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A system of weightlessness

Applying the EU general principle of proportionality to secure fundamental rights protection under contemporary EU investment agreements

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Summary

At the heart of modern investment law it has since long resided a conflict between extensive investment protection norms and public policy interests of host states. After receiving exclusive competence to conclude international investment agreements governing this interrelation, the EU has tried to cater for those latter objectives through the design of these agreements. Yet in addition to treaty design, promoters of public interests have argued that adjudication on investment treaties must be supplemented by proportionality assessments, to better strike a balance between economic interests of investors and the rights of others. Where a weighting of this sort is performed between fundamental (economic) freedoms and fundamental rights, in an intra-EU milieu, Union courts are obliged to employ the general principle of proportionality of EU law. The principle, as it is construed in this context, essentially supplies the level of protection that Union protected fundamental rights require. In light of a lack of any generality as to how proportionality examinations are performed in the realm of investment law, what this thesis examines is therefore whether it is possible to apply the principle (as construed in an EU fundamental rights environment) to assure that the same level of protection is safeguarded when Member States' rights protective actions are scrutinized not under Union law, but under the international investment law regime.

This operation uses the CETA, and its construct of the investment protection rule of fair and equitable treatment, as indicative of contemporary EU investment policy and by extension its effects on investment law in general. First studied is its fair and equitable treatment clause, to see in what ways proportionality assessments typically can affect investment adjudication. Charted out thereafter is the EU proportionality principle whose theoretical application under such CETA disputes is to be scrutinized. Leaving this information temporarily aside the work then establishes the ways in which external norms, like the Union principle, can affect adjudication on investment protection rules. That blueprint on applicability is finally lain over the CETA alongside its fair and equitable treatment provision, and by the framework that emerges, attempts to apply EU fundamental rights proportionality to investment disputes, concerning the fairness and equitability of EU Member States' rights protective measures, are conducted.

The results that surface show that once an EU investment treaty has been concluded with a third-country, it can as hierarchically superior to EU law, as does the CETA, exclude the possibility to apply EU fundamental rights proportionality under its disputes. Under the few exceptional circumstances that the norm can be applied, it is moreover exposed to the risk of being used in a manner less rights protective than it would be by Union courts. To secure an EU level of rights protection it is therefore best to make fundamental rights protection a question over which investment tribunals will not adjudicate, and this can be achieved by means of a public policy oriented treaty design.

Résumé

Il existe au centre du droit de l'investissement contemporain depuis longtemps un conflit entre les normes de protection de l'investissement extensives et la politique publique des états hôtes. Ayant reçu une compétence exclusive pour conclure des traités internationaux à ce sujet, l'UE a essayé de préserver ce dernier objectif par la conception de ceux-ci. Cependant, il y a des promoteurs de la politique publique qui pensent qu'il faut compléter cette conception avec des analyses de proportionnalité, afin de trouver un équilibre meilleur entre les intérêts économiques des investisseurs et les droits des autres. En considérant les quatre libertés (économique) et les droits fondamentaux dans un milieu intra-européen, les tribunaux de l'Union sont obligés d'utiliser le principe général de proportionnalité du droit communautaire. Le principe, sous sa forme dans ce contexte, fournit essentiellement le niveau de protection qu'exigent les droits fondamentaux protégés par le droit européen. Puisque le droit de l'investissement n'offre aucune version régnante sur l'application des analyses de proportionnalité, ce mémoire examine en conséquence s'il y a des possibilités d'appliquer ce principe (comme construit dans l'environnement des droits fondamentaux de l'UE) en vue de maintenir le même niveau de protection qu'il accorde aux États membres dans des situations intra-européennes, lorsqu'ils prennent des mesures pour la protection des droits fondamentaux dans le milieu du droit international de l'investissement.

Pour commencer cette analyse, le mémoire se sert de l'AECC et sa construction de la norme du traitement juste et équitable, en qualité d'une représentation du plan d'investissement actuel de l'UE et par surcroît de ces effets sur le droit de l'investissement en général. Étudiée premièrement est sa clause du traitement juste et équitable, pour voir comment des analyses de proportionnalité pourraient affecter typiquement les règlements des litiges en matière d'investissement. Ensuite, la structure du principe de proportionnalité du droit communautaire est tracée, dans le but de construire une forme de celle-ci à appliquer sous les litiges d'AECC. Mettant néanmoins temporairement cette information de côté, le mémoire établit par la suite les manières dont des normes externes, e.g. le principe européen, peuvent influencer le règlement sur le droit de l'investissement. Finalement, ce projet d'applicabilité est connecté à l'AECC et sa disposition du traitement juste et équitable, et suivant le cadre qui apparaît à ce moment, il tente d'appliquer le principe de proportionnalité des droits fondamentaux communautaire aux règlements des litiges concernant la justice et l'équité des mesures prises des États membres pour la protection de ceux-ci.

Les résultats qui se présentent montrent qu'au moment où un traité européen d'investissement a été conclu avec un état tiers, il est, en jouant un rôle supérieur au droit européen comme joue l'AECC, capable d'exclure la possibilité d'appliquer le principe de proportionnalité du droit communautaire au sein de ces règlements. Et dans les cas exceptionnels où cette possibilité n'est pas ex-

clue, le principe sera exposé au risque d'être utilisé d'une façon moins respectueuse des droits fondamentaux qu'il serait dans des situations intra-européennes. Donc, afin de garder un niveau de protection des droits égal à ces dernières, le mieux serait de rendre la protection des droits fondamentaux une question que des tribunaux d'investissement ne règlent pas. Cet objectif pourrait bien être atteint, au moyen d'une conception de traités étroitement liés à la politique publique.

Sammanfattning

Inom modern investeringsrätt existerar sedan länge en konflikt mellan extensiva investeringsskyddsregler och värdländers allmänna intressen, och numera med exklusiv kompetens att sluta de internationella investeringsavtal som tangerar denna motsättning söker EU skydda de senare genom traktatens utformning. Som nödvändigt komplement till sådana konstruktioner menar dock förespråkare för allmänna intressen att investeringstribunaler måste utföra proportionalitetsbedömningar, för att bättre uppnå balans mellan investerares ekonomiska intressen och rättigheterna hos andra rättssubjekt. När denna typ av avvägningar görs mellan de fyra (ekonomiska) friheterna och fundamentala rättigheter, i intern unionsrättslig miljö, är EU-domstolar tvungna att använda sig av EU-rättens allmänna proportionalitetsprincip. Principen, såsom den konstrueras i denna kontext, fastslår i grunden den nivå av rättighetsskydd som EU-skyddade fundamentala rättigheter kräver. I ljuset av den bristande generalitet som tynger de proportionalitetsbedömningar som görs inom investeringsrätten, undersöker denna uppsats därför huruvida det är möjligt att tillämpa proportionalitetsprincipen (såsom den utvecklats i relation till EU:s rättighetsskydd) för att på så vis säkra att bedömningar av medlemsstaternas rättighetsskyddande åtgärder genererar samma nivå av skydd när de senare granskas, inte under EU-rätten, men inom ramen för den internationella investeringsrätten.

Som utgångspunkt för detta företag används CETA och dess upplaga av den investeringsrättsliga rättvis- och skälighetsstandard, i egenskap av indikatorer på Unionens nuvarande investeringspolicy och i förlängningen dess avtryck på investeringsrätten överlag. Inledningsvis studeras avtalets rättvis- och skälighetsstandard, för att se hur proportionalitetsbedömningar kan påverka skiljerättskipning inom investeringsområdet i allmänhet. Därefter konstrueras den version av den EU-rättsliga proportionalitetsprincipen vars teoretiska tillämplighet inom CETA-tvister ska undersökas. Slutsatserna så långt läggs sedan tillfälligt åt sidan, för att klargöra hur externa normer, såsom EU:s proportionalitetsprincip, kan påverka värderingar av investeringsregler. Slutligen används denna kunskap specifikt på CETA och dess rättvis- och skälighetsstandard, och via ramverket som därigenom uppdragas görs försök att tillämpa den rättighetsrelaterade proportionalitetsprincipen på investeringstvister över rättvisan och skäligheten hos EU-medlemsstaternas rättighetsskyddande åtgärder.

Resultaten som framgår visar att när EU-investeringsavtal, hierarkiskt överlägsna EU-rätten, väl slutits med tredjeland, kan avtalen, såsom CETA gör, utesluta möjligheten att tillämpa den EU-rättsliga rättighetsproportionaliteten inom dess tvister. Undantagen från detta klargörande visar vidare att om principen väl tillämpas riskerar denna tillämpning att generera ett sämre rättighetsskydd än vad som hade varit fallet inom Unionen. För att säkra en EU-rättslig skyddsnivå för fundamentala rättigheter är det istället bäst att göra rättighetsskydd till en fråga som investeringstribunaler inte behandlar, och detta kan åstadkommas genom en avtalskonstruktion med det allmänna intresset i fokus.

Preface

Att sätta ord på tankens innersta är en förmåga jag långt ifrån besitter, och eftersom jag inte vill reducera nästan 5 år av mitt liv till de delar av det som jag klarar av att beskriva, är det inget jag ämnar försöka mig på här. Därför väljer jag att se tillbaka på min tid i Lund i sinnet, för att istället viga några rader åt att utdela ett antal tack.

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“Så mycket har jag överlevt Dig,
och bara så mycket,
att jag kan tänka på avstånd.”

(Szymborska, 1993, s. 309)

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Abbreviations

AG	Advocate General
ARSIWA	(Draft) Articles on Responsibility of States for Internationally Wrongful Acts
BIT	Bilateral Investment Treaty
CETA	EU-Canada Comprehensive and Economic Trade Agreement
CFR	Charter of Fundamental Rights
CIL	Customary International Law
CJEU	Court of Justice of the European Union
Commission	The Commission of the European Union
Council	The Council of the European Union
ECtHR	European Court of Human Rights
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the Former Yugoslavia
IIA	International Investment Agreement
IIL	International Investment Law
ILC	International Law Commission

ISDS	Investor-State Dispute Settlement
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SCC	Stockholm Chamber of Commerce
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

1. Introduction

1.1. Background

In light of an ambition to re-establish the EU as a major player of global economy, the Lisbon Treaty by its entry into force provided the Union with exclusive competence to conclude international investment agreements (IIAs) in the field of foreign direct investment (FDI).¹ While exercise of this competence incorporates investment protection rules and dispute settlement mechanisms from international investment law (IIL) into EU IIAs,² it also houses a requirement of respecting central Community values, such as EU fundamental rights.³ Between states' regulatory actions taken in protection of these latter, and investment protection rules, there exists however since long a conflict.⁴

Originating in the 20th century, where it was heatedly debated whether foreign investments should be governed by international or domestic law, this friction essentially concerns the apprehension of which are the proper fora, norms and rule hierarchies to settle investment disputes. Nowadays it is well-established that the yardstick for treatment of foreign investors is provided by international autonomous standards and that disagreements over such treatment are resolved by international investor-state dispute settlement (ISDS), but the issue of striking a proper balance between national and international law within IIL, and thereby between national regulatory interests and international investment protection, nevertheless persists.⁵ ISDS tribunals are still, although choice of law clauses are commonly included in contemporary IIAs, many times forced to prioritize between simultaneously applicable sets of norms, of both dome-

¹ See Treaty on the Functioning of the European Union (TFEU) [2016] OJ C 202/47, article 3(1)e and 207(1); and Paul James Cardwell, *EU External Relations Law and Policy in the Post-Lisbon Era* (I.M.C Asser Press, 2012) 3–4.

² See Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Towards a comprehensive European international investment policy' COM (2010) 343 final 8–10.

³ See Treaty on European Union [2016] OJ C 202/15 (TEU), article 21(1); TFEU, articles 205 and 207; and Commission, 'A comprehensive European investment policy' (n 2) 9.

⁴ Cf Stephan W. Schill, 'Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward' (E15Initiative, ICTSD and World Economic Forum, Geneva, July 2015) 1–2.

⁵ See Jonathan Bonnitcha, Michael Waibel and Lage N. Skovgaard Poulsen, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017) 8–13 and 17; and Ibrahim FI Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 ICSID Rev - FILJ 1–3.

stic and international character.⁶ These priorities can lead to rather extensive investment protection rules, notably what concerns the right of investors to receive fair and equitable treatment (FET) from their host states^{7,8} As a result those standards frequently render domestic law incompatible with IIL, which in consequence may pre-exhaustively deter states from legislating in protection of their public interests.⁹ Interests, e.g. of a fundamental rights nature, that domestic or IIL external international law obliges them to cater to.¹⁰

To better preserve the right of states to sovereignly regulate in loyalty to obligations of this sort, the EU, by its conclusion of the CETA^{11,12} introduced both interpretive clarifications on this right as well as substantial restrictions of

⁶ See UNCTAD, ‘Investor-State Dispute Settlement – A sequel’ (2014) 2 UNCTAD Series on Issues in International Investment Agreements 127–134; See further Section 4.1.

⁷ The state in which a foreign investor invests, compared to its state of origin, the *home state*.

⁸ See Christian Tietje and Kevin Crow, ‘The Reform of Investment Protection Rules in CETA, TTIP, and Other Recent EU FTAs: Convincing?’ in Eric Vranes, Stefan Griller and Walter Obwexer (eds.), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Oxford University Press, 2017) 90 ff; and UNCTAD, ‘Dispute Settlement – A sequel’ (n 6) 136–137.

⁹ See Ashley Schram et al. in ‘Internalisation of International Investment Agreements in Public Policymaking: Developing a Conceptual Framework of Regulatory Chill’ (2018) 9 Global Policy 194–195, 197 and 200; Ralf Michaels, ‘International Arbitration as Private and Public Good’ in Federico Ortino and Thomas Schultz (eds.), *The Oxford Handbook on International Arbitration* (Oxford University Press, 2020) 413; and UNCTAD, ‘Dispute Settlement – A sequel’ (n 6) 25–26.

¹⁰ Cf UNCTAD, ‘Dispute Settlement – A sequel’ (n 6) 25 and 134–137; and Ursula Kriebaum, ‘Human Rights and International Investment Arbitration’ in Federico Ortino and Thomas Schultz (eds.), *The Oxford Handbook on International Arbitration* (Oxford University Press, 2020) 156.

¹¹ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23; The agreement is provisionally in force since September 2017. The majority of its investment provisions however, is not. See Commission, ‘EU-Canada Comprehensive and Economic Trade Agreement’ <https://trade.ec.europa.eu/access-to-markets/en/content/eu-canada-comprehensive-and-economic-trade-agreement#toc_9> accessed September 13th 2022.

¹² Regarded as somewhat of a blueprint for Union investment reforms, cf Commission, ‘CETA: EU and Canada agree on new approach on investment in trade agreement’ (IP/16/399, Press release, 2016); On CETA reforms, see further Stephan W. Schill, ‘Authority, Legitimacy, and Fragmentation’ in the (Envisaged) Dispute Settlement Disciplines in Mega-Regionals’ in Stefan Griller, Walter Obwexer, and Erich Vranes (eds), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Oxford University Press, 2017) 136 ff; and Lorand Bartels, ‘Human Rights, Labour Standards, and Environmental Standards in CETA’ in Stefan Griller, Walter Obwexer, and Erich Vranes (eds), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Oxford University Press, 2017) 202.

i.a. its FET provision.¹³ Modifications furthermore correlative to providing a more solid ground for Member States to protect EU fundamental rights when actualized in ISDS under the treaty.¹⁴ Whether these alternations hit their targets is doubtful, as the treaty's chapter on investment protection is not applicable as of yet.¹⁵ Even if applicable however, many scholars are of the opinion that adjustments of IIAs are not sufficient to strike a proper balance between the rights of investors and interests of the public.¹⁶ Instead, they propose, ISDS tribunals must resort to proportionality assessments to settle this issue.¹⁷

Fact is nonetheless that such examinations are already performed by arbitral tribunals in adjudication on FET standards, but because no uniformity can be detected, as to how they go about this task, what balance that conduct may generate is highly uncertain.¹⁸ A more harmonized balancing test, whose application is required to determine how far Member States may pursue fundamental rights protection to the detriment of conflicting Union objectives, is the general principle of proportionality in EU law.¹⁹ While this principle relates to an intra-Union context,²⁰ the measures it reviews could be challenged also by fo-

¹³ See the CETA, article 8(9)-(10) and Chapter 28; and Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States (Joint Interpretative Instrument) [2017] OJ L 11/3 paras 2 and 6(a); Cf also Tietje and Crow (n 8) 102–104.

¹⁴ Cf Bartels (n 12).

¹⁵ Some provisions are in fact applicable but the majority are not, see Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2016] OJ L 11/1080 article 1(1)a.

¹⁶ See Eric De Brabandere and Paula Baldini Miranda da Cruz, 'The Role of Proportionality in International Investment Law and Arbitration: A System-Specific Perspective' in Eduardo Gill-Pedro and Ulf Linderfalk (eds.), *Revisiting Proportionality in International and European Law* (Brill | Nijhoff, 2021) 218–219; Daria Davitti, *Investment and Human Rights in Armed Conflict: Charting an Elusive Intersection* (Hart Publishing, 2019) 143–145; Stefan Griller, 'Three salient issues of the New Comprehensive Free Trade Agreements' in Stefan Griller, Walter Obwexer, and Erich Vranes (eds.), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Oxford University Press, 2017) 300 ff; and Tietje and Crow (n 8) 105 and 110; For a to some extent concurring opinion, see Bartels (n 12) 215.

¹⁷ See Davitti (n 16) 177 and further therein made references.

¹⁸ Cf De Brabandere and da Cruz (n 16) 212–214; and Kriebaum, 'Human Rights' (n 10) 182–184.

¹⁹ See e.g. TFEU, article 36; See also Charter of Fundamental Rights (CFR) [2012] OJ C 326/391, article 52(1); and Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 CYELS 445–446; Cf also Case C-112/00 *Schmidberger Internationale Transporte und Planzüge v Austria* [2003] EU:C:2003:333; Case C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforsis and Siotirios Kouvelas* [1991] EU:C:1991:254; and Case C-112/00 *Schmidberger Internationale Transporte und Planzüge v Austria*, Opinion of AG Jacobs [2002] EU:C:2002:437, paras 90–95.

²⁰ Cf the CFR, article 51(1).

reign investors, claiming them to be contrary to FET clauses under EU IIAs. In these cases, national and EU obligations to respect fundamental rights will exist concurrently to the obligation to award these investors FET. As it is unsettled whether proportionality assessments generally can balance these demands so that the latter does not overly-infringe upon the former, this thesis, departing from the theoretical possibility of EU proportionality constituting an applicable norm under ISDS on FET,²¹ aims at examining whether it could be applied in these disputes to secure that Member States are therein allowed to adopt rights protective measures to the same extent that they are capable of, and required to, under EU law.

This question eagerly demands answering, since a conclusion pointing to insufficient possibilities to this effect could indicate that EU IIAs are in fact incompatible with fundamental rights protection prescribed by Union primary law. Moreover, since individuals, as the holders of EU fundamental rights,²² normally (apart from investors) do not constitute legal subjects of IIL,²³ having it answered helps to advocate the position they themselves cannot plead in ISDS. Lastly, because the applicability of EU fundamental rights proportionality would be contingent upon the determined relevance of IIA external norms in ISDS, and since it is studied to illuminate the relationship between legal obligations internal and external to IIL, the chosen subject also tackles the polemic between national and international legal regimes that trails this system.

