

# The Reform of International Economic Governance

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## Chapter 10

### A History of Success?

#### Proportionality in International Economic Law

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Undoubtedly, philosophers are in the right  
when they tell us that nothing is great or little  
otherwise than by comparison.

Jonathan Swift, *Gulliver's Travels*

#### **Introduction**

The migration of the proportionality analysis from constitutional law to a number of other areas of law is deemed to be a paradigm of successful legal transplant. While some aspects of proportionality analysis are deeply ingrained in international trade law and European Union (EU) law, proportionality analysis has gradually found its way to international investment law and arbitration. Proportionality is often depicted as an ideal mechanism for balancing opposing interests and thus creating equilibrium between different public goods – namely economic growth spurred by foreign direct investment and trade on the one hand, and other public interests on the other.

Can proportionality analysis be a useful tool of judicial governance in international economic law to promote the perceived legitimacy of the latter? Can it facilitate the consideration of the commonweal in investment economic law and/or contribute to the humanization of the same? If so, can one size of proportionality analysis fit all needs in international trade, international investment law and EU law? Or should a more nuanced and varied understanding of proportionality – as adopted by the Court of Justice of the European Union (CJEU) – be adopted to cope with different needs in various institutional settings? What are, if any, the possible shortcomings of proportionality analysis? How can these shortcomings be addressed?

The chapter shows that while the concept of proportionality has analytical merits, it also presents a number of pitfalls when applied to the context of economic disputes. While proportionality is a general principle of EU law,<sup>1</sup> and is deeply ingrained in international trade law, no consensus

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seems to have arisen with regard to its legal status in international law. If proportionality was a general principle of law, or was deemed to reflect state practice (and thus constitute an element of customary law) it could be eventually used in international investment law and arbitration as part of the applicable law or as a matter of treaty interpretation. In the uncertainty as to the legal status of proportionality in international law, the legal grounds for considering proportionality in investor-state arbitration can be problematic. Certainly, if the applicable law is the law of the host state and this law includes the proportionality principle, such principle becomes relevant in the context of investment treaty arbitration. This chapter concludes that more comparative and international law studies are needed to ascertain the legal status of proportionality in international law.

The chapter proceeds as follows. *First*, after a brief introduction, the study highlights the promises and pitfalls of the proportionality analysis. *Second*, it focuses on the specific migration of the notion of proportionality from its constitutional matrix to the regional sphere, focusing on EU law as a case study of successful legal migration. *Third*, it examines the use of the proportionality analysis in international investment law and arbitration. *Fourth*, it examines the use of the proportionality analysis in international trade law. *Fifth*, a critical assessment is provided, focusing on some critical methodological questions concerning the migration of constitutional ideas and the identification of general principles of law. The conclusions will then sum up the key arguments of the study.

### **Proportionality: A Cosmopolitan Destiny?**

Proportionality has moved across a wide range of national, regional and international legal systems.<sup>2</sup> As a legal concept, proportionality expresses the idea that there should be a balance between competing objectives or values. In a number of constitutional traditions, the concept of proportionality

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<sup>1</sup> See generally Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999).

<sup>2</sup> Moshe Cohen-Elyia and Iddo Porat, *Proportionality and Constitutional Culture* (CUP 2012) 2, noting that in the past decades proportionality has become ‘one of the most prominent instances of the successful migration of constitutional ideas’.

is understood as a methodological framework for balancing conflicting values and aiming at delimiting the legitimate exercise of state authority.<sup>3</sup>

Conceived as a tool for reviewing state conduct (and thus closely connected with the aim of ensuring good governance), the proportionality test is usually articulated in three main phases; suitability, necessity and proportionality.<sup>4</sup> The suitability test requires that the adopted measure be appropriate to achieve the stated aims. There must be a rational, logical and causal relationship between the measure and its objectives. The necessity test aims at verifying that the measure was the least restrictive available alternative or that no less drastic means were available. The proportionality test in the narrow sense requires adjudicators to ascertain that the benefit obtained from realizing the objective exceeds the harm caused by the adopted measure.

The main reason for proportionality's success in the marketplace of ideas is its ability to: (1) restrain the exercise of public authority; (2) shape judicial review; and (3) manage private actors' expectations. This section examines these three functions of the proportionality analysis.

First, proportionality is based on 'a culture of justification' which 'requires that governments should provide substantive justification for all their actions ...'.<sup>5</sup> In order to be legitimate, a governmental action must be 'justified in terms of its "cogency" and its capacity for "persuasion," that is, in terms of its rationality, reasonableness',<sup>6</sup> and efficiency.<sup>7</sup> Proportionality is a 'deliberative methodology',<sup>8</sup> which requires that all of the relevant factors be considered and can insert 'Socratic

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<sup>3</sup> Jacco Bomhoff, 'Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law' (2008) 31 *Hastings International and Comparative Law Review* 555.

<sup>4</sup> Jan H Jans, 'Proportionality Revisited' (2000) 27 *Legal Issues of Economic Integration* 239, 240–41.

<sup>5</sup> Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 *American Journal of Comparative Law* 463, 467.

<sup>6</sup> *ibid* 475.

<sup>7</sup> *ibid* 467.

<sup>8</sup> Iddo Porat, 'Some Critical Thoughts on Proportionality' in Giorgio Bongiovanni, Giovanni Sartor and Chiara Valentini (eds), *Reasonableness and Law* (Springer 2009) 243, 244.

contestation' in the deliberative process of governmental action.<sup>9</sup> It then requires that a balance be struck according to the importance of the relevant interests depending on the contextual circumstances.

Second, proportionality limits the subjectivity of the adjudicator, empowering courts and tribunals to review state conduct in a significant fashion, and providing a structured, formalized and seemingly objective test. All awards and decisions must state the reasons on which they are based;<sup>10</sup> failure to state such reasons is a ground for annulment of the award.<sup>11</sup> Proportionality also allows adjudicators to adopt nuanced decisions rather than 'all-or-nothing' approaches<sup>12</sup> and to structure their analysis in a framework which 'may produce better and more convincing reasoning, and enable clearer assessment ... of tribunals', thus enhancing predictability.<sup>13</sup> In addition, proportionality can provide 'a common language that transcends national borders and that allows for dialogue and exchange of information' between courts and tribunals.<sup>14</sup> Proportionality analysis can constitute an entry for non-economic interests as expressed in general principles of law into the argumentative framework of adjudication and thereby help to overcome the fragmentation of international law.<sup>15</sup>

Finally, proportionality can also delimit – and thus indirectly define – the legitimate expectations of private actors vis-à-vis regulatory or other types of governmental interference with their vested rights. Proportionality analysis can 'reduc[e] the sense of defeat for the losing party. As

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<sup>9</sup> Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights Based Proportionality Review' (2010) 4 *Law & Ethics Human Rights* 141.

<sup>10</sup> See generally Pierre Lalive, 'On the Reasoning of International Arbitral Awards' (2010) 1 *Journal of International Dispute Settlement* 55, 55.

<sup>11</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention or Washington Convention), Washington, 18 March 1965, in force 14 October 1966, 575 UNTS 159, art 52(1).

<sup>12</sup> Benedict Kingsbury and Stephan Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality' in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 75, 79.

<sup>13</sup> *ibid* 103.

<sup>14</sup> Cohen-Eliya and Porat, 'Proportionality and the Culture of Justification' (n 5), 472.

<sup>15</sup> Stephan Schill, 'Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment law, the Law of State Immunity and Human Rights' (2012) 27 *ICSID Review FILJ* 87.

such, it is consensus-oriented because it acknowledges explicitly that there are valid constitutional arguments on both sides and that the arguments outweighed by the opposing ones do not lose thereby their constitutional weight'.<sup>16</sup>

Despite the success of proportionality analysis in a number of fields,<sup>17</sup> its legal status remain unsettled. Some authors contend that proportionality is an emerging general principle of international law,<sup>18</sup> or even an already established one.<sup>19</sup> If one admits that such proposition is true, then such a contention would constitute a formidable entry point for proportionality analysis in supranational adjudication, as adjudicators could refer to proportionality in their awards as either part of the applicable law, under article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),<sup>20</sup> or as a rule of international law applicable in the relations between the parties under article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).<sup>21</sup> If proportionality is a general principle of law, it can help the interpreter address the high level of indeterminacy of treaty provisions. Others contend that also good faith interpretation, as restated by article 31(1) of the VCLT may require some balancing between the public and the private interest.<sup>22</sup>

### **Proportionality: The Perils of Success**

The migration of the concept of proportionality from constitutional law to the supranational sphere poses a range of challenges. In particular, its viability as the main tool for balancing different interests

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<sup>16</sup> Wojciech Sadurski, 'Reasonableness and Value Pluralism in Law and Politics' in Giorgio Bongiovanni, Giovanni Sartor and Chiara Valentini (eds), *Reasonableness and Law* (Springer 2009) 129, 145.

<sup>17</sup> See generally Alec Stone Sweet and Joseph Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 73, 98–111.

