</sup> that the issue arises only when an EU investment agreement is concluded as a mixed agreement, i.e. to which both the EU and the Member States are parties – which is likely to be the case of most, if not all, future EU agreements.<sup>24</sup> Otherwise, and presuming that new EU investment agreements effectively put out of force the existing BITs of the Member States,<sup>25</sup> there would simply be no jurisdictional basis for initiating investment arbitration proceedings against a Member State; 'then it is only the Union which may be sued by an investor'.<sup>26</sup>

Secondly, it has to be highlighted that the external responsibility toward an investor under public international law consists primarily of the responsibility for having to respond to the claim brought in international arbitration proceeding by the claiming investor. This is the matter regulated in the Draft Regulation in Chapter III – *Conduct of Proceedings*. Indeed, the Commission's statement has to be

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<sup>21</sup> Tietje *et al* (n \*) 15.

<sup>22</sup> COM(2012) 355 final, Explanatory Memorandum, p 4 (emphasis added).

<sup>23</sup> *ibid.*

<sup>24</sup> See the Council's negotiating mandate for the investment chapters in the FTA with Canada, India and Singapore (n 6).

<sup>25</sup> See also below after n 31.

<sup>26</sup> COM(2012) 355 final, 4.



understood in the context of its affirmation that, in a case of a mixed agreement to which both the EU and the Member States are parties, the question of ‘who is responsible as a matter of international law [...] has to be decided not by the author of the act, but on the basis of the competence for the subject matter of the international rules in question’.<sup>27</sup> Put differently, the Commission claims that, because of the exclusive competence for international investment policy,<sup>28</sup> it must be the EU alone who decides on who has to assume the responsibility for the treatment that allegedly caused harm to a foreign investor. The Commission’s proposal is to provide, in Article 4, for a fixed legislative rule for the cases in which the dispute concerns treatment afforded by the Union and, in Article 7, a more flexible and differentiated rule in Article 8 for the cases in which the treatment was afforded by a Member State.

Coupled with the external responsibility of conducting the arbitration proceedings as respondent, is also the external responsibility eventually to negotiate a settlement with the foreign investor and to ensure the payment of any award resulting from arbitral proceedings. These are both dealt with in Chapters IV and V of the draft Regulation and grant the EU broad discretion as regards the power to settle or not to authorise settlement cases dealt with by Member States or to handle the payment of awards rendered against a Member State.

It should be recalled that the rules proposed in the draft Regulation, even insofar as they address external responsibilities towards the investor, cannot, in themselves, alter the legal rules under public international law, which are the only ones relevant to the arbitral tribunal when deciding over a foreign investor’s claim.<sup>29</sup> An arbitral tribunal will decide on whether it has jurisdiction over the EU or over a Member State on the basis of the provisions of the EU investment agreement under which the foreign investor is bringing its claim. This highlights a need, which is not explicitly addressed, but presumably intended, by the Commission. Every future EU investment agreement negotiated with a third country will have to clarify that the investor must accept the determination based on the rules of this Regulation of who, the EU or the Member State concerned, will actually act as the respondent and thus assume responsibility in the arbitral proceedings. Moreover, it needs to be clarified that also the Regulation’s rules on settlement and payment of settlements or awards also qualify and condition any right that the foreign investor receives under the EU investment agreement. Such a clarification in any future EU investment agreement is necessary for the sake of establishing legal certainty for the foreign investor and for pre-empting expectations that the investor could have the choice against whom to bring its

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<sup>27</sup> *ibid.*

<sup>28</sup> See above text accompanying n 14-17.

<sup>29</sup> Just as the ‘grandfathering rule’ of Regulation 1219/2012 (n 5) is, as such, irrelevant for the continuing in force of the Member States BITs from a public international law perspective, but merely constitute internal EU law rules on the relationship between the EU and the Member States that are not relevant for an arbitral tribunal drawing its jurisdiction from the BIT.

claim.<sup>30</sup> It would have been useful already to clarify in the Recitals of the draft Regulation or even by an express provision in the Regulation that its rules fixing the external status as respondent and potential award debtor are binding on any foreign investor bringing a claim under an EU agreement. A suggested amendment in this sense, however, could not find a sufficient majority in INTA.<sup>31</sup>

Furthermore, the Regulation's provisions could only be fully effective if future EU investment agreements leave no doubt about the expiration of existing BITs of the Member States. Any parallel continuation in force of existing Member State BITs, even if only on the basis of the therein included 'survival clauses' after termination,<sup>32</sup> would allow foreign investors the strategic choice on which agreement to base their claim. This could allow them to circumvent the effective application of the Regulation, for example, to avoid the Union taking up a Member States' respondent status under Article 8. For the avoidance of such circumvention, it would have been useful to include a clarification that future EU investment agreements must completely and effectively supersede existing BITs of Member States with the same third country. In the absence of such clarification, the Commission will have to ensure the insertion of specific provisions for this purpose into each EU investment agreement.

## **2. INTERNAL APPORTIONMENT OF FINANCIAL RESPONSIBILITY BETWEEN THE EU AND THE MEMBER STATES**

In contrast to the external responsibility (for acting as respondent, negotiating a settlement or assuming the role of the award debtor), the question of apportionment of the financial responsibility from an EU internal perspective is not coupled to the Union's external competences. Article 3 of the draft Regulation links financial responsibility to the question of who – the EU or a Member State – actually afforded the treatment that then gives rise to the foreign investor's claim. To the degree that either the Member State concerned or the Union respected the limits of their respective powers as defined by the Treaties, the internal apportionment of financial responsibility can thus be said to follow the internal competences within the EU. Put differently, financial responsibility should fall internally on the entity responsible for defining the content of the treatment afforded to the foreign investor. Accordingly, Article 3(1)(b) of the draft Regulation exempts Member States from their financial responsibility for claims brought by foreign investors where the Member State's treatment that triggered the claim was required by EU law. This *prima facie* sensible solution, however, raises three fundamental issues.

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<sup>30</sup> cf Tietje *et al* (n \*) 20: "Forum Shopping" is [...] not inappropriate behaviour by the investor but a logical consequence of granting investors the exclusive right to initiate an arbitral proceeding."

<sup>31</sup> See Amendments 30 and 51, INTA PE 506.105v01-00, 28 February 2013, <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARI&mode=XML&language=EN&reference=PE506.105>.

<sup>32</sup> On survival clauses see S Ripinsky, 'Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims' [2012-2] IIA Issue Notes (UNCTAD) 1, 3-4.

a. *Responsibility for treatment that is illegal under EU law*

Article 3(1) of the draft Regulation merely focuses on which entity *did* afford the treatment that gives rise to the foreign investors claim as opposed to on whether the entity had the competence for taking such measure according the allocation of internal competences under the Treaties. It thereby implicitly accepts that investment treaties concluded by the Union will allow arbitral tribunals to impose damages on the entity that afforded treatment in breach of its powers under EU law.

