

Fall 2015

The Migration of Constitutional Ideas to Regional and International Economic Law: The Case of Proportionality

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The Migration of Constitutional Ideas to Regional and International Economic Law: The Case of Proportionality

*Valentina Vadi**

Abstract: The adjudication of regional and international economic disputes has become the final frontier in the migration of constitutional ideas. The migration of these ideas across different branches of law has become increasingly common, building bridges between different legal systems, furthering judicial dialogue, and allowing judicial borrowing. Scholars, adjudicators and practitioners “establish a transnational legal discourse and act as merchants of law.” Against this background, this study investigates the migration of constitutional ideas to regional and international economic law by focusing on the migration of the concept of proportionality from constitutional law to European Union (EU) law and international investment law. The article 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.

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INTRODUCTION

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*

The adjudication of regional and international economic disputes has become the last frontier of the migration of constitutional ideas. The migration of constitutional ideas across different branches of law has come to be a common practice, building bridges between different legal systems, furthering judicial dialogue and allowing judicial borrowing. Scholars, adjudicators and practitioners “establish a transnational legal discourse and act as merchants of law.”¹ According to this paradigm, constitutional ideas are “goods” or “merchandise” imported from the outside into a different legal order.² Can constitutional benchmarks help adjudicators in interpreting and applying broad and open-ended treaty provisions? Can these constitutional ideas help facilitate the consideration of the commonweal in international and regional adjudication, contribute to the humanization of international and regional economic law, or both? Can the use of constitutional analogies contribute to the current debate over the legitimacy of international and regional economic integration? Are there rules to govern this “market”? Should such rules exist? What are the limits, if any, of constitutional approaches to international and regional economic integration?

Although the use of constitutional ideas in international and regional economic law can offer concrete solutions to emerging conceptual dilemmas, and is forcefully presented by reputed scholars, one may question whether a more critical approach to the use of such concepts should be adopted. It is often assumed that borrowing is a neutral process, but this is not always the case. Further reflection on the methodology of constitutional analogies in international and regional economic integration is needed.

Against this background, this study investigates the migration of constitutional ideas to regional and international economic law by focusing on a case study that is the migration of the concept of proportionality from constitutional law to European Union (EU) law and international investment law. The article 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,³ no consensus seems to have arisen with regard to its legal status in international law. If proportionality was a general principle of law, or

¹ Sabino Cassese, *Beyond Legal Comparison*, 2012 ANNUARIO DI DIRITTO COMPARATO E DI STUDI LEGISLATIVI 387, 388 (2012).

² *Id.*

³ See generally THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE (Evelyn Ellis ed., 1999).

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. Considering proportionality in investment treaty arbitration can be problematic due to this uncertainty. To be sure, if the applicable law is that of the host state and if such law includes the proportionality principle, then proportionality becomes relevant in the context of investment treaty arbitration. Beyond this specific case, however, this article focuses on proportionality as seen through the lens of constitutional ideas and concludes that more comparative and international law studies are needed to ascertain the legal status of proportionality in international law.

The article proceeds as follows. First, after a brief introduction, the notion of the migration of constitutional ideas is defined and examined and its promises and pitfalls are investigated. Second, the study highlights some pitfalls of the proportionality analysis. Third, 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. Fourth, it examines the use of the proportionality analysis in investment treaty arbitration. 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.

I. THE MIGRATION OF CONSTITUTIONAL IDEAS

The migration of constitutional ideas is an interpretative and legislative act of borrowing elements belonging to given constitutional traditions and importing them into a different legal system.⁴ Constitutional law indicates a body of national law setting up fundamental norms and mechanisms of power control for the protection of the rights of the citizenry.⁵ The basic idea is that the constitution constitutes “a higher or supreme law.”⁶ The gist of constitutional law is to subject the exercise of governmental powers to the limitations of a higher law.⁷

The migration of constitutional ideas is related to but differs from constitutionalism in that the former implies a distance and or invisible boundary between the source (i.e. the constitution) and the destination (*in casu* EU law and international investment law). Rather, constitutionalism is

⁴ On the “migration of constitutional ideas,” see generally THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudry ed., 2006).

⁵ SCOTT GORDON, CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY 4 (1999).

⁶ Günter Frankenberg, *Comparative Constitutional Law*, in CAMBRIDGE COMPANION TO COMPARATIVE LAW 171 (Mauro Bussani & Ugo Mattei eds., 2012).

⁷ GORDON, *supra* note 5.

a conceptual movement or doctrinal project—some contend a phenomenon—which proposes the constitutionalization of a number of different areas of law.⁸ Constitutionalization indicates:

The attempt to subject all governmental action within a designated field to the structures, processes, principles and values of a ‘constitution’ . . . [s]ince governmental power is now being channelled through regional, supranational and international agencies, constitutionalization . . . [aims at] subjecting the exercise of all types of public power . . . to the discipline of constitutional procedures and norms.⁹

The constitutionalization of different areas of law, ranging from public international law,¹⁰ to international investment law¹¹ and EU law¹²—scholars argue—promote their humanization, suggest the idea of a scale of higher values, and thus potentially contribute to the legitimacy of the system.¹³ Yet, constitutionalism risks blurring the distinction between international and constitutional law, thus interpreting the former through the lens of the latter, while it is a traditional tenet of international law that states must comply with international law even if this was in conflict with national law, including constitutional law. Whether or not the constitutionalization of these areas of law has taken place is subject to debate.¹⁴ For the limited purpose of this study, suffice it to say that constitutional law principles can—and has—influence(d) other areas of the law. This has taken place in two different ways. First, the migration of constitutional ideas can take the form of a legal transplant when the lawmakers deliberately borrow given legal tools from other legal systems. Second, the migration of constitutional ideas can take place at the judicial level through cross-judging.

⁸ NORMAN DORSEN, MICHEL ROSENFELD, ANDRAS SAJÓ & SUSANNE BAER, *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (2d ed. 2010).

⁹ Martin Loughlin, *What is Constitutionalization?*, 3 *INT’L J. CONST. L. & POL.* 1 (2009).

¹⁰ *See generally* JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (2009) (examining the questions as to whether and if so to what extent the international legal system has constitutional features comparable to what we find in national law); *TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN MODELS* (Nicholas Tsagourias ed., 2007).

¹¹ Peter Behrens, *Towards the Constitutionalization of International Investment Protection*, 45 *ARCHIV DES VÖLKERRECHTS [ARCHIVE PUB. INT’L L.]* 153–179 (2007).

¹² *See, e.g.*, *CONSTITUTIONALIZING THE EUROPEAN UNION* (T. Christiansen & C. Reh eds., 2009).

¹³ Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 *EUR. J. INT’L L.* 907 (2004).

¹⁴ Robert Howse & Kalypso Nicolaidis, *Legitimacy Through ‘Higher Law’? Why Constitutionalizing the WTO is a Step Too Far*, in *THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION: EXPERIENCE AND LESSONS FOR THE WTO* 307 (Thomas Cottier & Petros C. Mavroidis eds., 2003).

A. The Migration of Constitutional Ideas through Legal Transplants

The migration of constitutional ideas can take the form of a legal transplant from a legal system to another. The concept of legal transplant has been introduced by Alan Watson who contended that there is no inherent relationship between law and society.¹⁵ According to Watson, being autonomous from any social structure, law develops by transplanting.¹⁶ A legal concept can be moved from a context and applied elsewhere.¹⁷ Inevitably, the concept will adapt to the new context; however, according to Watson, the adaptation does not imply the failure of the transplant; rather it is a natural process.¹⁸

In the constitutional realm, legal transplants have not been uncommon—constitutional ideas have migrated from one constitutional system to another since ancient times.¹⁹ At the regional and international levels, the migration of constitutional ideas plays a central role in treaty-making.²⁰ For instance, at the regional level, the treaty drafters structuring the relationship between the courts of the European Union and those of the Member States opted for a structure that echoes national systems delineating the interplay between their ordinary and constitutional courts.²¹ Constitutional law has played a pivotal role in the making of international (investment) law. For instance, the provisions against indirect expropriation in a number of international investment treaties derive from United States (U.S.) Constitutional law, specifically, the *Penn Central* test, articulated by the U.S. Supreme Court.²² In parallel, as the U.S. Model Bilateral Investment Treaty (US Model BIT)²³ is often used as a template by a number of countries in their investment for treaty negotiations, the *lex Americana* has become the gold

¹⁵ A. Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 314–5 (1978).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ A. WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 19–20 (2d ed. 1993).