<sup>18</sup> Andreas Kulick, *Global Public Interest in International Investment Law* (CUP 2012), 169.

<sup>19</sup> See generally Enzo Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (Giuffrè 2000).

<sup>20</sup> ICSID Convention, art 42.

<sup>21</sup> Vienna Convention on the Law of Treaties of 23 May 1969, in force 27 January 1980, UN Treaty Series vol 1155, 331.

<sup>22</sup> Benedict Kingsbury and Stephan Schill, 'Investor–State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2009) *New York University School of Law, Public Law & Legal Research Theory Research Paper Series*, Working Paper No 09-46, 23.

and values has been challenged on five grounds: (1) institutional competences; (2) scale of values; (3) cultural arguments; (4) incommensurability and (5) overprotection of property rights.

*First*, proportionality can be perceived as running against the traditional allocation of institutional competences among the executive, the judiciary and the administrative organs. Democratic arguments run against using balancing to review the host state's decisions, because adjudicators would second-guess the decisions of the host state by repeating the original decision-making process.<sup>23</sup> By considering different alternatives to given measures under the necessity test, and by balancing competing interests under the proportionality test the adjudicator interferes with the regulatory autonomy of states, supplanting the role of legitimately deputed decision-makers.<sup>24</sup> The rise of the proportionality analysis 'as a juristic method, rather than a method restricted to legislation, threatens the sharp distinction between legislation and legal interpretation ...'.<sup>25</sup> As Stone Sweet and Mathews put it, 'balancing can never be dissociated from lawmaking: it requires judges to behave as legislators'.<sup>26</sup> In particular, the necessity test would – almost without exception – invalidate the given measure since the adjudicator can always envisage alternatives *ex post* with the benefit of hindsight.

*Second*, proportionality does not clarify the scale of values to be used in order to evaluate competing objectives. Even if the given measure passes the suitability and necessity tests, it may be considered to be disproportionate under the third prong of the test, when it is assessed in the light of competing norms and objectives. In this context, as Jans put it 'The central question [i]s what must be proportionate to what'.<sup>27</sup> Proportionality analysis tells us nothing about the scale of values that will determine the final outcome. The fact that proportionality concerns quantity rather than quality leaves

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<sup>23</sup> Iddo Porat, 'Why All Attempts to Make Judicial Review Balancing Principled Fail?' (Paper presented at the VII World Congress of the International Association of Constitutional Law, Athens, 11–15 June 2007) 7.

<sup>24</sup> Kulick, *Global Public Interest in International Investment Law* (n 18) 172.

<sup>25</sup> David Kennedy, 'Political Ideology and Comparative Law' in Mauro Bussani and Ugo Mattei (eds) *The Cambridge Companion to Comparative Law* (CUP 2012) 35, 36.

<sup>26</sup> Stone Sweet and Mathews, 'Proportionality Balancing and Global Constitutionalism' (n 17) 88.

<sup>27</sup> Jans, 'Proportionality Revisited' (n 4) 239.

the adjudicator free to select his or her own value system, and the relevant criteria to explain why one value is considered more important than another.<sup>28</sup>

*Third*, not only can proportionality analysis not take into account the cultural context of a given measure but it also risks importing its specific cultural baggage into the adjudicative process. On the one hand, supranational adjudicators may not be familiar with the background of a given policy measure. As Burke White and von Staden point out, ‘prioritization of the values chosen by the polity requires both familiarity with those values and a degree of embeddedness within that polity’.<sup>29</sup> However, supranational adjudicators are far removed from the polities over which they exercise control.

On the other hand, proportionality comes from a certain historical setting,<sup>30</sup> reflecting distrust towards the public administration in the aftermath of WWII.<sup>31</sup> In a number of European countries, constitutional law has gained an increasing primacy since the end of the war and the democratic transitions that followed.<sup>32</sup> Constitutional courts have played a key role in making constitutional law effective,<sup>33</sup> aiming to be an ‘impenetrable bulwark against any infringement of the rights of the people’.<sup>34</sup> At the same time, lawyers elaborated the respective constitutions on the basis of ‘their understanding of state and society’ with ‘distinct starting points and trajectories’.<sup>35</sup>

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<sup>28</sup> Stone Sweet and Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (n 17) 89.

<sup>29</sup> William W Burke White and Andreas von Staden, ‘Private Litigation in a Public Private Sphere: The Standard of Review in Investor–State Arbitrations’ (2010) 35 *Yale Journal of International Law* 283, 336.

<sup>30</sup> Cohen-Elyia and Porat, *Proportionality and Constitutional Culture* (n 2) 8.

<sup>31</sup> Michal Bobek, ‘Reasonableness in Administrative Law: A Comparative Reflection on Functional Equivalence’ in Giorgio Bongiovanni, Giovanni Sartor and Chiara Valentini (eds) *Reasonableness and Law* (Springer 2009) 311, 323.

<sup>32</sup> Miguel Schor, ‘Mapping Comparative Judicial Review’ (2008) 7 *Washington University Global Studies Law Review* 257, 271.

<sup>33</sup> Mauro Cappelletti, ‘Repudiating Montesquieu? The Expansion and Legitimacy of “Constitutional Justice”’ (1985) 35 *Catholic University Law Review* 191.

<sup>34</sup> *ibid* 191 (quoting Piero Calamandrei).

<sup>35</sup> Peer Zumbansen, ‘Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance’ *Osgoode Hall Law School Research Paper No 1/2012*, 19.

*Fourth*, some values can be incommensurable.<sup>36</sup> While proportionality assumes measurability (i.e., to be balanced, two competing principles should be based on a common denominator),<sup>37</sup> arguments are made that cost-benefit analysis is flawed with respect to public sector decisions due to the incommensurability of certain values.<sup>38</sup>

*Fifth*, critical legal theorists contend that ‘hegemonic elites’ might use proportionality to entrench their values and shift power from the democratic process to the courts<sup>39</sup> and that proportionality might have an ‘imperialistic effect’, in that it might set aside local constitutional values.<sup>40</sup> In the EU law context, the concept of proportionality has fostered the goal of European integration.<sup>41</sup> With regard to investment law, scholars question whether the application of proportionality in investment arbitration could lead to the overprotection of foreign investments.<sup>42</sup> The use of proportionality analysis can lead to the overprotection of investors’ rights if it is used in a very exacting fashion. In fact the proportionality analysis can restrict the regulatory power of the state to a large extent if arbitral tribunals do not adopt deferential standards of review.

In conclusion, proportionality – like any conceptual framework – is not a neutral process; rather it is based on the primacy and priority of individual entitlements over the exercise of public powers.<sup>43</sup> The spread of the proportionality analysis highlights ‘a shift from a culture of authority to a

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<sup>36</sup> Cass Sunstein, ‘Incommensurability and Valuation in Law’ (1994) 92 *Michigan Law Review* 779.

<sup>37</sup> Aharon Barak, *Proportionality, Constitutional Rights and Their Limitations* (CUP 2012) 482–84, arguing that a common denominator exists in the form of the marginal social importance of each value.

<sup>38</sup> Franck Ackerman and Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (The New Press 2004).

<sup>39</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).

<sup>40</sup> Cohen-Ely and Porat, *Proportionality and Constitutional Culture* (n 2) 8–9.

<sup>41</sup> Paul Craig and Gráinne De Búrca, *EU Law – Text, Cases, and Materials* (5th edn, OUP 2011) 532.

<sup>42</sup> Han Xiuli, ‘The Application of the Principle of Proportionality in *Tecmed v Mexico*’ (2007) 6 *Chinese Journal of International Law* 635.

<sup>43</sup> Maria Sakellaridou, ‘La Généalogie de la proportionnalité’ (Paper presented at the VII World Congress of the International Association of Constitutional Law, Athens, 11–15 June 2007) 20.

culture of justification,' which is connected, inter alia, to the rise of the human rights movement which developed after WWII. Whether this entails a neglect of a polity's choices towards a judicial dictatorship or the achievement of a higher rule of law – the ultimate rule of law<sup>44</sup> – is open to debate.

### **Proportionality in European Union Law**

The migration of the proportionality analysis from constitutional law to EU law is a paradigm of successful legal transplant. Proportionality is a general principle of EU law and can be used for reviewing EU action and Member State action that falls within the sphere of EU law.<sup>45</sup> Largely fashioned by the Union Courts, proportionality has subsequently assumed treaty status<sup>46</sup> since the inception of the Maastricht Treaty.<sup>47</sup> The criteria for its application are set out in the Protocol No. 2 on the application of the principles of subsidiarity and proportionality annexed to the treaties.<sup>48</sup>

The numerous reasons for the success of proportionality in EU law address the criticisms moved to proportionality in a seemingly effective fashion. Let us consider how the EU courts have transformed the various challenges posed by the proportionality concept in opportunities. *First*, with regard to institutional competences, the courts have interpreted the concept of proportionality in a flexible manner,<sup>49</sup> conferring it a relative character and showing varying degrees of deference. In some cases, the CJEU has adopted 'a very deferential approach', in others it has conducted 'a quite rigorous and searching examination of the justification for a measure which has been challenged'.<sup>50</sup> In a seminal article, De Búrca noted that 'in reaching decisions, the Court of Justice is influenced not only

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<sup>44</sup> See generally David M Beatty, *The Ultimate Rule of Law* (OUP 2005).