1.2. Research question

By virtue of these focal points, the question this thesis purports to answer is the following ... *To what extent can the principle of proportionality, as construed in an EU fundamental rights context, be applied in IIL to ensure fundamental rights protection equal to internal EU law?*

In order to give an answer to this question, the following sub-questions are addressed:

- (i) What are the contents of the FET standard and how does it invite proportionality assessments to help adjudicate on the rule?

²¹ Cf UNCTAD, ‘Dispute Settlement – A sequel’ (n 6).

²² The CFR has been firmly established to have direct effect contra EU law, see e.g. Joint cases C-293 and 594-12 *Digital Rights Ireland and Seitlinger v Minister for Communications et al.* [2014] EU:C:2014:238, paras 24–31; read together with Case C-414/16 *Egenberger v Evangelisches Werk für Diakonie und Entwicklung* [2018] EU:C:2018:257, paras 78–80.

²³ Cf the CETA, article 30.6; and Stefan Mayr, ‘CETA, TTIP, TiSA, and Their Relationship with EU Law’ in Stefan Griller, Walter Obwexer, and Erich Vranes (eds), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Oxford University Press, 2017) 249–251.

- (i) What are the specific characteristics of the CETA's FET standard?
- (ii) What are the material and procedural contents of the principle of proportionality, *as construed in EU law*, and what is its function in adjudicating on restrictions on fundamental rights,
- (iii) What factors guide an investment tribunal in defining relevant law and sources,
- (iv) What is the relationship between international, national and EU law within an IIL context,
- (v) In what ways is the proportionality principle, *as construed in an EU fundamental rights milieu*, applicable in examinations of EU Member States' rights protective measures challenged through FET claims under the CETA?
 - (i) To what extent is the CETA Tribunal, if it applies the principle, obliged to apply it in a manner conform with EU law?

1.3. Delimitations

In delimiting the scope of this work to above described lines of inquiry, several aspects of EU investment policy, and of IIL in general, will be left unexamined. There are multiple public policy concerns to put in contrast to investment protection rules,²⁴ but having them contrasted by fundamental rights is a suitable way to enhance the position of the individual within IIL. By an instead more pragmatic token, the scope is further limited to certain specific elements of Union law and IIL. As the basis of all investment arbitration is always the relevant treaty,²⁵ it is difficult to make any general pronouncements on the applicability of EU proportionality without first choosing a specific IIA.²⁶ Therefore the CETA, the as of now most heatedly debated EU MEGA-Regional at least partially applicable,²⁷ is here selected. On top of that, discrepancies can also materialize in relation to which investment standard that is weighted

²⁴ Such as environmental protection or regulation of the labour market, see De Brabandere and da Cruz (n 16) 203–204.

²⁵ Cf UNCTAD, 'Dispute Settlement – A sequel' (n 6) 127–132.

²⁶ Cf De Brabandere and da Cruz (n 16) 213–214.

²⁷ See Commission, 'CETA Press release' (n 12); On the termination of negotiations regarding the other formerly envisaged MEGA-Regional, TTIP, see Commission, 'United States EU trade relations with the United States. Facts, figures and latest developments' <https://policy-trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/united-states_en> accessed September 15th 2022.

against a public interest,²⁸ hence only the one of FET is presently scrutinized. Similar divergences are also obvious in an intra-EU milieu,²⁹ and to create a common denominator between Union law and IIL, in the specific balancing between economic and fundamental rights, these latter are only weighted vis-à-vis the fundamental freedoms of EU law.

1.4. Method and materials

1.4.1. A legal doctrinal method of comparative perspectives

In such weighting, and in all source examinations of this thesis, a legal doctrinal method is taken as a point of departure. The express intent being to define the contents of a norm (the proportionality principle) within a given legal context (EU law or IIL), the applied modus is what Smits would categorize a *descriptive* use of legal doctrinal research, something which suitably achieves the (extended) objective of this work; namely to supply a foundation for discussions on possible incoherences within the system of EU fundamental rights protection.³⁰ While thus legal doctrinal, the approach here taken however has to tackle a constant interlinkage between two different systems. In this operation it is important to keep in mind that each system has its own methodology for legal interpretation and the subsequent use of sources, and where EU fundamental rights proportionality is construed to match the way it could materialize in ISDS under the CETA, as well as later transposed into IIL, it cannot therefore be taken for granted that it takes a form identical to what would be the case in an intra-Union context.³¹ Conversely, not all aspects of IIL are of relevance, but solely the ones which relate to the possible applicability of EU proportionality therein. Thus both systems are throughout this thesis gazed upon partly through the prism of an external legal environment, and therefore the doctrinal method applied necessitates a partly comparative perspective.³²

²⁸ Cf Tietje and Crow (n 8) 97–99 and 102–104; and De Brabandere and da Cruz (n 16) 213–214.

²⁹ See further Sections 3.2–3.4.

³⁰ Cf Jan M. Smits, ‘What Is Legal Doctrine?: On The Aims and Methods of Legal-Dogmatic Research’ in Edward L. Rubin, Hans-W. Micklitz and Rob van Gestel (eds.), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017) 210 and 213 ff.

³¹ Cf Jaakko Husa, ‘Comparative Law, Legal Linguistics and Methodology of Legal Doctrine’ in Mark van Hoecke (ed.), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011) 209; Smits (n 30) 211 and 223–225; and John Bell, ‘Legal Research and the Distinctiveness of Comparative Law’ in Mark van Hoecke (ed.), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011) 169–172.

³² See Husa (n 31) 210.

This is explained by the fact that law, from an authoritarian point of view, justifies itself with reference to nothing but its own system of rules. To fully grasp how a norm could, or would, function in a specific legal regime, a hermeneutic approach duly has to be employed. The observer accordingly must apply the norm in concordance with that legal system, in the same manner as would its institutions and by the same interpretational logic.³³ In light of these demands, the construction of proportionality in an EU law milieu and its subsequent application in an IIL context therefore requires loyalty to two different authorities. Both with their very own constraints what concerns legal sources and their interpretation.³⁴

1.4.2. Sources and interpretational considerations

To provide sound reasoning when conveying the current state of the law, by use of the legal doctrinal method, interpretations supporting such reasoning must be based on a source hierarchy accepted in the legal system of examination.³⁵ Establishing this hierarchy will further require an understanding of the interpretative tools that lawyers of this specific system adhere to.³⁶ While providing a brief explanation of sources chosen for this thesis, a clarification is therefore concurrently given as to how these conform to the methods and sources each respective system applies in legal interpretation.

1.4.2.1. EU law

As should undeniably be the case with any doctrinal examination, the basis for scrutiny of EU law is sought in its binding sources,³⁷ which include e.g. primary and secondary law, the CFR, general principles of law and judgements as well as opinions from the CJEU delivered under Article 218(11) TFEU.³⁸ For the construction of EU fundamental rights proportionality, the jurisprudence

³³ See Bell (n 31) 167–171.

³⁴ Cf Smits (n 30) 223–225.

³⁵ See Jan Kleineman, 'Rättsdogmatisk metod' in Maria Nääv and Mauro Zamboni (eds.), *Juridisk metodlära* (2nd ed., Studentlitteratur, 2018) 27 ff.

³⁶ Cf Kent Greenawalt, *Realms of legal interpretation: core elements and critical variations* (Oxford University Press, 2018) 97, who e.g. makes a distinction between easily and more difficultly amended constitutions, where the former would likely be interpreted closer to the actual wording, as where the latter would have to be interpreted dynamically to account for modern values (and would therefore require recourse to later materials [my comment]); Cf also Smits (n 30) 225.

³⁷ Cf Kleineman (n 35).

³⁸ See TEU, articles 6 and 19; TFEU, articles 216(2) and 218(11); Case C-26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] EU:C:1963:1; and Case C-6/64 *Costa v E.N.E.L* [1964] EU:C:1964:66.

of the Court has been especially instrumental³⁹ and is therefore devoted a primary role, alongside (non-binding) doctrinal works used for summary reports, contextualization and as inroads to the former.⁴⁰ What concerns the CETA, albeit binding EU law,⁴¹ the treaty is mainly reviewed from an IIL perspective. Yet where an internal Union outlook can contribute to understanding how it has been constructed, the CJEU's *Opinion 1/17*,⁴² on the treaty's compatibility with EU law, is consulted.

In review of these sources, the interpretational methods deployed by the CJEU⁴³ must be adhered to. The Court adopts many different approaches, but in light of the dynamic nature of EU law and the strive for continuing European integration inherent therein, it has over the years shown a certain predisposition towards teleological interpretations.⁴⁴ There are certainly other ways to weigh different normative values of EU law interpretations,⁴⁵ but since the method presently applied relies heavily on CJEU case law (what concerns analysis of EU law), and is descriptive in nature, adherence to that interpretative modus is simply consequential.

1.4.2.2. IIL

Although each sub-regime of international law adopts its somewhat unique view on source methodology,⁴⁶ assessment always begins in the binding sour-

³⁹ See Jörgen Hettne, 'EU:s rättskällor' in Ida Otken Eriksson and Jörgen Hettne (eds.), *EU-rättslig metod: teori och genomslag i svensk rättstillämpning* (2nd ed., Norstedts Juridik, 2011) 44, 63 and 66; and Paul Craig, *EU Administrative Law* (3rd ed., Oxford University Press, 2018) 643; Cf also Rüdiger Stotz, 'The Case Law of the CJEU' in Karl Riesenhuber (ed.), *European Legal Methodology* (1st ed., Fritz Thyssen Foundation (tr), Intersentia, 2017) 548.

⁴⁰ See Hettne 'Rättskällor' (n 39) 120–122; Cf also Kleineman (n 35) 21 and 28.

⁴¹ Cf Publications Office of the European Union, 'International agreements and the EU's external competences' (2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legisum:ai0034>> last updated April 8th 2020.

⁴² *Opinion 1/17 EU-Canada CET Agreement* [2019] EU:C:2019:341.

⁴³ Sole actor with authority to deliver binding interpretations on EU law, see TEU, article 19.

⁴⁴ See Jörgen Hettne, 'EU-rättsliga tolkningsmetoder' in Ida Otken Eriksson and Jörgen Hettne (eds.), *EU-rättslig metod: teori och genomslag i svensk rättstillämpning* (2nd ed., Norstedts Juridik, 2011) 158–159 and 168; Rudolf Streinz, 'Interpretation and Development of EU Primary Law' in Karl Riesenhuber (ed.), *European Legal Methodology* (1st ed., Fritz Thyssen Foundation (tr), Intersentia, 2017) 156 and 162–163; and Karl Riesenhuber, 'Interpretation of EU Secondary Law' in Karl Riesenhuber (ed.), *European Legal Methodology* (1st ed., Fritz Thyssen Foundation (tr), Intersentia, 2017) 236–237.

⁴⁵ Cf Riesenhuber (n 44) 235–236.

⁴⁶ See Jean d'Aspremont and Samantha Besson, 'Sources of International Law: An Introduction' in Jean d'Aspremont and Samantha Besson (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford University Press, 2017) 6.

ces of international law, which consist of treaties,⁴⁷ customary international law (CIL) and general principles^{48,49} What is moreover permitted is to supplement these with doctrinal works and precedence.⁵⁰ Albeit there being no rule of stare decisis in international law⁵¹ the latter is heavily relied upon by arbitral tribunals⁵² and therefore also by this thesis. Due to the nowadays apparent convergence between trade law and IIL in the realm of public policy exceptions,⁵³ WTO case law is additionally consulted. However, as there exists no central source of case law,⁵⁴ doctrinal works are also used to provide input on possible IIL interpretations.⁵⁵ Other complementary sources of IIL are furthermore soft law instruments,⁵⁶ of which publications from i.a. the ILC and UNCTAD are employed below to support findings in their binding counterparts. Lastly, what is clarified through the subsequent chapters is that interna-

⁴⁷ Sometimes complemented by interpretive statements, on their normative value see Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) 117.

⁴⁸ Through the division in article 38 of the ICJ Statute it becomes clear that general principles of law do not have to enjoy customary status to count as relevant sources. On their stand-alone applicability see *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1 (Award, 31 March 2010) para 187.

⁴⁹ See Statute of the International Court of Justice (ICJ Statute) [1945] 832 USTS 993, article 38(1)a–c.

⁵⁰ See the ICJ Statute, article 38(1)d and 59.

⁵¹ See e.g. *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17 (Decision on Jurisdiction, 26 April 2005) para 23.

⁵² See Rudolf Dolzer, ‘Interpretation and Intertemporal Application of Investment Treaties’ in Christoph Schreuer, Rudolf Dolzer and Ursula Kriebaum (eds.), *Principles of International Investment Law* (3rd ed., Oxford University Press, 2022) 45–47; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3 (Award, 4 October 2013) paras 111–116; and *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07 (Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007) paras 66–67; To note is that this is particularly true for case law interpreting vague IIA standards, which have necessarily had to be developed through case law. On this point, see further Stephan W. Schill, ‘Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law’ in Jean d’Aspremont and Samantha Besson (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford University Press, 2017) 1103–1105.

⁵³ See Jürgen Kurtz and Sungjoon Cho, ‘Convergence and Divergence in International Economic Law and Politics’ (2018) 29 EJIL 186–198.

⁵⁴ See Dolzer, ‘Interpretation and Intertemporal Application’ (n 52) 47.

⁵⁵ As always when doctrine is used to establish the state of the law, its weight is determined by its logic of reasoning, cf Kleineman (n 35) 33–34.

⁵⁶ See Moshe Hirsch, ‘Sources of International Investment Law’ (Research Paper No. 05-11, International Law Forum of the Hebrew University of Jerusalem Law Faculty, 2011) 23.

tional law is not the only set of norms applicable in IIL.⁵⁷ Instead, arbitral tribunals often need to take account of national laws relevant to disputes, making them not sources of international law but sources relevant to an analysis of IIL such as the present.⁵⁸

As regards interpretational considerations the IIA is no doubt the source most central,⁵⁹ and as tribunals thus take the VCLT's⁶⁰ rules on treaty interpretation as their frame of reference,⁶¹ highly similar to the ICJ Statute what concerns source identification,⁶² it is difficult to differentiate between source and interpretative methodology. Concerning the latter it can nevertheless be mentioned that it all in all comes quite close to the methods employed by the CJEU, even though it is more loyal to the wording of provisions.⁶³ Nonetheless, even arbitral tribunals must take note of a similarly dynamic character of international law, and therefore frequently resort to reasoning oriented around the objects and purposes of treaties.⁶⁴ Following this methodology the CETA takes the centre stage, but as investment tribunals commonly go beyond the relevant IIA in solving interpretative issues, so does this thesis.

1.5. State of current research

In Union theory and practice there is no shortage of materials neither on proportionality nor on the interactions between EU law and other international legal orders. As concerns the latter topic that interrelation is however, apart

⁵⁷ See further Section 4.1.2; and Jorge E. Viñuales, 'Sources of International Investment Law: Conceptual Foundations of Unruly Practices' in Jean d'Aspremont and Samantha Besson (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford University Press, 2017) 1069–1070 and 1073–1074.

⁵⁸ Cf Rudolf Dolzer, 'History, Sources, and Nature of International Investment Law' in Christoph Schreuer, Rudolf Dolzer and Ursula Kriebaum (eds.), *Principles of International Investment Law* (3rd ed., Oxford University Press, 2022) 15–16.

⁵⁹ See Dolzer, 'Interpretation and Intertemporal Application' (n 52) 35–37; Cf also *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8 (Decision on Jurisdiction, 3 August 2004) paras 80–81.

⁶⁰ Vienna Convention on the Law of Treaties (VCLT) [1969] 1115 UNTS 331.

⁶¹ See the VCLT, articles 1 and 31–33; Newcombe and Paradell (n 47) 110; and Ingo Venzke, 'Sources in Interpretation Theories: The International Law-Making Process' in Jean d'Aspremont and Samantha Besson (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford University Press, 2017) 404 and 406–407; Cf also UNCTAD, 'Dispute Settlement – A sequel' (n 6) 132–133.

⁶² Cf the VCLT, articles 31–32; with the ICJ Statute, article 38(1).

⁶³ Cf *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14 (Award, 8 December 2008) paras 78–82 and further therein made citations.

⁶⁴ See Newcombe and Paradell (n 47) 111–114; and Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Hart Publishing, 2016) 215; Cf also the VCLT, article 31(3)c.

from a few exceptions,⁶⁵ normally framed as an issue of autonomy of EU law.⁶⁶ This modus disregards the unavoidable constraints that Union norms have to withstand on the IIL arena, when faced with then hierarchically superior international law. In an attempt to add to research which properly considers also external perspectives on EU law, this thesis therefore, by placing EU proportionality within international law source methodology, examines that legal order from an IIL viewpoint. Yet what exactly constitutes such a perspective is difficultly determined. Practice and doctrinal works in international law (and in IIL in particular) point in different directions what concerns many of its fundamentals,⁶⁷ such as proper source methodology⁶⁸ or differentiations between legal concepts,⁶⁹ but more importantly as regards the systemic framework for proportionality within this system.⁷⁰ The present ambition is to convey these varying angles but also to argue for which ones that should be prevailing, as to highlight the importance of a settled methodological process for legitimizing the introduction of interest balancing in IIL. Choosing EU fundamental rights proportionality as a specific incarnation of reasonableness caters to the same goal, but moreover facilitates what is a strive of this work to depart from the partly instrumental look upon domestic norms in ISDS.⁷¹ In this way discussions on fragmented obligations within international legal systems is widened,⁷² to include also the specific conundrum of fundamental rights protection for EU Member States, concurrently torn as they are between national, supra- and international demands.

⁶⁵ See e.g. Katariina Särkännä, 'EU Law in investment arbitration: a view from international arbitral tribunals' (2021) 5 *Europe and the World: A law review* 1; and Jan Wouters et al., *International law: a European perspective* (Bloomsbury Publishing, 2018).

⁶⁶ See e.g. Opinion 1/17 (n 42); and Violeta Moreno-Lax, 'The Axiological Emancipation of a (Non-)Principle: Autonomy, International Law and the EU Legal Order' in Inge Govaere and Sacha Garben (eds.), *The Interface Between EU and International Law: Contemporary Reflections* (Hart Publishing, 2019) 45.

⁶⁷ See d'Aspremont and Besson (n 46) 14–17.

⁶⁸ Cf e.g. José E. Alvarez, 'Beware: Boundary Crossings' - A Critical Appraisal of Public Law Approaches to International Investment Law' (2016) 17 *JWIT* 171; with Viñuales (n 57).

⁶⁹ Cf e.g. Anastasios Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 *Journal of International Dispute Settlement* 31; with Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (Oxford University Press, 2015).

⁷⁰ Cf e.g. Alec Stone Sweet and Giacinto Della Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez' (2014) 46 *NYU Journal of International Law & Politics* 911; with De Brabandere and da Cruz (n 16).