¹⁹ Mads Andenas & Duncan Fairgrieve, *Intent on Making Mischief: Seven Ways of Using Comparative Law*, in *METHODS OF COMPARATIVE LAW* 25 (Pier Giuseppe Monateri ed., 2012) (stating that Plato’s famous conception of the Republic “built on all the known constitutions of the time” and even Aristotle had a project of collecting texts on all constitutions).

²⁰ George A Bermann, *Comparative Law and International Organizations*, in *THE CAMBRIDGE COMPANION TO COMPARATIVE LAW* 241, 249 (Mauro Bussani & Ugo Mattei eds., 2012) (stating that treaty-making is one scenario “to which comparative law has the most obvious contribution to make . . .”);

²¹ *Id.* at 251.

²² *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). For commentary, see A.B. Sanders, *Of All Things Made in America Why Are We Exporting the Penn Central Test?*, 30 *NW. J. INT’L L. & BUS.* 339 (2010).

²³ The 2012 United States Model Bilateral Investment Treaty includes both substantive and procedural standards of investment protection. The United States uses this model when it negotiates a given BIT with another country. The text of the US Model BIT is available at the website of the U.S. Department of State.

standard in the area.²⁴

This process has not been uncontroversial or uncontested. Some commentators have argued that the extensive protection granted to investors' rights amounts to an extraterritorial application of the Fifth Amendment of the U.S. Constitution,²⁵ or an expression of the "Americanization" of international law.²⁶ The interplay between constitutional law and international investment law in the form of legal transplant has been investigated by a number of authors;²⁷ therefore this study focuses on the underexplored second dimension of this interplay—namely cross-judging.

B. The Migration of Constitutional Ideas through Cross-Judging

At the adjudicative level, constitutional ideas have migrated across boundaries,²⁸ contributing to the phenomenon of "judicial globalization"²⁹ and the cross-pollination of different legal cultures. International and regional courts and tribunals as well as constitutional courts around the world have increasingly "cross-judged"—cited and or relied upon each other's opinions—determining a judicial dialogue at both horizontal and vertical levels.

At the horizontal level, the migration of constitutional ideas from one international tribunal to another allows these tribunals to de-fragment the alleged fragmentation of international law. The proliferation of different treaty regimes and international courts has raised the question as to whether international law is a fragmented system. There is no binding precedent in international law. As international courts and tribunals are not structured in a hierarchical fashion, they are not formally bound by the decisions of other peers. By "importing" concepts from other international courts and tribunals, international adjudicators counteract the risk of fragmentation and reinforce the perceived unity of international law. In parallel, a number of na-

²⁴ José E. Alvarez, *The Evolving BIT*, in INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 12–13 (I.A. Laird & Todd Weiler eds., 2010).

²⁵ See, e.g., David Schneiderman, *NAFTA's Takings Rule: American Constitutionalism Comes to Canada*, 46 U. TORONTO L.J. 499 (1996).

²⁶ On the Americanization of international law, see generally Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383 (2003).

²⁷ See generally SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION—GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION (2009); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007); Vicki Bean & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protection and the Misguided Quest for an International Regulatory Takings Doctrine*, 78 N.Y.U. L. REV. 30 (2003); G. Starner, *Taking a Constitutional Look: NAFTA Chapter 11 as an Extension of Member States' Constitutional Protection of Property*, 33 LAW & POL'Y INT'L BUS. 405 (2002); M. R. Poirier, *The NAFTA Chapter 11 Expropriation Debate through the Eyes of a Property Theorist*, 33 ENVTL. L. 851 (2003).

²⁸ Sujit Choudry, *Migration as the New Metaphor in Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 1–25 (Sujit Choudry ed., 2006).

²⁹ Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1103–24 (2000).

tional courts do consider foreign viewpoints in addressing analogous issues.³⁰

In a vertical or hierarchical sense, national courts and tribunals in common law jurisdictions follow the rule of “stare decisis.” Analogously, in civil law jurisdictions, courts do regard the previous decisions of superior courts, although they are not formally bound by the latter. At the vertical level, the migration of constitutional ideas from constitutional law to the regional and international sphere—through the coalescence of general principles of law or customary international law—allows a dialogue between national constitutional courts on the one hand and supranational courts and tribunals on the other. Such dialogue has also given rise to a common lexicon³¹ that fosters the circular migration of constitutional ideas from constitutional courts to regional and international fora and then back to constitutional courts.³² The migration of constitutional ideas to supranational law is not unbound; the duty to bring national law into conformity with regional and international law is a well settled part of customary law³³ and this is confirmed by consistent jurisprudence.³⁴ Reliance on national constitutional provisions does not justify a violation of supranational law.

The migration of constitutional ideas reflects the current “zeitgeist” or spirit of the time due to the coexistence of different legal systems that are, at times, overlapping, diverging, or both—legal pluralism.³⁵ Law—once the exclusive domain of states—has become a polycentric phenomenon, now the terrain of competition among multiple regulatory entities at national, regional, and international levels. The adoption of communal judicial approaches is mainly motivated by functional reasons, especially when adjudicators face difficult cases, since resorting to other cases may provide them with useful examples and strengthen the perceived legitimacy of the outcome.³⁶ Looking outside one’s own system as a tool for reassessing and adjusting it to evolving circumstances can be a necessity.³⁷ Whether this is done for imitation or because of convergence in a given policy domain, the

³⁰ Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570 (2004).

³¹ See, e.g., David Feldman, *Modalities of Internationalisation in Constitutional Law*, 18 EUR. REV. PUB. L. 131 (2006).

³² Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241 (2008).

³³ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 35 (7th ed. 2008).

³⁴ See, e.g., *Treatment of Polish National and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44, at 24–25 (Feb. 4). On the supremacy of EU law, see Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585.

³⁵ See, e.g., Günther Teubner, *Global Bukovina: Legal Pluralism in the World-Society*, in *GLOBAL LAW WITHOUT A STATE* 3 (Günther Teubner ed., 1997); Michel Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, 6 INT’L J. CONST. L. 415 (2008).

³⁶ Erlend M. Leonhardsen, *Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration*, 3 J. INT’L DISP. SETTLEMENT 95, 116 (2012).

³⁷ Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

influence of borrowing goes beyond the specific case, influencing the culture of the importing system³⁸ and determining gravitation towards certain models which exert dominant influence. Reverse constitutional borrowing—absorbing the experience of other systems after their borrowing of constitutional concepts—is theoretically possible, albeit rare.³⁹ For instance, in EU law reverse borrowing is taking place increasingly due to the influential role played by the Court of Justice of the European Union (CJEU).⁴⁰

C. Methodological Aspects

As the migration of constitutional ideas is in essence a comparative law endeavor, methodological concerns are myriad.⁴¹ Comparative law faces deep methodological challenges,⁴² concerning, *inter alia*, “the proper terms, categories, scales, methods, and data to be used in comparison.”⁴³ More specifically, with regard to the migration of constitutional ideas, the key question is whether constitutional theory can be generalized and transposed from the national terrain to the supranational sphere.⁴⁴ If international adjudicators rely on domestic cases, there is a risk that they “cherry-pick” the cases they are more familiar with, namely those of their legal system. This possible selection bias increases the risks of importing, not necessarily the best qualitative models, but those that are more familiar to the adjudicators.⁴⁵

The migration of constitutional ideas can (and has been) criticized on several grounds. First, by adopting “foreign elements,” adjudicators risk

³⁸ See C. Picker, *International Investment Law: Some Legal Cultural Insights*, in REGIONALISM IN INTERNATIONAL INVESTMENT LAW 27, 27–58 (L. Trakman & N. Ranieri eds., 2013).