<sup>45</sup> Craig and De Búrca, *EU Law* (n 41) 526. See generally Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (n 1); Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer 1996).

<sup>46</sup> Art 5 TEU, stating that stating that 'any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty'.

<sup>47</sup> The Treaty on European Union (TEU), signed on 7 February 1992, in force on 1 November 1993.

<sup>48</sup> Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union by the Treaty of Lisbon of 13 December 2007.

<sup>49</sup> Tor Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 *European Law Journal* 158.

<sup>50</sup> Gráinne De Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 *Yearbook of European Law* 105, 111–12.

by what it considers to be the nature and the importance of the interest or right claimed by the applicant, and the nature and importance of the objective alleged to be served by the measure, but by the relative expertise, position and overall competence of the Court as against the decision-making authority in assessing those factors'.<sup>51</sup>

Some authors contend that the Court has adopted a stricter proportionality test when assessing national regulation (vertical dimension) and a more lenient approach when assessing Union regulation (horizontal dimension).<sup>52</sup> Therefore, according to these authors, the court will adopt more demanding proportionality test in the former case, requiring the national legislation to choose the less trade restrictive alternative.<sup>53</sup> In such cases, the Court tends to undertake a strict test of proportionality and only the less restrictive measures will be considered as proportionate.<sup>54</sup> Instead, when reviewing Union action, the court will deem the regulatory measure to be disproportionate only if it finds it manifestly inappropriate to achieve the stated objective.<sup>55</sup>

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<sup>51</sup> *ibid.*

<sup>52</sup> See generally Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) chs 3 and 5.

<sup>53</sup> Harbo, 'The Function of the Proportionality Principle in EU Law' (n 49) 172.

<sup>54</sup> See eg Case 104/75, *de Peijper* [1976] ECR 613, deeming a national measure conditioning the importation of medical products to the obtainment of certain documents to be disproportionate as a means to protect public health; Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, deeming that the measure requiring a minimum alcohol content for a beverage was not necessary to protect consumers as less restrictive ways for protecting them could be envisaged, such as labelling.

<sup>55</sup> Harbo, 'The Function of Proportionality Principle in EU Law' (n 49) 172. For instance, in *Hauer*, the Court found that the Community regulatory measure was proportionate and thus not infringing the right to property. The claimant claimed that a Community regulation prohibiting the planting of new vines on certain lands for three years violated her rights to property and to pursue a trade. The claim was dismissed as the Court emphasized that the regulation pursued objectives of general interest and did not constitute a disproportionate and intolerable interference with the property rights of the owner. The prohibition of the new planting of vines for a limited period of time was justified by the objectives of general interest pursued by the Community, namely the reduction of production surpluses and the restructuring of the European wine industry. Case 44/79, *Liselotte Hauer v Land Rheinland-Phalz* [1979] ECR 3727.

An alternative viewpoint suggests that the proportionality analysis has been interpreted differently according to the various areas it is applied to.<sup>56</sup> For instance, the Court has showed a more deferential approach in the adjudication of public health-related disputes. By contrast, the Court has adopted a strict proportionality test even for Community measures for instance ‘where an individual argues that her rights have been unduly restricted by Union action’.<sup>57</sup> There are a number of examples where such measures were deemed to be disproportionate.<sup>58</sup>

Certainly the varied intensity of the proportionality test is not neutral; rather, it is value-laden, expressing the Court’s function, that of adjudicating disputes and promoting European integration.<sup>59</sup>

Second, with regard to the scale of values, the case of the CJEU is rather unique, as the Court has recently acquired a mandate to adjudicate on human rights violations, since the Lisbon Treaty<sup>60</sup> conferred binding nature to the Charter of Fundamental Human Rights.<sup>61</sup> Not only has the European Union integrated the consideration of human rights in its treaty texts, but it is also negotiating its accession to the European Convention on Human Rights (ECHR).<sup>62</sup> Even before these notable institutional developments, since the early 1970s, the Court has considered fundamental rights to be general principles of European law, and has referred to the European Convention on Human Rights as ‘a source of inspiration’.<sup>63</sup> Therefore, favouring the objective of European integration does not

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<sup>56</sup> Harbo, ‘The Function of the Proportionality Principle in EU Law’ (n 49) 172.

<sup>57</sup> Craig and De Búrca, *EU Law* (n 41), 529.

<sup>58</sup> See eg Case 114/76 *Bela-Muhle v Grows Farm* (the *Skimmed Milk Case*) [1977] ECR 1211, holding that a regulation requiring animal foodstuff producers to buy skimmed milk powder at a price three times more expensive than its current value was disproportionate.

<sup>59</sup> *ibid.*

<sup>60</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007 OJ (C306) 1.

<sup>61</sup> Charter of Fundamental Rights of the European Union, OJ C 364/1 (2000).

<sup>62</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, in force 3 September 1953, 213 UNTS 222.

<sup>63</sup> Gráinne De Búrca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?’ (2013) 14 *Maastricht Journal of European and Comparative Law* 168, 170.

necessarily entail a predominance of economic interests vis-à-vis other non-economic values as the latter also constitute part of the European project. This is particularly evident in a number of cases.<sup>64</sup>

Third, with regard to the cultural arguments, while the Court has derived the proportionality concept from the legal orders of some Member States,<sup>65</sup> its application of the concept has at times converged<sup>66</sup> and at times diverged from that of national courts.<sup>67</sup> More interestingly, when reviewing state measures the CJEU has acknowledged the possibility of different approaches by Member States to similar issues,<sup>68</sup> and has interpreted proportionality ‘in the light of the Member State’s particular values, notwithstanding that those values differ from those of other Member States’.<sup>69</sup> In a few cases, the invocation of a norm as reflecting constitutional history and identity has been accepted as a ground for relaxing the proportionality test.<sup>70</sup>

Fourth, with regard to incommensurability, the Court has found a common denominator of the various interests at stake in their social function. Finally, with regard to the eventual overprotection of property rights, relying on the jurisprudence of the European Court of Human Rights, the ECJ has

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<sup>64</sup> Cases C-402/05 P and 415/05 P *Kadi and Al Barakat International Foundation* [2008] ECR I-6351, annulling the regulation that froze the funds of Mr Kadi and finding that such measure infringed the right of effective judicial review, and the right to property. The regulation had given effect to resolutions of the United Nations Security Council (UNSC) adopted against the Al-Qaeda; Case C-36/2002, *Omega Spielhallen und Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, upholding a German ban on the commercialization of violent games for protecting public policy and human dignity.

<sup>65</sup> Harbo, ‘The Function of the Proportionality Principle in EU Law’ (n 49) 172.

<sup>66</sup> See eg Case 44/79, *Liselotte Hauer v Land Rheinland-Phalz* [1979] ECR 3727 in which both the national court and the ECJ held that the relevant Community regulation was proportionate to the stated objective.

<sup>67</sup> See eg Case 11/70, *Internationale Handelsgesellschaft v Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125 in which the national court had found that Community measure was disproportionate, while the Court deemed it proportionate to the stated objective.

<sup>68</sup> Case C-108/96 *Criminal Proceedings against Dennis Mac Quen et al* [2001] ECR I-837 para 34, stating that ‘the mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal of the need for and the proportionality of the provisions adopted’.

<sup>69</sup> Craig and De Búrca, *EU Law* (n 41) 532.

<sup>70</sup> Case C-208/09, *Sayn Wittgenstein* [2010] ECR I-13693 paras 83 and 92.

pointed out that such rights are not absolute and there may be cases in which private interests may be limited for the commonweal.<sup>71</sup> While this does not mean that all of the cases adjudicated by the CJEU have reached an optimal balance between the competing interests,<sup>72</sup> at least there is an indication that this concern has been considered if not addressed by the CJEU.

In conclusion, proportionality has migrated successfully from the national legal systems of the EU Member States to the EU legal system. On the one hand, the EU courts have relied on the legal heritage of the Member States to establish proportionality as a general principle of EU law. On the other, they have interpreted the concept of proportionality in a flexible manner – so flexible as to transcend the classical understanding of proportionality – shaping and adapting it to the various needs of European integration and the parallel protection of human rights and fundamental freedoms.

Ultimately, the migration of proportionality from the national realm to the regional level may constitute a case of ‘overfitting legal transplant’, i.e. a legal transplant which ‘work[s] even “better” in the transplant than in the origin country’,<sup>73</sup> fitting particularly well in the peculiar structure of the European Union. In fact, the flexible interpretation of the concept which is at times expanded and at times restricted as if it was an accordion allows the courts of the Union to accommodate the converging divergences of the Member States promoting the European integration while respecting state sovereignty.