⁷¹ See e.g. Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press, 2017); and Newcombe and Paradell (n 47).

⁷² See e.g. ILC, 'Fragmentation of international law : difficulties arising from the diversification and expansion of international law : report of the Study Group of the International Law Commission' (A/CN.4/L.682, Geneva, 2006).

1.6. Outline

In the center of examination is a clearly defined context of applicability, and the chosen outline tries to mimic the steps that need be taken to place EU fundamental rights proportionality in that milieu.

First studied is the standard opening the door for EU proportionality to be applied within IIL, the investment protection rule of FET (Chapter 2). In the following chapter (Chapter 3), the norm attempted to be applied to disputes over that provision, the EU principle of proportionality as perceived in an EU fundamental rights environment, is constructed.

With the synthesized principle, and the level of fundamental rights protection it offers, as springboard, its possible application in CETA FET disputes, concerning Member States' rights protective measures, is scrutinized in a later chapter (Chapter 5). Before tackling this task there exists however a need to understand the forms in which EU law in general, and by extension the principle of proportionality in particular, can be of relevance in IIL. The chapter (Chapter 4) foregoing the undertaking of actual application is thus devoted to mapping out how national, EU and international law materialize and interrelate on the IIL arena. The issues portrayed in this part of the thesis further act as a common thread for the presentations on applicability in Chapter 5.

The last chapter (Chapter 6) presents a condensed analysis and finishing conclusions over the main findings, in an attempt to review in what ways the relationship between EU and international law under the IIL regime affects how EU fundamental rights can be protected therein.

2. Fair and Equitable Treatment

2.1. The basics

The importance of the FET standard in IIL cannot be over-stressed: it forms part of almost every IIA, it is the most invoked foundation of claims and it is also one of the standards to have generated the largest amount of awards in favor of investors.⁷³ FET follows the general rationale of IIL in pursuing autonomous standards, meaning that its standard of treatment is neither contingent upon how a host state treats its own nationals⁷⁴ or more generally upon what is considered fair and equitable under national law^{75,76} In its independence however, the standard can impartially be described as rather vague or at least as very generally defined,⁷⁷ a trait which some view as an ill-chosen award of arbitral discretion, whereas others applaud it as necessary for targeting a wide array of host state measures.⁷⁸ No matter the camp chosen, it is anyhow beyond doubt that the vagueness of the provision has somewhat been tackled through arbitral practice.⁷⁹ From such jurisprudence it is therefore possible to elaborate on several compounds of FET, nowadays viewed with great unity as definitive parts of the standard.⁸⁰ As Dolzer argues,⁸¹ the entirety of these are

⁷³ See Rudolf Dolzer, ‘Standards of Protection’ in Christoph Schreuer, Rudolf Dolzer and Ursula Kriebaum (eds.), *Principles of International Investment Law* (3rd ed., Oxford University Press, 2022) 186; and Roland Kläger, ‘Revising Treatment Standards – Fair and Equitable Treatment in Light of Sustainable Development’ in Markus Krajewski and Steffen Hindelang (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press, 2016) 65–66.

⁷⁴ See e.g. *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1 (Award, 9 January 2003) paras 176–178.

⁷⁵ See e.g. *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 (Award, 31 October 2011) paras 336–337.

⁷⁶ Cf Dolzer, ‘Standards of Protection’ (n 73) 188.

⁷⁷ For an example of an arguably standard FET clause, see Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment [1992] 31 ILM 124, article II(2)a; See also Kläger (n 73) 66; On the unavoidable ‘vagueness of what is fair’, see further Güneş Ünüvar, ‘The vague meaning of the Fair and Equitable Treatment principle in investment arbitration and new generation clarifications’ in Anne Lise Kjær and Joanna Lam (eds.), *Language and Legal Interpretation in International Law* (Oxford University Press, 2022) 271.

⁷⁸ See Kläger (n 73) 67–68; Dolzer, ‘Standards of Protection’ (n 73) 186–188; and Caroline Henckels, ‘Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP’ (2016) 19 *Journal of International Economic Law* 32–33.

⁷⁹ See Dolzer, ‘Standards of Protection’ (n 73) 187.

⁸⁰ See Kläger (n 73) 66.

⁸¹ See Dolzer, ‘Standards of Protection’ (n 73) 191.

probably best captured through the award in *Tecmed*⁸², which clarifies that investors (legitimately) expect treatment from host states which is: (a) consistent, (b) unambiguous, (c) transparent, (d) based on a stable legal framework, (e) devoid of arbitrariness and (f) in respect of the principle of legality.⁸³ In determining whether host state treatment complies with these expectations, note must be taken of the FET provision's ordinary meaning, relevant international law and specifically the principle of good faith.⁸⁴ While almost successful in providing a comprehensive overview over different sub-standards of FET, the *Tecmed* award requires some complement to be found in e.g. the *MTD*⁸⁵ and *Saluka*⁸⁶ awards, which further lists due process, non-discrimination and proportionality and/or reasonableness as criteria by which fair and equitable treatment is to be scrutinized.⁸⁷

2.2. Proportionality and FET

As for the last mentioned factors, the role of proportionality in determinations of FET has been depicted using not one but many different brushes. Several authors and tribunals are of the impression that a balancing of interests, be it under the label of proportionality or reasonableness, is inherent in application of the FET standard.⁸⁸ Especially Schill delivers a convincing account on the standard as a transposition of the rule of law, to be found in both domestic law as well as international legal systems such as the EU *acquis*. From this perspective, FET is a method used in review of public action.⁸⁹ Not in contradiction to these statements, but focused on attributing the exercise of interest balancing to specific sub-elements of the standard, others have presented pro-

⁸² *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2 (Award, 29 May 2003).

⁸³ See *Tecmed* (n 82) para 154.

⁸⁴ See *Tecmed* (n 82) paras 153 and 155.

⁸⁵ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7 (Award, 25 May 2004).

⁸⁶ *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL (Partial Award, 17 March 2006).

⁸⁷ See *MTD* (n 85) para 109; and *Saluka* (n 86) para 309.

⁸⁸ See *Saluka* (n 86) paras 300–305, especially 300; Kläger (n 73) 69; Bücheler (n 69) 186; and Federico Ortino, 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing' (2017) 30 LJIL 72, 81 and 85; Cf also *Suez Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 (Decision on Liability, 30 July 2010) paras 103 and 139–140 which concerns expropriation but whose clarifications on the CIL status of the *police powers* doctrine should be equally applicable on FET.

⁸⁹ See Stephan W. Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 154–155, 158–159, 169 and 175–176.

proportionality as a step in examination of arbitrariness,⁹⁰ legitimate expectations,⁹¹ stability of legal frameworks⁹² and good faith⁹³. Not in direct reference to proportionality, but evidently capable of having its domestic version scrutinized, tribunals have also many times looked to domestic legality of host state measures to inform what is FET.⁹⁴

The major difference between the two positions is that it would be possible to argue under the second line of reasoning that for proportionality assessments to be of relevance, the studied FET clause would have to include the criteria to which materialization of the principle is connected. Such arguments can easily become of importance, since FET provisions, although there is unity regarding which elements they *can* include, are constructed rather diversely.⁹⁵ Submitted is that no line of reasoning is necessarily more correct than the other, rather they should be combined to fully explain what is the proper function of the FET standard. For starters, FET cannot be equated to a principle of proportionality, if that was ever the intention of different IIA authors they would have no doubt formulated these provisions differently. But be that as it may there is unquestionably reason behind the views of e.g. Schill and of the *Suez/Vivendi* tribunal in that the standard introduces limitations to the regulatory sovereignty of states. Instead of introducing these limits by means of a general proportionality principle however, they adhere to other criteria (arbitrariness, good faith etc). Yet these criteria at the same time open up for applying proportionality tests to define their meaning, and consequently those can be applied in adjudication over FET claims, but only in reference to the standard's different sub-elements. Elements which the FET provision under examination therefore must include.

⁹⁰ See e.g. *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (Award, 8 July 2016) paras 389–391; and Ursula Kriebaum, 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 JWIT 475; See also *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1 (Award, 30 August 2000) paras 86–94; read jointly with Schill, 'Fair and Equitable Treatment' (n 89) 171.

⁹¹ See e.g. *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9 (Award, 5 September 2008) paras 258–262; and *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18 (Decision on Jurisdiction and Liability, 14 January 2010) paras 273 and 285.

⁹² See e.g. *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30 (Decision on Responsibility and on the Principles of Quantum, 30 November 2018) paras 315–317 and 322–323; and *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26 (Award, 8 December 2016) paras 620–625.

⁹³ See e.g. *Bayindir Insaat Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29 (Decision on Jurisdiction, 14 November 2005) paras 242–252.

⁹⁴ See e.g. *Bivater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Award, 24 July 2008) paras 615–621; and *Quiborax SA v Bolivia*, ICSID Case No. ARB/06/2 (Award, 16 September 2015) para 292.

⁹⁵ See Kläger (n 73) 66.

Subsequent to establishing that there is room for proportionality assessments within FET follows the issue of which values to lay as foundation for such reviews and by which level of scrutiny they should be performed.⁹⁶ In cases where the domestic legality of measures stands under FET examination, the solution is quite simple. Here, it would be observance of domestic law, and thus application of domestic proportionality tests, if that law so requires, that would determine if treatment has been fair and equitable.⁹⁷ But apart from such situations, how to identify and measure relevant interests could rather be guided by the relevant IIA, but also by other applicable sources of law.⁹⁸ From the perspective of this thesis, the test which should be applied to secure proper protection of EU fundamental rights is the proportionality principle as construed in their intra-EU context. Returning to the venues by which it is possible to invoke EU law as applicable source in ISDS in Chapter 4, Chapter 3 is devoted to charting out what specifics this principle entails. Yet before beginning that description, a few words must first be mentioned on the FET clause of the CETA and possible restrictions it might imply as for invocation of proportionality assessments in FET reviews.

2.3. The FET standard under the CETA

2.3.1. The basics

As an answer to what has been a heated debate concerning the sometimes substantially scrutinizing review of host state legislation that accompanies the FET standard, the CETA introduces a quite restrained FET provision.⁹⁹ Its article 8.10 first generally establishes that foreign investors should be treated fairly and equitably, but then goes on to provide a list of host state measures that are capable of breaching this standard. Whether this list is a closed one is not apparent from the letter of the law,¹⁰⁰ but since a regular review process is

⁹⁶ Cf Bücheler (n 69) 196; and Ortino, ‘A Case Against Strict Proportionality Balancing’ (n 88) 72–73.

⁹⁷ Cf *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11 (Award, 12 October 2005) paras 176–178; and Schill, ‘Fair and Equitable Treatment’ (n 89) 163.

⁹⁸ See Bücheler (n 69) 196–198.

⁹⁹ See Kläger (n 73) 66–68; Cf also Ünüvar (n 77) 272–274.

¹⁰⁰ See Henckels (n 78) 36.

instated as the only way to change the list¹⁰¹ it suffices to presume that such is the case.¹⁰² What can be established as of now is therefore (a) that listed behaviors are capable of constituting breaches of FET,¹⁰³ (b) that an investor's legitimate expectations *may* affect the review of whether an element of the list has been actualized¹⁰⁴ and lastly (c) that a measure's incompatibility with domestic law 'in and on itself' does not equate a FET breach.¹⁰⁵

Apart from this construction of FET, the CETA further goes to considerable length to give the right to regulate a high ground position vis-à-vis its investment protection rules.¹⁰⁶ With bearing on the FET standard this is done in its chapter on investment, where it is first established that the parties maintain the right to regulate in pursuit of certain public interests and secondly clarified that 'merely the fact' that an adopted regulation negatively affects investments is not in itself sufficient to establish that an obligation under the chapter has been breached.¹⁰⁷

The traces from arbitral case law are evident from the set-up to which the CETA adheres, but in individualizing fashion it removes some of the sub-criteria there listed and also evidently tries to stave the risk of regulatory chills by its clarifications meet exceptions.¹⁰⁸ Be that as it may, after a closer look it is less obvious if these specific features bring with them any concrete differences when applied. To begin with, the closed list, which effectively removes e.g. the

¹⁰¹ See the CETA, article 8.10(3); On August 29th 2022 the Commission declared that a review proposal, which it has drafted together with Germany, will be brought forth by the EU after it has been agreed on by all Member States. The proposal contains several interesting modifications to the FET standard, but as the law now stands they are not close to becoming part of the Treaty text. See Commission, 'Statement on CETA Agreement' (STATEMENT/22/5223, 2022); and Damien Charlotin, 'Analysis: Germany and European Commission Propose Draft Decision on Interpretations of CETA, Addressing Scope of FET and Expropriation Provisions, as well as Climate Change' (IA Reporter, 8 September 2022) <<https://www.iareporter.com.ludwig.lub.lu.se/articles/analysis-germany-and-european-commission-propose-draft-decision-on-interpretation-of-ceta-addressing-scope-of-fet-and-expropriation-provisions-as-well-as-climate-change/>>.

¹⁰² Cf. Ünüvar (n 77) 286; Opinion 1/17 (n 42) para 158; and Arnaud de Nanteuil, *International Investment Law* (Edward Edgar Publishing, 2020) 410.

¹⁰³ The listed behaviors are: (a) denial of justice, (b) fundamental breach of due process (c) manifest arbitrariness, (d) targeted discrimination on manifestly wrongful grounds and (e) abusive treatment of investors, see the CETA, article 8.10(2).

¹⁰⁴ See the CETA, article 8.10(4).

¹⁰⁵ See the CETA, article 8.10(7).

¹⁰⁶ See the CETA, articles 8.9 and 28.3; For interpretative clarifications on these provisions, see also the Joint Interpretative Instrument, paras 1(c)-(e), 2, 6(a)-(b) and concordance table; Cf also Henckels (n 78) 46–48; and Kläger (n 73) 75–76.

¹⁰⁷ See the CETA, article 8.9(1)–(2).

¹⁰⁸ See Ünüvar (n 77) 287; Cf also Henckels (n 78) 46–48.

criteria of reasonableness,¹⁰⁹ would not necessarily remain as closed in actual ISDS. The removed sub-elements can qualify as CIL or general principles of law, something which would make them applicable anyway.¹¹⁰ Furthermore, it is not unusual that certain of these are extracted from one another, as has been the case e.g. when demands for stable legal environments have been distilled from the requirement of legitimate expectations.¹¹¹ Yet lastly, the clarifications on the right to regulate may fulfill a function of some sort. To some extent their practical importance is questionable, judging from the fact that this right is already well-established in practice,¹¹² but that the authors of the CETA despite this fact have chosen to have it (over-)repeatedly recognized¹¹³ could at least act as an interpretative hint of the extraordinary importance they attribute to this power.¹¹⁴ More importantly still, because the right is in this case directly connected to the FET standard it can act as a possible inroad for proportionality assessments of this clause.¹¹⁵

2.3.2. Proportionality and FET under the CETA

Because proportionality is contingent upon sub-standards of FET, it should be established whether the CETA's limitations of such factors have any effects on the possibility to invoke proportionality assessments of FET claims. A suitable starting point would be listing the elements that have been held to include assessments of a proportionality character, and these are: arbitrariness, legitimate expectations, stability of legal frameworks and the principle of good faith.¹¹⁶ For the latter two, both obviously missing from the CETA's FET definition, exclusion does not imply that they cannot influence tribunals to resort to proportionality reasoning. Stability requirements are as presented possibly inherent

¹⁰⁹ As pointed out by Ünüvar, see Ünüvar (n 77) 287.

¹¹⁰ See Kläger (n 73) 75–77; On applicability of CIL and general principles in ISDS, see further Section 4.1.

¹¹¹ See e.g. *RREEF* (n 92) paras 316, 320 and 322–324; See also Ünüvar (n 77) 287; and Kläger (n 73) 75–77.

¹¹² See e.g. *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16 (Award, 2 October 2006) paras 423–425; *SD. Myers, Inc. v. Government of Canada*, UNCITRAL (Partial award, 13 November 2000) paras 252–257; and *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7 (Award, 13 November 2000) paras 65–71.

¹¹³ Except for its mentioning in relation to the FET clause and in the Joint Interpretative Instrument it is also underlined multiple times in the Treaty Preamble, see the CETA, Preamble.

¹¹⁴ Cf. *Siemens* (n 59) paras 80–81; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 (Award, 28 September 2007) para 385; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (Decision on Jurisdiction, 8 February 2005) paras 192–194 and 197; and Dolzer, 'Interpretation and Intertemporal Application' (n 52) 36–37.

¹¹⁵ Cf. Section 2.2.; See further Section 2.3.2.

¹¹⁶ See Section 2.2.

in the criteria of legitimate expectations (which is included under the CETA's FET standard¹¹⁷), and as a general principle,¹¹⁸ good faith would be possible to invoke in assessment of FET claims no matter its in- or exclusion in the relevant clause.¹¹⁹

Contrary to the elimination that stability and good faith have had to withstand, the two former criteria (arbitrariness and legitimate expectations) instead make the list of the CETA. For both, the relevance of a balancing exercise therefore remains, but the actual situations where such possibilities present themselves might all the same diminish. As concerns arbitrariness, it has to be *manifest*, an add-on most likely reducing the amount of ambiguous cases where a thorough proportionality examination would have to be undertaken.¹²⁰ For legitimate expectations the CETA also introduces certain qualifications, it is only where the host state makes *specific representations to an investor* that these can be held to exist, and consequently it is only then that these must be balanced vis-à-vis regulatory interests of host states.¹²¹ They furthermore do not constitute a free-standing basis, but are to be combined with sub-elements of the list, meaning that they only entail consequences if breached in e.g. a manifestly arbitrary manner.¹²² This is in stark contrast to IIL in general, where a broad reading of legitimate expectations normally take the center stage of the FET standard.¹²³ The CETA's version conversely being considerably slimmed down ultimately entails that the possibility of invoking the requirement of stable legal environments also diminishes,¹²⁴ and thereby further the opportunity to invoke proportionality tests on that basis.

Apart from if they are invoked through the principle of good faith, it therefore looks as if the rationale for resorting to proportionality exercises diminishes under the CETA. Yet it is by no means completely eradicated, and to note further is that the four now treated sub-elements of FET are not the only proportionality inroads to the clause. A more constant link between proportionality and the CETA's FET provision can first of all be established through its article 8.10(7). While this provision states that solely domestic illegality cannot constitute a FET breach, an *e contrario* reading implies that such determinations

¹¹⁷ See the CETA, article 8.10(4).

¹¹⁸ See e.g. *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5 (Award, 15 April 2009) paras 106–107.

¹¹⁹ See Section 2.2.

¹²⁰ Cf Henckels (n 78) 37; and Kriebaum, 'FET and Expropriation' (n 90) 477.

¹²¹ See the CETA, article 8.10(4); Cf also Section 2.2.

¹²² Cf Henckels (n 78) 38.

¹²³ See Henckels (n 78) 34; Bücheler (n 69) 186; and Kläger (n 73) 68–69.