This may seem like an obvious case for accepting liability, and hence financial responsibility, under an EU investment agreement since a Member State acting in breach of EU law would also be liable under EU law in line with the case law of the CJEU originating with the *Francoovich* decision,<sup>33</sup> just as the Union according to Article 340(2) TFEU.<sup>34</sup> The problem is, however, that by accepting that future EU agreements may impose such a liability, the proposal requires accepting that such Union agreements will fundamentally alter the existing rules of liability in EU law. The CJEU has clearly recognized that ‘it is a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the loss or damage himself’.<sup>35</sup> The rule is therefore that a European investor is under the obligation first to attempt to obtain the annulment of the illegal act of the Member State or Union that affects its investment before being able to recover the losses suffered.<sup>36</sup> The CJEU has recognized that the obligation only exists insofar as it is reasonable to pursue annulment,<sup>37</sup> but this exception merely confirms the rule that EU law, in line with most national laws of the member states,<sup>38</sup> does not allow private actors merely to ‘endure and cash in’. Indeed, every national judge of a Member State is obliged to ensure the primacy of EU law possibly violated by the national act and, where an act of a Member State is based on secondary EU law that might be violating the Treaties, has to request a preliminary ruling from the CJEU.<sup>39</sup>

<sup>33</sup> Joined Cases C-9/90 *Francoovich* [1991] ECR I-5373 ¶ 35: ‘It is a principle of Community law that the Member States are obliged to make good losses and damage caused to individuals by breaches of Community law for which they can be held responsible.’

<sup>34</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029 ¶ 28-29; for Article 340(2) TFEU see below.

<sup>35</sup> Case C-446/06 *Danske Slagterier* [2009] ECR I-2119 ¶ 61, referring to Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission* [1992] ECR I-3061 ¶ 33, and *Brasserie du Pêcheur and Factortame* (n 34) ¶ 85.

<sup>36</sup> The finding of illegality of a measure of the EU ‘has the legal effect of requiring the competent Community institutions to take the necessary measures to remedy that illegality’, Order of 8 November 2007 in Case C-421/06 *Fratelli Martini and Cargill* [2007] ECR I-152 ¶ 52.

<sup>37</sup> ECJ, Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727 ¶¶ 104-106.

<sup>38</sup> See, eg, in Germany Bundesverfassungsgericht 1 BvL 77/78 (*Naßauskiesung*), decision of 15 July 1981, BVerfGE 58 (1981), 300, 322-324.

<sup>39</sup> Article 267 TFEU.

Most existing BITs, in contrast, do not require investors to exhaust local remedies and allow them directly to bring a claim for all damages before an international arbitral tribunal.<sup>40</sup> Investment treaties concluded by the Union on such basis, as indirectly accepted by the Commission's proposal, would *de facto* change the existing balance of judicial recourses established by the Treaties for the determination of whether EU law has been breached. Foreign investors could short-cut the existing mechanisms by relying exclusively on the protection standards of the investment agreement and seeking damages directly. Whereas the EU wants to establish such new liability rules by accepting investment treaty rules along the lines of existing BITs of the Member States is, as indicated above, foremost a policy choice. It must therefore be clear that, by agreeing to the text as proposed by the Commission without any qualification, the Parliament also opens the way for future negotiating mandates by the Council to the Commission to bring about such a change to the existing legal system of liability of the Member States and of the EU – and the reverse discrimination of EU investors in Europe that this entails.

*b. Responsibility for treatment that is legal under EU law*

The second issue arises from the exception in draft Article 3(1)(b) which exempts a Member State from financial responsibility 'where such treatment [afforded by that Member State] was required by the law of the Union'. While this solution again appears to be self-evident,<sup>41</sup> the underlying assumption on which it rests is not unproblematic: the formulation suggested by the Commission implies that investment tribunals can decide over the legality of legislative acts of the Union in the light of the protection standards of the investment agreements. This means that a legislative act of the Union may be perfectly legal according to the Treaties but nevertheless gives rise to the Union's liability under the investment agreement if an arbitral tribunal finds that the treatment required under that legislation is not in conformity of the provisions of the investment treaty. Whereas the liability of Member States or the Union for legislative acts that violate EU law is clearly recognized by the CJEU<sup>42</sup> – albeit in quite different terms than the liability that current BITs establish, as shown above – the situation is different regarding the liability of the Union for legislative acts that are legal under EU law. The liability

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<sup>40</sup> See in detail A von Aaken, 'Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View, in: S Schill, *International Investment Law and Comparative Public Law* (OUP 2010) 721, 730-731. The logic of dispensing foreign investors from exhausting national remedies emerged as a solution to the low effectiveness of the rule of law in many developing countries and at a time where the directions of investment streams were unidirectional and the 'bilateral' reciprocity of the investment treaties was 'rather a matter of prestige [...] than reality'; FA Mann, 'British Treaties for the Promotion and Protection of Investments' [1981] *British Yearbook of International Law* 241.

<sup>41</sup> See also Case C-511/03 *Ten Kate* [2008] ECR I-8979 ¶ 32: 'Community law does not impose any obligation on a Member State to bring an action for annulment or failure to act for the benefit of one of its citizens'.

<sup>42</sup> Joined Cases C-120/06 and C-121/06 *FLAMM and Fedon* ¶¶ 170 and 175.

of the EU for damages caused to investors is laid down in Article 340(2) TFEU, which provides:

In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

It is therefore for the CJEU to determine the exact extent of the Union's liability on the basis of comparative analysis of the national laws of state liability of Member States. In the *FLAMM and Fedon* case,<sup>43</sup> the CJEU had to address, on this basis, the question whether the Union can be liable for legislative acts that cause loss to an investor but which are in full conformity with the Treaties.

This question of 'objective liability' arose when European companies sued the Union for losses suffered as a consequence of retaliation measures that the US imposed on the EU after it had been condemned by a WTO panel to be in breach of WTO law. In line with previous case law,<sup>44</sup> the CJEU confirmed that WTO rules 'are not in principle, given their nature and structure,<sup>45</sup> among the rules in the light of which the Community courts review the legality of action by the Community institutions'.<sup>46</sup> Consequently, companies affected by EU measures breaching WTO law by the EU cannot invoke this breach of the 'external' obligations of the EU (under international law) for the purpose of establishing an 'internal' illegality of, and thus the liability for, the EU measures (under EU law). The remaining question is then whether the Union can be liable under EU law for measures that are perfectly legal from the 'internal' perspective of EU law, i.e. whether there is some 'objective liability' without the traditional requirement of fault. Rejecting the affirmative position of Advocate General Poiras Maduro and reversing the judgement of the Court of First Instance, the Grand Chamber of the CJEU found that the comparative analysis of the laws of the Member State did *not* allow affirming 'the possible existence of a principle of liability in the case of a lawful act or omission of the public authorities, in particular where it is of a legislative nature'.<sup>47</sup> The CJEU concluded that:

<sup>43</sup> *ibid.*

<sup>44</sup> Case C-149/96 *Portugal v Council* [1999] ECR I-8395 ¶ 47; Case C-93/02 *P Biret International v Council* [2003] ECR I-10497 ¶ 52; Case C-377/02 *Van Parys* [2005] ECR I-1465 ¶ 39.

<sup>45</sup> The reasons given by the CJEU are that WTO law, even where a breach has been established, still allows the parties to find a solution by negotiations, which would be compromised if EU courts could impose certain behaviour following the claim of affected individuals; and that 'by undertaking [specifically] to comply with the WTO rules [...] the Community did not intend to assume a particular obligation in the context of the WTO, capable of justifying an exception to the principle that WTO rules cannot be relied upon before the Community courts and enabling the Community courts to review the legality'; *Van Parys* (n 44) ¶ 41 and 52.