³⁹ See David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 767 (2012) (mentioning the views of a few scholars that “the United States is losing constitutional influence” and that “the reluctance of the U.S. Supreme Court to pay decent respect to the opinions of mankind by participating in an ongoing global judicial dialogue is supposedly diminishing the global appeal and influence of American constitutional jurisprudence.”).

⁴⁰ See *infra* Part I.C.

⁴¹ See Peer Zumbansen, *Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance* 11 (Osgoode Hall Law Sch. Comp. Research in Law & Pol. Econ., Research Paper No. 1/2012, 2012) (“Just as comparative law in general, constitutional comparisons, too, are still plagued by a great degree of methodological uncertainty and theoretical indeterminacy.”).

⁴² Annelise Riles, *Wigmore’s Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT’L L.J. 221, 224 (1999) (highlighting that “a collective crisis of methodological confidence is something of a defining genre of comparative legal scholarship, as each commentator outdoes the next with dire critiques of the field and timid solutions for reconfiguration.”).

⁴³ Annelise Riles, *The Projects of Comparison*, in RETHINKING THE MASTERS OF COMPARATIVE LAW 2 (Annelise Riles ed., 2001).

⁴⁴ Günther Teubner, *Framed Foundations: Societal Constitutionalism Beyond the Nation State*, in THE TWILIGHT OF CONSTITUTIONALISM? 328 (Petra Dobner & Martin Loughlin eds., 2010).

⁴⁵ Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005).

making or transforming the law rather than interpreting or applying it. Customary norms of treaty interpretation, as restated by the Vienna Convention on the Law of Treaties (VCLT), demand that adjudicators rely on the text of the applicable law. Second, sovereignty concerns—critics contend—also matter as courts should not impose “foreign moods, fads, or fashions” on their audiences, as this would infringe the separation of powers and undermine the very legitimacy of the adjudicators.⁴⁶ Third, some scholars question whether constitutional ideas can migrate successfully from a given constitutional experience to the international plane,⁴⁷ contending that constitutional ideas cannot be separated from the constitutional culture in which they are rooted.⁴⁸

The question of whether some legal systems are comparable lies at the very heart of any comparative endeavor. At the macro-level, the argument goes that EU law and international investment law are comparable to public law adjudication.⁴⁹ Under EU law and investment law, states have agreed to give the CJEU and arbitrators respectively a comprehensive jurisdiction over what are essentially regulatory disputes.⁵⁰ Authors postulate the existence of a regional and transnational “administrative space”: a space in which the firm separation between national, regional “and international has largely broken down, in which administrative functions are performed in often complex interplays between . . . institutions on different levels . . .”⁵¹

The CJEU has made consistent use of comparisons, referring to the constitutional experiences of the Member States to elaborate general principles of EU law.⁵² In parallel, investor-state arbitration has been conceptualized as a global administrative law (GAL) creature,⁵³ which impels states to

⁴⁶ *Lawrence v. Texas*, 123 S. Ct. 2472, 2495 (2003) (Scalia, J., dissenting); *see generally* *Foster v. Florida*, 123 S. Ct. 470, 470–71 (2002) (Thomas, J., concurring).

⁴⁷ Zumbansen, *supra* note 41, at 16 (wondering whether constitutional ideas can be “conceived in near to complete isolation of the historical-intellectual contexts in which the very concepts . . . ha[d] their origin” and pinpointing the need to “understand the potential of bringing the hidden histories of a particular legal field to light, as they feed into the conceptualization on a world scale.”)

⁴⁸ *Id.* (suggesting that “close readings of national narratives of administrative governance reveal particular connotations of regulatory power and of the relationship between different institutions (legislature, executive, judiciary and administrative agencies).”)

⁴⁹ *See generally* MONTT, *supra* note 27; VAN HARTEN, *supra* note 27; DAVID SCHNEIDERMAN, *CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY’S PREMISE* (2008).

⁵⁰ Valentina Vadi & Lukasz Gruszczynski, *Standards of Review in International Investment Law and Arbitration: Multilevel Governance and the Commonwealth*, 16 J. INT’L ECON. L. 613 (2013).

⁵¹ Nico Krisch & Benedict Kingsbury, Introduction, *Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT’L L. 1, 1 (2006).

⁵² GIORGIO REPETTO, ARGOMENTI COMPARATIVI E DIRITTI FONDAMENTALI IN EUROPA: TEORIE DELL’INTERPRETAZIONE E GIURISPRUDENZA SOVRANAZIONALE [COMPARATIVE ARGUMENTS AND FUNDAMENTAL RIGHTS IN EUROPE: THEORIES OF INTERPRETATION AND JURISPRUDENCE SUPRANATIONAL] 192 (2011).

⁵³ Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Ad-*

conform to global administrative law principles.⁵⁴ Investment disputes arise from the exercise of public authority by the state, and arbitral tribunals are given the power to review and control such an exercise of public authority.⁵⁵ Their awards ultimately shape the relationship between state, on the one hand, and private individuals on the other.⁵⁶ Arbitrators determine matters such as the legality of governmental activity, the degree to which individuals should be protected from regulation, and the appropriate role of the state.⁵⁷

Nevertheless, other analogies are proposed at the macro-level,⁵⁸ and international law scholars prefer to analogize EU adjudication and investment treaty arbitration to other forms of international dispute settlement. Some view the European Union legal order as “essentially one of international law.”⁵⁹ Arbitral tribunals review state action in the light of international investment treaty provisions.⁶⁰ Both systems are “about the way in which we bring the state under some measure of control, which is the main aspiration of general international law.”⁶¹ At the end of the day, both EU adjudication and investment arbitration are conducted on the basis of international treaties at a supranational level. Therefore, the CJEU and arbitral tribunals are analogous to other international courts and tribunals.

Given the supranational law setting of EU adjudication and investment treaty arbitration respectively, it would be inappropriate to automatically transpose the experience of any national jurisdiction to such settings. For instance, “the Court of Justice has deliberately refrained from citing the rulings of national courts in order to avoid allegations of cherry-picking or of the privileging of the rulings of one or more Member State courts over others.”⁶² Analogously, in investment treaty arbitration, reference to the consti-

ministrative Law, 17 EUR. J. INT’L L. 121, 121 (2006) (suggesting that “international investment arbitration—pursuant to regional and bilateral investment treaties—offers the clearest example of global administrative law, strictly construed, yet to have emerged.”).

⁵⁴ For a critical assessment of this theory, see Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT’L L. 187 (2006).

⁵⁵ See Van Harten & Loughlin, *supra* note 53, at 121, 123.

⁵⁶ VAN HARTEN, *supra* note 27, at 9.

⁵⁷ Muthucumaraswamy Sornarajah, *The Clash of Globalizations and the International Law on Foreign Investment*, 12 CAN. FOREIGN POL’Y J. 17 (2003).

⁵⁸ Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45, 46 (2003).

⁵⁹ Timothy Moorhead, *European Union Law as International Law*, 5 EUR. J. LEGAL STUD. 126, 126–43 (2012).

⁶⁰ Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 GERMAN L.J. 1083, 1088 (2011).

⁶¹ James Crawford, *International Protection of Foreign Direct Investment: Between Clinical Isolation and Systematic Integration*, in INTERNATIONAL INVESTMENT LAW AND GENERAL INTERNATIONAL LAW: FROM CLINICAL ISOLATION TO SYSTEMIC INTEGRATION? 22 (Rainer Hofmann & Christian J. Tams eds., 2011) (referring to investment arbitration only).

⁶² Gráinne De Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Hu-*

tutional experience of a country different from the host state might seem out of place.⁶³ Only insofar as a discrete number of constitutional experiences constitute evidence of state practice or general principles of law can they assume relevance in the context of supranational adjudication.

Against this background, this article suggests that studies from different domains of international, regional, and comparative law are needed for mapping the migration of constitutional concepts from constitutional law to regional and international economic law. This study focuses on a case, which exemplifies how, at the micro-level, constitutional ideas have migrated to EU law and investment law, respectively. Proportionality analysis is an interesting case study because its migration from constitutional law to the supranational level is forcefully advocated by a number of scholars.⁶⁴ Yet, the methodological challenges and opportunities posed by the migration of proportionality to the supranational sphere have been undertheorised. It is now time to address this problem.