### **Proportionality in Investment Treaty Arbitration**

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<sup>71</sup> See eg C-331/88 *R v Minister for Agriculture, Fisheries and Food, ex p Fedesa* [1990] ECR I-4023, upholding a Community regulation prohibiting the use of hormones in meat production; and Case C-210/03 *Swedish Match AB and Swedish Match UK Ltd* [2004] ECR I-11893, paras 56–58, upholding the ban on tobacco for oral use deeming it to be proportionate the stated objective, namely the protection of public health, and acknowledging that other measures such as labelling could not achieve the same preventive effect.

<sup>72</sup> See, for instance, Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line* [2007] ECR I-10779. For commentary, see ACL Davies, ‘One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ’ (2008) 37 *Industrial Law Journal* 126.

<sup>73</sup> Mathias M Siems, ‘The Curious Case of Overfitting Legal Transplants’ in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Hart Publishing, 2014) 133, 134.

Now the question is: can proportionality be considered part of international investment law and arbitration? Some authors contend that arbitral tribunals should adopt proportionality analysis,<sup>74</sup> stating that ‘proportionality analysis offers the best available doctrinal framework with which to meet the present challenges’ to the investment treaty system.<sup>75</sup> To the contrary, a few investment law scholars have pointed out that ‘there does not seem to be a strong legal basis for the application [of the proportionality analysis] in the cases where it has been applied’ and that the conceptual foundations for using proportionality analysis in investment arbitration are shaky.<sup>76</sup>

Most investment treaties do not refer to proportionality.<sup>77</sup> As the European experience shows, however, this does not necessarily mean that proportionality is not part of the investment law system. In fact, this could be the case if arbitral tribunals used such concept. Therefore, an examination of the arbitral practice is of critical relevance for ascertaining whether and, if so how, proportionality has migrated to investment treaty arbitration.

In the past decade arbitral tribunals have increasingly relied on some form of proportionality analysis.<sup>78</sup> This section explores how they have used the concept of proportionality to define substantive standards of protection, including the protection against unlawful expropriation, fair and equitable treatment, and non-discrimination. It also discusses some cases in which the applicable national law required the use of proportionality and other cases in which proportionality defined the

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<sup>74</sup> See Alec Stone Sweet, ‘Investor–State Arbitration: Proportionality’s New Frontier’ (2010) 4 *Law and Ethics of Human Rights* 46.

<sup>75</sup> *ibid* 48.

<sup>76</sup> Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review* (Europa Law Publishing 2013).

<sup>77</sup> See, however, Annex 11-B(3)b of the Free Trade Agreement between the Republic of Korea and the United States of America and Annex 2 of the 2009 ASEAN Comprehensive Investment Agreement.

<sup>78</sup> This section does not purport to be exhaustive, as some arbitral tribunals may not be disclosed to the public, and other awards may have referred to proportionality only implicitly. This section acknowledges only awards which have used the concept of proportionality *expressis verbis*. The argument is that the use of some elements of proportionality, like suitability, is a common judicial endeavor and therefore should not be reconnected to proportionality as such; while the implicit use of all of the various elements of proportionality without naming it would give rise to a number of distinct hermeneutical and legitimacy concerns.

ambit of application of given exceptions. Finally, the section concludes discussing how proportionality has been used also with regard to procedural matters.

With regard to the notion of expropriation, in *Tecnicas Medioambientales Tecmed S.A. v the United Mexican States*, which concerned the replacement of an unlimited licence by a licence of limited duration for the operation of a landfill, the Arbitral Tribunal used the concept of proportionality to ascertain whether given measures could be characterized as expropriatory. The Tribunal considered whether such actions or measures were ‘proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality’.<sup>79</sup>

In *Azurix*, which involved a water concession contract, Argentina had enacted measures for the protection of public health after an algae outbreak contaminated water supply after privatization.<sup>80</sup> Warnings not to drink water were enacted and customers were dissuaded from paying their water bills.<sup>81</sup> In order to ascertain whether there was a (compensable) expropriation or a (non-compensable) legitimate exercise of police powers, the Tribunal relied on *Tecmed*, stating that an expropriatory measure must pursue a ‘legitimate aim in the public interest’ and the means employed must be (reasonably) proportional to the stated objective.<sup>82</sup> The Tribunal dismissed the claim of expropriation.

In *Burlington Resources Inc. v Ecuador*, which concerned an investment in the hydrocarbon industry, Ecuador contended that ‘[its] intervention in Blocks 7 and 21 did not constitute an expropriation of Burlington’s investment; rather, it ‘aimed at preventing significant harm to the Blocks’ and in Ecuador’s view it ‘was necessary, adequate, proportionate under the circumstances’.<sup>83</sup> The Arbitral Tribunal confirmed that Ecuador’s intervention in the Blocks ‘was necessary to avoid significant economic loss and the risk of permanent damage to the Blocks. It was also appropriate

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<sup>79</sup> *Tecnicas Medioambientales Tecmed S.A. v the United Mexican States*, ICSID Case No ARB (AF)/00/, Award, 29 May 2003, para 122.

<sup>80</sup> *Azurix v Argentine Republic*, ICSID Case No ARB/01/12, Award, 23 June 2006.

<sup>81</sup> *ibid* para 283.

<sup>82</sup> *ibid* para 311.

<sup>83</sup> *Burlington Resources Inc v Ecuador*, ICSID Case No ARB/08/5, Decision on Liability, 14 December 2012, para 164.

because Ecuador entered the Blocks without using force. It was equally proportionate as the means employed were suited to the ends of protecting the Blocks.’<sup>84</sup>

With regard to the fair and equitable treatment standard, in *MTD Equity SDN BHD and MTD Chile S.A. v Republic of Chile*, which concerned the failure of a construction project deemed to be inconsistent with zoning regulations, the Arbitral Tribunal held that fair and equitable treatment is ‘a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, nondiscrimination and proportionality’.<sup>85</sup> In *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, which concerned an investment in the oil sector, the Arbitral Tribunal stated that ‘numerous investment treaty tribunals have found that the principle of proportionality is part and parcel of the overarching duty to accord fair and equitable treatment to investors’.<sup>86</sup> The claimant contended that a given sanction imposed by Ecuador was disproportionate and therefore violated legitimate expectations under the relevant BIT.<sup>87</sup> The Tribunal concluded that the measure ‘was not a proportionate response by Ecuador in the particular circumstances of this case’.<sup>88</sup>

Yet, in *Glamis Gold v United States of America*, concerning a gold mining project in California, the claimant’s attempt to impose upon respondent the burden of justifying the appropriateness of the regulatory measures and proving that they are ‘the least restrictive measures available’ and ‘necessary, suitable and proportionate’ failed.<sup>89</sup> The Tribunal noted that ‘it is not for an international tribunal to delve into the details of and justifications of domestic law’.<sup>90</sup> It also stated that

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<sup>84</sup> *ibid* para 504.

<sup>85</sup> *MTD Equity SDN BHD and MTD Chile S.A. v Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, para 109.

<sup>86</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Co v Republic of Ecuador*, ICSID Case ARB/06/11, Award, 5 October 2012, footnote 7.

<sup>87</sup> *ibid* para 277.

<sup>88</sup> *ibid* para 338.

<sup>89</sup> *Glamis Gold, Ltd v United States of America*, Award, 8 June 2009, para 590.

<sup>90</sup> *ibid* para 762.

‘[i]t is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency’.<sup>91</sup>

With regard to non-discrimination, in *Parkerings v Lithuania*, which concerned the planned construction of a parking area, the Tribunal stated that ‘to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State’.<sup>92</sup> Yet, in *Pope & Talbot*, which concerned exports of Canadian softwood lumber, the Tribunal dismissed Canada’s argument that the foreign investor should prove that it was ‘disproportionately disadvantaged’ by the measure.<sup>93</sup> The Tribunal considered that the disproportionate advantage test would weaken NAFTA’s ability to protect foreign investors.<sup>94</sup>

Other cases referred to proportionality as it was a requirement under the applicable national law. In *Aucoven v Venezuela*, relating to a highway concession, Venezuela argued that Aucoven’s claims did not meet the criteria of definiteness and proportionality required by Venezuelan law.<sup>95</sup> In *Spyridon Roussalis v Romania*, the Tribunal considered that ‘[the] Respondent’s conduct did not infringe the principles of legal certainty and proportionality in violation of the full protection and safety clause contained in article 2(2) of the BIT’.<sup>96</sup> The claimant contended that the host state measures were ‘in breach of the principles of due process, proportionality and reasonableness.’<sup>97</sup> However, the Tribunal held that the measures adopted by the host state were ‘discriminatory, disproportionate or otherwise improper under Romanian law’.<sup>98</sup> In *Occidental Petroleum Corporation*

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<sup>91</sup> *ibid* para 779.

<sup>92</sup> *Parkerings v Lithuania*, ICSID Case ARB/05/8, Award, 11 September 2007, para 368.