<sup>46</sup> *FLAMM* (n 42) ¶ 111; for the same conclusion see already W Weiß, 'Zur Haftung der EG für die Verletzung des WTO Rechts' [2005] *Europarecht* 277, 297-300.

<sup>47</sup> *ibid* ¶ 175.

as Community law currently stands, no liability regime exists under which the Community can incur liability for conduct falling within the sphere of its legislative competence in a situation where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the Community courts.<sup>48</sup>

The CJEU's position can be understood in the light of its previous case law, which firmly stated as early 1978 that:

the legislative authority, even where the validity of its measures is subject to judicial review, *cannot always be hindered by in making its decisions by the prospect of applications for the damages* whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interest of individuals... Although [the] principles [in the legal systems of the Member States governing the liability of public authorities for damage caused to individuals by legislative measures] vary considerably from one Member State to another, it is however possible to state that the public authorities can *only exceptionally and in special circumstances* incur liability for legislative measures which are the result of choices of economic policy [...]<sup>49</sup>

The CJEU affirmed this strict approach towards the liability of the Community in the exercise of its legislative activities in its landmark decision in *Brasserie du Pêcheur and Factortame* in 1996:

First, even where the legality of measures is subject to judicial review, *exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests*. Second, in a legislative context characterized by the *exercise of a wide discretion, which is essential for implementing a Community policy*, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.<sup>50</sup>

The current restrictive liability of the Union for its legislative acts, however, would be widened significantly if future investment treaties of the EU were to be based on the principles of the existing BITs of the Member States, as currently required by the Council in the mandate for the negotiations with Canada, India and Singapore.<sup>51</sup> The EU may be obliged under WTO law to find (and negotiate) a

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<sup>48</sup> *ibid* ¶ 176.

<sup>49</sup> Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *Bayerische HNL Vermehrungsbetriebe and Others v Council and Commission* [1978] ECR 1209 ¶ 5 (emphasis added).

<sup>50</sup> *Brasserie du pêcheur and Factortame* (n 34) ¶ 45 (emphasis added).

<sup>51</sup> See above n 5.

way of adapting its legislation to conform an interpretation affirmed by a WTO panel; but the Grand Chamber of the CJEU clarified in *FLAMM* that the EU is not obliged to pay compensation to merchants affected by this legislation. Whereas WTO law, whose rules apply only between third countries and the Union, does not confer any directly applicable and thus actionable rights to individuals, investment agreements do. Their most broadly framed and vague provisions, such as especially the ‘Fair and Equitable Treatment’ standard, do not differentiate between legislative and executive or administrative acts for the purposes of establishing liability. This means that if future EU investment agreements are negotiated in the same spirit, as also implicitly accepted by the current proposal of the Commission in Article 3(1)(b), the restrictions on state liability accepted by the laws of the majority of Member States and elaborated on that basis by the CJEU for the Union will no longer apply if future investment agreements did not contain safeguards in this respect. Put differently, the EU would expose itself to financial responsibility for its legislative acts that are perfectly legal under EU law but which could be considered by some arbitral tribunal to be in breach of standards of an investment treaty.

This is, again, not surprising from the perspective of existing BITs, but a policy choice to be made. This choice must be made with the full consciousness that unqualified acceptance of the rule on apportionment of financial responsibility as proposed by the Commission also means acceptance of the underlying assumption and consequent implication: future – and already the present – negotiation mandates by the Council could lead to allowing foreign to circumvent the existing safeguards that currently shield the Union from financial responsibility for its decisions on economic policies in exercise of its legislative powers – and, again, the reverse discrimination of EU investors in Europe that this entails.

### **3. THE INTERACTION BETWEEN EXTERNAL AND INTERNAL RESPONSIBILITIES**

Tietje *et al* address two further issues that relate, specifically, to the internal allocation of financial responsibility under Article 3(1)(b) of the draft Regulation for treatment required by the law of the Union and, generally, to the distinction between financial responsibility internally and the responsibility for external representation. Both of the issues raised actually exemplify the interaction and interrelatedness of the external and internal responsibilities and raise further questions in this respect.

#### *a. Sorting out whether treatment was required under EU law*

One issue raised by the Tietje study is that the criteria for sorting out whether a given treatment afforded by a Member State was actually required by the law of

the Union. It points at three scenarios in which this would be very difficult to determine: (i) the incorrect transposition of an EU directive by a Member State; (ii) the ‘gold-plating’ of directives by Member States who exceed the standards set by the EU; and (iii) the improper implementation of EU regulations by a Member State. All of these situations call into question whether the criterion in Article 3(1)(b) of the draft Regulation is sufficiently clear in order to provide legal certainty, since the determination of the breach of, or conformity with, EU law in the individual case is ultimately reserved to the CJEU.<sup>52</sup>

These problems might actually be much less relevant than they may seem at first sight. To the degree that there is certainty that the treatment is based on one of the three scenarios, the application of Article 3(1)(b) requires the Member State to bear the financial responsibility: in scenario (i) the treatment is not required under EU law; and in scenarios (i) and (iii) the Member State acts in violation of EU law so that the treatment is equally not required by EU law. On the contrary, it is even likely that the Member State scenarios (i) and (iii) would already be liable under the EU law’s own *Franovich* criteria. To the degree that there is uncertainty whether or not the treatment is based on the Member State’s breach or excess of EU law, Article 3 does not provide for the ultimate determination of this question but merely allows the Commission in paragraph 2 to take a decision in this respect to bring about a preliminary clarification of the situation – the legality of which the Member State can have reviewed by the CJEU in infringement procedures according to Article 263 TFEU if it disagrees.

Article 3 merely concerns the internal apportionment of liability between the Union and the Member States. A decision of the Commission under Article 3(2) of the draft Regulation *should not* concern a foreign investor bringing an action in arbitration under an investment agreement of the Union; at least this is the spirit in which the Regulation seems to have been drafted. In the absence of an explicit clarification, however, a complication could arise out of the interdependence of internal and external responsibilities under the Regulation. Article 8(1) and (2)(a) provide that the Commission may decide that the Union shall act as the respondent in the proceedings initiated by the foreign investor when the Union according to Article 3 would have to bear the potential financial responsibility for the treatment that gave rise to the claim. One could thus imagine the – admittedly most unlikely but technically possible – situation in which the investor brings a claim against a Member State, the Commission then takes a decision based on Article 8(2)(a) to have the Union substitute the Member State in the arbitral proceedings, and the investor then, for strategic reasons, challenges that substitution before the arbitral tribunal and insists on bringing its claim against the Member State.<sup>53</sup> The problem is that, as already mentioned before, the arbitral

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<sup>52</sup> Tietje *et al* (n \*) 17-18, relying on F Hoffmeister, ‘The European Union and the Peaceful Settlement of International Disputes’ (2012) 11 Chinese Journal International Law 77.