¹²⁴ Cf Section 2.2.

can still be of relevance in assessment of the listed sub-standards. And when establishing domestic illegality, an examination of proportionality under national law can no doubt materialize.¹²⁵ But finally and more notably still, it is here submitted that from the clarifications on the right to regulate, made in direct connection to the FET provision, a general¹²⁶ inroad to proportionality emerges. Recourse to this right is first of all contingent upon it being exercised in relation to certain legitimate objectives, without it being clarified in the treaty when a measure should be regarded as pursuing such purposes. And furthermore, nowhere in its text is there to be found any stipulations as to the effect that a host state measure should, under all circumstances, be accepted simply because it has been enacted in pursuit of a legitimate public interest.¹²⁷ The right to regulate therefore does not look to be absolute, and to determine what are its limits in relation to the opposite right of FET, when the latter has been *prima facie* breached, enter: proportionality.

2.4. Summary

The FET standard is one of the major, if not the major, substantial investment protection rule(s) included in investment treaties. It is an autonomous IIL concept which could not care less of whether a certain host state measure is judged to be fair and equitable under domestic law. In the concept of FET it lies however that a balancing between the interests of host states and investors has to be performed to divine what is fair and equitable in a given situation, and for that operation the standard does not prescribe any particular source of law to be applied. This holds true also for the specific FET standard of the CETA, which despite its relatively narrowed down character either through the sub-elements of the standard that it does list, through other FET criteria either distilled from these or simply applied as general international law, or above all through the provision's general exception for the right to regulate, points to proportionality assessments to inform adjudication on fairness and equitability.

¹²⁵ See Section 2.2.

¹²⁶ As opposed to proportionality assessments actualized in relation to specific sub-elements of FET.

¹²⁷ Cf jointly the CETA, articles 8.9(1)–(2); and the Joint interpretative instrument, paras 1(d) and 2.

3. The EU general principle of proportionality (in a fundamental rights environment)

3.1. The basics

The proportionality principle was introduced into Union law by the CJEU, which, drawing upon Member States' legal traditions, saw it fit to fashion some form of systemized protection against ill-founded and overly-infringing interventions from public authority.¹²⁸ Since then codified and well-entrenched in EU law,¹²⁹ the principle today takes many different forms across the Community acquis.¹³⁰ Before addressing such differences however, a basic form should be outlined. For a principle on which the scholarly material is, without strict delimitation, insurmountable, this task can nonetheless easily turn into one of contention. Despite some divergence in how the test is depicted, it is all the same submitted that there exists unity what concerns its substance.¹³¹ Regarded by this author as the most pedagogic explanation, the one given by von Danwitz will be used here. As the latter puts forth, the proportionality test consists of *four* different stages applied to an EU or a Member State measure:

(a) Does the measure aim at fulfilling an objective viewed as legitimate in light of the EU legal order,¹³²

(b) Does the measure fulfill this objective effectively,¹³³

¹²⁸ See Case 11/70 *Internationale Handelsgesellschaft* [1970] EU:C:1970:114, paras 14–16; Craig (n 39); Thomas von Danwitz, 'Thoughts on Proportionality and Coherence in the Jurisprudence of the Court of Justice' in Allan Rosas, Nils Wahl and Pascal Cardonnel (eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing, 2012) 367–368; and Alison L. Young and Gráinne De Búrca, 'Proportionality' in Stefan Vogenauer and Stephen Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing, 2017) 136.

¹²⁹ See e.g. TEU, article 5(4); See also Craig (n 39).

¹³⁰ For an account of the different tracks taken with the test, see further Christoph Sobotta and Juliane Kokott, 'The Evolution of the Principle of Proportionality — Towards an Anticipative Understanding?' in Stefan Vogenauer and Stephen Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing, 2017) 167.

¹³¹ Cf e.g. jointly Young and De Búrca (n 128) 133; Craig (n 39) 643–644; and Emily Reid, *Balancing Human Rights, Environmental Protection and International Trade: Lessons from the EU Experience* (Online ed., Hart Publishing, 2015) 80–81.

¹³² Test of legitimacy [My formulation].

¹³³ Test of appropriateness [See von Danwitz].

- (c) When comparing the measure to other possible ways of fulfilling the objective, does it fulfill the objective at a level of at least equally little impact on the interests of others,¹³⁴ and
- (d) When comparing the positives of fulfilling the objective, to possible negative impacts on the interests of others, is the measure defensible¹³⁵?¹³⁶

Summarized as a whole this test aims at providing an acceptable outcome of an action, and it is thus one of substance.¹³⁷ However, as highlighted by Sobotta and Kokott, the CJEU applies it with more of a procedural focus, which takes a step back from opposite interests by scrutinizing the factual basis of decisions rather than the decisions themselves.¹³⁸ Craig means that this *modus*, which refuses to engage in *stricto sensu* balancing (step (d)), changes the nature of the test. Because without that evaluation, a measure achieving its goal with the least impact possible will be lawful regardless of how huge this most limited impact might be.¹³⁹ Despite tendencies of this sort it might nevertheless be misleading to coin distancing from conflicting interests as part of the basic test, as both the relevant actor and the relevant legal area under scrutiny affect whether the Court engages in adequacy assessments or not.¹⁴⁰ To chart out the contents of the principle to be applied to fundamental rights issues, account must therefore first be taken of which actor that has deployed a measure and in which field this has been done.

3.2. Different actor, different test

Albeit the proportionality principle can be applied both vertically¹⁴¹ and horizontally,¹⁴² with a scope of relevant actors thus spanning from Union Institutions to Member States and individuals, they will not all be of relevance when

¹³⁴ Test of necessity [See von Danwitz].

¹³⁵ Test of adequacy [See von Danwitz], also commonly known under the term ‘proportionality *stricto sensu*’, see Young and De Búrca (n 128) 139.

¹³⁶ See von Danwitz (n 128) 371–372.

¹³⁷ See Young and De Búrca (n 128) 137.

¹³⁸ Cf Sobotta and Kokott (n 130) 168–171.

¹³⁹ See Craig (n 39) 643–644.

¹⁴⁰ For a structured account on these factors and the need for such differentiations, see further Craig (n 39) chapters 19–20; In the case of Member State actions taken to protect fundamental rights, see further Sections 3.2–3.4.

¹⁴¹ See e.g. Case 36/75 *Rutili v Ministre de l’Intérieur* [1975] EU:C:1975:137, para 32.

¹⁴² See e.g. Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] EU:C:2007:809, para 94.

attempting to construct a dispute similar to one that would take place in ISDS under the CETA. Under those circumstances it will always be the investor who challenges Member State measures and consequently it is the proportionality principle as applied in judicial review of Member States' actions that is of essence.¹⁴³ To understand how the CJEU has applied the test in these situations however, a mention initially has to be made regarding the use of the principle in review of EU action.

When assessing the actions of the Union, the CJEU has been careful to replace the policy choices of the Union legislator with ones of its own.¹⁴⁴ Where deployment of measures has involved e.g. a certain degree of facultative choices, the Court has therefore decided to leave the relevant EU actor considerable discretion as to how identified legitimate objectives are to be achieved.¹⁴⁵ In lieu it has applied the aforementioned procedural angle, consequently leaving opposing interests (ie *stricto sensu* evaluations) rather briefly addressed.¹⁴⁶ When actions of the EU are put under the microscope, it is thereby essentially the Union and not the CJEU that decides if contrary interests are at risk or not.¹⁴⁷

Since the Court neither has been aching to apply *stricto sensu* tests towards Member State actions,¹⁴⁸ an equal conclusion could be drawn also for these. In doing so an important discrepancy between Union and Member State measures would however be overlooked. The former are reviewed to limit abuse of powers over which the EU actually resides,¹⁴⁹ whereas the latter to see if there is any exceptional room for Member States to execute powers over which they do not,¹⁵⁰ as these are normally regarded as *prima facie* prohibited derogations from Union integration. While examinations still stay at stage 1-3 of the proportionality principle, opposing interest are thus taken into consideration from

¹⁴³ Cf Tietje and Crow (n 8) 106–109.

¹⁴⁴ Cf Case C-150/94 *United Kingdom v Council* [1998] EU:C:1998:547, para 87; See also von Danwitz (n 128) 370.

¹⁴⁵ See e.g. Case C-491/01 *R v Secretary of State for Health, ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] EU:C:2002:741, paras 122–123; Case C-15/10 *Etimine v Secretary of State for Work and Pensions* [2011] EU:C:2011:504, paras 59–60; and Case C-331/88 *R v Minister for Agriculture, Fisheries and Food, ex parte Fedesa* [1990] EU:C:1990:391, paras 14–16.

¹⁴⁶ See e.g. C-189/01 *Jippes v Minister van Landbouw, Natuurbeheer en Visserij* [2001] EU:C:2001:420, paras 70, 80, 84–86 and 99; Case C-343/09 *Afton Chemical v Secretary of State for Transport* [2010] EU:C:2010:419, paras 28–42; and *Fedesa* (n 145) para 17–18; See also Craig (n 39) 652–653.

¹⁴⁷ See von Danwitz (n 128) 377.

¹⁴⁸ Cf e.g. Case C-510/99 *Tridon* [2001] EU:C:2001:559, paras 53 and 58–59; and Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers und Andibel* [2008] EU:C:2008:353, paras 41–42; See also von Danwitz (n 128) 378; and Reid (n 131) 81.

¹⁴⁹ Cf *Etimine* (n 145) para 59.

¹⁵⁰ Cf Case 8/74 *Procureur du Roi v Dassonville* [1974] EU:C:1974:82, para 5–7.

the get-go, while interests related to e.g. public security or morals instead have to be presented as legitimate defence to infringements of the former.¹⁵¹ The scrutiny applied is accordingly more intense,¹⁵² the CJEU firstly assesses whether objectives brought forth by Member States are actually what they seek to achieve,¹⁵³ and if that is confirmed they then go into close detail when charting out how the relevant necessity assessments are to be conducted.¹⁵⁴

Understandable as it thus might be that there are differences in review, there are however situations in which also the Member States have been awarded a certain discretion by the Court. This often contingent upon the objective a Member State has sought to protect.¹⁵⁵

3.3. Different objective, different test – the fundamental rights factor

One objective, with which the Member States have sometimes successfully defended their derogations, is the objective of fundamental rights protection.¹⁵⁶ For fundamental rights, proportionality is relevant both when invoked in that manner, but also when they themselves face restriction.¹⁵⁷ In disputes under the CETA however, FET will be the obligation from which Member States try to divert,¹⁵⁸ and as regards the current examination relevant case law is therefore only one where Member States have invoked fundamental rights to legitimize their derogations from EU law.

¹⁵¹ See e.g. Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* [1979] EU:C:1979:42; Case 222/84 *Johnston v Chief Constable of the RUC* [1986] EU:C:1986:206, paras 36–38; and Case C-140/03 *Commission v Greece* [2005] EU:C:2005:242, paras 34–36; See also Craig (n 39) 682–684; and von Danwitz (n 128) 378–379.

¹⁵² Cf *Johnston* (n 151) para 36.

¹⁵³ See e.g. Case C-270/02 *Commission v Italy* [2004] EU:C:2004:78, paras 23–26.

¹⁵⁴ See e.g. Case C-390/99 *Canal Satélite Digital SL v Administración General del Estado, and Distribuidora de Televisión Digital SA (DTS)* [2002] EU:C:2002:34, paras 34–43; Case C-334/02 *Commission v France* [2004] EU:C:2004:129, paras 30–34; and Case C-170/04 *Rosengren and ors* [2007] EU:C:2007:313, paras 50–55; See also Craig (n 39) 683–684.

¹⁵⁵ Cf *Schmidberger* (n 19) para 74; and Case C-169/07 *Hartlauer* [2009] EU:C:2009:141, paras 29–30; See also Craig (n 39) 684–687; and von Danwitz (n 128) 378–379.

¹⁵⁶ See e.g. *Schmidberger* (n 19); Case C-36/02 *Omega Spielballen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] EU:C:2004:614; Case C-271/08 *Commission v Germany* [2010] EU:C:2010:426; and Case C-208/09 *Sayn-Wittgenstein* [2010] EU:C:2010:806.

¹⁵⁷ Cf jointly *Schmidberger* (n 19); and *ERT* (n 19); Cf also *Schmidberger*, Opinion of AG Jacobs (n 19) paras 90–95.

¹⁵⁸ Cf the CETA, articles 8.9–10 and 18.

Here, as underlined by AG Jacobs,¹⁵⁹ *Schmidberger* is foundational. The case concerned a demonstration whose execution came to impede the free movement of goods, a demonstration which Austria by reference to i.a. the freedom of assembly (protected under both Austrian and Union law) refused to prohibit.¹⁶⁰ In response the CJEU concluded that not just Austria but also the Union had to adhere to fundamental rights protection, and that this objective could therefore *in principle* legitimately restrict other EU aims.¹⁶¹ Since neither these latter nor the fundamental rights invoked were absolute, a suitable balance nevertheless had to be struck between their respective restriction.¹⁶² In this regard, without completely diverting from assessments of legitimacy and necessity, the Court declared, in stark contrast to its normally detailed necessity examinations, that the national authorities enjoyed a ‘wide margin of discretion’¹⁶³. In the present case Austria had thus been ‘*reasonably entitled* [...] to consider that the legitimate aim [...] could not have been achieved [...] by measures less restrictive to intra-Community trade’¹⁶⁴. Thus, although the classification of Member State measures as *prima facie* prohibited remained, and the proportionality test still stayed at its first three limbs, the CJEU’s *Schmidberger* approach indicates that it will be less strict when fundamental rights are invoked as derogative rationale. This is initially obvious from the express award of discretion, but also from the shallowly conducted legitimacy test, with which the Court merely satisfied itself to proclaim that Austria had been ‘inspired’ by its obligation to respect fundamental rights.¹⁶⁵

The *Schmidberger* line of reasoning was later confirmed in *Omega Spielballen*, in which the CJEU expressly clarified that methods of rights protection were allowed to vary from one Member State to the next.¹⁶⁶ Yet more recent judgments on collisions between interests of economic integration and fundamental rights suggest a more diverse proportionality application, and as that is the contention relevant also to ISDS on Member States’ rights protective actions,¹⁶⁷ these must also be examined to establish if the moderate review of

¹⁵⁹ See *Schmidberger*, Opinion of AG Jacobs (n 19) paras 90–95.

¹⁶⁰ See *Schmidberger* (n 19) paras 10–17, 60–64, 69–72 and 76.

¹⁶¹ See *Schmidberger* (n 19) paras 73–74.

¹⁶² See *Schmidberger* (n 19) paras 77–81.

¹⁶³ *Schmidberger* (n 19) para 82 [relevant citation]; See also *Schmidberger* (n 19) paras 69, 76 and 84–92.

¹⁶⁴ *Schmidberger* (n 19) para 93 [my highlight].

¹⁶⁵ See *Schmidberger* (n 19) para 69.

¹⁶⁶ See *Omega Spielballen* (n 156) paras 31–34 and 37–38.

¹⁶⁷ See Christoph Schreuer and Clara Reiner, ‘Human Rights and International Investment Arbitration’ in Ernst-Ulrich Petersmann, Francesco Francioni and Pierre-Marie Dupuy (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 89–96.

Schmidberger holds firm, or if the proper test in fact comes closer to what is generally the case for Member State measures.

3.4. Fundamental rights vis-à-vis other Union objectives

While EU market integration (achieved through the removal of borders and prohibitions on trade restrictions) is controversially the most well-entrenched objective of Union law, it still allows for certain justifiable limitations to its scope.¹⁶⁸ A central question concerning scope has been whether aforementioned prohibitions target only discriminatory measures, or if conversely all actions constituting impediments to market access can be struck down as unlawful restrictions. Lacking a clear-cut answer the CJEU approach looks to support the second reading, meaning that all Member State measures taken to protect fundamental rights, even if applied unilaterally, run the theoretical risk of restricting market access and thus of requiring justification.¹⁶⁹ The question is when and how such justification can be provided, and it is in these shallow waters that the conflict between fundamental freedoms and rights comes to its head.¹⁷⁰

Standing on the hill of *Schmidberger* and *Omega* it looks as if fundamental rights enjoy a rather strong position vis-à-vis economic interests, firstly in that they are weighted on equal footing contra the latter, and secondly since Member States receive considerable discretion in performing this balancing exercise.¹⁷¹ After taking these liberal steps in relation to fundamental rights proportionality, the CJEU however readjusted its measurements in *Viking*¹⁷² and *Laval*. Weighting the economic interests of the companies in question vis-à-vis the right of their workers to take collective action,¹⁷³ the Court as in *Schmidberger* and *Omega* declared that the Union pursued both economic as well as social interests and that these accordingly had to be harmonized. Contrary to the approach in the earlier cases however, it only demanded justification for the

¹⁶⁸ See TFEU, articles 26(2), 34, 36, 45, 49, 52, 56, 62, 63 and 65; and Pieter Van Cleynenbreugel and Xavier Miny, ‘The Fundamental Economic Freedoms: Constitutionalizing the Internal Market’ in Guillaume Grégoire and Xavier Miny (eds.), *The Idea of Economic Constitution in Europe* (Brill | Nijhoff, 2022) 265–266.

¹⁶⁹ See *Dassonville* (n 150) para 5; and Van Cleynenbreugel and Miny (n 168) 289 ff.

¹⁷⁰ Cf Van Cleynenbreugel and Miny (n 168) 292–294.

¹⁷¹ See Section 3.3.

¹⁷² Case C-438/05 *International Transport Workers’ Federation (ITF) and Finnish Seamen’s Union (FSU) v Viking Line ABP and OU Viking Line Eesti* [2007] EU:C:2007:772.

¹⁷³ See *Viking Line* (n 172) paras 6–21 and 42–47; and *Laval* (n 142) paras 27–38 and 86–92.

restrictions of fundamental freedoms.¹⁷⁴ In light of this assertion the CJEU next applied a close proportionality assessment, firstly scrutinizing whether the objective of the collective action had really been to protect workers rights and secondly mapping out in detail what elements national courts were to consider when determining the necessity of the relevant actions.¹⁷⁵ In relation to the latter examination the Court particularly questioned the necessity of the collective action in light of the workers protection already available before such action was taken.¹⁷⁶

Critique against these judgements, as a step back from the fundamental rights protection established by *Schmidberger* and *Omega*, has been monumental.¹⁷⁷ Reid nonetheless, believes that the CJEU, in response to this opposition, has now returned to the test of the two earlier cases through its award in *Commission v Germany*.¹⁷⁸ In these proceedings, an award of contracts through collective bargaining had effectively circumvented Union public procurement rules, which the Commission argued infringed the freedom to provide services.¹⁷⁹ As in *Viking* and *Laval* the Court performed a detailed examination of the necessity of that exercise of the right to collective bargaining,¹⁸⁰ but in likeness to *Schmidberger* and *Omega* it also reiterated that EU law prescribed a two-way balancing between economic and social rights.¹⁸¹ On that basis it directed its necessity assessment towards determining whether these latter, by another approach, could have been protected whilst actually applying EU procurement rules.¹⁸² The judgment thus reaffirms the equal footing between fundamental rights and freedoms, but it must be submitted that it still partly tangents *Viking* and *Laval* proportionality through its close necessity test, even if that test seeks to cater for the former.