<sup>93</sup> *Pope & Talbot v Canada*, Phase 2, NAFTA Ch11, Award, 10 April 2001, paras 43–45.

<sup>94</sup> *ibid* para 79.

<sup>95</sup> *Autopista Concesionada de Venezuela, C.A. (‘Aucoven’) v Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5, Award, 23 September 2003, para 338.

<sup>96</sup> *Spyridon Roussalis v Romania*, ICSID Case ARB/06/1, Award, 7 December 2011, para 358.

<sup>97</sup> *ibid* para 394.

<sup>98</sup> *ibid* para 515.

and *Occidental Exploration and Production Company v Republic of Ecuador*, the claimant contended that ‘both international and Ecuadorian law proscribe the unilateral termination of a government contract where ... the alleged breach was always known and never objected to by the State, and such termination was manifestly unfair, arbitrary, discriminatory and disproportionate’.<sup>99</sup> The claimant alleged that a given decree was ‘in breach of the Respondent’s obligations under the Treaty and Ecuadorian law because it was unfair, arbitrary, discriminatory and disproportionate’.<sup>100</sup> The Tribunal noted that the proportionality review of the decree ‘pervaded the submissions of both parties’ as ‘the Ecuadorian Constitution firmly establishes as a matter of Ecuadorian law the principle of proportionality’.<sup>101</sup>

In other cases, proportionality was used to define the ambit of application of given exceptions. For instance, in *Continental Casualty v Argentine Republic*, concerning an insurance business, the Tribunal imported the ‘weighting and balancing’ formula from international trade law.<sup>102</sup> Both parties had referred to the concept of proportionality. The claimant pointed out to Argentina’s Supreme Court decisions that declared a given decree ‘to be unconstitutional on the grounds that it was an unreasonable measure, lacking in proportionality between the deprivation of property rights and the objective of averting the crisis ...’.<sup>103</sup> The Tribunal considered that ‘the Government’s efforts struck an appropriate balance between that aim and the responsibility of any government towards the country’s population: it is self-evident that not every sacrifice can properly be imposed on a country’s people in order to safeguard a certain policy that would ensure full respect towards international obligations in the financial sphere, before a breach of those obligations can be considered justified as being necessary under this BIT. The standard of reasonableness and proportionality do not require as much.’<sup>104</sup>

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<sup>99</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Co v Republic of Ecuador* (n 86) para 203.

<sup>100</sup> *ibid* para 206.

<sup>101</sup> *ibid* paras 396–401 (on the principle of proportionality in Ecuadorian law).

<sup>102</sup> *Continental Casualty Co v Argentine Republic*, ICSID case No ARB/03/9, Award, 5 September 2008, para 192.

<sup>103</sup> *ibid* para 67.

<sup>104</sup> *ibid* para 227.

Finally, proportionality has been used also with regard to matters of procedure. In *Libananco Holdings Co. Limited v Republic of Turkey*, concerning the seizure of two electric utility companies, the Tribunal stated that ‘there needs to be some proportionality in the award (as opposed to the expenditure) of legal costs and expenses.’<sup>105</sup> A party with a deep pocket may have its own justification for heavy spending, but it cannot expect to be reimbursed for all its expenditure as a matter of course simply because it is ultimately the prevailing party’.<sup>106</sup> In *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, concerning a licence to explore and extract hydrocarbons, the Tribunal acknowledged that ‘on [the] one hand, ordering the production of documents can be helpful for a party to present its case and in the Tribunal’s task of establishing the facts of the case relevant for the issues to be decided, but, on the other hand, (1) the process of discovery and disclosure may be time consuming, excessively burdensome and even oppressive and that unless carefully limited, the burden may be disproportionate to the value of the result, and (2) Parties may have a legitimate interest of confidentiality’.<sup>107</sup>

These arbitrations took place in a variety of different locations, were conducted by different arbitral tribunals under different bilateral treaties and concerned different subject matters and causes of action. One may legitimately wonder whether there is any commonality between these awards. One may also legitimately wonder the relevance of discussing previous awards, given the fact that there is no binding precedent in international (investment) law.

Nonetheless, these awards show an increasingly frequent use of some form of proportionality analysis in investor-state arbitration. Proportionality analysis is used in a varying of contexts; for delimiting substantive standards of protection, clarifying procedural matters and even quantifying damages and legal fees. Moreover, awards can and do influence subsequent awards.

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<sup>105</sup> *Libananco Holdings Co Limited v Republic of Turkey*, ICSID Case No ARB/06/8, Award 2 September 2011.

<sup>106</sup> *ibid* para 565(c).

<sup>107</sup> *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No ARB/07/14, Award, 22 June 2010, para 26.

Yet, the proportionality analysis is not used consistently in investment treaty arbitration. As mentioned, arbitral tribunals have used the proportionality concept in different contexts. Proportionality is often mentioned in passing together with other concepts such as reasonableness and rationality. Most tribunals have not used it at all. More importantly, no single unified notion of proportionality has been used; rather arbitral tribunals seem to have elaborated ad hoc notions of proportionality depending on circumstances. In the context of investment arbitration, the proportionality analysis lacks the clear and consistent structure it has in other fields of national, regional and international law.<sup>108</sup>

In conclusion, while generic reference to proportionality has increased in the awards rendered in the past decade, a critical mass of awards relying on this test is missing. In addition, at an analytical level, one may legitimately wonder whether proportionality can contribute to better awards given the specific features of international investment law.

### **Proportionality in International Trade Law**

The question as to whether proportionality is a pillar of international trade law remains debated. On the one hand, some scholars point out that the text of the WTO Agreements do not refer to proportionality in explicit terms and that only some elements of the proportionality analysis are used in the jurisprudence of the WTO panels and the Appellate Body.<sup>109</sup> On the other hand, other scholars contend that ‘the principle of proportionality is one of the more basic principles underlying the multilateral trading system’.<sup>110</sup>

As this section shows, while the WTO Agreements do not expressly refer to proportionality, the WTO adjudicative bodies have used some elements of the proportionality analysis. This is not to say that there exists a principle of proportionality embedded in WTO law; rather, some elements of

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<sup>108</sup> Nicholas Di Mascio and Joost Pauwelyn, ‘Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’ (2008) 102 *American Journal of International Law* 48, 76, noting that ‘(T)he majority of the Tribunals have ... taken a considerably softer approach than the “necessity test” under many GATT article XX exceptions, looking only for a “reasonable” or “rational” nexus between the measure and the policy pursued’.

<sup>109</sup> Axel Desmedt, ‘Proportionality in WTO Law’ (2001) 4 *JIEL* 441.

<sup>110</sup> Meinhard Hilf, ‘Power, Rules and Principles – Which Orientation for WTO/GATT Law?’ (2001) 4 *JIEL* 111, 120.

proportionality are ingrained in the system for reconciling trade and non-trade issues. WTO provisions that reflect elements of the proportionality analysis ‘include words such as “necessary”, “proportionate”, “less trade restrictive”, and “commensurate”’.<sup>111</sup> In particular, elements of proportionality analysis play a role in three major areas of international trade law: (1) the General Agreement on Tariffs and Trade (GATT);<sup>112</sup> (2) the Agreement on Technical Barriers to Trade (TBT Agreement)<sup>113</sup> and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement);<sup>114</sup> as well as (3) in the determination of countermeasures.<sup>115</sup>

With regard to the first area,<sup>116</sup> GATT article XX provides a list of general exceptions. WTO Members can adopt measures that would prima facie be in breach of the relevant GATT obligations provided that they comply with the conditions laid down in this provision. GATT article XX is divided into two parts. The first part of the provision – generally known as the *chapeau* – relates to the way a given policy is implemented. The second part of the provision includes a detailed list of policy objectives. Some paragraphs require that a measure be necessary to protect a specific public policy objective (e.g. public morals; human, animal or plant life or health). Other paragraphs require that a given measure be related to other objectives such as the conservation of exhaustible natural resources.

The assessment of the necessity of a given measure to reach the particular objectives mentioned in paragraphs (a), (b), (d) and (i) of article XX – including the protection of public morals and of human, animal or plant life or health – requires some elements of the proportionality analysis,

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<sup>111</sup> Andrew D Mitchell, ‘Proportionality and Remedies in WTO Disputes’ (2007) 17 *EJIL* 985, 987.

<sup>112</sup> General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 *ILM* 1153 (1994).

<sup>113</sup> Agreement on Technical Barriers to Trade, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 UNTS 120.

<sup>114</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 493.

<sup>115</sup> AD Mitchell, ‘Proportionality and Remedies in WTO Disputes’ (n 111).