<sup>53</sup> The inverse situation, in which the investor insists on having the Union as the respondent against the will of the Member State (and the Commission), for example, because the Member States and the



tribunal would determine its jurisdiction on the basis of the provisions of the investment agreement. Moreover, the tribunal may either ignore the provisions of the Regulation altogether, or not feel bound by the Commission's decision and feel compelled to decide itself the question as to whether Member States treatment was in breach or excess of EU law.

While the draft Regulation does establish EU internal rules as to who has the power to decide over the defendant status, it does not – and actually cannot directly – clarify what the effect of a Commission decision (addressed to the Member State in question) under Article 8(2) with regard to a specific investment arbitration initiated against a Member State. Only the applicable investment agreement concluded by the EU can actually provide that the Commission's decision is actually binding on the arbitral tribunal. It can again be assumed that the Commission has the intention to include such clarification in every future EU investment agreement, since otherwise the solution in the present draft Regulation would wholly ineffective and moot. The far-reaching dependence of the Regulation on the implementation of its solutions in future EU investment agreements, however, reaffirms that it would have been most useful, for the sake of legal certainty, to announce explicitly in a recital and/or an operative provision of the Regulation that:

- every EU investment agreement – and thus all rights of an investor deriving from it – is subject to the provisions of this Regulation; and
- every EU investment agreement must state, for the sake of legal certainty and the avoidance of frustration of investors' expectations, that the decisions of the Commission made under this Regulation are binding on any arbitral tribunal deriving its jurisdiction from that agreement.<sup>54</sup>

Only such a clarification would have ensured that, in the external relation, the Commission exclusively determines who is to assume responsibility and, in the internal relation, only the Member State – and not the investor – can question the Commission's decisions under Articles 3(2) and 8(2) in infringement proceedings before the CJEU. The decision over alleged violations of EU law is then reserved exclusively to the CJEU and the question of who is responsible as a matter of international law for any particular action is, indeed, decided on the basis of the rules of external competence, as postulated by the Commission.<sup>55</sup>

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Commission do deem that there was no breach or excess of EU law for the purposes of Article 3(1)(b) *in fine*, is equally thinkable and, at least technically, not excluded.

<sup>54</sup> See also above text after n 31.

<sup>55</sup> See above text accompanying nn 27-28.

b. *The distinction between external and internal responsibility and competences*

The other issue raised by Tietje *et al* is also related to the interplay between external and internal competences. Whereas the power to afford the treatment that affects a foreign investor, and thus largely financial responsibility under Article 3, is determined by the 'Treaties' allocation of internal competences, the external competence of the EU for foreign investments determines that the EU will, in case of doubt, assume the respondent status in an arbitration brought by an investor under Article 8. Tietje *et al* question whether this distinction of internal and external responsibility is convincing.<sup>56</sup>

The touchstone of their criticism is Article 207(6) TFEU, which provides that:

[t]he exercise of the competences [...] in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

The study then points at potential cases in which claims of foreign investors before arbitral tribunals whose jurisdiction would stem from a future EU investment agreement could possibly interfere with the Member States competences or force upon them harmonization in the areas excluded from harmonization. The main example is that of the education service sector, which could at least in theory be covered by an EU investment agreement but whose regulation still remains in the domain of the competences of the Member States. The study discusses the following scenario: a foreign investor in the education service sector brings a claim against national legislative measure that affects the profitability of the sector; the Commission then decides under Article 8(2) of the Regulation that the EU should assume respondent status; the arbitral tribunal rules that the Member State legislation violates the 'Fair and Equitable Treatment' standard of the EU investment agreement<sup>57</sup> and, not only awards damages, but orders the Member State to bring its legislation in compliance with the 'Fair and Equitable Treatment' standard as interpreted by the arbitral tribunal. This, according to Tietje *et al*, would be a situation in which the EU would then be

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<sup>56</sup> Tietje *et al* (n \*) 15-17.

<sup>57</sup> For the inclusion of the 'Fair and Equitable Treatment' standard as providing the 'highest possible level of legal protection and certainty for European investors' in accordance with 'the Member States' experience and best practices regarding their bilateral investment agreements', i.e. *a priori* without any restraining qualifications, see the mandate given by the Council to the Commission for the FTA negotiations with Canada, India and Singapore, above (n 6). Contrast this with the clarification in Article 5(2) of the 2004 Canadian Model Foreign Investment Protection Agreement (FIPA), which coincides with Article 5(2) 2012 U.S. Model BIT and is based on the ruling of the NAFTA Free Trade Commission: '2. The concepts of 'fair and equitable treatment' and 'full protection and security' in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.'

obliged to force the Member State to change its legislation and thus interfere with a competences explicitly reserved to the Member States. The legislation of the Member States would, *de facto*, be harmonized via the investment agreement concluded by the EU – in violation of Articles 165(4) and 207(6) TFEU.

This situation, although not completely excluded in theory, is not as crass as suggested – at least not for the reasons given by Tietje *et al.* First of all, as pointed out by the study itself, both the negotiation and the conclusion of an EU investment agreement covering the education service sector would require a unanimous decision in the Council according to Article 207(4). This means that every Member State that is afraid of an EU agreement ‘seriously disturbing [its] national organisation of such services and prejudicing [its] responsibility [...] to deliver them’ has a veto right in the Council. If a Member State nevertheless did not use its veto power, it must be understood to have acquiesced to the possibility that the dispute resolution mechanism under the EU agreement might ultimately impact on its regulatory and legislative powers. Secondly, given the Member States’ internal competences under the Treaties for the regulation of the education sector,<sup>58</sup> it is difficult to imagine how the Commission could invoke any of the grounds of Article 8(2) to decide that the EU should act as a respondent, especially since it would be clear under Article 3(1)(b) that the Member State bears the exclusive financial responsibility for its legislation. Practically, respondent status could only fall on the EU under Article 8(1)(b) if the Member State refused to assume it – in which case again the Member State could hardly object to having to bear the consequences. Thirdly, while academic writers have pointed out that international law does not exclude tribunals ordering a state to take specific actions,<sup>59</sup> it is questionable whether arbitral tribunals, beyond being able to order the payment of monetary compensation, could, or at least should, have those powers to interfere with a states sovereign powers to decide on regulatory measures. The only instances where arbitrators ordered a state to revoke its measures, the order was formulated as a choice either to revoke or to compensate.<sup>60</sup> The scenario in which arbitral tribunal could condemn the EU to force a Member State to change its legislation is thus extremely unlikely and would be legally questionable. In summary, the hypothetical possibility of EU external competences trespassing on the Member States does not seem to be all too worrisome.

<sup>58</sup> Article 165(4) TFEU: ‘excluding any harmonisation of the laws and regulations of the Member States’; see also Articles 6(e) TFEU.

<sup>59</sup> von Aaken (n 40) 733-735.

<sup>60</sup> *Antoine Goetz et al v Republic of Burundi*, ICSID Case No ARB/95/3, ¶¶ 132-136 (ordering Burundi either to restitute certain licenses to the investor or to compensate for the resulting damages); see also the US Federal District Court for the Western District of Texas in *Sky Petroleum v Albania*, Case No. A-12-CA-023-SS, Order and Preliminary Injunction (20 January 2012), enjoining the Government of Albania from awarding, transferring or otherwise disposing of petroleum exploration and exploitation rights purportedly held by the claimant investor until an investment tribunal could be constituted and decide the matter.