II. PROPORTIONALITY: A COSMOPOLITAN DESTINY?

A paradigmatic example of the migration of constitutional ideas is given by the mobility of proportionality across a wide range of national, regional and international legal systems.⁶⁵ As a legal concept, proportionality expresses the idea that there should be a balance between competing objectives or values.⁶⁶ In a number of constitutional traditions, the concept of proportionality is understood as a methodological framework for balancing conflicting values and aiming at delimiting the legitimate exercise of state authority.⁶⁷

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 pro-

man Rights Adjudicator?, 20 MAASTRICHT J. EUR. & COMP. L. 168, 178 (2013).

⁶³ An important instance in which a given constitutional practice may be relevant is when the applicable law is national law. In fact, some arbitral tribunals have referred to proportionality because proportionality was embedded in the national law, which was applicable to the given dispute. See *infra* Part III.

⁶⁴ See, e.g., B. Kingsbury & S. Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest: The Concept of Proportionality*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 75 (S. Schill ed., 2010).

⁶⁵ MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 2 (2012) (noting that in the past decades proportionality has become “one of the most prominent instances of the successful migration of constitutional ideas . . .”).

⁶⁶ The idea of justice as an archetype of proportion also appeared in Aristotle's *Nicomachean Ethics*. See Eric Engle, *The History of the General Principle of Proportionality: An Overview*, 10 DARTMOUTH L.J. 1, 3 (2012).

⁶⁷ Jacco Bomhoff, *Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law*, 31 HASTINGS INT'L & COMP. L. REV. 555 (2008).

proportionality.⁶⁸ 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 restrain the exercise of public authority, shape judicial review, and manage private actors' expectations. This section dissects this reason examining its various elements.

First, proportionality is based on "a culture of justification" which "requires that governments should provide substantive justification for all their actions"⁶⁹ 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 and reasonableness,"⁷⁰ as well as efficiency and optimization concerns.⁷¹ Proportionality is a "deliberative methodology,"⁷² which requires that all of the relevant factors be considered and can insert "Socratic contestation" in the deliberative process of governmental action.⁷³ 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 based⁷⁴; failure to state such reasons is a ground for annulment of the award.⁷⁵ Proportionality also allows adjudicators to adopt nuanced decisions rather than "all-or-nothing" approaches⁷⁶ and to structure their analysis in a framework which "may produce better and more convincing reasoning, and enable

⁶⁸ Jan H. Jans, *Proportionality Revisited*, 27 LEGAL ISSUES OF ECON. INTEGRATION 239, 240–41 (2000).

⁶⁹ Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463, 467 (2011).

⁷⁰ *Id.* at 475.

⁷¹ *Id.* at 467.

⁷² Iddo Porat, *Some Critical Thoughts on Proportionality*, in REASONABLENESS AND LAW 243, 244 (Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini eds., 2009).

⁷³ Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights Based Proportionality Review*, 4 LAW & ETHICS HUM. RTS. 141 (2010).

⁷⁴ See generally Pierre Lalive, *On the Reasoning of International Arbitral Awards*, 1 J. INT'L DISPUTE SETTLEMENT 55, 55 (2010).

⁷⁵ Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 52(1).

⁷⁶ Kingsbury & Schill, *supra* note 64, at 75, 79.

clearer assessment of tribunals, thus enhancing predictability.”⁷⁷ 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.⁷⁸ 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.⁷⁹

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 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.”⁸⁰

Given the pervasiveness of the concept of proportionality in a few constitutional traditions⁸¹ and in various areas of international law, some authors contend that proportionality is an emerging general principle of international law,⁸² or even an already established one.⁸³ 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),⁸⁴ 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).⁸⁵ 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

⁷⁷ *Id.* at 103.

⁷⁸ Cohen-Eliya & Porat, *supra* note 72, at 472.

⁷⁹ S. Schill, *Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights*, 27 ICSID REV. 87 (2012).

⁸⁰ Wojciech Sadurski, *Reasonableness and Value Pluralism in Law and Politics*, in REASONABLENESS AND LAW 129, 145 (Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini eds., 2009).

⁸¹ See generally Alec Stone Sweet & Joseph Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 73 (2008).

⁸² ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 169 (2012).

⁸³ See generally ENZO CANNIZZARO, *IL PRINCIPIO DELLA PROPORZIONALITÀ NELL'ORDINAMENTO INTERNAZIONALE* [THE PRINCIPLE OF PROPORTIONALITY IN INTERNATIONAL LAW] (2000).

⁸⁴ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).

⁸⁵ Vienna Convention on the Law of Treaties, *opened for signature*, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (entered into force Jan. 27, 1980).

and the private interest.⁸⁶

III. 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 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.⁸⁷ 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.⁸⁸ 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"⁸⁹ As Stone Sweet and Mathews put it, "balancing can never be dissociated from lawmaking: it requires judges to behave as legislators."⁹⁰ 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, "[t]he central question [i]s what must be proportionate to what."⁹¹ 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 the ad-

⁸⁶ Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* 23 (N.Y.U. Sch. of Law, Pub. Law Research Paper, Working Paper No. 09-46, 2009).

⁸⁷ Iddo Porat, *Why All Attempts to Make Judicial Review Balancing Principled Fail?*, Address before the VII World Congress of the International Association of Constitutional Law 7 (June 11, 2007).

⁸⁸ KULICK, *supra* note 82, at 172.

⁸⁹ David Kennedy, *Political Ideology and Comparative Law*, in *THE CAMBRIDGE COMPANION TO COMPARATIVE LAW* 35, 36 (Mauro Bussani & Ugo Mattei eds., 2012).

⁹⁰ Stone Sweet & Mathews, *supra* note 81, at 88.

⁹¹ Jans, *supra* note 68, at 239.

judicator free to select his or her own value system, and the relevant criteria to explain why one value is considered more important than another.⁹²

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.”⁹³ 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,⁹⁴ reflecting distrust towards the public administration in the aftermath of WWII.⁹⁵ In a number of European countries, including Germany, constitutional law has gained an increasing primacy since the end of the war and the democratic transitions that followed.⁹⁶ Constitutional courts have played a key role in making constitutional law effective,⁹⁷ aiming to be an “impenetrable bulwark against any infringement of the rights of the people.”⁹⁸ 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.”⁹⁹

Can proportionality be conceived in near to complete isolation from the cultural context in which it originated? Critical legal theorists contend that “hegemonic elites” might use proportionality to entrench their values and shift power from the democratic process to the courts¹⁰⁰ and that proportionality might have an “imperialistic effect,” in that it might set aside local constitutional values.¹⁰¹ In the EU law context, the concept of proportionality has fostered the goal of European integration.¹⁰² With regard to in-

⁹² Stone Sweet & Mathews, *supra* note 81, at 89. See also Kennedy, *supra* note 93, at 38 (stressing that there is a risk that proportionality analysis “operates in the shadow of ideology”).

⁹³ William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT’L L. 283, 336 (2010).

⁹⁴ COHEN-ELIYA & PORAT, *supra* note 65, at 8.

⁹⁵ M. Bobek, *Reasonableness in Administrative Law: A Comparative Reflection on Functional Equivalence*, in REASONABLENESS AND LAW 311, 323 (Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini eds., 2009).

⁹⁶ M. Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOBAL STUD. L. REV. 257, 271 (2008).

⁹⁷ Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of “Constitutional Justice”*, 35 CATH. U. L. REV. 1, 2 (1985).

⁹⁸ *Id.* at 2 (quoting Piero Calamandrei).

⁹⁹ Zumbansen, *supra* note 41, at 19.

¹⁰⁰ RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

¹⁰¹ COHEN-ELIYA & PORAT, *supra* note 65, at 8–9.