¹⁷⁴ See *Viking Line* (n 172) paras 44, 46, 52, 74–75 and 78–79; and *Laval* (n 142) paras 91, 94, 96 101 and 104–105.

¹⁷⁵ See *Viking Line* (n 172) paras 80–86 and 87–89; and *Laval* (n 142) paras 107–110.

¹⁷⁶ In *Laval* the CJEU argued that minimum workers protection had already been incorporated into secondary legislation, see *Laval* (n 142) paras 53, 57–59, 65, 68, 70, 73, 76–78 and 80; In *Viking* the Court had no jurisdiction to deliver a judgment on the relevant regulation, but a decisive point of the necessity assessment was nevertheless that the collective action affected re-flagging even where employment protection was higher than in the state of origin, see *Viking Line* (n 172) paras 29–31 and 88–89.

¹⁷⁷ See Craig (n 39) 688 and further therein made citations.

¹⁷⁸ See Reid (n 131) 84–85.

¹⁷⁹ See *Commission v Germany* (n 156) paras 30–35.

¹⁸⁰ See *Commission v Germany* (n 156) paras 42–44, 47–48 and 53–65.

¹⁸¹ See *Commission v Germany* (n 156) para 52.

¹⁸² See *Commission v Germany* (n 156) paras 55, 58 and 66.

It is ultimately difficult to assert exactly how the developments from *Schmidberger* to *Commission v Germany* should be characterized. Especially since the CJEU soon after the latter judgment once again deployed its *Schmidberger* approach, in *Sayn-Wittgenstein*.¹⁸³ A difference opposing generalizations is initially that some of the cases concern vertical relations and others horizontal, but since the CJEU itself had them repeatedly cross-referenced¹⁸⁴ it is nevertheless suitable to consider all as parts of a larger picture on fundamental rights proportionality. What emerges as the substantially relevant criterium from looking at this image, it is here argued, is whether the protection of those rights, or the *raison d'être* of the same, was in some way already harmonized under EU law. In all cases protection of fundamental rights was a legitimate purpose, but in *Schmidberger*, *Omega* and *Sayn-Wittgenstein* it was not *ex-ante* determined how to have it achieved in interaction with fundamental freedoms.¹⁸⁵ In *Viking* and *Laval* on the contrary, that pursuit tried to go beyond a baseline of protection already established in the economic framework of dispute, hence stronger verifications were mandated. The *Commission v Germany* manifests perhaps most clearly this state of affairs, in that it establishes a level playing field between fundamental freedoms and rights, but still scrutinizes whether these latter are already protected by means of the relevant secondary legislation. To summarize it can therefore convincingly be asserted that, unlike what is the impression from reading *Viking* and *Laval*, there is a dual relationship between the two different fundamentals and that they have to be weighed against one another.¹⁸⁶ Where the CJEU considers that steps have already been taken to perform this balancing exercise in EU law however, closer proportionality examinations will be performed.

3.5. Summary

Evident even before and now clearly established by the CFR; fundamental rights infringements within the scope of EU law will require proportionality assessments to be conducted. However, where fundamental rights protective actions are challenged under Union market integration law, or in ISDS under the CETA, the fundamental right will not, by way of how the legal issue is framed, be regarded as the infringed interest but as the infringing interest demanding justification. In theory this would mean that it is in fact solely this action that would be put to the proportionality test. Also mostly in theory, this would imply that a detailed four stage examination of the measure's legitimacy, appropriateness, necessity and adequacy is to be performed.

¹⁸³ See *Sayn-Wittgenstein* (n 156) paras 81–85 and 87–94.

¹⁸⁴ See *Viking Line* (n 172) paras 45–46, 62 and 77; and *Laval* (n 142) paras 93–94.

¹⁸⁵ Cf *Schmidberger* (n 19) paras 69–71, 75–77 and 79–80; *Omega Spielhallen* (n 156) paras 28 and 31; and *Sayn-Wittgenstein* (n 156) paras 83, 87–89 and 91–92.

¹⁸⁶ Something which is arguably even more clearly established since the entry into force of the CFR, cf the CFR, article 52(1).

In practice however, the picture is a tad more multilayered. Firstly, albeit the proportionality principle does comprise of four stages, the CJEU, no matter the reason, normally stays at the first three, leaving the direct balancing between infringing and infringed interest unscrutinized. As concerns examination of Member State actions this conflict is instead already inherent in the framework of assessment, departing as it is from a point where the measures are *prima facie* regarded as unlawful.

Secondly, case law suggests that even if it is the action taken in protection of fundamental rights that has to be defended, the relationship between these rights and the infringed economic interests is one of equality. Consequently, they both have to be balanced vis-à-vis one another in order to produce a defensible substantial outcome. When there is no clear answer in EU law as to how this is to be done, Member States will, just as the EU when faced with choices of a complicated and appreciative nature, be awarded discretion in this regard. If considerations concerning a balance between social and economic rights are however already apparent in the legal and factual framework surrounding the dispute at hand, this discretion has to make way for a detailed application of the first three legs of the proportionality principle.

4. The relationship between national, international and EU law in international investment law

4.1. Three elements of applicability

In order to determine in what ways EU proportionality, as defined in the previous chapter, can be applied in ISDS under the CETA, it is of essence to clarify the limits under which an investment tribunal will operate when a party (or the tribunal *ex officio*) wishes to have recourse to this (or any) particular norm.¹⁸⁷ As touched upon in Section 1.1 the application of a norm will obviously be contingent upon how the relevant applicable law is defined,¹⁸⁸ but since even norms lacking direct applicability¹⁸⁹ may guide the interpretation of a specific treaty provision, methods with that effect need also be established.¹⁹⁰ Lastly, how broadly a tribunal's jurisdiction is defined can also carry significance for which norms that materialize, as that determination decides if the tribunal is capable of reviewing a claim with basis in those norms.¹⁹¹ The impact of these three elements of norm applicability moreover varies depending on the national or international origin of said norms,¹⁹² and for EU law (to be discussed below¹⁹³) it is besides unclear whether its norms from an international law

¹⁸⁷ See Kriebaum, 'Human Rights' (n 10) 153–155 who discusses these limits with regards to human rights considerations under III.

¹⁸⁸ Cf *Elettronica Sicula SPA (ELSI) (United States of America v Italy)* (Judgment) [1989] ICJR 51 [73].

¹⁸⁹ *Direct* applicability here meaning that it is determined to be applicable law under ISDS, while *interpretative* applicability instead refers to a certain norm having an impact on defining the meaning of the applicable law. This differentiation, as an attempt to separate between applicable law and interpretational considerations, will be further explained in Section 4.1.3.1.

¹⁹⁰ Cf the VCLT, art 31(3)c; and Newcombe and Paradell (n 47) 109.

¹⁹¹ Cf Christoph Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1 MJDR 2.

¹⁹² As will be seen through subsequent sections. As for now, for an illuminating example concerning jurisdiction, cf *Hussein Nuaman Soufraki v The United Arab Emirates*, ICSID Case No. ARB/02/7 (Award, 7 July 2004) paras 53–55; concerning applicable law, cf *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8 (Award, 12 May 2005) paras 115–117; concerning interpretation, cf *Hussein Nuaman Soufraki v The United Arab Emirates*, ICSID Case No. ARB/02/7 (Decision on Annulment, 5 June 2007) paras 95–97.

¹⁹³ See further Section 4.2.

perspective are regarded as the former or the latter.¹⁹⁴ Lacking a definitive answer, this chapter therefore first charts out how both national and international law respectively, depending on jurisdiction, applicable law and interpretation, can come into play on the IIL arena, to then terminate with a description of the duality of form which characterizes EU law and how this duality affects its applicability in ISDS.

4.1.1. Jurisdiction

All judicial resolution systems will one time or another have to deal with issues relating to jurisdiction, no matter if they are domestic or international, made up by courts or by arbitral tribunals.¹⁹⁵ The essential question of jurisdiction will always be this one: *does the relevant dispute resolution organ have authority to deliver an award which with binding effect settles the issue(s) raised before it?*¹⁹⁶ Answering this overarching question often requires multiple sub-inquires, focused towards defining over what legal matters, what legal subjects or what events in time that this authority may be exercised.¹⁹⁷ For current examination it is however only norm invocation, hence subject matter jurisdiction (or jurisdiction *ratione materiae*¹⁹⁸) that is of relevance, and scrutinized is therefore which norms that must form the basis of claims for tribunals to receive authority to settle a subsequent dispute.¹⁹⁹

In IIL, the origin of subject matter jurisdiction is to be found in consent to dispute settlement,²⁰⁰ but even when established, the task of defining its scope remains. For this delineation, the IIA will almost unfailingly have included a jurisdictional clause.²⁰¹ As Schreuer highlights, several differences exist in how broad of an authority these clauses bestow upon their dispute settlement organs.²⁰² An authority which may vary from allowing adjudication only on

¹⁹⁴ See Rudolf Dolzer, 'Settling investment disputes' in Christoph Schreuer, Rudolf Dolzer and Ursula Kriebaum (eds.), *Principles of International Investment Law* (3rd ed., Oxford University Press, 2022) 423.

¹⁹⁵ See Wouters et al. (n 65) 1385 ff.

¹⁹⁶ See David A. R. Williams, 'Jurisdiction and Admissibility' in Federico Ortino, Peter T. Muchlinski and Thomas Schultz (eds.), *The Oxford Handbook on International Investment Law* (Oxford University Press, 2008) 869.

¹⁹⁷ See Williams (n 196).

¹⁹⁸ Cf UNCTAD, 'Dispute Settlement: Investor-State' (2003) UNCTAD Series on Issues in International Investment Agreements 17.

¹⁹⁹ Cf Newcombe and Paradell (n 47) 77.

²⁰⁰ See Schreuer (n 191) 2–3; Cf also Dolzer, 'History, Sources and Nature' (n 58) 16–17; and Dolzer, 'Settling investment disputes' (n 194) 340–342.

²⁰¹ Cf Schreuer (n 191) 6.

²⁰² See Schreuer (n 191) 6 ff.

claims relating to certain of an IIA's substantial rules,²⁰³ to authorizing settlement of all disputes relating to investments (made under the particular treaty²⁰⁴)^{205,206} Depending on what clause that is used, an investor will be capable of bringing different kinds of claims to dispute settlement.²⁰⁷ As for the former (narrow) clause, an investor would have to allege a state breach of a specific investment protection standard contained in that IIA, whereas an investor guided by the latter (broad clause) could challenge a state measure with basis in a variety of sets of norms as long as the measure is in some way linked to its investment(s).²⁰⁸

A jurisdictional clause, whatever its extensiveness, comes a long way of determining the jurisdiction of an arbitral tribunal. The IIA is thus the backbone of such a process.²⁰⁹ Sometimes however, the IIA will come short of describing what will be the actual jurisdiction exercised. First, even a narrowly defined clause may use terms whose definitions can only be found in sets of norms outside of IIL. In these scenarios, albeit rather used to define jurisdiction than included under the same, external norms must always be within the authority of a tribunal to examine, should it be capable to settle the issue of its jurisdiction.²¹⁰ Second, even a broadly defined clause may in practice be limited at the

²⁰³ See e.g. (while no longer in force) Treaty between the Federal Republic of Germany and the People's Republic of Bulgaria concerning the Reciprocal Encouragement and Protection of Investments [1986] 1518 UNTS 3, article 4(3).

²⁰⁴ See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (Decision on Annulment, 3 July 2002) paras 54–55.

²⁰⁵ See e.g. Accord entre le Gouvernement de la République Française et le Gouvernement de la République Argentine sur l'Encouragement et la Protection Réciproques des Investissements [1991] Décret n° 93-834, article 8(1); This type of clause is accepted by most tribunals to imply a broad jurisdiction, see e.g. *SGS Société Générale de Surveillance S.A. v The Republic of Paraguay*, ICSID Case No. ARB/07/29 (Decision on Jurisdiction, 12 February 2010) paras 127–130 and 182–183; For a contrary view *SGS v Pakistan* provides an example where such framing rather was interpreted as defining the relevant subject matter (investment) instead of the jurisdictional basis, see further *SGS Société Générale de Surveillance S.A v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003), paras 156–162.

²⁰⁶ See Schreuer (n 191) 6–11.

²⁰⁷ See Schreuer (n 191) 11.

²⁰⁸ Cf Schreuer (n 191) 11; As regards the link between claims and investments, see *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8 (Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003) paras 32–35; and *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3 (Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997) para 24.

²⁰⁹ Cf *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4 (Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999) paras 36 and 49.

²¹⁰ Cf Schreuer (n 191) 4–6; Dolzer, 'Settling investment disputes' (n 194) 424; and Newcombe and Paradell (n 47) 95–96; See also *Emmis International Holding BV*, ICSID Case No ARB/12/2 (Award, 16 April 2014) paras 159–162.

hands of the relevant tribunal, if it declines IIA external claims despite being authorized to settle them.²¹¹ Yet reluctance of this kind is not equal to ignoring such IIA external sets of norms altogether, as e.g. *Biloune v Ghana* illuminates. While the tribunal in this case declined jurisdiction to assess claims external to IIL, it still held that potential fundamental rights breaches alleged by these claims could affect its judgment on the main action.²¹² A similar approach can also be detected in WTO law, where a state's other (non-trade related) obligations under international law, while not capable of giving rise to claims under the WTO agreement, can be invoked as defence for derogations from the latter.²¹³

4.1.2. Applicable law

When the limits of assessable claims have been established, in suit comes the question of what law to apply to examine the substance of the legal rights invoked by such claims.²¹⁴ As the existence or non-existence of a right or obligation, legitimating what is asked by the claimant or refused by the respondent, may depend on which legal system that is argued to be its origin, providing this query with an answer is indispensable to giving a materially sound award.²¹⁵

4.1.2.1. The IIA – primary source of law in a larger norm complex

If then a challenge towards host state actions is based on the substantial rules of the relevant IIA, something which will always be the case concerning FET claims,²¹⁶ this instrument will unfailingly be the central source of law.²¹⁷ In line with according to the IIA the position of primary applicable law²¹⁸ it however

²¹¹ Cf *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, UNCITRAL [1994] 95 ILR 202–203; *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008) paras 77–79 and 168–172; and *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15 (Award, 28 July 2015) paras 56–59, 86–87, 284–288 and 309–316; See also Kriebaum, 'Human Rights' (n 10) 157–159; and *SGS v Pakistan* (n 205) paras 156–162.

²¹² See *Biloune* (n 211) 203.

²¹³ See Gazzini (n 64) 221–222 and further therein made citations; and ILC, 'Fragmentation of international law' (n 72) paras 44–45; For elaborations on IIA external obligations as defence in ISDS, see further Section 4.1.3.2.

²¹⁴ See Newcombe and Paradell (n 47) 75 and 77.

²¹⁵ Cf *ELSI* (n 188); See also Newcombe and Paradell (n 47) 78–79.

²¹⁶ See Newcombe and Paradell (n 47) 77; Cf also Dolzer, 'History, Sources, and Nature' (n 58) 16.

²¹⁷ See Antonio R. Parra, 'Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties' (2001) 16 ICSID Rev 21.

²¹⁸ As regards the hierarchy between different sources of applicable law, see this section further below.

follows that if this instrument points also to other sources of law as applicable, these too can be consulted in settlement of the dispute at hand.²¹⁹ Such a situation is anything but uncommon in the IIL milieu, where most IIAs include specific choice of law clauses that, variations aside, normally share the characteristic of referring to several norm complexes.²²⁰ By submitting or accepting a request for arbitration, parties to ISDS accept the contents of these clauses and thus consent to their differences being settled in line with not only the IIA but also e.g. relevant international law as well as municipal laws.²²¹

Yet regardless of what laws clauses of this sort might refer to, tribunals and academics alike have, time and time again, held that law on foreign investment cannot be regarded as a closed system of rules.²²² The message here being that no matter if a particular IIA pinpoints only certain norms as applicable, or if there is conversely no choice of law made at all, norms of different origin will under certain circumstances necessarily have to come into play.²²³ In what capacity this occurs is not viewed uniformly by the academic community,²²⁴ but independent of differences in opinion there are several practical reasons as to why it comes to be.

First, IIAs contain vague substantive standards, such as the one of FET, which inherently call for supplementary sources should one wish to assert to them any actual meaning.²²⁵ Second, an IIA is a treaty concluded between states and as such an international law construct, by concluding the treaty they consequently accept to be bound by general international law ranging from principles such as *pacta sunt servanda* to rules on e.g. state liability or fundamental

²¹⁹ Cf Convention on the Settlement of Investment Disputes between States and Nationals of Other States [1965] 575 UNTS 159, article 42(1); and Newcombe and Paradell (n 47) 85–86.

²²⁰ Cf Dolzer, ‘Settling investment disputes’ (n 194) 416–420; and Newcombe and Paradell (n 47) 79–83.

²²¹ See *Antoine Goetz et consorts v. République du Burundi*, Affaire CIRDI No. ARB/95/3 (Sentence, 10 février 1999) paras 94–96.

²²² See primarily *Asian Agricultural Products LTD (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/ 87/3 (Final Award, 27 June 1990), para 21; See also e.g. Viñuales (n 57) 1077.

²²³ See Newcombe and Paradell (n 47) 91–92.

²²⁴ Schill leans towards according a law-asserting capability to IIAs only, whereas Viñuales looks at different norm systems as more equally footed. See further respectively Schill, ‘Sources of International Investment Law’ (n 52) passim; and Viñuales (n 57) passim; On such differentiations between directly applicable law and law as interpretative guidance, see further Section 4.1.3.1.

²²⁵ Cf *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (Award, 8 December 2000) para 79; Viñuales (n 57) 1088–1089; See also Newcombe and Paradell (n 47) 91–92.

rights.²²⁶ Should the parties have other intentions, to the extent that it is possible to denounce the application of certain international law standards, these would have to be explicitly spelled out in the IIA.²²⁷ Third, albeit the IIA is an international law construct, the relationships between investors and host states, as Viñuales phrases it, ‘remain very largely regulated by the domestic laws of the host State or other States’²²⁸. Therefore, especially if the relevant IIA provision does not point to any specific factors to clarify its content, there might exist national law circumstances needed to be consulted to define its meaning.²²⁹ For example, to consider that an investor has been treated unfairly and inequitably, allegedly through violations of contracts between the former and the host state, the occurrence of a contract breach should be examined under the laws of that particular state.²³⁰ More generally, a host state’s behaviour under national law can thus shed light on the compatibility of that behaviour with international law obligations.²³¹ Lastly, apart from being directly applicable, it should also be noted that municipal laws can be indicative of the directly applicable general international law, in that they can be significative of state practices constituting CIL or otherwise be apt to transpose into general principles of international law.²³²

4.1.2.2. Domestic law – Applicable as law or as fact?

What can accordingly be established, as a result of IIA standards’ general complementary needs, the overarching international law framework of ISDS, and the converse national law character of investor-state relations is this: the

²²⁶ See the VCLT, article 2(1)a; *Goetz* (n 221) para 98; *Merrill and Ring* (n 48) paras 182–187; and *Newcombe and Paradell* (n 47) 101 and 107–109.