The example in the study by Tietje *et al* illustrates again that the problem is not so much the allocation of financial responsibility but the underlying grounds for liability. Why is it necessary to have to worry about arbitral tribunals condemning the policy choices of the Union or Member States for not complying with vague standards such as ‘Fair and Equitable Treatment’? Why the need to discuss the possibilities of an arbitral tribunal condemning the Union or Member States to revoke measures or legislation implementing policies decided in conformity with the rules established by the EU Treaties? The answer can hardly be that the EU does not dispose of a sufficiently sophisticated and elaborate (and balanced) legal framework for protecting economic actors in the Internal Market.<sup>61</sup> On the contrary, the answer rather lies in the problem that if future EU investment treaties ‘shall provide for the highest possible level of legal protection for European investors’ abroad ‘built upon the Member States’ experience and best practices regarding their bilateral investment agreements’,<sup>62</sup> they will provide for the same degree of indeterminacy as the existing BITs of the Member States.<sup>63</sup> If there is a risk of the EU external competences for investments encroaching on the internal allocation of competences for policy making and regulatory powers, then it is adopting at EU level this high degree of legal uncertainty that results from the vagueness of the investor protection standards and the large spectrum of possible interpretations in the decentralized system of investment arbitration.

#### **IV. FINANCIAL RESPONSIBILITY AND THE GROUNDS FOR LIABILITY**

The discussion of the different issues arising under the draft Regulation show that financial responsibility is intimately linked with the substantive and procedural rules of investment protection agreements. One may well question whether it is altogether possible to establish a ‘framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party’ without addressing also the grounds for liability that give rise to potential financial responsibility. Without an

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<sup>61</sup> For the overlap of BIT standards and the protection of economic actors under EU law see J Kleinheisterkamp, ‘Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty’ (2012) 15-1 *Journal of International Economic Law* 85, 98-99.

<sup>62</sup> See above text accompanying nn 9-13.

<sup>63</sup> But see the senior trade policy advisor of the Dutch government, N Lavranos, ‘In Defence of Member States’ BITs Gold Standard: The Regulation 1219/2012 Establishing a Transitional Regime for Existing Extra-EU BITs – A Member State’s Perspective’ (2013) 10:2 *Transnational Dispute Settlement* 1, 12 and 14, available also at <http://ssrn.com/abstract=2226979>, announcing that the Council would ‘fiercely’ oppose the 2<sup>nd</sup> IIA Regulation and emphasising the passage in the Council’s ‘Conclusions on a comprehensive European international investment policy’ (25 October 2010), [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/117328.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf), that ‘the creation of a common EU international investment policy should increase the current level of protection and legal security for the European investor abroad’.

assessment of the latter it is hardly possible to evaluate the actual impact of the former. It is difficult to conceive regulating abstractly the attribution of responsibility without having clear parameters upon which the underlying liability will be established – especially in times where even old Member States are currently facing multi-billion Euro claims by foreign (but even intra-EU) investors in arbitration, such as Germany being sued by Vattenfall in a case over its decision to abandon the use nuclear energy;<sup>64</sup> Belgium being sued by Ping An in a case over its decision to sell Fortis bank in an effort to avoid its collapse in the early phase of the financial crisis;<sup>65</sup> Spain and other countries being sued by investors for having cut benefits for photovoltaic electricity production because of need for financial austerity;<sup>66</sup> and not to speak of potential investor claims as the fall-out of a default of Member States in the Euro zone.

If the policy choice of the European Union is to afford European investors the ‘highest possible level of legal protection’, a consequent policy choice to be made is whether this economic benefit granted to European investors should be cross-subsidized by exposing European taxpayers to claims of non-EU investors to at a much higher degree than that recognized by the rules of liability of the Union and the Member States. Setting a framework that depends on the content to be negotiated in future *bilateral* investment agreements, indeed, leads to the challenge of having to set general parameters that allow reconciling the goals of maximizing the protection for own investors abroad while minimizing the exposure of own taxpayers to claims by foreign investors.

## 1. APPROACHES TO CAPPING FINANCIAL RESPONSIBILITY IN THE UNITED STATES

It is worth noting that there are two approaches to the setting of parameters for keeping financial responsibility (also politically) within bounds that have been adopted by the United States as a consequence of its exposure in the context of NAFTA to foreign investors challenging public policy decisions taken at the state or federal level and resulting the political pressure. Firstly, public indignation over Canadian investors challenging Californian environmental legislation in the

<sup>64</sup> *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case ARB/12/12, registered 31 May 2012; cf L Peterson, ‘Germany is Sued at ICSID by Swedish Energy Company in Bid for Compensation for Losses Arising out of Nuclear Phase-Out’, IARepporter 1 June 2012, [http://www.iareporter.com/articles/20120601\\_1/](http://www.iareporter.com/articles/20120601_1/).

<sup>65</sup> *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium*, ICSID Case ARB/12/29, registered 19 September 2012; cf L Peterson, ‘Chinese insurer files ICSID Arbitration against Belgium; Ping An lost \$2.3 billion when Fortis Bank crumbled’, IARepporter 22 September 2012, [http://www.iareporter.com/articles/20120922\\_1/](http://www.iareporter.com/articles/20120922_1/).

<sup>66</sup> cf L Peterson, ‘New Arbitration Threat Looms for Spain as Legislature Debates New Measures Affecting Solar-Thermal Energy’, IARepporter 12 November 2012, [http://www.iareporter.com/articles/20121112\\_2/](http://www.iareporter.com/articles/20121112_2/); *id*, ‘Solar Investors File Arbitration Against Czech Republic; Intra-EU BITs and Energy Charter Treaty at Center of Dispute’, IARepporter 15 May 2013, [http://www.iareporter.com/articles/20130515\\_1/](http://www.iareporter.com/articles/20130515_1/).

*Methanex* case resulted in Congress conditioning the fast-track authority first granted in 2002 for the negotiation of trade agreements to the requirement that such agreement must ‘ensur[e] that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States’.<sup>67</sup> Accordingly, the FTA’s concluded by the United States with Panama, Peru, Colombia and South Korea explicitly include such a line in their Preamble.<sup>68</sup>

Secondly, the consequent revision of the US BIT programme led to the elaboration of the 2004 US Model BIT, followed by the Canadian Model FIPA also of 2004, which aimed at limiting the interpretative powers of arbitral tribunals and spelled out in much greater detail what the conditions of the investor protection standards are. Notably, the US Model BIT, which remained unchanged in this 2012 version after a new review, enshrines US case law on state liability so as to ensure that US internal standards of protection and international standards in investment treaties concluded by the US coincide to a large degree,<sup>69</sup> as well as clarifications of the NAFTA Free Trade Commission sensitively limiting the scope of the ‘Fair and Equitable Treatment Standard’.<sup>70</sup> It is also worth noting that the US, in its negotiations of its FTA with Australia, did not insist on including any direct investor-state dispute settlement mechanism because of ‘the fact that both countries have robust, developed legal systems for resolving disputes between foreign investors and government’.<sup>71</sup> This shows that also the decision as to whether to grant investors direct access to international arbitration is carefully decided on an individual basis.