¹⁰² PAUL P. CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 532 (5th ed.

vestment law, scholars question whether the application of proportionality in investment arbitration could lead to the overprotection of property rights.¹⁰³

Fourth, some values can be incommensurable.¹⁰⁴ While proportionality assumes measurability—to be balanced, two competing principles should be based on a common denominator¹⁰⁵—arguments are made that cost-benefit analysis is flawed with respect to public sector decisions due to the incommensurability of certain values.¹⁰⁶

Fifth, the use of proportionality analysis can lead to the overprotection of property 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.¹⁰⁷ The spread of the proportionality analysis highlights “a shift from a culture of authority to a culture of justification,” which is connected, *inter alia*, to the rise of the human rights movement that 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 law¹⁰⁸—is open to debate.

IV. PROPORTIONALITY IN EUROPEAN UNION LAW

Proportionality is a general principle of European Union (EU) law and can be used for reviewing EU action and Member State action that falls within the sphere of EU law.¹⁰⁹ The migration of the proportionality analysis from constitutional law to EU law is a paradigm of successful legal transplant. Largely fashioned by the Union Courts, proportionality has subsequently assumed treaty status¹¹⁰ since the inception of the Maastricht

2011).

¹⁰³ Han Xiuli, *The Application of the Principle of Proportionality in Tecmed v. Mexico*, 6 CHINESE J. INT’L L. 635, 635–52 (2007).

¹⁰⁴ Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

¹⁰⁵ AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 482–84 (2012) (arguing that a common denominator exists in the form of the marginal social importance of each value).

¹⁰⁶ FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

¹⁰⁷ Maria Sakellaridou, *La Généalogie de la proportionnalité [The Genealogy of Proportionality]*, Address before the VII World Congress of the International Association of Constitutional Law 20 (July 11, 2007).

¹⁰⁸ See generally D.M. BEATTY, THE ULTIMATE RULE OF LAW (2003).

¹⁰⁹ CRAIG & DE BÚRCA, *supra* note 102 at 526; see generally THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE, *supra* note 3; NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY (1996).

¹¹⁰ Consolidated Version of The Treaty on European Union art. 5, 2010, O.J. (C 83/01) (stating that

Treaty.¹¹¹ 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.¹¹²

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,¹¹³ 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 “quite a rigorous and searching examination of the justification for a measure which has been challenged.”¹¹⁴ In a seminal article, De Búrca noted:

[I]n reaching decisions, the Court of Justice is influenced not only 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.¹¹⁵

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).¹¹⁶ 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 restrictive alternative.”¹¹⁷ In such cases, the Court tends to undertake a strict test of proportionality and only the less restrictive measures will be considered as proportionate.¹¹⁸ Instead, when re-

“the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”)

¹¹¹ The Treaty on European Union (TEU) was signed on February 7, 1992 and entered into force on November 1, 1993.

¹¹² Consolidated Version of The Treaty on European Union Protocol (No 2), 2010, O.J. (C 83/01) (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 December 13, 2007).

¹¹³ Tor Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 EUR. L.J. 158 (2010).

¹¹⁴ Gráinne De Búrca, *The Principle of Proportionality and its Application in EC Law*, in 13 YEARBOOK OF EUROPEAN LAW 105, 111–12 (Thomas Bingham et al. eds., 1993).

¹¹⁵ *Id.*

¹¹⁶ See generally TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* 136–74, 193–241 (2d ed. 2006).

¹¹⁷ Harbo, *supra* note 113, at 172.

¹¹⁸ See, e.g., Case 104/75, *Van Justitie v. de Peijper*, 1976 E.C.R. 613 (deeming a national measure conditioning the importation of medical products to the obtainment of certain documents to be dispro-

viewing Union action, the court will deem the regulatory measure to be disproportionate only if it finds it manifestly inappropriate to achieve the stated objective.¹¹⁹

An alternative viewpoint suggests that the proportionality analysis has been interpreted differently according to the various areas it is applied to¹²⁰—for instance showing a more deferential approach in the adjudication of public health related disputes, while at the same time detecting discriminatory measures. This approach relies on the fact that 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.”¹²¹ There are a number of examples where such measures were deemed to be disproportionate.¹²²

Regardless of what causes the varying intensity of the proportionality test in EU adjudication, it is certainly not neutral. It is value-laden and expresses the Court’s function of adjudicating disputes and “promoting European integration.”¹²³

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 Treaty¹²⁴ conferred binding nature to the Charter of Fundamental Human Rights.¹²⁵ 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).¹²⁶ Even before these notable institutional developments,

portionate as a means to protect public health); Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 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 labeling).

¹¹⁹ *Id.* 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, *Hauer v. Land Rheinland-Phalz*, 1979 E.C.R. 3727.

¹²⁰ Harbo, *supra* note 113, at 172.

¹²¹ CRAIG & DE BÚRCA, *supra* note 106, at 529.

¹²² *See, e.g.*, Case 114/76, *Bela-Muhle v. Grows Farm*, 1977 E.C.R. 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).

¹²³ *Id.*

¹²⁴ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

¹²⁵ Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364/1).

¹²⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

“the Court has made reference, for several decades since the early 1970s, to fundamental rights as general principles of law, and to provisions of the European Convention on Human Rights as a source of inspiration underpinning these general principles¹²⁷ Therefore, favoring the objective of European integration does not necessarily entail a predominance of economic interests vis-à-vis other non-economic values as the latter constitute part of the European project. This is particularly evident in a number of cases.¹²⁸

Third, with regard to the cultural arguments, while the Court has derived the proportionality concept from “(some of) the Member States’ legal orders,”¹²⁹ its application of the concept has at times converged¹³⁰ and at times diverged from that of national courts.¹³¹ More interestingly, when reviewing state measures the CJEU has acknowledged the possibility of different approaches by Member States to similar issues,¹³² and has been “willing to interpret proportionality in the light of the Member State’s particular values, notwithstanding that those values differ from those of other Member States.”¹³³ 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.¹³⁴

Fourth with regard to incommensurability, the Court has found a common denominator in 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 pointed out that rights are not absolute and there may be cases in

¹²⁷ De Búrca, *supra* note 62, at 170.

¹²⁸ Joined Cases C-402/05 P & 415/05 P, *Kadi & Al Barakaat Int’l Found. v. Council & Comm’n*, 2008 E.C.R. 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 E.C.R. I-9609 (upholding a German ban on the commercialization of violent games for protecting public policy and human dignity).

¹²⁹ Harbo, *supra* note 113, at 172.

¹³⁰ *See, e.g.*, Case 44/79, *Hauer v. Land Rheinland-Phalz*, 1979 E.C.R. 3727 (holding that the relevant Community regulation was proportionate to the stated objective).

¹³¹ *See, e.g.*, Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125 (holding that the Community measure was proportionate to the stated objective).

¹³² Case C-108/96, *Criminal Proceedings against Dennis Mac Quen et al.*, 2001 E.C.R. I-837, ¶ 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.”).

¹³³ CRAIG & DE BÚRCA, *supra* note 102, at 532.

¹³⁴ Case C-208/09, *Sayn-Wittgenstein v. Landeshauptmann von Wien*, 2010 E.C.R. I-13693, ¶¶ 83, 92.

which private interests may be limited for the commonweal.¹³⁵ While this does not mean that all of the cases adjudicated by the CJEU have reached an optimal balance between the competing interests,¹³⁶ 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,”—a legal transplant which “work[s] even ‘better’ in the transplant than in the origin country,”¹³⁷ fitting particularly well in the peculiar structure of the European Union. In fact, the accordion-like interpretation of proportionality as broad or narrow in a particular case allows the courts of the Union to accommodate the converging divergences of the Member States, which promotes European integration while respecting state sovereignty.

V. PROPORTIONALITY IN INVESTMENT TREATY ARBITRATION

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,¹³⁸ stating that “proportionality analysis offers the best available doctrinal framework with which to meet the present challenges” to the investment treaty system.¹³⁹ To the con-

¹³⁵ See, e.g., C-331/88, *R. v. Minister for Agriculture, Fisheries & Food, ex parte Fedesa*, 1990 E.C.R. I-4023 (upholding a Community regulation prohibiting the use of hormones in meat production); Case C-210/03, *Swedish Match AB & Swedish Match UK Ltd. v. Sec’y of State for Health*, 2004 E.C.R. I-11893, ¶¶ 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 labeling could not achieve the same preventive effect).