²²⁷ Cf Viñuales (n 57) 1087–1088 and 1090. This author regards as convincing the opinion of Viñuales on the need to expressly flag for derogations from CIL, but for a different opinion advocating for the interpreter to actively keep in mind possible party intentions to the same effect, see further Gazzini (n 64) 218–219.

²²⁸ Viñuales (n 57) 1073.

²²⁹ Cf *Newcombe and Paradell* (n 47) 92–95; Viñuales (n 57) 1073–1074.

²³⁰ See *MTD* (n 85) paras 187–189. Use of the word ‘should’ is intentional since there has been discrepancies between awards of different tribunals concerning this matter, for a picture of an award adopting an approach opposite to the one in *MTD*, see further *Newcombe’s* and *Paradell’s* discussion on the *Wena* award’s disregard of domestic law prerequisites in *Newcombe and Paradell* (n 47) 96–97.

²³¹ Cf *Certain German Interests in Polish Upper Silesia (Germany v. Poland)* [1926] PCIJ Series A no 7, 19; and *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (WTO Appellate Body Report, 19 December 1997) para 65.

²³² Strictly speaking this is rather a question of interpretation, see further Section 4.1.3; See also *Prosecutor v Tadić*, ICTY Appeals Chamber (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995) paras 130–135; and *Certain German Interests* (n 231) passim; For a more thorough explanation see further Wouters et al. (n 65) 954–956; On transposition of national law principles into international law counterparts, see further Bücheler (n 69) 32–33 and therein made citations.

IIA, general international law and municipal law can all be applicable law under ISDS.²³³ For the latter set of norms an old line of thought is nevertheless that it can, despite when relevant to consult, never be applied as law but only as fact.²³⁴ The difference this purports is firstly that as fact, the contents of national law must be proven by the party wishing to rely upon it, and secondly that since it is only a circumstance and not law it cannot be interpreted but solely applied as it is proven to exist.²³⁵ This differentiation however looks to crumble under its own faulty logic. Law must be applied to facts, and to prove its exact content (as a fact) in a specific dispute would thus not be possible until it has first been *de facto* applied to the circumstances of this case.²³⁶ Arbitral tribunals nowadays also look to take the same approach, following a logic where legal questions whose answers can only be found in municipal law require application of this law.²³⁷

4.1.2.3. The IIA, international law and domestic law in conflict

In case of direct conflict however, it is important to remember that the ascertainment of breaches of IIA obligations, in conjunction with the consequences these might entail, is a subject for international law to treat.²³⁸ States cannot invoke their domestic laws as reasons to derogate from international law obligations, and domestic legality of measures does in principle not affect their potential illegality under international rules.²³⁹ Consequently, should municipal norms point to a different substantial outcome than would the IIA or other norms of international law, these former will have to give in.²⁴⁰ The general relationship between municipal and international law is accordingly rather simply categorized as one of *lex superior derogat lex inferiori*,²⁴¹ the only exception

²³³ See Newcombe and Paradell (n 47) 86.

²³⁴ See *Certain German Interests* (n 231); and Hepburn (n 71) 104.

²³⁵ Cf Hepburn (n 71) 104–105; and *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3 (Decision on Jurisdiction, 14 April 1998) paras 57–59.

²³⁶ See Hepburn (n 71) 105.

²³⁷ See e.g. *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7 (Decision on Annulment, 21 March 2007) para 72; See also Hepburn (n 71) 106–108.

²³⁸ See Newcombe and Paradell (n 47) 99; and *MTD* (n 85) paras 87 and 203–204.

²³⁹ See Wouters et al. (n 65) 950–952; The principle of *pacta sunt servanda* is codified in the VCLT, see the VCLT, article 27; and rules on state liability in ARSIWA, see ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)’ [2001] 2 YILC (Part 2) 36.

²⁴⁰ See *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1 (Award in Resubmitted proceedings, 31 May 1990) paras 38–40; *ELSI* (n 188) paras 71–73; Cf also UNCTAD, ‘Dispute Settlement – A sequel’ (n 6) 135–136.

²⁴¹ Cf Aaron X. Fellmeth and Maurice Horwitz, ‘Lex Superior’ and ‘Lex Inferiori’ in *Guide to Latin in International Law* (2nd online ed., Oxford University Press, 2022).

being if a choice of law clause actively points to the former in case of conflict.²⁴² In this case, party autonomy has domestic law prevailing over international law (both the IIA and general international law) to the extent that this is possible.²⁴³

A more intricate relationship, apart from if hierarchy is similarly established by the IIA itself, is the one between this instrument and general international law. The reason being that no formal source of international law is valued higher than any other,²⁴⁴ and that both sets of norms therefore in principle can adjacently generate their very own legal effects within a dispute.²⁴⁵ However, since relevant claims here are the ones brought under an IIA's FET provision, and since that provision as seen in Chapter 2 opens up for assessments of proportionality, there exists by reason of interpretational considerations good cause for treating the IIA as *lex specialis* when questions of proportionality materialize in these disputes.²⁴⁶ Hence, apart from norms of a *jus cogens* nature, application of general international law would remain legitimate only as long as it stays reconcilable with provisions of the IIA in question.²⁴⁷ In the eyes of IIL, national and general international law will thus in effect be treated as equally inferior to the investment treaty in question.²⁴⁸

4.1.3. Interpretation

Where jurisdiction decides what legal questions that can be brought before a tribunal to answer, and applicable law singles out what legal acts to apply in

²⁴² As was done in e.g. Agreement between the Government of the Republic of Turkey and the Government of the Federal Republic of Nigeria concerning the Reciprocal Promotion and Protection of Investments [2011] article 11(5) <[https://edit.wti.org/wti-filesystem/20200715/c6d02425-37d8-4764-a1d6-3e067013adc8/Nigeria%20-%20Turkey%20BIT%20\(2011\).pdf](https://edit.wti.org/wti-filesystem/20200715/c6d02425-37d8-4764-a1d6-3e067013adc8/Nigeria%20-%20Turkey%20BIT%20(2011).pdf)>.

²⁴³ Cf Ole Spiermann, 'Applicable law' in Federico Ortino, Peter T. Muchlinski and Thomas Schultz (eds.), *The Oxford Handbook on International Investment Law* (Oxford University Press, 2008) 99–102; and Viñuales (n 57) 1086–1087 and 1089–90.

²⁴⁴ Cf the ICJ Statute, article 38; See also Viñuales (n 57) 1086–1087.

²⁴⁵ Cf *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R (WTO Panel Report, 31 March 2008) paras 7.310–7.327; and Anastasios Gourgourinis (n 69) 42–43.

²⁴⁶ Cf primarily *Sempra* (n 114) paras 377–391; *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland*, PCA (Final Award) [2003] 23 RIAA 87 and 90–91 [84] and [100]–[101]; and Gourgourinis (n 69) 52–53; See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJR 177–178 [105]–[106]; and Viñuales (n 57) 1091 and further therein made citations.

²⁴⁷ Cf the VCLT, article 31(1); jointly with *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6 (Award, 12 April 2002) paras 85–87; and Newcombe and Paradell (n 47) 91 and 100; Cf also *Noble Ventures* (n 97) paras 49–51; with Viñuales (n 57) 1087 and 1091.

²⁴⁸ Cf Newcombe and Paradell (n 47) 109; and Viñuales (n 57) 1077–1078.

this operation, interpretation instead defines the substance of the legal acts and therefore is the *law* that will have to decide the questions brought.²⁴⁹ As explained in Section 1.4., the adopted interpretative modus follows a structure decided by the system of law under examination and is accordingly not identical for all three bodies of law possible to apply in investment disputes.²⁵⁰ For national law application usually entails that it will be used in a manner compliant with the current state of the law as established by national precedent.²⁵¹ Where general international law is concerned, ie norms of a non-treaty character such as CIL or general principles, the question is not so much one of interpreting ‘ready to go’ norms but rather to, albeit in this process certainly having to conduct textual interpretations, clarify if a certain customary rule or general principle can be held to exist.²⁵² When instead faced with written international law, here relevantly an IIA, investment tribunals, as do all international dispute settlement organs, adhere to the VCLT.²⁵³ Since domestic law will be interpreted hermeneutically, and by reason of general international law interpretations rather being concerned with defining whether these norms exist to be applied (hence concerned with an issue of applicable law²⁵⁴), what is of relevance in this section is only interpretations of IIAs and more specifically (in line with the overall ambition of this section) whether these open up for letting external norms, *albeit not directly applicable*, inform the meaning of terms in these instruments.

²⁴⁹ Cf Odile Ammann, *Domestic Courts and the Interpretation of International Law – Methods and Reasoning Based on the Swiss Example* (Brill|Nijhoff, 2019) 58; See also Venzke (n 61) 401–402 and 405.

²⁵⁰ See Kleineman (n 35); Cf also Greenawalt (n 36).

²⁵¹ See *Soufraki* (Decision on Annulment) (n 192) paras 96; and Spiermann (n 243) 114–115.

²⁵² See Peter Staubach, ‘The Interpretation of Unwritten International Law by Domestic Judges’ in Helmut Philipp Aust and Georg Nolte (eds.), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press, 2016) 113–115; and Panos Merkouris, ‘Interpreting Customary International Law: You’ll Never Walk Alone’ in Jörg Kammerhofer, Noora Arajärvi and Panos Merkouris (eds.), *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge University Press, 2022) 348–353.

²⁵³ See the VCLT, articles 1 and 31–33; Newcombe and Paradell (n 47) 110; and Venzke (n 61) 404 and 406–407; Cf also UNCTAD, ‘Dispute Settlement – A sequel’ (n 6) 132–133; To note is that the CETA should not be governed by the VCLT but by the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. The EU has however never ratified the latter treaty, is anyhow bound by the former where it constitutes CIL and has furthermore agreed with Canada on making this instrument the proper tool for interpreting the CETA, see the CETA, article 8.31(1); and Ramesses A. Wessel, ‘The Meso Level: Means of Interaction between EU and International Law; Flipping the Question: The Reception of EU Law in the International Legal Order’ (2016) 35 YEL 545.

²⁵⁴ Cf Gourgourinis (n 69) 36.

4.1.3.1. The difference between direct and interpretative applicability

As recalled in the introductory portion of this fourth chapter, what is meant by *directly* applicable is that a norm is held by a tribunal to form part of the applicable law to the dispute at hand, whereas *interpretatively* applicable instead refers to a norm that can in some way inform definitions of the IIA's provisions. The relevant differentiation to make is ie between the norm contributing to the task of application or the task of interpretation.²⁵⁵ Interpretation meaning 'the process of determining the meaning of a text'²⁵⁶, application instead referring to 'the process of determining the consequences which, according to the text, should follow in a given situation'²⁵⁷. An applied norm thus has freestanding effects, whereas a norm used for interpretation has effects only insofar as its own contents can say something about the meaning of an applicable norm.²⁵⁸ In the context of a FET dispute the relevant question to ask is therefore whether a norm, despite the legal results generated by the relevant FET provision, can be applied adjacently to this standard to cause its own legal effects, or if it can conversely only be used to assist in determining what will be the results brought forth by the treaty rule.

In practice, it is not decisively so that this question requires answering, as it has little significance for both domestic and general international law, despite both in principle forming parts of the body of (*directly*) applicable law to investment disputes.²⁵⁹ Domestic law is unquestionably applied as having its own legal effects, judging from the fact that it is used to determine domestic legal consequences of host state actions,²⁶⁰ but since these consequences are only examined to divine what constitutes breaches of IIA standards,²⁶¹ and since they have to subdue to the IIA in case of conflict,²⁶² domestic law is *de facto* only applied to inform the contents of the former. For general international law a *generalis* application is as explained inherent in the international character of all

²⁵⁵ Cf Gourgourinis (n 69) 43–44.

²⁵⁶ Harvard Law School, 'Draft Convention on the Law of Treaties: Comment on Article 19. Interpretation (Article 19 Harvard Draft Convention)' (1935) 29 AJIL (Supplement: Research in International Law) 938.

²⁵⁷ Harvard Law School, 'Article 19 Harvard Draft Convention' (n 256).

²⁵⁸ See *Case concerning the Factory at Chorzów* (Dissenting Opinion of Judge Ehrlich) [1927] PCIJ Series A No 9, 39; *India – Patent Protection* (n 231) paras 42–45; and Gourgourinis (n 69) 44.

²⁵⁹ See Sections 4.1.2.1. and 4.1.2.3.

²⁶⁰ Cf *Certain German Interests* (n 231); and *India – Patent Protection* (n 231).

²⁶¹ Cf Newcombe and Paradell (n 47) 92–95; and Viñuales (n 57) 1073–1074; If not recognized by a choice of law clause that is, see Section 4.1.2.1.

²⁶² See *Amco* (n 240); and *ELSI* (n 188) paras 71–73; Cf also UNCTAD, 'Dispute Settlement – A sequel' (n 6) 135–136.

ISDS,²⁶³ but because the issue at hand is one of FET proportionality, which an IIA to a certain extent solves itself,²⁶⁴ it will *à cause de lex specialis* also only be awarded an interpretative significance in relation this standard.²⁶⁵

The latter situation is in principle equally true for a last set of norms, up until this point only briefly mentioned in Section 4.1.1., where it was stated that WTO tribunals generally accept them to be invoked as defence when obligations under an IIA are alleged to have been breached: namely *IIA external treaties*. It also by reason of *lex specialis*, these are used only in a complementary fashion vis-à-vis the IIA.²⁶⁶ Contrary to general international law however, whose foundational importance even for the relevant *leges speciales* (the IIA) makes it *directly* applicable,²⁶⁷ these other norms are not necessarily (if not directly pinpointed as applicable laws²⁶⁸) within the powers of arbitral tribunals to apply.²⁶⁹ Originating in external specialized regimes there is no apparent reason for regarding them as constituting applicable laws to ISDS.²⁷⁰ Should these be applied it must instead occur *interpretatively*, and fittingly enough the VCLT rules on treaty interpretation actually provide for such an opportunity.²⁷¹ Hence these treaties are discussed in this section, under the label of interpretation.

²⁶³ See the VCLT, article 2(1)a; *Goetz* (n 221) para 98; *Merrill and Ring* (n 48) paras 182–187; and Newcombe and Paradell (n 47) 101 and 107–109.

²⁶⁴ See Sections 2.2 and 2.3.2.

²⁶⁵ Cf *Sempre* (n 114) paras 377–391; *Access to Information Under Article 9 of the OSPAR* (n 246); and Gourgourinis (n 69) 52–54.

²⁶⁶ Cf ILC, ‘Fragmentation of international law’ (n 72) paras 74, 85–86, 94, 128 and 254–255; See also *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* (Judgment) [1997] ICJR 76 [132]; If the external treaty’s obligations are of a *superior* nature, this obviously has to be qualified, see ILC, ‘Fragmentation of international law’ (n 72) para 108.

²⁶⁷ Cf ILC, ‘Fragmentation of international law’ (n 72) paras 120, 192–194 and 468–469.

²⁶⁸ Cf *Goetz* (n 221) paras 94–96.

²⁶⁹ Cf Chang-fa Lo, ‘The Difference between Treaty Interpretation and Treaty Application and the Possibility to Account for Non-WTO Treaties during WTO Treaty Interpretation’ (2012) 22 *Indiana International & Comparative Law Review* 6–8.

²⁷⁰ Cf *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (Judgment) [1980] ICJR 40 [86]; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Judgment) [1986] ICJR 134–135 [266]–[268]; See also *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50 (Decision on Termination Request and Intra-EU Objection, 7 May 2019) para 181; and ILC, ‘Fragmentation of international law’ (n 72) paras 123–125.

²⁷¹ See ILC, ‘Fragmentation of international law’ (n 72) paras 411, 415, 421, 462 and 470; and Newcombe and Paradell (n 47) 109–110; Cf also ILC, ‘Fragmentation of international law’ (n 72) paras 92 and 96.

4.1.3.2. Article 31(3)c VCLT and the concept of ‘systemic integration’

The reason for the interpretative applicability of IIA external treaties is this one: states are presumed to wish to honor all their existing obligations under international law when they accede to a new treaty, and by reason thereof arbitral tribunals must try to have new and old obligations under different regimes of international law harmonized.²⁷² Their tool for accomplishing this task is to be found in article 31(3)c of the VCLT, which requires²⁷³ that they ‘(take into account [...] any relevant rules of international law applicable in the relations between the parties’²⁷⁴, an operation commonly referred to as *systemic integration*.²⁷⁵ The key criteria here is that external norms systemically integrated must reach the threshold of inter-party applicability, and the key question what is meant by this term.²⁷⁶

In practice it has not always been devoted the attention a strict reading thereof perhaps deserves. Investment tribunals have instead on several occasions interpreted treaty standards in light of external treaties where not all, or none, of the parties to the relevant IIA had acceded to these instruments.²⁷⁷ Nonetheless, should a tribunal wish to actually follow the constraints of the VCLT, this would, according to the ILC, purport that at least both the parties²⁷⁸ to a specific ISDS were parties also to the external treaty used for interpretation.²⁷⁹ While this reading, contrary to the modus applied in the above cited cases, certainly

²⁷² See ILC, ‘Fragmentation of international law’ (n 72) paras 412–416, 423 and 465; and *AAPL* (n 222).

²⁷³ The operation constitutes a mandatory part of treaty interpretation, cf ILC, ‘Draft Articles on the Law of Treaties with commentaries’ [1966] 2 YILC 220–222; Cf also e.g. *Wintershall* (n 63) paras 78–82; and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* (Judgment) [2008] ICJR 219 [112]–[114].

²⁷⁴ The VCLT, article 31(3)c [my note].

²⁷⁵ See ILC, ‘Fragmentation of international law’ (n 72) paras 410–413; For an early piece often cited, see further Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention’ [2005] 25 ICLQ 279.

²⁷⁶ Cf ILC, ‘Fragmentation of international law’ (n 72) para 470.

²⁷⁷ See e.g. *Tecmed* (n 82) paras 116 and 122 where case law from the ECtHR was applied to interpret the meaning of an expropriatory measure, albeit the Mexican States were not parties to the ECHR; and *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 (Award, 14 July 2006) paras 1–2 and 311 where ECtHR case law was once again cited, despite none of the states being parties to the ECHR.

²⁷⁸ Since investors derive their rights from their home states, the parties in this context means the host state and the home state of the particular investor, see Bücheler (n 69) 112.

²⁷⁹ See ILC, ‘Fragmentation of international law’ (n 72) paras 469–472; Cf with the VCLT, article 30(4); *SD. Myers* (n 112) paras 210 and 215; and *European Communities – Approval and Marketing of Biotech Products*, WT/DS291/R (WTO Panel Report, 29 September 2006) paras 7.70–7.72.

follows the constraints of article 31(3)c, it might however be that it does this too rigidly. Because the article does not use the term *parties to*, but *applicable between*, and from this latter formulation it is not clear whether the demand is that all parties to the IIA must also be *parties* to the external treaty interpretatively applied.²⁸⁰ As suggested by Bücheler, if only one party is bound by an external treaty, but is bound by some of its norms *erga omnes*, then these *specific* norms should be possible to invoke in reliance on article 31(3)c.²⁸¹ Because in that case, they do essentially apply *between* the parties, even if the obligations they generate are only owed in a one-way direction.²⁸² The question that then lingers is of course which norms to qualify as *erga omnes*. Whether EU fundamental rights proportionality could qualify as such a norm, and on that basis be *interpretatively* applied in a FET dispute under the CETA, will be addressed in Chapter 5.