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<sup>67</sup> § 2102(b)(3) of the Trade Act 2002, 19 USC 3802, Public Law 107–210, reiterated in, and force under, the Bipartisan Agreement on Trade Policy between Congressional leaders of 10 May 2007, [http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset\\_upload\\_file127\\_11319.pdf](http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf). For a more detailed analysis see J Kleinheisterkamp, ‘Sovereignty and Investment Treaty Law: Transnational Challenges and Solutions’, forthcoming (hereinafter: *Sovereignty*).

<sup>68</sup> U.S.–Peru FTA, signed 12 April 2006, <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>; U.S.–Colombia FTA, signed 22 November 2006, <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>; U.S.–Panama FTA, signed 28 June 2007, <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>; U.S.–South Korea FTA, signed 30 June 2007, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>, Preamble paragraph 5: ‘Agreeing that foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement’.

<sup>69</sup> See, eg, Annex B of the 2012 U.S. Model BIT, incorporating under 4(a) the *Penn Central* test of the U.S. Supreme Court for regulatory takings, *Penn Central Transportation Co v City of New York* 438 U.S. 104 (1978); as well as the clarification in (b) that ‘[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.’

<sup>70</sup> See above n 57.

<sup>71</sup> See Australian Government Department of Foreign Affairs and Trade, ‘Australia-United States Free Trade Agreement: Fact Sheets – Investment’, [http://www.dfat.gov.au/fta/ausfta/outcomes/09\\_investment.html](http://www.dfat.gov.au/fta/ausfta/outcomes/09_investment.html); see Article 11.16 US-Australia FTA 2004.

## 2. CURRENT REACTIONS IN THE EU

It could thus be imagined that the EU would also follow one or both of these two approaches – or even a more sophisticated one. One option would be to condition the framework for managing financial responsibility to the interpretative safeguard that future EU investment agreements cannot provide for more protection to foreign investors than European investors are granted under current EU law. This would not be quite consistent with the logic of reciprocity of investment agreements,<sup>72</sup> but it is a politically attractive solution and would, albeit simplistically, eliminate much of the problems addressed earlier in this paper. Notably, it would allow for at least some assessment of the future impact of the rules on financial responsibility because it provides for a straight-forward cap to the exposure of the EU and the Member States in investment arbitrations.

A systematically more coherent solution could be to condition the rules on managing financial responsibility to the assurance that future EU investment treaties will contain much more elaborate and detailed rules on the exact scope and conditions of the protection granted to investors than the existing BITs of the Member States. It could be a requirement that future EU investment treaties incorporate the rules of EU law that protect investors in the Internal Market against the interference by public administrations, and especially the existing case law of the CJEU on Article 340(2) TFEU, which is based on the general principles common to the law of the Member States.<sup>73</sup> This would be an efficient way of ensuring the ‘highest possible level of protection and legal certainty for European investors abroad’ since European investors abroad can legitimately not hope for better investment protection than they are guaranteed in the EU, which is arguably among the highest levels of protection of any national legal system.

In fact, both solutions have found their way into the current version of the Regulation on financial responsibility in a legally non-binding – but politically powerful – manner. Based on a prior version of this paper submitted to the members of INTA,<sup>74</sup> they accepted by unanimity to include two recitals that mirror the US approach,<sup>75</sup> which has also been approved by unanimity in the Plenary of the European Parliament on 23 May 2013:<sup>76</sup>

*(3a) Financial responsibility cannot be properly managed if the standards of protection afforded in investment agreements were to exceed significantly the limits of liability recognised*

<sup>72</sup> See in more detail Kleinheisterkamp, *Sovereignty* (n 67).

<sup>73</sup> See above text accompanying n 47.

<sup>74</sup> See above n \*.

<sup>75</sup> INTA Report A7-0124/2013 of 26 March 2013, <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0124&language=EN> (amendments 4 and 5).

<sup>76</sup> European Parliament (Plenary), text adopted on 23 May 2013 in Procedure 2012/0163(COD), P7\_TA-PROV(2013)0219, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0219+0+DOC+XML+V0//EN> (amendments 4 and 5).



*in the Union and the majority of the Member States. Accordingly, future Union agreements should afford foreign investors the same high level of protection as, but no higher level of protection than, Union law and the general principles common to the laws of the Member States grant to investors from within the Union.*

*(3b) Delineation of the outer limits of financial responsibilities under this Regulation is also linked to the safeguarding of the Union's legislative powers exercised within the competences defined by the Treaties, and controlled for their legality by the Court of Justice, which cannot be unduly restrained by potential liability defined outside the balanced system established by the Treaties. Accordingly, the Court of Justice has clearly confirmed that the Union's liability for legislative acts, especially in the interaction with international law, must be framed narrowly and cannot be engaged without the clear establishment of fault<sup>1</sup>. Future investment agreements to be concluded by the Union should respect those safeguards to the Union's legislative powers and should not establish stricter standards of liability allowing a circumvention of the standards defined by the Court of Justice.*

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<sup>1</sup> Judgment of the Court of Justice of 9 September 2008 in Joined Cases C-120/06 P and C-121/06 P, FIAMM and Fedon v Council and Commission ([2008] ECR I-6513).

It is furthermore noteworthy that the Plenary also adopted an amendment relating to the use of investor state arbitration, also inspired by the previous version of this paper. Whereas the text proposed by the Commission in Recital 2 reads:

*Agreements providing for investment protection typically include an investor-to-state dispute settlement mechanism, which allows an investor from a third country to bring a claim against a state in which it has made an investment [...],*<sup>77</sup>

the INTA Committee and the Plenary, only against the votes of the far-left parties who reject investor-state-arbitration categorically, opted for the following clarification:

*In the cases where it is justifiable, future investment protection agreements concluded by the Union can include an investor-to-state dispute settlement mechanism, which allows an investor from a third country to bring a claim against a state in which it has made an investment.*<sup>78</sup>

The justification for this amendment in the INTA report shows that this amendment will also most likely have a direct bearing on the on-going discussion on whether to include investor-state-arbitration provisions in the negotiations with the US over the TTIP and could justify emulating the US-Australian FTA approach of limiting dispute settlement to the state-to-state level:

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<sup>77</sup> COM(2012) 335 final (n 1).

<sup>78</sup> See above nn 75 and 76 (amendment 3).



It should be highlighted that it is not a necessity to include ISDS provisions in future EU investment agreements and that their inclusion should be a conscious and informed policy choice that requires political and economic justification. Even if there is a general policy choice in favour, the question whether to include ISDS should be decided for each International Investment Agreement in the light of the particular circumstances.<sup>79</sup>

It remains to be seen how serious the Council and the Commission will take that decision making. Not very promising is the Commission's reply to a recent parliamentary question as to why to include ISDS provisions in the CETA negotiations with Canada. The Commission alleges that '[t]here have been several instances in the past of foreign investors being expropriated in Canada and who have been denied compensation and access to the Canadian courts'.<sup>80</sup> In its answer to a follow-up question, the Commission referred to the *Abitibi-Bowater v Canada* and the *Gallo v Canada* cases.<sup>81</sup> Whereas the first case suggests a significant misreading of Canadian law as it stands,<sup>82</sup> the second one highlights the highly questionable merits of the claim brought and the potential misuse of investor-state arbitration rather than any failure of the Canadian legal system or courts to protect legitimate private interests.