¹³⁶ See Case C-438/05, *Int’l Transp. Workers’ Fed’n & Finnish Seamen’s Union v. Viking Line ABP & OÜ Viking Line Eesti*, 2007 E.C.R. I-10779. For commentary, see A.C.L. Davies, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, 37 *INDUS. L.J.* 126 (2008).

¹³⁷ Mathias M. Siems, *The Curious Case of Overfitting Legal Transplants*, in *THE METHOD AND CULTURE OF COMPARATIVE LAW: ESSAYS IN HONOUR OF MARK VAN HOECKE* 133–146, 134. (Maurice Adams & Dirk Heirbaut eds., 2014).

¹³⁸ See Alec Stone Sweet, *Investor-State Arbitration: Proportionality’s New Frontier*, 4 *LAW AND LEGAL ETHICS OF HUM. RTS.* 46 (2010).

¹³⁹ *Id.* at 48.

trary, 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.¹⁴⁰

Most investment treaties do not refer to proportionality.¹⁴¹ 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. Against the background of a lively doctrinal debate on the migration of proportionality to investment treaty arbitration, an examination of the arbitral practice is of critical relevance for ascertaining whether and, if so, how proportionality has migrated to investment treaty arbitration.

While reference to proportionality used to be rare in investment arbitration, in the past decade arbitral tribunals have increasingly relied on some form of proportionality analysis.¹⁴² This section explores how the concept has been used to define substantive standards of protection, including the protection against unlawful expropriation, fair and equitable treatment, and non-discrimination. It also discusses some cases which referred to proportionality as required under the applicable national law and other cases in which proportionality was used to define the 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 license by a license 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-

¹⁴⁰ BENEDIKT PIRKER, PROPORTIONALITY ANALYSIS AND MODELS OF JUDICIAL REVIEW (2013).

¹⁴¹ *But see* Free Trade Agreement between the Republic of Korea and the United States of America, U.S.-S.Kor., June 30, 2007, OFFICE OF THE U.S. TRADE REPRESENTATIVE (entered into force Mar. 15, 2012); 2009 ASEAN Comprehensive Investment Agreement, Feb. 26, 2009, ASS'N OF SOUTHEAST ASIAN NATIONS (entered into force Mar. 29, 2012).

¹⁴² 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.

ty.”¹⁴³

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.¹⁴⁴ Warnings not to drink water were enacted and customers were dissuaded from paying their water bills.¹⁴⁵ In order to ascertain whether there was a (compensable) expropriation or a (non-compensable) legitimate exercise of police powers, the Tribunal relied on *Tecmed*, and its analysis of the European Court of Human Rights (ECtHR)’s jurisprudence, 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.¹⁴⁶ The Tribunal dismissed the claim of expropriation.

In *Burlington Resources Inc. v. Ecuador*, 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.”¹⁴⁷ 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 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.”¹⁴⁸

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.”¹⁴⁹ In *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, 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.”¹⁵⁰ The claimant contended that a given

¹⁴³ *Tecnicas Medioambientales Tecmed S.A. v. the United Mexican States*, ICSID Case No. ARB(AF)/00/, ¶ 122 (May 29, 2003).

¹⁴⁴ *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (June 23, 2006).

¹⁴⁵ *Id.* ¶ 283.

¹⁴⁶ *Id.* ¶ 311.

¹⁴⁷ *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 164 Dec. 14, 2012).

¹⁴⁸ *Id.* ¶ 504.

¹⁴⁹ *MTD Equity SDN BHD & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, ¶ 109 (May 25, 2004).

¹⁵⁰ *Occidental Petroleum Corp. & Occidental Exploration & Production Co. v. Republic of Ecuador*, ICSID Case ARB/06/11, 70 n.7 (Dec. 16, 2011).

sanction imposed by Ecuador was disproportionate and therefore violated legitimate expectations under the relevant BIT.¹⁵¹ The Tribunal concluded that the measure “was not a proportionate response by Ecuador in the particular circumstances of this case.”¹⁵²

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.¹⁵³ The Tribunal noted that “it is not for an international tribunal to delve into the details of and justifications of domestic law.”¹⁵⁴ It also stated that “[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.¹⁵⁵ To deem it otherwise—in the words of the claimant—would amount to transform arbitrators into ‘archeologists and ethnographers.’”¹⁵⁶

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.”¹⁵⁷ Yet, in *Pope & Talbot*, the Tribunal dismissed Canada’s argument that the foreign investor should prove that it was “disproportionately disadvantaged” by the measure.¹⁵⁸ The Tribunal considered that the disproportionate advantage test would weaken NAFTA’s ability to protect foreign investors.¹⁵⁹

Other cases referred to proportionality as if it were 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.¹⁶⁰ 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

¹⁵¹ *Id.* ¶ 277.

¹⁵² *Id.* ¶ 338.

¹⁵³ *Glamis Gold, Ltd. v. U.S.*, IIC 380, Award, ¶ 590 (June 8, 2009).

¹⁵⁴ *Id.* ¶ 762.

¹⁵⁵ *Id.* ¶ 779.

¹⁵⁶ *Id.* (stating that the Tribunal was mindful of Respondent’s statement that “[i]t is simply not this Tribunal’s task to become archaeologists and ethnographers . . .”).

¹⁵⁷ *Parkerings v. Lithuania*, ICSID Case No. ARB/05/8, Award, ¶ 368 (Sept. 11, 2007).

¹⁵⁸ *Pope & Talbot v. Canada*, NAFTA Chapter 11 Arbitral Tribunal, Award on Merits of Phase 2, ¶¶ 43–45 (Apr. 10, 2001).

¹⁵⁹ *Id.* ¶ 79.

¹⁶⁰ *Autopista Concesionada de Venezuela, C.A. (‘Aucoven’) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, ¶ 338 (Sept. 23, 2003).

contained in Article 2(2) of the BIT.”¹⁶¹ The claimant argued:

Instead of freezing only the cash equivalent to the claimed tax amount, Romania chose, through its fiscal authorities, to sequester all [Claimant’s] assets . . . and bank accounts . . . [t]his decision impaired Claimant’s right to dispose of its investment and was taken in breach of the principles of due process, proportionality and reasonableness.¹⁶²

However, the Tribunal held that “[claimant] has not proved that this sequestration was discriminatory, disproportionate or otherwise improper under Romanian law.”¹⁶³ In *Occidental Petroleum Corporation 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.”¹⁶⁴ 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.”¹⁶⁵ 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.”¹⁶⁶

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.¹⁶⁷ 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”¹⁶⁸ The Tribunal considered the following:

[T]he Government’s efforts struck an appropriate balance between that aim and the responsibility of any government towards the coun-

¹⁶¹ Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, ¶ 358 (Dec. 7, 2011).

¹⁶² *Id.* ¶ 394.

¹⁶³ *Id.* ¶ 515.

¹⁶⁴ Occidental Petroleum Corp. & Occidental Exploration & Production Co. v. Republic of Ecuador, ICSID Case No. ARB/06/11, ¶ 203 (Dec. 16, 2011).

¹⁶⁵ *Id.* ¶ 206.

¹⁶⁶ *Id.* at 70 n.7, ¶¶ 396–401 (on the principle of proportionality in Ecuadorian law).

¹⁶⁷ Cont’l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 192 (Sept. 5, 2008).

¹⁶⁸ *Id.* ¶ 67.

try'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.¹⁶⁹

Finally, proportionality has also been used with regard to matters of procedure. In *Libananco Holdings Co. Limited v. Republic of Turkey*, which concerned the seizure of two electric utility companies, the Tribunal stated:

[T]here needs to be some proportionality in the award (as opposed to the expenditure) of legal costs and expenses.¹⁷⁰ 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.¹⁷¹

In *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, which concerned license to explore and extract hydrocarbons, the Tribunal acknowledged:

[O]n [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.¹⁷²

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 question the relevance of discussing previous awards, given the fact that there is no binding precedent in international (investment) law.