4.1.4. Partial summary – Three elements of applicability

From the simple inclusion of ISDS in IIAs, international investment tribunals receive some authority to settle disputes raised before them. Yet different IIAs take different measures to limit this authority to claims emanating from only certain sets of norms, such as e.g. the treaty itself. Despite boundaries of this sort tribunals may nevertheless remain forced to travel beyond the IIA to define their jurisdiction, and where they are on the contrary allowed to adjudicate on treaty external claims, they still conserve the prerogative to refuse to treat them as free-standing actions. Notwithstanding if such choices are made or not, these external norms however continue to be relevant, in that they can still affect the outcome of the, IIA entrenched, main action.

In assessing that action (e.g. based upon a FET standard), the outer limits to what other sets of norms this might be will to some extent always be contingent upon international law in general, and the relevant IIA in particular. This

²⁸⁰ See ILC, ‘Fragmentation of international law’ (n 72) para 470.

²⁸¹ See Bücheler (n 69) 116–118; and *Nuclear Tests (Australia v. France)* (Judgement) [1974] ICJR 268–270 [48]–[52]; The judgement in *Nuclear Tests* is also commonly read as creating another treaty external source upon which it is possible to rely, namely *unilateral acts*. With regards to EU fundamental rights proportionality, linked as it is to either the Treaties or the CFR (see Sections 3.3–3.4.), they are however of little relevance, since neither of these instruments *in fine* contain any declarations to the effect that EU considers itself bound to them in relation to third-parties. Cf TEU, article 3; TFEU, article 4 and 26(1); and the CFR, article 51; See also Israel de Jesús Butler, ‘The European Union and International Human Rights Law’ (OHCHR, 2011) 22–25 <https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf>; On this question of unilateral acts, cf Wouters et al. (n 65) 875–887; and Wessel (n 253) 541–543.

²⁸² See Bücheler (n 69) 116–118; *Nuclear Tests* (n 281); and ILC, ‘Fragmentation of international law’ (n 72) paras 380 and 396; Cf also Erika De Wet, ‘Jus Cogens and Obligations Erga Omnes’ in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013) 554; and Israel de Jesús Butler and Tawhida Ahmed, ‘The European Union and Human Rights: An International Law Perspective’ (2006) 17 EJIL 779.

is not to say that explicit delimitations of applicable laws in that instrument will render other sources of law superfluous. These will, either by the sheer international law character of the IIA, by the necessity to define certain legal circumstances under domestic law, or by the interpretative requirements of the VCLT, stay material. But no matter if regarded as *directly* or simply *interpretatively* applicable, their invocation will in the end have to be reconciled with the meaning possible to subsume from the IIA standards. For standards as poorly defined as e.g. the one of FET, this demand of reconcilability is however generally not saying much²⁸³.

4.2. The two faces of EU law

With knowledge of the ways in which national and international law can come to inform decisions of investment tribunals, the question left to answer is this one: How will EU-law be categorized by these tribunals, as national or international law? And apart from the general structures covered in Section 4.1, are there any other consequences of their categorization, for the manner in which they incorporate EU norms into their awards? Going in from an IIL perspective, the internal Union outlook on its position within IIL naturally receives an inferior role in reply to these queries, but where this view has repercussions on the IIL arena, or where it can shed light on the actual IIL state of the law, it is nevertheless mentioned.

According to Wouters et al., EU law ‘constitutes an international legal order that cuts across the classic dichotomy between monism and dualism’²⁸⁴. It constitutes international law in so far as its founding elements are treaties concluded between states, treaties whose existence in the end is subject to the sovereignty of these actors.²⁸⁵ Contrary to international law however, it circumvents this sovereignty with which ‘classic’ international law usually does not meddle. In international law there are obligations, but how to comply with these is left to be decided by each individual state, thus it respects the dualistic nature of most legal systems.²⁸⁶ EU law conversely, by making it possible for Union citizens to base their claims directly on the EU *acquis* in domestic courts,²⁸⁷ essen-

²⁸³ A point perhaps better made by Krommendijk and Morijn, see Jasper Krommendijk and John Morijn, ‘Proportional’ by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration’ in Ernst-Ulrich Petersmann, Francesco Francioni and Pierre-Marie Dupuy (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 427.

²⁸⁴ Wouters et al. (n 65) 998.

²⁸⁵ See Moreno-Lax (n 66) 46.

²⁸⁶ See *LaGrand (Germany v United States of America)* (Judgment) [2001] ICJR 516 [128(7)]; and Wouters et al. (n 65) 958.

²⁸⁷ See *Opinion 2/13* [2014] EU:C:2014:2454, para 157; *Opinion 1/09* [2011] EU:C:2011:123, para 65; and *van Gend & Loos* (n 38) 12.

tially forces dualistic (Member) States to adopt a monistic approach, requiring them to apply Union law as if it in fact constituted domestic norms. In this capacity, from an international law perspective, EU law is ie national law.²⁸⁸ EU law can thus in theory be applied as both national and/or international law within IIL, and to complicate things further there are those who think that it, as a *sue generis* legal system, can be applied as neither.²⁸⁹ An ultimate definition of its characteristics cannot be found within the foundations of the EU,²⁹⁰ and regardlessly it is for ISDS tribunals (subject to limitations in the relevant IIA), not for the EU legal order, to decide which norms to apply in their adjudication.²⁹¹

In practice, their approaches are several. Assessing intra-EU IIAs (e.g. the ECT) they have opted for treating EU law as international law as far as applicable law goes, while EU law as national law has been assessed as facts.²⁹² Under extra-EU circumstances it has rather been regarded as not applicable at all, but instead simply as national law considered on a factual basis.²⁹³ The main difference here probably being the inter-party applicability of EU law within intra-EU disputes, contrary to what is the case vis-à-vis third countries.²⁹⁴ No matter, tribunals have anyhow more generally tried to interpret IIAs as to reconcile obligations under these treaties with dittos prescribed for EU countries, but if conflict cannot be avoided, that commitment reaches its end.²⁹⁵ In this

²⁸⁸ See Case C-284/16 *Achmea* [2018] EU:C:2018:158, paras 33 and 41; Cf also Wouters et al. (n 65) 991–992 and 995–998.

²⁸⁹ See e.g. Ricardo Da Silva Passos, ‘The Interaction between Public International Law and EU Law: The Role Played by the Court of Justice’ in Inge Govaere and Sacha Garben (eds.), *The Interface Between EU and International Law: Contemporary Reflections* (Hart Publishing, 2019) 296; See also Moreno-Lax (n 66).

²⁹⁰ See Moreno-Lax (n 66) 46 and further therein made citations.

²⁹¹ See Section 4.1; and *PL Holdings S.à.r.l. v. Republic of Poland*, SCC Case No. V 2014/163 (Partial award, 28 June 2017) paras 307–309.

²⁹² Notably in both shapes within the same dispute, see e.g. *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19 (Decision on Jurisdiction, Applicable law and Liability, 30 November 2012) paras 4.117–4.128; and *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34 (Decision on jurisdiction, liability and certain issues of quantum, 30 December 2019) para 314.

²⁹³ See e.g. *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2 (Final Award, 29 February 2008) paras 227–229; See also Särkänne (n 65) 15–16.

²⁹⁴ Cf the VCLT, article 31(3)c; and Section 4.1.3; See also Opinion 1/17 *EU-Canada CET Agreement*, Opinion of AG Bot [2019] EU:C:2019:72, paras 109–110.

²⁹⁵ See e.g. *Eskosol* (n 270) para 183.

case, IIL and international law in general determine how to solve the issue of irreconcilability, even where the outcome is to the detriment of EU law.²⁹⁶

4.2.1. The two faces of EU law from a CETA viewpoint

As the CETA is an extra-EU IIA, arbitral practice would have EU law applied as national law, and then as fact only, under CETA ISDS. Possible is furthermore that the CETA Tribunal would attempt to have intra-EU obligations harmonized with demands of the treaty. All good and well, from the theoretical framework of Section 4.1. emerges however an EU law impact larger than this. To begin with it, nothing precludes EU law from being applied as international law, either *directly* in the form of CIL and general principles, or *interpretatively* as stemming from IIA external treaties.²⁹⁷ And continuing, if regarded as nothing but national law it should still be applied as law and not as fact, with the consequence that EU law, albeit while attempting to follow the prevailing interpretations of the CJEU, can be interpreted to fit with the circumstances of a specific case.²⁹⁸ That this is a definitive possibility is furthermore evident from the concern expressed to this effect by the CJEU in their *Achmea* judgment, where it affirms that if an IIA permits recourse to domestic law then that law will in effect be applied and interpreted by the tribunal in question.²⁹⁹

The conclusions of Section 4.1 thus clarifies that approaches taken by arbitral tribunals, when applying EU law in relation to extra-EU IIAs, do not have to be limited neither to applying EU law as national law nor to applying it only as facts. From an intra-Union perspective it is all the same crucial for such constraints to remain, in that their wish is to not have EU law interpreted by any form of external jurisdiction.³⁰⁰ If it was only applied as domestic law and then as fact, this would not be of issue, since tribunals would then look to the interpretations of the CJEU to define the contents of the relevant norms.³⁰¹ As (according to the EU internal conclusion on the *Achmea* saga) the only situation where EU law could be applicable law, and not simply a factual circumstance, is where an IIA is of an intra-EU character, the Union looks to be

²⁹⁶ See *Eskosol* (n 270) para 184; and *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30 (Decision on Jurisdiction, 6 June 2016) para 87.

²⁹⁷ See Sections 4.1.2.–4.1.3.

²⁹⁸ See Section 4.1.2.2; and Spiermann (n 243) 114–115; Cf also Hepburn (n 71) 105.

²⁹⁹ Cf *Achmea* (n 288) paras 40–42.

³⁰⁰ See Inge Govaere and Sacha Garben, 'Introduction: The Interface between EU and International Law' in Inge Govaere and Sacha Garben (eds.), *The Interface Between EU and International Law: Contemporary Reflections* (Hart Publishing, 2019) 2–3; and *Opinion 2/13* (n 287) paras 13 and 201.

³⁰¹ See *Certain German Interests* (n 231); and Quentin Declève, 'Achmea: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements' (2019) 4 *European Papers - A Journal on Law and Integration* 106.

fully convinced that these limits would in fact prevail in extra-EU contexts.³⁰² Yet as stated above, and as argued convincingly by Declève,³⁰³ there is good reason to doubt that assumption. Instead, Särkänne argues, should the Union wish to be certain of how EU law is to be applied by ISDS tribunals, the best way to reach such certainty would be to delineate possible applicability through their IIAs.³⁰⁴ This has in fact been done in the CETA, both as regards applicable law and what concerns how it is to be interpreted.³⁰⁵

4.3. Summary

As EU law can materialize in ISDS both as national and international law, it is therefore relevant to ascertain how both these norm complexes in theory can inform the decisions of investment tribunals. These tribunals define their jurisdiction as a matter of international law and consequently draw upon the instrument determining its scope (the IIA) to divine over what claims and in light of what norms that they can and must adjudicate. As a result of the international character of disputes, necessary cases of *renvoi* or interpretative methods, these norms emanate not only from the IIA but also from relevant international law and domestic law. Be that as it may, the latter two will in almost every case of conflict have to submit to the law as it is prescribed by the IIA, and as a consequence of this hierarchy the IIA can further be used to limit the possible impact of external norms (as has been done in the CETA). Despite this *lex specialis* / *lex superior* character, loosely defined standards such as FET will undoubtedly still require substantiation from external sources, and it will be the level of the detail the former clause manages to provide that will determine if it actually includes any substantial content for these latter sources to be in conflict with.

³⁰² See e.g. Opinion 1/17, Opinion of AG Bot (n 294) paras 106–114; and Commission, ‘Fact sheet: Commission provides guidance on protection of cross-border EU investments – Questions and Answers’ (MEMO/18/4529, 2018).

³⁰³ Who underlines that inter-party applicability, no matter how one construes this criteria, is not the only way in which EU law could materialize as law, not as fact, under extra-EU BITs, see Declève (n 301) 103–108.

³⁰⁴ See Särkänne (n 65) 16–18.

³⁰⁵ See the CETA, article 8.31(1)–(2).

5. The EU principle of proportionality applied in assessment of possible FET breaches under the CETA

For the purpose of comprehensibility, what is established throughout Chapters 2–4 is the following. The FET standard, the one in the CETA included, to some extent implies that the interests of investors must be balanced vis-à-vis host states' interests in adopting domestic regulation in pursuit of certain public objectives. However, the standard does generally not combine this introduction, of what can rightly be called a proportionality assessment, with any indication as to against which value backdrop it is to be performed. For the sake of guaranteeing a level of scrutiny deemed ample for fundamental rights review in an intra-EU context, the proportionality principle as construed in Chapter 3 should be applied when Member States of the EU, just as in an intra-EU situation, adopt derogative legislation with the aim of protecting fundamental rights. As is seen in Chapter 4 it is by all means possible to apply concepts of norm systems external to IIL in ISDS, and there is no exception to this general conclusion in what regards EU law.

The question that remains is therefore whether the EU principle of proportionality, as construed in an EU fundamental rights context, under any label qualifies as such a concept. This specifically with respect to possible limitations to that effect introduced by the CETA. Since the principle, if in principle applicable, is to be used to perform proportionality assessments in review of the treaty's FET standard, two inquiries inseparable with that question is also in which form(s) it would be applicable under those specific circumstances, and furthermore whether it, despite being in principle possible to apply, would meet any obstacles to this effect produced by the FET clause's *specialis* character.

Sticking to a structure inferable from the elements of applicability depicted in the previous chapter,³⁰⁶ and to a sound theoretical argument for EU law as applicable in ISDS in the form of both national and international law, these questions are answered below.

³⁰⁶ As will be seen, the reasons for assessing interpretation independently however disappear under the CETA, see further Section 5.2.1.1.

5.1. Jurisdiction and EU proportionality under the CETA

By now an overly-repeated ground rule, an arbitral tribunal's jurisdiction is determined by the relevant IIA and its jurisdictional clause. The clause of the CETA allows for investors to bring claims concerning breaches of host state obligations under i.a. Section D of Chapter 8, in which the treaty's FET standard is to be found.³⁰⁷ Outside the scope of this clause, the tribunal conversely has no jurisdiction.³⁰⁸ The scope of what can legitimately substantiate claims for FET breaches is however quite wide-spanning,³⁰⁹ and as any Member State measure, in some way affecting an investment, can be challenged under the clause,³¹⁰ so can undoubtedly their fundamental rights protective actions.

What is of essence in those claims, apart from these easy to meet-demands, is simply that it is a FET breach that is challenged. In this sense, the jurisdictional clause of the CETA is a narrow one in comparison to some of its counterparts,³¹¹ and there is accordingly no need to analyze if the CETA Tribunal would, despite operating under a clause permitting claims based in external sets of norms (such as general principles of EU law), take an approach where it *de facto* limits that jurisdiction. EU proportionality, it can therefore be subsumed, will never be possible to invoke as a stand-alone basis for investors' claims.³¹² However, even if there exists no possibility to file treaty external claims under the CETA, it is still mandated to consult external norms in determining whether or not all of its jurisdictional requirements are met. For an investment to qualify as *covered* it must be 'made in accordance with the applicable law at the time the investment is made'³¹³, a qualification necessitating that the CETA Tribunal examines that law. Yet regardlessly, as it is the actions of investors that are then under scrutiny, it is unlikely that proportionality reviews of Member State actions would actualize in this process.

It can therefore be established from the preceding text that EU fundamental rights proportionality as construed in Chapter 3 does not enjoy any stand-alone relevance in ISDS under the CETA, neither as a norm whose breach can substantiate a claim from an investor, nor as a necessary step of defining the mea-

³⁰⁷ See the CETA, articles 8.10(1) and 8.18(1)b.

³⁰⁸ See the CETA, article 8.18(5).

³⁰⁹ Cf Opinion 1/17 (n 42) paras 139–143.

³¹⁰ See the CETA, articles 1.1, 8.2(1) and (4).

³¹¹ Cf Section 4.1.1.

³¹² Cf Igor Materljan, 'Investment Court System under CETA and the Autonomy of EU Law' (2020) 4 ECLIC 203–204.

³¹³ The CETA, article 8.1.

ning of the treaty's jurisdictional terms. For the CETA Tribunal to be able to adjudicate on the principle, reasons for applying the norm must accordingly present themselves in relation to a FET claim contra Member State action.

5.1.1. Jurisdictional restrictions on resort to domestic law

As is inferable from Chapter 2, such reason is however not hard to come by. Either as a consequence of the treaty's FET standard in itself, or as an effect of the CETA's thorough preservation of host states' right to regulate, a proportionality test is no doubt possible to apply in settlement of these disputes.³¹⁴ That adjudication to this effect will be required is furthermore very likely, since Member States, as Materljan predicts, and as has been the case on numerous occasions in international investment disputes,³¹⁵ would often reference their public policy interests in defending their accused FET breaches.³¹⁶ Whether such defence can be reviewed through application of EU fundamental rights proportionality under any shape, is a question for Section 5.2. to answer, for now suffice to clarify that if possible then the CETA Tribunal must therefore in principle be capable of having it applied.³¹⁷

Yet regardless of that finding, or rather just because of that finding,³¹⁸ the CETA purports to introduce a further limitation to the tribunal's jurisdiction by stating that '(the) Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party'³¹⁹. 'For greater certainty' it furthermore adds that '[...] in determining the consistency of a measure with this Agreement, the tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact'³²⁰. To some extent these stipulations declare that the CETA Tribunal may not pronounce Member State actions to be unlawful under EU law,³²¹ but from a jurisdictional perspective they appear completely superfluous. Both sentences employ the word *determine*, which by its ordinary legal meaning is taken to mean that something is, e.g. by an award, authoritatively defined to be of a certain

³¹⁴ See Section 2.3.2.

³¹⁵ See e.g. *Suez* (n 88) para 202; and *RREEF* (n 92) paras 235, 251 and 422.

³¹⁶ Cf Materljan (n 312) 210.

³¹⁷ Cf Opinion 1/17, Opinion of AG Bot (n 294) paras 130–133.

³¹⁸ Cf Opinion 1/17 (n 42) para 131; and Opinion 1/17, Opinion of AG Bot (n 294) paras 136–140; See also Materljan (n 312) 205.

³¹⁹ The CETA, article 8.31(2) 1st sentence.

³²⁰ The CETA, article 8.31(2) 2nd sentence.