### 3. A MORE SOPHISTICATED SOLUTION

There is, however, a more sophisticated solution that goes beyond merely insisting on 'no greater rights' and trying to negotiate the incorporation of EU law in an agreement with a third country. What is needed is an approach that could accommodate the bilateral and reciprocal logic of an international agreement and actually 'multilateralize' the *a priori* unilateralist 'no greater rights' logic. The solution would be to extend the comparative approach of Article 340(2) TFEU to the international dimension of investment agreements and thus to elaborate detailed principles of investor protection not on the basis of existing BITs but on the basis of the rich experience with, and the detailed rules on, state liability in the legal systems of the countries with the highest levels of investment protection and

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<sup>79</sup> See above n 75 (amendment 3).

<sup>80</sup> Answer given by Mr de Gucht on behalf of the Commission on 29 January 2013, Parliamentary question E-011230/2012, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-011230&language=EN>.

<sup>81</sup> Answer given by Mr De Gucht on behalf of the Commission on 22 March 2013, Parliamentary question E-001132/2013, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-001132&language=EN>.

<sup>82</sup> See the Supreme Court of Canada in *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at 52: 'This does not mean that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and [...] neither Parliament nor any legislature can completely remove the court's power to review the actions and decisions of administrative bodies. This power is constitutionally protected.'

the most sophisticated balancing of private and public interests.<sup>83</sup> The current negotiations with Canada could be the ideal laboratory for such a comparative public law approach, since both Canada and the EU presumably offer among the highest – and, moreover, a comparable – level of investor protection.

In that respect, it is rather regrettable that the Commission, in order to avoid Canada's position of linking the 'Fair and Equitable Treatment' standard to the 'customary international law minimum standard of treatment of aliens',<sup>84</sup> has originally merely thought of referring to the available interpretations by arbitral tribunals for 'codifying a generally accepted outcome of jurisprudence that both sides are comfortable with' so as 'to spell out the criteria for its application [of the FET standard]'.<sup>85</sup> Not only is it questionable whether that arbitral case law is sufficiently consistent.<sup>86</sup> Such an approach negligently ignores the much richer and more consolidated experience of Canadian and European courts with the intricacies of the law of state liability. This could lead to the absurd result that the future EU-Canada agreement could be granting European investors in Canada a higher level of protection than European law would afford them, and *vice versa* for Canadian investors in Europe.<sup>87</sup> It is quite understandable in the light of the time pressure of the negotiations that both the European and the Canadian negotiators prefer working merely with a handful of arbitral decisions on FET rather than venturing into extensive comparative studies of the much voluminous Canadian and European law on state liability. It would, nevertheless, be a pity if not more time is taken with the very first investment agreement negotiated by the EU so as to effectively enhance legal certainty and to put the future EU international investment policy on a sounder basis.<sup>88</sup>

An interesting question is how the 'no greater rights for foreign investors in the EU' logic will play out in the future, especially in negotiations with the US, whose negotiators will equally be bound to insist on 'no greater rights for EU investors in the US'.<sup>89</sup> Logically speaking, a 'no greater rights' position on both

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<sup>83</sup> For this transnational approach in more detail see Kleinheisterkamp, *Sovereignty* (n 67); see more generally on the comparative public law approach S Schill, 'Introduction' in *id* (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 1, 23-37.

<sup>84</sup> See above n 57.

<sup>85</sup> See the leaked Meeting Document of 6 November 2012 from the European Commission to the Trade Policy Committee on 'EU Canada Comprehensive Economic and Trade Agreement – Landing Zone', Council Document DS 1744/12 (EU Restricted), 9, [http://www.lapresse.ca/html/1633/Document\\_UE\\_2.pdf](http://www.lapresse.ca/html/1633/Document_UE_2.pdf); see also Commissioner De Gucht in the Plenary debate in the European Parliament on 22 May 2013 on the Parliamentary questions O-000043/2013 (B7-0120/2013), 22 May 2013, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20130522+ITEM-019+DOC+XML+V0//EN>: 'The Commission [...] is endeavouring to better clarify the content of our investment protection standards without reducing the level of protection, for example by including useful guidance on the practice of arbitral tribunals.'

<sup>86</sup> See, eg, K Vandevelde, 'A Unified Theory of Fair and Equitable Treatment' (2010) 43 *International Law & Politics* 43; see also J Kalicki & S Medeiros, 'Fair, Equitable and Ambiguous: What is Fair and Equitable Treatment in International Investment Law' (2007) 22(1) *ICSID Review* 27.

<sup>87</sup> See also S Montt, *State Liability in Investment Treaty Arbitration* (2009) 76.

<sup>88</sup> See also Kleinheisterkamp, *Policy Space* (n 9) 431.

<sup>89</sup> See the specific objectives set out in the letter of 20 March 2013 by which the Obama Administration notified Congress of its intent to negotiate the TTIP,

sides of the negotiation table would lead to rendering international investment protection provisions *ad absurdum*: the whole point of establishing such legal provisions is to grant foreign investors rights that are different from those in the host country. If EU investors are to be treated no better in the US than US investors and, at the same time, US investors are to be treated no better in the EU than EU investors, a chapter on investment protection in the TTIP would simply not make any sense..., unless its provisions were to constitute a detailed restatement of the rules of investment protection common to, or at least compatible with, both legal orders. This would then bind arbitral tribunals to the application of rules that leave no scope for arbitral tribunals to deviate from the fundamental principles governing the regimes of state liability in both trading blocs, which probably have the highest internal standards of investment protection under the respective national laws. The adoption of a ‘no greater rights’ principle, which by now seems to be politically unavoidable, can thus reasonably be expected to press the negotiators – if they take the maxim of legal certainty seriously – to accept the comparative public law approach. It can only be hoped that they will not opt for merely fudging the issue but taking the time to allow for the elaboration of these principles. Otherwise, the issue is again delegated to the arbitral tribunals. But even if the standards of protection remain essentially as vague as they have been in the past, maybe somewhat polished up cosmetically, arbitral tribunals will hardly be able to ignore that the ‘no greater rights’ principle imposes a substantive cap on the interpretation of those standards and arbitral tribunals will necessarily have to engage with comparative law arguments. If tribunals were to ignore this capping logic and the solution of comparative public law, the predictable result would be a further political backlash against international investment arbitration. If they embrace it, one may hope that international investment arbitration will significantly gain in legitimacy and, moreover, in legal certainty both for states and investors.

## V. CONCLUSIONS

The current efforts to establish a legal framework for managing the financial responsibility of the EU and its member states potentially resulting from future investor-state arbitrations constitute a logical step forward in defining the emerging European international investment policy. The criteria for allocating financial responsibility between member states and the Union internally, as well as

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<http://www.ustr.gov/sites/default/files/03202013%20TTIP%20Notification%20Letter.PDF> : ‘Seek to secure for U.S. investors in the EU important rights comparable to those that would be available under U.S. legal principles and practice, while ensuring that EU investors in the United States are not accorded greater substantive rights with respect to investment protections than U.S. investors in the United States’.

the resulting solutions for managing the external interface with foreign investors, are technically sound, over all. It might be regrettable that the proposed framework does not ensure its own full bindingness on arbitral tribunals but leaves it to the Commission's to insert its rules on financial responsibility into every future investment agreement.<sup>90</sup> A failure to do so by the Commission would amount to a breach of EU law and a ground for Parliament to refuse its consent to the final adoption of the agreement or even to seek a corresponding declaration from the CJEU.<sup>91</sup> Accordingly, this scenario is rather unlikely, and it can be expected that the Regulation as now also adopted by the EU Parliament will effectively condition and shape all future EU investment agreements.