These awards show an increasingly frequent pattern in the use of some form of proportionality analysis in investment treaty arbitration. Proportionality analysis is used in a varying of contexts—delimiting substantive standards of protecting, clarifying procedural matters and even quantifying

¹⁶⁹ *Id.* ¶ 227.

¹⁷⁰ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, ¶ 565(c) (Sept. 2, 2011).

¹⁷¹ *Id.*

¹⁷² *Liman Caspian Oil BV & NCL Dutch Inv. BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, ¶ 26 (June 22, 2010).

damages and legal fees. The study of previous awards is useful because patterns of consistent use can and do influence subsequent awards.

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. Instead, 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 clearly articulated structure it has in other fields of national, regional, and international law.¹⁷³

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 ask whether proportionality is inevitable; whether it is needed in investment arbitration; or whether it can contribute to better awards given the specific features of international investment law.

V. A HISTORY OF SUCCESS?

While the migration of constitutional ideas can flourish in certain contexts, it may easily falter in others. Why have EU adjudicators been drawn to proportionality when treaty tribunals have been half-hearted or even hostile to the concept? The answer is multifold.

First, EU law and investment law present very different institutional settings. EU law builds upon and fosters legal cohesiveness in the Union, constituting a *sui generis* system lying between a fully-fledged constitutional order and an international organization.¹⁷⁴ Joseph Weiler argued, “one of the great perceived truisms, or myths, of the European Union legal order is its alleged rupture with, or mutation from, public international law and its transformation into a constitutional legal order.”¹⁷⁵ 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.¹⁷⁶ Yet, EU law has a “constitutional dimension.”¹⁷⁷ Over time, the

¹⁷³ N. Di Mascio & J. Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT’L L. 48, 76 (2008) (noting that “The 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.”).

¹⁷⁴ See generally M. Poiars Maduro, *How Constitutional Can the EU Be? The Tension Between Intergovernmentalism and Constitutionalism in the EU* (Jean Monnet, Working Paper No. 5/04, 2004).

¹⁷⁵ JOSEPH H. H. WEILER, *THE CONSTITUTION OF EUROPE* 295 (1999).

¹⁷⁶ See generally Giuseppe Martinico, *From the Constitution for Europe to the Reform Treaty: A*

EU treaties have been perceived as having assumed some constitutional features.¹⁷⁸ Although the Treaty of Rome was concluded in the form of an international treaty, it has become the constitutional charter of the Union.¹⁷⁹ In fact, the European Court of Justice played a pivotal role in creating a material constitution in its judgments,¹⁸⁰ holding that the treaties founding the European communities (now the European Union) established a new legal order whose subjects do not only comprise Member States, but also their nationals.¹⁸¹ 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.”¹⁸² More fundamentally, the integration project reflects some evidence of commonality in constitutional principles or constitutional dialogue in Europe.¹⁸³

By contrast, international investment law is a relatively fragmented system where different arbitral tribunals interpret different treaties. Because of the lack of “stare decisis” in investment arbitration, it may be difficult to elaborate a meaningfully consistent proportionality test. Furthermore, EU law and investment law are at a different stage of development,¹⁸⁴ and this makes their comparison necessarily approximate and perhaps premature.

Second, despite some commonalities, EU law and international investment law have very different aims and objectives. Both systems presuppose a triangular relationship between: (1) the individual—the EU citizen and the investor respectively; (2) the state—the Member state or host state respectively—imposing certain burdens on that individual which may

Literature Survey on European Constitutional Law, PERSPECTIVES ON FEDERALISM, May 12, 2009.

¹⁷⁷ Wolf Sauter, *Proportionality in EU Law: A Balancing Act?* 4–5 (Tilburg L. & Econ. Ctr., ILEC, Discussion Paper No. 2013-003, 2013) (referring to the existence of an “implicit constitution”).

¹⁷⁸ See, e.g., Joined Cases C-402/05 P & 415/05 P, *Kadi & Al Barakaat Int’l Found. v. Council & Comm’n*, 2008 E.C.R. I-6351 (holding that “obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty”).

¹⁷⁹ Case 249/83, *Parti écologiste ‘Les Verts’ v. European Parliament*, 1986 E.C.R. 1339 (stating that “[T]he European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.”).

¹⁸⁰ See Case 26/62, *N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1; Case 6/64, *Flaminio Costa v. Enel*, 1964 E.C.R. 585; Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 1978 E.C.R. 629.

¹⁸¹ Opinion 1/91 of the Court Pursuant to Article 228 of the EEC Treaty on the Draft Treaty on the Establishment of the European Union Economic Area, 1991 E.C.R. I-6079.

¹⁸² Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT’L L. 1, 27 (1981).

¹⁸³ Monica Claes & Maartje De Visser, *Reflections on Comparative Method in European Constitutional Law*, in PRACTICE AND THEORY IN COMPARATIVE LAW 143, 168–169 (Maurice Adams & Jacco Bomhoff eds., 2012) (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”).

¹⁸⁴ While there are thousands of publicly available cases adjudicated by the CJEU, the available investment awards are much more limited.

preclude the exercise of her rights—under EU or investment law respectively; and (3) the supranational court—the CJEU or the relevant arbitral tribunal respectively.¹⁸⁵ Despite this common tripartite framework, there are very different fundamental assumptions underlying the two systems. On the one hand, the once European Economic Community (EEC) “‘market citizen’—*Marktbürger*—engaged in using the market freedoms under the EEC Treaty”¹⁸⁶ has become a European Union citizen entitled to a number of 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, international investment law has the objective of fostering foreign direct investment and of promoting economic development.¹⁸⁷ Arbitral tribunals do not have the comprehensive jurisdiction of the CJEU; rather they have a more limited mandate.

Third, the CJEU has abstracted the proportionality principles from the legal systems of its Member States; unless the proportionality principles was also a principle of international law, or was part of the applicable law as included in the domestic law of the host state it appears that its application might seem shaky. In this regard it is remarkable that 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.¹⁸⁸ 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.¹⁸⁹ The functional approach relies on the assumption that law addresses social problems and that all societies confront essentially the same challenges.¹⁹⁰ The functional approach thus presupposes similarity among legal systems

¹⁸⁵ 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, Working Paper presented at the Oslo conference on The Reach of Free Movement (May 18, 2011).

¹⁸⁶ *Id.* at 11.

¹⁸⁷ See, e.g., J. Bhagwati, *Why Multinationals Help Reduce Poverty*, 30 *WORLD ECON.* 211 (2007); V.N. Balasubramanyam, M. Salisu & D. Sapsford, *Foreign Direct Investment and Growth: New Hypotheses and Evidence*, 8 *J. INT’L TRADE & ECON. DEV.* 27 (1999).

¹⁸⁸ See Günther Frankenberg, *Comparing Constitutions: Ideas, Ideals, and Ideology—Toward a Layered Narrative*, 4 *INT’L J. CONST. L.* 439 (2006); Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 67 (Sujit Choudry ed., 2006); Peer Zumbansen, *Comparative Law’s Coming of Age?*, 6 *GERMAN L.J.* 1073 (2005).

¹⁸⁹ See generally Ralf Michaels, *The Functional Method of Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 339–382 (Matthias Reimann & Reinhard Zimmermann eds., 2006) (explaining the functional approach); Pierre Legrand, *How to Compare Now*, 16 *LEGAL STUD.* 232 (1996) (explaining the cultural approach).

¹⁹⁰ See, e.g., Konrad Zweigert, *Méthodologie du droit compare [Methodology of Comparative Law]*, in *MÉLANGES J. MAURY* 579, 570–596 (Daloz-Sirey ed., 1960).