<sup>116</sup> Mads Andenas and Stefan Zleptnig, ‘Proportionality: WTO Law: in Comparative Perspective’ (2007) 42 *Texas International Law Journal* 371.

namely the suitability and necessity tests. As Shoenbaum points out, there has been a semantic change in the interpretation of necessary, as ‘necessary no longer relates to the protection of living things, but to whether or not the measure is a “necessary” departure from the trade agreement.’<sup>117</sup> In the *Thai – Cigarettes* case, the panel stated that trade restrictions were necessary ‘only if there were no alternative measures consistent with the GATT or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives’.<sup>118</sup> In *Korea – Beef*, the AB stated that the necessity of a measure should be ascertained taking into account, first, ‘the extent to which the measure contribute to the realization of the end pursued’, and, second, ‘the extent to which the compliance measure produces restrictive effects on international commerce’.<sup>119</sup> The AB added that ‘determination of whether a measure ... may ... be “necessary” ... involves in every case a process of weighting and balancing a series of factors which ... include the importance of the ... interests or values protected by that law or regulation at issue, and the accompanying impact of the law or regulation on imports or exports’.<sup>120</sup> The jurisprudence of panels and AB has treated certain values more deferentially than others. For instance, in the *EC – Asbestos* case, the AB noted that health is ‘vital and important to the highest degree’,<sup>121</sup> and held that the adopted measures were indispensable. Once the adjudicative body reaches a preliminary conclusion that the measure is necessary, ‘this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade

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<sup>117</sup> Thomas J Shoenbaum, ‘International Trade and Protection of the Environment: The Continuing Search for Reconciliation’ (1997) 91 *AJIL* 269, 276, mentioned in Gisele Kapterian, ‘A Critique of the WTO Jurisprudence on Necessity’ (2010) 59 *ICLQ* 89.

<sup>118</sup> Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, 7 November 1990, DS10/R – 37 S/200, para 75.

<sup>119</sup> Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, 11 December 2000, WT/DS161/AB/R, para 163.

<sup>120</sup> *ibid* para 164.

<sup>121</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, 12 March 2001, WT/DS135/AB/R, para 172.

restrictive while providing an equivalent contribution to the achievement of the objective pursued'.<sup>122</sup> The necessity test helps identifying 'whether a less WTO-inconsistent measure is reasonably available'.<sup>123</sup> This judicial development marked an evolution 'from the least trade restrictive approach to the less trade restrictive one'.<sup>124</sup>

The necessity test has been criticized as 'overbroad and under-inclusive' at the same time.<sup>125</sup> On the one hand, 'it seems to elevate trade values to a pre-eminent status'.<sup>126</sup> On the other hand, as noted by Trachtman, 'by keeping the regulatory benefit constant and working on the trade detriment side', the necessity test, as it is used at the WTO 'evaluates a much more limited range of options, ignoring other groups of options that may be superior'.<sup>127</sup> However, the fact that the necessity test does not address the chosen level of protection that a member wants to achieve but the design of the instrument it has chosen to use restricts the discretion of the adjudicators and indicates that a fully fledged proportionality analysis or balancing is still missing from this sector of WTO adjudication.

The assessment of the relation between a given measure and one of the particular objectives mentioned in the specific paragraphs of GATT article XX includes some elements of the proportionality analysis, namely the suitability and proportionality (in the strict sense) tests. For instance, in *US – Shrimp*, the AB clarified that the requirement 'relating to' is about a 'close and genuine relationship of ends and means'.<sup>128</sup> It added that the design of the measure was 'not

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<sup>122</sup> Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, 17 December 2007, WT/DS332/AB/R, para 156.

<sup>123</sup> *Korea – Beef* (n 120) para 166.

<sup>124</sup> Andenas and Zleptnig, 'Proportionality: WTO Law: in Comparative Perspective' (n 116) 408.

<sup>125</sup> Joel P Trachtman, 'Trade and ... Problems, Cost-Benefit Analysis and Subsidiarity' (1998) 9 *EJIL* 32, 72.

<sup>126</sup> *ibid.*

<sup>127</sup> *ibid.*

<sup>128</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998, WT/DS58/AB/R, para 136.

disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species'.<sup>129</sup>

After a measure is found to be provisionally justified under any of the specific paragraphs of article XX, the adjudicators turn to the *chapeau* of the same provision to assess whether the application of the measure does not constitute an 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' or 'a disguised restriction on trade'.<sup>130</sup> Although the *chapeau* does not in itself contain a proportionality requirement, some scholars consider that it is an expression of, or at least 'resembles, a proportionality analysis'.<sup>131</sup> First, lack of proportionality can help ascertaining the arbitrariness or discriminatory nature of given regulatory measures.<sup>132</sup> Second, the AB held that it 'embodies the recognition on the part of the WTO Members of the need to maintain a balance of rights and obligations between the right of a member to invoke one or another of the exceptions of article XX ... on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand'.<sup>133</sup>

Other elements of the proportionality analysis surface in the interpretation of certain provisions of the SPS and TBT Agreement. For instance, article 2.2 of the SPS Agreement requires that 'Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence ...'. On the one hand, 'sufficient scientific evidence' has been deemed to embody elements of the suitability test. In *Japan – Apples*, the AB held that the sufficient scientific evidence criterion required 'a rational and objective relationship' between the measure and the relevant scientific evidence.<sup>134</sup> On the other hand, article 5.6 of the SPS Agreement clarifies that measures necessary to protect human, animal or plant life and health should not be 'more

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<sup>129</sup> *ibid* para 141.

<sup>130</sup> GATT, art XX.

<sup>131</sup> Andenas and Zleptnig, 'Proportionality: WTO Law: in Comparative Perspective' (n 116) 411.

<sup>132</sup> Desmedt, 'Proportionality in WTO Law' (n 109) 478.

<sup>133</sup> *US – Shrimp* (n 128) para 156.

<sup>134</sup> Appellate Body Report, *Japan – Affecting the Importation of Apples*, 26 November 2003, WT/DS245/AB/R, para 147.

trade restrictive than required to achieve their appropriate level of ... protection, taking into account technical and economic feasibility'.<sup>135</sup>

Finally, elements of the proportionality analysis appear in the determination of countermeasures and in enforcement provisions. For instance, article 46 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)<sup>136</sup> refers to the 'need of proportionality' in the context of enforcement provisions.<sup>137</sup> In parallel, footnote 9 of article 4.10 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement)<sup>138</sup> clarifies that 'appropriate countermeasures' do not include 'countermeasures that are disproportionate'.<sup>139</sup> In *EC – Bananas*, the arbitrators refused to 'double-count' nullification of benefits, as this would be contrary to 'the general international law principle of proportionality of countermeasures'.<sup>140</sup> In *US – Line Pipe*, the AB held that the idea that 'countermeasures in response to breaches by States of their international obligations' should 'be proportionate to such breaches' is 'a recognized principle of customary international law', which is fully applicable in the WTO system.<sup>141</sup> An arbitral tribunal has similarly acknowledged the 'customary international law' nature of the proportionality requirement for the validity of countermeasures.<sup>142</sup>

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<sup>135</sup> SPS Agreement, art 5.6.

<sup>136</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 *ILM* 1197 (1994).

<sup>137</sup> TRIPS Agreement, art 46.

<sup>138</sup> Agreement on Subsidies and Countervailing Measures (SCM Agreement), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 UNTS 14.

<sup>139</sup> SCM Agreement, footnote 9 of art 4.10.

<sup>140</sup> Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Art 22.6 of the DSU*, 9 April 1999, WT/DS27/ARB, para 6.16.

<sup>141</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, 15 February 2002, WT/DS202/AB/R, para 259.

<sup>142</sup> *Archer Daniel Midland Co and Tate & Lyle Ingredients Americas, Inc v the United Mexican States*, ICSID Case No ARB(AF)/04/05, Award, 21 November 2007, para 160.

In conclusion, while there is no explicit reference to proportionality in the WTO Agreement, and there is uncertainty as to whether proportionality is a general principle of international law, some elements of the proportionality analysis appear in the interpretation and application of certain provisions of the WTO Agreements.

### **A History of Success?**

While the migration of constitutional ideas can be particularly successful in certain contexts, this may not be the case in others. Why is proportionality so successful in EU adjudication and, albeit to a lesser extent, in WTO dispute settlement, while investment treaty tribunals have shown a more fragmented if not recalcitrant approach? The answer is multifold.

First, EU law, WTO law and investment law present very different institutional settings. EU law builds upon and has fostered legal cohesion in the Union, constituting a *sui generis* system lying between a fully fledged constitutional order and an international organization.<sup>143</sup> Joseph Weiler has argued that ‘one of the great perceived truism, or myths, of the EU legal order is its alleged rupture with, or mutation from, public international law and its transformation into a constitutional legal order.’<sup>144</sup> Certainly, the Union is not a federal system, and the failure to ratify an explicit EU Constitution in 2005 signals some reticence in that regard at least in some Member States.<sup>145</sup> Yet, EU law has a ‘constitutional dimension’.<sup>146</sup> Over time, the EU treaties have been perceived as having assumed some constitutional features.<sup>147</sup> Although the Treaty of Rome was concluded in the form of

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<sup>143</sup> See generally Miguel Poiares Maduro, ‘How Constitutional Can the EU Be? The Tension between Intergovernmentalism and Constitutionalism in the EU’ in Joseph HH Weiler and Christopher L Eisgruber (eds), *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04.