The basic assumptions underlying the Commission's proposal are, however, not unproblematic. The proposal assumes that future EU investment agreements will – in line with existing BITs – grant jurisdiction to arbitral tribunals to award foreign investors damages for regulatory treatment afforded by the Union or its member states within the realm of EU law. While this is nothing extraordinary from the perspective of existing BITs, it nevertheless implies two significant deviations from the present EU law on the liability of the Union as elaborated by the CJEU.

The first implication is that foreign investors will have access to investor-state arbitration without having to avail themselves first of the recourses available under EU law for breaches of the EU's own safeguards against abuses of public power, i.e. where the treatment afforded by the EU or a member state is illegal under EU law. Prior to the shift of powers to the Union under the Lisbon Treaty, the EU member states already – consciously or unconsciously by ratifying BITs – have accepted that foreign investors may short-cut existing constitutional procedures for protection of economic actors against excesses by public administration. The EU, in contrast, which was created, and whose legal order is primarily designed, to allow economic actors to operate across borders, has not yet made any comparable concessions. Economic actors in the EU context must rely on the mechanisms for protection of private interests and for the balancing of private and public interests provided for by EU law. They cannot rely on a simple 'endure and cash in' logic but may seek damages only after having challenged the treatment as contrary to EU law in the local administrative jurisdictions so as to obtain the annulment of that treatment.<sup>92</sup> This principle will continue to apply to EU investors in the EU. It will, however, no longer apply to foreign investors in the EU once future EU investment treaties with unqualified investor-state arbitration provisions enter into force. It needs to be clear that such a policy choice will change the current institutional procedure governing private claims relating to regulatory interventions and entail a reverse discrimination of European investors in the EU.

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<sup>90</sup> See above III.1 and III.3.a.

<sup>91</sup> *cf.* Article 218(6) and (11) TFEU.

<sup>92</sup> See above III.2.a.

The second implication is that future EU investment treaties will confer jurisdiction on arbitral tribunals for awarding damages if they find that EU legislation, despite being perfectly legal under EU law, does not respect the standards of protection of the investment treaty. Again, this is not anything surprising from the perspective of the member states. For the purpose of obtaining for their investors abroad the same commitments from other states, they have made the choice to accept liability for damages under their BITs even if the challenged treatment is in full compliance with the standards of protection under their own constitutions. The system of protecting individual interests and balancing them with public interests under the EU Treaties is not yet been pierced by such exceptions. In a conscious choice of strengthening democratic decision making, the CJEU has specifically limited the liability of the Union for legislative policy choices that are in conformity with the EU Treaties.<sup>93</sup> Both the vagueness and the lack of qualification of existing BIT standards, if adopted in future EU agreements, would thus effectively change the rules of liability of the EU insofar as non-EU investors had the option to side-line the existing restrictions by opting for arbitration and invoking the standards of the new agreements. Again, this – as well as the reverse discrimination of domestic investors that this entails – is a policy choice of which the political stakeholders must be conscious when accepting the assumptions underlying the current proposals.

Finally, the interaction between external and internal responsibility under the draft Regulation suggests that no realistic assessment and thus management of the financial responsibility is possible without some minimal parameters for the grounds of liability under future EU investment treaties. The central problem in this respect is the high degree of indeterminacy of current BIT standards that, if also adopted at the EU level, risks exposing the EU to unpredictable levels of liability and thus compromising its policy making powers. In the light of the challenges of such management of financial responsibility and the necessity to set parameters for the underlying grounds for liability, it is worthwhile reflecting on the approaches taken by other countries with more experience with investment arbitrations as well as the resulting political pressures, such as the United States, especially in the light of the upcoming TTIP negotiations. In this light, the European Parliament has, indeed, taken a strong stance – even if more politically than legally<sup>94</sup> – to condition the framework for managing financial responsibility by combining two approaches.<sup>95</sup> One is a negative cap on future treaty standards by calling for a general safeguard that future EU investment agreements shall not provide for more protection to foreign investors than European investors are granted by EU law. The other is a positive cap in the form of requiring the

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<sup>93</sup> See above III.2.b.

<sup>94</sup> But see above n 91 for the possibility of Parliament to reject its consent for the final approval of an agreement negotiated in violation of the principles laid down in the recitals of the current draft Regulation.

<sup>95</sup> Above IV.2.

incorporation of the detailed existing rules on liability as elaborated by the CJEU. The combination of the negative and the positive dimension of these caps should ensure that the rules on balancing private and public interests that have emerged in the EU context will not be compromised by investment treaty standards and, at the same time, that European investors abroad will enjoy the high level of protection provided for by EU law and, what is more important, arguably a very high degree of legal certainty.

Both approaches, however, suffer from the fact that they are highly unilateralist and difficult to square with the principles of reciprocity and equality of nations that should be underlying international treaties. They lead into an outright dilemma, at least at first sight, when the EU is facing negotiations with a country that is committed to the same approaches, such as the US. The clash of two ‘no greater rights’ positions can then only be resolved by actually comparing the legal orders of the two sides so as to distil and restate their common core on investment protection rules, and to complement, where necessary, this restatement by a pre-statement of synthesized rules based on the comparative public law exercise that will inform as to which new solutions would still be – if not identical – at least reconcilable with the respective national legal orders that constitute the benchmark for granting ‘no greater rights’ for foreign investors. This is, in any case, the approach that arbitrators would have to take if the negotiators limited themselves to merely stating their respective ‘no greater rights’ reservation, for example, in the preamble of the agreement, without taking the time to elaborate the specific rules that define in detail what the foreign investors are entitled to. If facing the challenges of interpreting vague treaty standards along the conventional lines, arbitrators will necessarily be confronted and have to engage with such comparative public law logic that goes beyond the partially unfruitful exegesis of existing arbitral decisions.

The most mature solution would be to pause the burgeoning negotiations with such important trade partners such as Canada, the US and China and first work on outlining in much more detail the exact rights to protection that investors, both European investors abroad as well as foreign investors in the EU, should be entitled to.<sup>96</sup> This could mean first taking the time to entrust academics with the task of drawing up comparative studies of the laws of the countries recognised to provide the highest degree of investor protection as well as the most elaborate rules on balancing private and public interests. These findings could then be amalgamated with the synthesis of the existing arbitral case law to the degree that it is consistent and compatible with those findings. The outcome would be principles of investor protection with a global aspiration that would then inform both the negotiations of specific rules in new EU investment agreements and their later interpretation by arbitral tribunals. This would be a scientific and sustainable way forward for providing both investors and states with what is the ultimate

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<sup>96</sup> Above IV.3.

justification for creating international investment law: not some 'highest possible degree of protection' but the highest possible degree of legal certainty.