(*praesumptio similitudinis*),¹⁹¹ potentially reflecting “epistemological optimism,” or the belief that legal systems are comparable.¹⁹² For instance, Alan Watson contended that there is no inherent relationship between law and society—being autonomous from any social structure, law develops by transplanting.¹⁹³ Inevitably, the concept will adapt to the new context; however, according to Watson, the adaptation does not imply the failure of the transplant; rather it is a natural process.¹⁹⁴

Cultural approaches reject a purely functionalist vision of law and 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 contextualise such concepts in their legal matrix and culture of origin.¹⁹⁵ Meaningful comparisons require understanding the cultural context of legal rules.¹⁹⁶ For instance, Otto Kahn-Freund believed that law cannot be separated from its *telos* and context.¹⁹⁷ 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 also should consider whether it would be suitable to the potentially recipient system.¹⁹⁸ As Pierre Legrand has stated, each legal system is unique, reflecting a particular worldview.¹⁹⁹ Law can be considered as a “cultural expression.”²⁰⁰

Despite their differences, comparative law methodologies share a number of caveats as a common denominator. For instance, superficial borrowing, based on inadequately verified information should be avoided (*e.g.*, when adjudicators rely on sources provided by the parties without further research). Analogously, the selection of the use of certain countries as examples should be justified. If comparisons are made, these should be explicit rather than implicit. The understanding of the borrowed items should be proper, accurate and contextual. More fundamentally, one should consider whether the migration of constitutional ideas to transnational systems serves outcomes in compliance with the culture of such systems.

Finally, judicial borrowing cannot be a mechanical process also in

¹⁹¹ Jaakko Husa, *Methodology of Comparative Law Today*, 4 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 1095, 1107 (2006).

¹⁹² Mark Van Hoecke, *Deep Level Comparative Law*, in EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 172, 172–174 (2004).

¹⁹³ See Watson, *supra* note 15, at 314–315; see generally WATSON, *supra* note 18.

¹⁹⁴ WATSON, *supra* note 18.

¹⁹⁵ John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 626 (1998).

¹⁹⁶ Legrand, *supra* note 189.

¹⁹⁷ Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974).

¹⁹⁸ *Id.* at 6 (questioning: “Are there any principles which may assist us in measuring the degree to which a foreign institution can be ‘naturalized?’”).

¹⁹⁹ See Pierre Legrand, *On the Singularity of Law*, 47 HARV. INT’L L.J. 517 (2006).

²⁰⁰ See generally Reza Banakar, *Power, Culture and Method in Comparative Law*, 5 INT’L J. L. CONTEXT 69, 78 (2009) (stressing the dialectical nature of the relationship between law and society).

consideration of the fact that until recently both comparative law and international law used to have a Westphalian²⁰¹—if not Eurocentric—character.²⁰² 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 rarely recognized for any creative contribution to the market of legal ideas.²⁰³ Comparative law scholars have assumed that law is almost completely of European-making, which unfolded through nearly the entire world via colonialism, imperialism, trade, and more recently, through neo-liberal structural adjustment programs in developing countries, post-conflict reconstruction, and reform in countries in transition.

In parallel, the making of international law used to have a predominantly Western character.²⁰⁴ Some authors have even questioned whether and how international is international law,²⁰⁵ 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.”²⁰⁶ 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 that regarded Roman law as the standard by which justice should be measured.²⁰⁷ Furthermore, international law mainly governed relations among states, despite some treaties, which also regulated the interaction between states and indigenous peoples.²⁰⁸

In the post-colonial era, however, there is an emergent awareness that

²⁰¹ See generally Treaty of Westphalia: Peace Treaty between the Holy Roman Empire and the King of France and their respective Allies (1648), available at http://avalon.law.yale.edu/17th_century/westphal.asp.

²⁰² See generally William Twining, *Globalization and Comparative Law*, 6 MAASTRICHT J. EUR. & COMP. L. 217, 233 (1999).

²⁰³ Jorge González Jácome, *El uso del derecho comparado como forma de escape de la subordinación colonial* [*The Use of Comparative Law as a Way to Escape from Colonial Subordination*], 7 INT'L L.: REV. COLOMB. DERECHO INT'L 295, 301 (2006): (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 [it is contributing to the legitimacy of a geopolitical order in which the peripheral countries are credited with little creative potential in the market for legal ideas].”).

²⁰⁴ See generally ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

²⁰⁵ Kurt T. Gaubatz & Matthew MacArthur, *How International is International Law?*, 22 MICH. J. INT'L L. 239 (2001).

²⁰⁶ Annelise Riles, Note, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 HARV. L. REV. 723, 738 (1993).

²⁰⁷ See generally THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS (Benedict Kingsbury & Benjamin Straumann eds., 2010).

²⁰⁸ A notable example is the Treaty of Waitangi, signed on February 6, 1840, by representatives of the British Crown and various Māori chiefs from New Zealand.

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.²⁰⁹ On the other hand, the imported law did not remain the same: “legal transplants undergo meaning transformation once they are implanted into a new legal system” and are “transformed by the new context.”²¹⁰ 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.²¹¹ More recently, economic globalization has spurred the constant contact and communication among legal cultures facilitating processes of mutual borrowing, cross-fertilization, and learning.²¹² Therefore many characteristics that define and shape legal families “are fading or spreading into other systems.”²¹³

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. The legal transplant was subject to some adaptation. In fact, the European courts have fashioned the proportionality to meet their own needs. Authors have noted these unintended consequences of the “naturalization” process—some have criticized the more lenient understanding of proportionality, highlighting that the CJEU interprets proportionality in some areas in a way that is closer to the reasonableness test than the classical understanding of the proportionality analysis.²¹⁴ Others have suggested that proportionality—like other general principles of law—may have become an *enfant terrible* of the Court due to its unpredictability.²¹⁵ On the other hand, the migration has been successful exactly because the European Courts have adapted the concept to the needs of European integration and the protection of human rights. More fundamentally, they have relied on the common European legal heritage. 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

²⁰⁹ See Pier Giuseppe Monateri, *Black Gaius: A Quest for the Multicultural Origins of the “Western Legal Tradition”*, 51 HASTINGS L.J. 479, 484 (2000) (highlighting that Roman law is a multicultural product due to the interaction of different civilizations).

²¹⁰ Banakar, *supra* note 200, at 82.

²¹¹ See Nicholas Kasirer, *Legal Education as Métissage*, 78 TUL. L. REV. 481, 481 (2003).

²¹² Jaye Ellis, *General Principles and Comparative Law*, 22 EUR. J. INT’L L. 949, 966 (2011).

²¹³ Colin B. Picker, *International Law’s Mixed Heritage*, 41 VAND. J. TRANSNAT’L L. 1083, 1094 (2008); *but see* Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 63 (2001) (stressing the enduring difference between civil law and common law systems).

²¹⁴ Harbo, *supra* note 113, at 185.

²¹⁵ T. T. TRIDIMAS, *THE GENERAL PRINCIPLES OF EC LAW* 4 (1998) (stating that general principles of EU law were “children of national law, but as brought in front of the Court, they became enfants terribles.”).

comparative law: more fundamentally, they should be aware of their mandate to adjudicate the relevant disputes “in conformity with the principles of justice and international law.”²¹⁶

CONCLUSIONS

The migration of legal concepts has become an increasingly common phenomenon, highlighting a cosmopolitan if not “nomadic” character of law.²¹⁷ 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 be used to delimit the exercise of the police powers of the public authorities, ascertaining the consistency between a certain measure and its objectives.

This study investigated the question as to whether and if so, to what extent, proportionality has migrated from constitutional law to EU law and international investment law respectively. Undoubtedly, the migration of proportionality to EU law is a paradigmatic case of successful legal transplant. 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 inappropriate for arbitral tribunals. Rather they consider that a degree of deference should be paid to the sovereign choices of the host state. Against this background, this article has examined the relevant jurisprudence and proposed an alternative viewpoint, namely that of the interplay between comparative law and international law—highlighting the pros and cons, and the methodological issues raised by the migration of constitutional ideas in general (and proportionality in particular) from one field to another. If arbitral tribunals are to use proportionality to form their interpretation of particular provisions, they must ensure that they master the relevant methodological risks and opportunities.

This article is intended as a contribution to the debate in the field of international and regional economic integration—identifying and critically assessing the advantages and disadvantages of the migration of proportionality from constitutional law to supranational law. 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.

²¹⁶ Vienna Convention, *supra* note 85.

²¹⁷ WATSON, *supra* note 18, at 108.