<sup>144</sup> Joseph HH Weiler, *The Constitution of Europe* (CUP 1999) 295.

<sup>145</sup> See generally Giuseppe Martinico, ‘From the Constitution for Europe to the Reform Treaty: A Literature Survey on European Constitutional Law’ (2009) 1 *Perspectives on Federalism*.

<sup>146</sup> Wolf Sauter, ‘Proportionality in EU Law: A Balancing Act?’ (2013) *TILEC Discussion Paper* 4–5, referring to the existence of an ‘implicit constitution’.

<sup>147</sup> See eg Advocate General Poiares Maduro’s Opinion holding that ‘obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty’, Case C–402/05 P and C–415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I–6351, para 285.

an international treaty, it has become the constitutional charter of the Union.<sup>148</sup> In fact, the European Court of Justice played a pivotal role in creating a material constitution in its judgments,<sup>149</sup> holding that the treaties founding the European Communities (now the European Union) established a new legal order whose subjects do not comprise Member States only but also their nationals.<sup>150</sup> Commentators have pointed out that the court ‘constru[ed] the European Communities Treaties in a constitutional mode rather than employing the traditional international law methodology’.<sup>151</sup> More fundamentally, the integration project relies on the common constitutional principles of the EU member states.<sup>152</sup>

In parallel, since the inception of the World Trade Organization in 1995, international trade law has gone through a process of juridification, to an extent unknown before.<sup>153</sup> Some authors have argued that the WTO presents some constitutional features already, albeit this remains contested.<sup>154</sup>

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<sup>148</sup> Case 249/83 Parti écologiste ‘*Les Verts*’ v *EP* [1986] ECR 1357, para 23, stating that ‘(T)he European Economic Community is a Community based on the rule of law, inasmuch as neither its MS nor its institutions can avoid a review of whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty’.

<sup>149</sup> See Case 26/62 *NV Algemene Transport-en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 13; Case 6/64, *Flaminio Costa v Enel*, [1964] ECR 585; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

<sup>150</sup> Opinion 1/91 of the Court pursuant to art 228 of the EEC Treaty on the Draft Treaty on the Establishment of the European Union Economic Area [1991] ECR I-6079.

<sup>151</sup> Eric Stein, ‘Lawyers, Judges and the Making of a Transnational Constitution’ (1981) 75 *American Journal of International Law* 1, 27.

<sup>152</sup> Monica Claes and Maartje De Visser, ‘Reflections on Comparative Method in European Constitutional Law’ in Maurice Adams and Jacco Bomhoff (eds), *Practice and Theory in Comparative Law* (CUP 2012) 143, 168–69, noting that ‘by carrying out comparative constitutional research’, ‘there will be evidence of commonality in constitutional principles ...’ and suggesting that comparative law can contribute to ‘constitutional dialogue in Europe’.

<sup>153</sup> Joseph HH Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement’, *Harvard Jean Monnet Working Paper* 9/00, 2; Arie Reich, ‘From Diplomacy to Law: The Juridicization of International Trade Relations’ (1996–97) 17 *Northwestern Journal of International Law & Business* 775, 776.

<sup>154</sup> Joel P Trachtman, ‘The Constitutions of the WTO’ (2006) 17 *EJIL*, 623.

By contrast, international investment law is a relatively fragmented system, where different arbitral tribunals interpret different treaties. Because of the lack of binding precedent in investment arbitration, it may be difficult to elaborate a consistent proportionality test. Furthermore, EU law, WTO law and international investment law are at a different stage of development<sup>155</sup> and this makes their comparison necessarily approximate and perhaps premature.

Second, despite some commonalities, EU law, WTO law and international investment law have very different aims and objectives. All of these systems presuppose a triangular relationship between: (1) the individual (the EU citizen, the trader and the investor respectively); (2) the state (the Member State, the trading nations or host state respectively); and (3) the supranational court (the CJEU or the WTO ‘courts’ or the relevant arbitral tribunal respectively).<sup>156</sup> Despite this common tripartite framework, very different assumptions underlie the three systems. On the one hand, the once European Economic Community (EEC) ‘market citizen’ (*Marktbürger*) entitled to market freedoms under the EEC Treaty<sup>157</sup> has become a European Union citizen entitled to human rights, not only of an economic nature. Therefore, the balancing process takes place in a system where economic interests are part of a broader picture. By contrast, both international trade law and international investment law aim at fostering free trade and foreign direct investments respectively thus promoting economic development.<sup>158</sup> Neither the WTO dispute settlement mechanism nor arbitral tribunals have the comprehensive jurisdiction of the CJEU; rather they have a more limited mandate.

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<sup>155</sup> While there are thousands of publicly available cases adjudicated by the CJEU, the available investment awards are much more limited.

<sup>156</sup> For analogous reasoning with regard to EU law, see Norbert Reich, ‘How Proportionate is the Proportionality Principle? Some Critical Remarks on the Use and Methodology of the Proportionality Principle in the Internal Market Case Law of the ECJ’ (paper presented at the Oslo conference on ‘The Reach of Free Movement’, 2011).

<sup>157</sup> *ibid* 11.

<sup>158</sup> Jagdish Bhagwati, ‘Why Multinationals Help Reduce Poverty’ (2007) 30 *World Economy* 211; VN Balasubramanyam, M Salisu and D Sapsford, ‘Foreign Direct Investment and Growth: New Hypotheses and Evidence’ (1999) 8 *Journal of International Trade and Economic Development* 27.

Third, while the CJEU has borrowed the proportionality principles from the legal systems of its Member States, and WTO law includes some elements of proportionality analysis, the role of proportionality analysis in international investment law and arbitration is far from settled. Unless the concept of proportionality is a principle of international law, or is part of the applicable law its application might seem shaky in the context of investment treaty arbitration. Moreover, arbitral tribunals have used proportionality in conjunction with other criteria such as reasonableness and rationality.

On the other hand, further reflection on methodological issues is of key importance. Methodological concerns have long been a common feature of comparative constitutional law.<sup>159</sup> Although there is no single methodological model in comparative law, two fundamental approaches to the field have emerged: the functional approach and the cultural approach.<sup>160</sup>

The functional approach relies on the assumption that law addresses social problems and that all societies confront essentially the same challenges.<sup>161</sup> The functional approach thus presupposes similarity among legal systems (*praesumptio similitudinis*),<sup>162</sup> potentially reflecting ‘epistemological optimism’, i.e., the belief that legal systems are comparable.<sup>163</sup> For instance, Alan Watson contended that there is no inherent relationship between law and society – being autonomous from any social

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<sup>159</sup> See Günther Frankenberg, ‘Comparing Constitutions: Ideas, Ideals, and Ideology – Toward a Layered Narrative’ (2006) *International Journal of Constitutional Law* 439; Mark Tushnet, ‘Some Reflections on Method in Comparative Constitutional Law’ in Sujit Choudry (ed), *The Migration of Constitutional Ideas* (CUP 2006) 67; Peer Zumbansen, ‘Comparative Law’s Coming of Age?’ (2005) 6 *German Law Journal* 1073.

<sup>160</sup> On the functional approach, see generally Ralf Michaels, ‘The Functional Method of Comparative Law’ in Matthias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (OUP 2006) 339. On the cultural approach, see Pierre Lagrand, ‘How to Compare Now’ (1996) 16 *Legal Studies* 232.

<sup>161</sup> See eg Konrad Zweigert, ‘Méthodologie du droit comparé’ in *Mélanges J Maury* (Daloz-Sirey 1960) 579.

<sup>162</sup> Jaakko Husa, ‘Methodology of Comparative Law Today: From Paradoxes to Flexibility?’ (2006) 4 *Revue Internationale de droit comparé* 1095, 1107.

<sup>163</sup> Mark Van Hoecke, ‘Deep Level Comparative Law’ in Mark Van Hoecke (ed) *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004) 172–74.

structure, law develops by transplanting.<sup>164</sup> Inevitably, the concept will adapt to the new context. According to Watson, the adaptation does not imply the failure of the transplant; rather it is a natural process.<sup>165</sup>

By contrast, cultural approaches contend that law expresses and develops the cultural features of a society. Therefore, not only do comparativists need to consider the functions of legal concepts, but they also have to contextualize such concepts in their legal matrix and culture of origin.<sup>166</sup> Meaningful comparisons require understanding the cultural context of legal rules.<sup>167</sup> For instance, Otto Kahn-Freund believed that law cannot be separated from its context.<sup>168</sup> According to Kahn-Freund, not only should one verify whether the item that would be borrowed has proven satisfactory in its system of origin, but she should consider whether it would be suitable to the potentially recipient system.<sup>169</sup> Each legal system is unique, reflecting a particular worldview<sup>170</sup> and constituting a ‘cultural expression’.<sup>171</sup>

Despite their differences, comparative law methodologies share a number of caveats and a common denominator. For instance, borrowing based on inadequately verified information should be avoided (e.g. when adjudicators rely on sources provided by the parties without further research). Analogously, reference to certain legal systems as examples should be justified. If comparisons are made, these should be explicit rather than implicit. The understanding of the borrowed items should be

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<sup>164</sup> See generally Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1974); see also Alan Watson, ‘Comparative Law and Legal Change’ (1978) 37 *Cambridge Law Journal* 313, 314–15.

<sup>165</sup> Watson, *Legal Transplants* (n 164) 19–20.

<sup>166</sup> John C Reitz, ‘How to do Comparative Law’ (1998) 46 *American Journal of Comparative Law* 617, 626.

<sup>167</sup> Pierre Legrand, ‘How to Compare Now?’ (1996) 16 *Legal Studies* 232.

<sup>168</sup> Otto Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37 *Modern Law Review* 1.

<sup>169</sup> *ibid* 6, questioning: ‘Are there any principles which may assist us in measuring the degree to which a foreign institution can be “naturalized”?’

<sup>170</sup> Pierre Legrand, ‘On the Singularity of Law’ (2006) 47 *Harvard International Law Journal* 517, 517.

<sup>171</sup> Reza Banakar, ‘Power, Culture and Method in Comparative Law’ (2009) 5 *International Journal of Law in Context* 69, 78 and 93, stressing the dialectical nature of the relationship between law and society.

proper, accurate and contextual. More fundamentally, one should consider whether the migration of constitutional ideas to transnational systems fits the culture of such systems.

Finally judicial borrowing cannot be a mechanical process also in consideration of the fact that until recently both comparative law and international law used to have a Westphalian<sup>172</sup> – if not Eurocentric – character.<sup>173</sup> For a long time, comparative law (has) focused on European legal systems; the law of former colonies – with the exception of US law – was largely overlooked. In other words, by limiting its focus to Western legal traditions, comparative law contributed to the legitimization of an order in which peripheral countries were recognized very limited if any creative contribution to the market of legal ideas.<sup>174</sup> Comparative law scholars (have) assumed that law is almost completely of European making, unfolded through nearly the entire world via colonialism, imperialism and trade.

In parallel, the making of international law used to have a predominantly Western character.<sup>175</sup> Some authors have even questioned whether and how international is international law,<sup>176</sup> highlighting ‘the idea of international law as an ordering mechanism that draws its categories from an essential culture and yet stands apart from its cultural context’.<sup>177</sup> The origins of international law are imbued of civil law ideas; the fathers of international law – such as Grotius, Gentili and others – borrowed concepts from their traditions which in turn regarded Roman law as the standard by which justice

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<sup>172</sup> Treaty of Westphalia: Peace Treaty between the Holy Roman Empire and the King of France and their respective Allies, 24 October 1648, available at <<[www.yale.edu/lawweb/avalon/westphal.htm](http://www.yale.edu/lawweb/avalon/westphal.htm)> accessed 15 January 2015.

<sup>173</sup> William Twining, ‘Globalization and Comparative Law’ (1999) 6 *Maastricht Journal of European and Comparative Law* 217, 233.

<sup>174</sup> Jorge González Jácome, ‘El uso del derecho comparado como forma de escape de la subordinación colonial’ (2006) 7 *International Law: Revista Colombiana de Derecho Internacional*, 295, 301, affirming that ‘se está contribuyendo a la legitimación de un orden geopolítico en donde a los países periféricos se les atribuye poca posibilidad creativa en el mercado de las ideas jurídicas’.

<sup>175</sup> See generally Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005).

<sup>176</sup> Kurt T Gaubatz and Matthew MacArthur, ‘How International is International Law?’ (2001) 22 *Michigan Journal of International Law* 239, 239.

<sup>177</sup> Note, ‘Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture’ (1993) 106 *Harvard Law Review* 723, 738.

should be measured.<sup>178</sup> Furthermore, international law mainly governed relations among states, despite some treaties which also regulated the interaction between states and indigenous peoples.<sup>179</sup>

In the post-colonial era, however, there is an emergent awareness that diffusion of law does not necessarily lead to convergence, harmonization, or unification of laws. On the one hand, scholars have pointed out the multicultural genealogy of the Western legal tradition.<sup>180</sup> On the other hand, the imported law did not remain the same; legal transplants are ‘transformed by the new context’.<sup>181</sup> Furthermore, in a number of countries – the so-called mixed jurisdictions – the Romano-Germanic tradition and the common law have met and mingled for historical reasons with variegated outcomes.<sup>182</sup> More recently economic globalization has spurred the constant contact and communication among legal cultures facilitating processes of mutual borrowing, cross-fertilization and learning.<sup>183</sup> Therefore many characteristics which define and shape legal families ‘are fading or spreading into other systems’.<sup>184</sup>

In conclusion, the migration of proportionality from constitutional law to EU law has been a relatively straightforward process due to the fact that such principles already belonged to the legal heritage of a few Member States. European courts have borrowed the concept of proportionality and

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<sup>178</sup> See generally Benedict Kingsbury and Benjamin Straumann (eds) *The Roman Foundations of the Law of Nations* (OUP 2010).

<sup>179</sup> A notable example is the Treaty of Waitangi, signed on 6 February 1840 by representatives of the British Crown and various Māori chiefs from New Zealand.

<sup>180</sup> Pier Giuseppe Monateri, ‘Black Gaius – A Quest for the Multicultural Origins of the “Western Legal Tradition”’ (1999–2000) 51 *Hastings Law Journal* 479, 484, highlighting that Roman law is a multicultural product due to the interaction of different civilizations.

<sup>181</sup> Banakar, ‘Power, Culture and Method in Comparative Law’ (n 171) 82.

<sup>182</sup> Nicholas Kasirer, ‘Legal Education as Métissage’ (2003–04) 78 *Tulane Law Review* 481.

<sup>183</sup> Jaye Ellis, ‘General Principles and Comparative Law’ (2011) 22 *European Journal of International Law* 949, 966.

<sup>184</sup> Colin B Picker, ‘International Law’s Mixed Heritage: A Common/Civil Law Jurisdiction’ (2008) 41 *Vanderbilt Journal of Transnational Law* 1083, 1094. But see Vivian Grosswald Curran, ‘Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union’ (2001) 7 *Columbia Journal of European Law* 63, 63 stressing the enduring difference between civil law and common law systems.

adapted it to their own needs. In some areas, the CJEU interprets proportionality in a way that is closer to the reasonableness test than the classical proportionality analysis.<sup>185</sup> While proportionality may have become an *enfant terrible* of the Court due to its unpredictability,<sup>186</sup> the migration has been successful exactly because the European courts have adapted it to the needs of European integration. In parallel, some elements of proportionality analysis appear in the treaty text of some WTO covered agreements. One may wonder whether the same preconditions for success also exist in investment arbitration. Arbitrators should be aware of the methodological risks and opportunities offered by comparative reasoning: more fundamentally, they should be aware of their mandate to adjudicate the relevant disputes ‘in conformity with the principles of justice and international law’.<sup>187</sup>

## Conclusions

The migration of legal concepts has become an increasingly common phenomenon, highlighting a cosmopolitan character of law.<sup>188</sup> Conceived as an analytical tool to assist adjudicators in determining the interaction between public and private interests, the concept of proportionality has attracted increasing attention by scholars and policymakers and has migrated from constitutional law to a number of other fields of national, regional and international law. Proportionality can restrain the exercise of public authority, shape judicial review and manage private actors’ expectations.

This study investigated the question as to whether and if so, to what extent, proportionality has migrated from constitutional law to EU law, international trade law and international investment law. The migration of proportionality to EU law is a paradigmatic case of successful legal transplant. The migration of proportionality to WTO law seems relatively settled. The migration of proportionality to international investment law and arbitration remains a work in progress. Eminent authors forcefully suggest a broader use of proportionality in international investment law and arbitration. Others consider proportionality analysis to be inappropriate for arbitral tribunals. Rather, they consider that a

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<sup>185</sup> Harbo, ‘The Function of the Proportionality Principle in EU Law’ (n 49) 185.

<sup>186</sup> Takis T Tridimas, *The General Principles of EC Law* (OUP 1998) 4, stating that general principles of EU law were ‘children of national law, but as brought in front of the Court, they became enfants terribles’.

<sup>187</sup> VCLT, preamble.

<sup>188</sup> Watson, *Legal Transplants* (n 164) 108.

degree of deference should be paid to the sovereign choices of the host state. Against this background, this chapter has examined the relevant jurisprudence and proposed an alternative viewpoint, highlighting the pros and cons, and the methodological issues raised by the migration of proportionality from one field to another. If international economic ‘courts’ are to use proportionality to form their interpretation of particular provisions, they must ensure that they master the relevant methodological risks and opportunities. In conclusion,

the adoption of proportionality is not a neutral process as it may have important consequences. Certainly, more comparative constitutional law studies are needed to address the question as to whether proportionality is a general principle of international law.