³²¹ Part of the domestic law of EU parties to the CETA, see Section 4.2.

disposition.³²² A meaning clearly supported especially by the second of the two, which addresses determinations of (eg) Member State actions' consistency with the CETA and thereby ie resolution of claims under the treaty. Examined in light of that definition these declarations can reasonably only be understood as making national law a basis of claims over which the tribunal may not adjudicate, something which is already obvious from the CETA's jurisdictional clause.³²³

If however scrutinized with an aim of defining the law applicable to a FET dispute under the CETA, article 8.31(2) looks to establish that domestic law cannot, be it only as a step of an *intra vires* exercise of the authority to settle a FET claim, be directly applied to inform the tribunal of a measure's consistency with national law. Instead, it can only be taken into account as a factual supplement in interpretations of the treaty's FET provision. The practical soundness of a provision of this kind can as hinted, with good cause, be questioned,³²⁴ but for the time being it suffices to establish that if article 8.31(2) generates any actual legal effects these have repercussions for the applicable law,³²⁵ not for the CETA Tribunal's jurisdiction.

Based on the preceding conclusions the CETA consequently bestows upon its tribunal the possibility to resort to proportionality assessments in adjudication on FET claims. From a jurisdictional standpoint nothing precludes it from having recourse to EU proportionality specifically as a source of national law in this operation, and the same affirmation, it should lastly be underlined, necessarily will hold true also for the treaty's Appellate Tribunal when called upon to review the manner in which the first instance has used the principle in relation to its definition in domestic law.³²⁶

5.1.2. Are national protective measures excluded from CETA jurisdiction?

All things equal, if a proportionality test is applied to divine whether a Member State's rights protective measure is disproportionately infringing upon an investor's right to FET, what would in fact be under review is the level of protection

³²² Cf Merriam-Webster Dictionary, 'Determine' <<https://www.merriam-webster.com/dictionary/determine>> last updated November 8th 2022.

³²³ See Section 5.1.

³²⁴ See Section 4.1.2.2.

³²⁵ Whether the article delivers any consequences in that regard will be addressed further in Section 5.2.

³²⁶ Cf the CETA, article 8.28(2)b; and Antonis Metaxas, 'Opinion 1/17: Autonomy of EU Legal Order and the Conflicting Context of International Investment Arbitration' (2021) 6 European Papers - A Journal on Law and Integration 639–640.

afforded to fundamental rights under domestic law.³²⁷ According to the views of the EU, as formulated by the CJEU through *Opinion 1/17*, this is however an impossibility, since the CETA Tribunal can in their mind *never* exercise any adjudicative authority over Member State measures taken to protect public policy objectives recognized by EU law.³²⁸ In line with its earlier jurisprudence it is not at all surprising that the Court reads the CETA in this way,³²⁹ but if there is any reason behind this view is a different story altogether. Evaluating that soundness it is initially of essence to recall that *Opinion 1/17*, albeit with binding effect in an intra-EU milieu³³⁰ as well as in possession of a good claim on conveying the positions of a majority of the CETA's contracting parties,³³¹ in an extra-EU ditto still only plays the role of but one possible interpretation of the treaty.³³²

Now, the interpretation of the CJEU looks to two particularities of the CETA to inform its logic. First, the Court considers that the right to regulate must be read as to permit all parties to the CETA to adopt regulation in order to pursue whichever public policy objective that their national legal orders hold as legitimate.³³³ Second, this finding is according to the CJEU further accentuated by the fact that the FET standard has been constructed exhaustively, with focus only on gross mistreatment of investors, not on review of democratically adopted public interests.³³⁴ All in all the Court accordingly highlights that the contracting parties have deliberately ensured a lack of jurisdiction to question each other's choices concerning domestic levels of i.a. fundamental rights protection.³³⁵

The reading of the CJEU is not completely without its reason. Albeit, as mentioned, the right to regulate is already strongly entrenched in IIL,³³⁶ it can cer-

³²⁷ Cf *Opinion 1/17* (n 42) paras 138–138 and 148.

³²⁸ See *Opinion 1/17* (n 42) paras 148–149, 156 and 160.

³²⁹ Cf e.g. Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] EU:C:2008:461, paras 285 and 308; and *Opinion 2/13* (n 287) paras 187–190; See also Gesa Kübek, 'Autonomy and international investment agreements after *Opinion 1/17*' (2021) 4 *Europe and the World: A law review* 11.

³³⁰ See TFEU, articles 216(2) and 218(11).

³³¹ Cf *Opinion 1/17* (n 42) paras 70–78.

³³² Cf the ICJ Statute, article 38(1)d; *PL Holdings* (n 291) paras 308–309; and *Eskosol* (n 270) paras 182 and 184.

³³³ See *Opinion 1/17* (n 42) paras 149–150 and 153–156.

³³⁴ See *Opinion 1/17* (n 42) paras 158–159.

³³⁵ See *Opinion 1/17* (n 42) para 160.

³³⁶ See Section 2.3.1.

tainly be argued that the multiple references to this right across the CETA point to the fact that extra care has been taken by the contracting parties to have it preserved. As such the interpretation thus is loyal to party intentions. Furthermore, it is evidently so that restrictions made to the treaty's FET standard can be attributed to similar intentions³³⁷ and that the limits it introduces to the criteria of arbitrariness and legitimate expectations definitely lower the room for balancing investor and host state interests in examination of FET claims.³³⁸ However, what is here submitted is that it can nevertheless not possibly be subsumed, from the ways that discretion to review public action has been restricted under the CETA, that the treaty does not present this possibility at all. It would simply not be reconcilable either with IIL as a system or with the wording of the treaty's provisions.

To begin with, it is the whole purpose of introducing ISDS into IIAs to open up for review of domestic actions of states, in light of international law and in international fora.³³⁹ If it would not be possible to strike down a host state measure as contrary to FET when it has been adopted in pursuit of domestic public interests, hence not possible to find that measure to introduce a level of public interest protection overly-infringing upon the rights of investors, then a host state could always counter a FET claim with reliance on these interests.³⁴⁰ It is almost by reason of semantics that the CJEU reaches this conclusion without acknowledging its paradoxical nature. The Court is no doubt stating a truism when it clarifies that the CETA Tribunal is not capable of annulling domestic law and that it is not capable *stricto sensu* to declare protection of domestic public interests to be unlawful,³⁴¹ but to avoid incompliance with the whole *raison d'être* of IIL it cannot simply take these features to mean that even awards for compensation,³⁴² where the CETA Tribunal has found a domestic level of protection to be in breach of FET, are given *ultra vires*. Instead, if the substantial standards of the CETA permit that levels of protection, ie balancing of host states' public interests vis-à-vis the rights of investors,³⁴³ are taken into consideration, then such awards must lie within the tribunal's

³³⁷ See Kläger (n 73) 66–68; Cf also Ünüvar (n 77) 272–274.

³³⁸ See Section 2.3.2.

³³⁹ See Christian Riffel, 'The CETA Opinion of the European Court of Justice and its Implications – Not that Selfish After All' (2019) 22 J Int Econ Law 504 and 514; and Kübek (n 329) 6.

³⁴⁰ Materljan makes a similar remark as regards the contradictory position of the CJEU on this matter. A position which sees measures even of general application to be within the tribunal's jurisdiction, but which simultaneously sees all of them as untouchable if taken in reliance on public policy bases of a grand variety, see Materljan (n 312) 210–211; Cf also Krommendijk and Morijn (n 283) 436.

³⁴¹ See the CETA, article 8.39(1)a; and Opinion 1/17 (n 42) para 144.

³⁴² Within the remedies accessible under the treaty, see the CETA, article 8.39(1).

³⁴³ Cf Opinion 1/17, Opinion of AG Bot (n 294) paras 132–133.

jurisdiction.³⁴⁴ And as seen in Chapter 2, the treaty's FET standard does require such deliberations. This regardless of it being exhaustively formulated or of the right to regulate being awarded special attention in the CETA.

Contrary to the views of the CJEU, the CETA Tribunal thus possesses jurisdiction to, albeit solely³⁴⁵ in relation to adjudication on the treaty's FET standard, question the level of protection awarded to public interests by domestic measures. This conclusion is lastly also consistent with the treaty's FET-related provision on the right to regulate, which does not, apart from stating that 'the mere fact that a Party regulates [...] does not amount to a breach of an obligation under this Section'³⁴⁶, in any sense settle the issue of how far a host state may go in protection of their legitimate public interests.³⁴⁷

5.1.3. Partial summary – Jurisdiction and EU proportionality under the CETA

The jurisdictional clause of the CETA clearly limits the jurisdiction of its tribunal to cover nothing but breaches of certain of its substantial investment protection rules, among these its FET provision. If EU fundamental rights proportionality is to be applied under CETA ISDS, it must accordingly be used by invocation of (in this case) FET claims. That there are reasons to resort to proportionality reviews to adjudicate on such claims is however evident, and what is further evident is that CETA Jurisdiction does not preclude that these are executed by recourse to EU proportionality in the form of national law. Neither does this jurisdiction exclude, contrary to intra-Union analysis, proportionality assessments on the basis that it would be *ultra vires* for the CETA Tribunal to call into question the level of protection afforded to public objectives under EU law. Conversely, as the law currently stands, protection of EU fundamental rights can unquestionably be balanced against the rights of investors and jurisdiction-wise this balancing of interests could be performed by application of the principle of proportionality as construed in EU law. Yet whether the principle is possible to apply under this shape, is a question for Section 5.2 to answer.

³⁴⁴ Cf Opinion 1/17, Opinion of AG Bot (n 294) para 130.

³⁴⁵ 'Solely' is used in relation to this thesis alone. Whether similar jurisdiction exists for e.g. expropriations is not a question which it purports to answer.

³⁴⁶ The CETA, article 8.9(2).

³⁴⁷ Cf the CETA, article 8.9(1)–(2).

5.2. EU proportionality as applicable law in assessment of FET breaches under the CETA

5.2.1. The applicable law clause of the CETA

5.2.1.1. An inclusive approach towards international law

If an IIA explicitly identifies a certain set of norms as *directly* applicable law, it can without question be used to perform a proportionality assessment under the relevant treaty's FET clause. In the CETA, such identification is performed through its article 8.31(1), which reads as follows: 'When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties'. That the word *other* has been included must simply be taken to convey that the IIA is itself a source of rules and principles of international law applicable between the parties, but that what is referred to by the second leg of the clause is international law *external* to the treaty. Since there is furthermore such a clear separation, effectuated by inclusion of a comma sign, between that instrument and treaty external international law, it is undoubtedly so that the second portion of norms can in principle be applied independently, not simply as interpretational norms alongside the VCLT. As established in the chapter above they will nevertheless, by reason of conflict, be applied only interpretatively.³⁴⁸

These IIA external international law norms, applied if they pass the threshold of inter-party applicability, by that margin definitely encompass general international law, ie CIL and general principles. As these are always applicable between the parties,³⁴⁹ the clause of course does not need to make this clarification, but that it takes no steps to have them excluded at least highlights that no opt-outs have been incorporated.³⁵⁰ A particularity that the clause on the contrary does introduce is that the applicable law, by reason of its formulation (similar to the one of article 31(3)c of the VCLT), consists also of IIA external treaties applicable between the parties.³⁵¹ Owing to them being labeled applicable law they do not have to be *interpretatively* applied by means of systemic integration, but rather they are applicable *per se* and then subdued to the role of

³⁴⁸ See Sections 4.1.2.3. and 4.1.3.1.

³⁴⁹ See Sections 4.1.2.1. and 4.1.3.1.

³⁵⁰ Cf Viñuales (n 57) 1087–1088 and 1090; and Gazzini (n 64) 218–219.

³⁵¹ Cf Section 4.1.3.; Cf also the CETA, article 8.31(1); with the VCLT, article 31(3)c.

interpretative supplement in the same way as is general international law.³⁵² Contrary to the latter they however still have to meet the requirement of inter-party applicability on a conventional basis, just as when they are employed by means of the VCLT.³⁵³ The main novelty as compared to the theoretical foundations of Chapter 4 is therefore merely that under CETA practice this question is not of an interpretational nature, but instead of applicational importance.

What can be subsumed from studying the applicable law clause of the CETA is therefore ultimately that the IIA, *all* general international law and IIA external treaties applicable between the parties all constitute applicable law accessible to inform proportionality assessments under CETA FET disputes. This conclusion of course leaving to be addressed the role of domestic law in these conflicts.

5.2.1.2. A total exclusion of domestic law?

Apart from identifying what laws that are applicable, the clause of the CETA also attempts to spell out which laws that are not, its second paragraph looking to exclude domestic law from applicability altogether by asserting to it solely factual significance.³⁵⁴ In addition to prescribing this isolated factual significance, it moreover clarifies that if relied upon as fact, then the contents of domestic law must be established following the ‘prevailing interpretation’ given to it by national courts.³⁵⁵ By these measures the CETA authors clearly overlook the practical difficulties in proving the exact state of domestic law without first having it *de facto* applied to the relevant circumstances of a case,³⁵⁶ but since the wording of article 8.31(2)’s second to third sentences is nevertheless clear as day, assume that if EU proportionality as national law can be referred to when conducting a proportionality assessment of a FET breach,³⁵⁷ then it would have to be applied in an EU conform manner.

What this would practically entail is however difficult to discern, judging from the fact that the exact contents of EU proportionality as construed in Chapter 3 will to some extent always be contingent upon case-by-case analysis. Initially, a look must be had at the underlying substantial law at issue, examining to what

³⁵² Cf Section 4.1.3.1.

³⁵³ See Sections 4.1.3.1–4.1.3.2.

³⁵⁴ See Section 5.1.1; and the CETA, article 8.31(2) 2nd sentence.

³⁵⁵ See the CETA, article 8.31(2) 3rd sentence; Notably this declaration is completely unnecessary, since the whole purpose of treating law as fact is to have it applied as it would have been in the jurisdiction possessing interpretative power over that law, cf *Certain German Interests* (n 231).

³⁵⁶ See Section 4.1.2.2.

³⁵⁷ See further Section 5.2.3.

length this legislation balances the conflicting interests at hand.³⁵⁸ If it does not meddle with that issue, the tribunal would accordingly award considerable discretion to the Member State in question, but under the reverse circumstances it would have to examine all relevant facts in course of scrutinizing the legitimacy, adequacy and necessity of the Member State's measure.³⁵⁹ Under both circumstances, at least concerning elaborations on the intensity with which the proportionality test should be executed, consideration of EU proportionality simply as fact therefore comes rather close to downright application of the norm. It should also be underlined that this conclusion is based on but one possible reading of CJEU jurisprudence on fundamental rights proportionality, which as is inferable from Sections 3.3–3.4 does not necessarily point in only one direction. Simply from attempting to establish which 'version' of EU proportionality that in fact constitutes the relevant domestic law of the case, the CETA Tribunal would thus to some extent have to perform interpretations of its own.³⁶⁰

The requirement of applying EU law (when materialized as domestic law) as fact, and then following a prevailing interpretation of the CJEU, consequently rather takes the form of an ambition. As much is also controversially the conclusion reached by AG Bot, who, contrary to the CJEU,³⁶¹ seems to infer from the CETA that the intention of the parties has been to have domestic law interpreted 'as little as possible',³⁶² but that if no interpretative answer is to be found in EU law, then the autonomy of the latter is not protected by a ban on interpretations but rather by the limited binding effects of the tribunal's awards.³⁶³ For the second leg of the requirement it should lastly be noted that such conclusions are nonetheless quite unproblematic, since arbitral tribunals anyhow attempt to apply domestic law in a manner faithful to domestic jurisprudence.³⁶⁴

What can therefore be established is that EU proportionality as domestic law, albeit in principle only reviewable as fact, can in fact be *directly* applied in a manner similar to what is the case for the principle in its shape of international law. However, contrary to the latter it is still not pinpointed by the CETA's clause on applicable law as belonging to that category. Meaning that for re-

³⁵⁸ See Section 3.4.

³⁵⁹ See Sections 3.3–3.4.

³⁶⁰ Cf Hepburn (n 71) 133.

³⁶¹ See Opinion 1/17 (n 42) paras 131 and 136.

³⁶² See Opinion 1/17, Opinion of AG Bot (n 294) para 129.

³⁶³ Cf Opinion 1/17, Opinion of AG Bot (n 294) paras 137–140.

³⁶⁴ See Section 4.1.3.

course to be had to the principle in this form, adjudication on a FET breach would have to require that excursions into domestic law were conducted.³⁶⁵

5.2.2. EU proportionality as applicable international law

Enjoying the express award of applicable law status, general international law and IIA external treaties are on that ground alone possible to apply independently to settle a FET claim.³⁶⁶ Due to the *lex specialis derogat lex generalis* relationship which exists between these two sets of norms and the IIA however, they must only be used in a fashion supplementary to what the latter prescribes to be FET.³⁶⁷ For such prescriptions the treaty reveals proportionality as a potential tool, but it does not settle the issue of *which* proportionality assessment to use in such an exercise.³⁶⁸ Relevant international law can therefore supplement the treaty with the proportionality test to be applied. Yet if the CETA Tribunal wishes to apply specifically the EU principle of proportionality as the relevant test, it must first constitute a norm of relevant international law, and it is towards an inquiry as to whether this is the case that the examination now turns. Because, as will be seen, there is no need to tackle the relationship between EU fundamental rights proportionality and the CETA to perform this study in relation to its existence as a norm of an IIA external treaty, the examination suitably begins by treating this source of applicable law. This argument holds true also for the norm as a principle of CIL,³⁶⁹ but since this set of rules shares several similarities with general principles of law, these two are for the sake of comprehensibility jointly addressed last.

5.2.2.1. EU fundamental rights proportionality as a norm residing in an IIA external treaty applicable between the parties

Thus turning to IIA external treaties it must at the outset be clarified that while EU fundamental rights proportionality is essentially a concept that materializes through the jurisprudence of the CJEU, its basis is to be found in the Treaties or in the CFR, since it is provisions therein that mandate that this balancing exercise is performed.³⁷⁰ Consequently, it is as a norm of one of these instruments that the test reasonably can be argued to apply between the parties. That affirmation calls for an initial truism: Canada is party to neither of them.³⁷¹ To

³⁶⁵ Cf Section 4.1.2.1.

³⁶⁶ Cf Sections 4.1.2.1. and 4.1.3.1.

³⁶⁷ See Sections 4.1.2.3. and 4.1.3.1.

³⁶⁸ See Section 2.2–2.3.

³⁶⁹ See further Section 5.2.2.2.

³⁷⁰ See TFEU, articles 36, 45(3), 52, 62 and 65; and the CFR, article 52(1); See also Sections 3.3–3.4.

³⁷¹ Cf TEU, articles 1 and 49; and the CFR, article 51(1).

meet the inter-applicability requirement, employment of EU fundamental rights proportionality would therefore have to be an obligation of the Union *erga omnes*.³⁷² There is no real consensus regarding which rules that give rise to *erga omnes* effects,³⁷³ but it is well-conceivable that the Treaties, or perhaps more likely the CFR, could include rules of this kind.³⁷⁴ Yet even if this was the case, this does not purport that the proportionality test applied to these rules would acquire the same status. Because EU fundamental rights proportionality in itself does not give rise to any *erga omnes* obligations, but is merely instrumental to the end of balancing opposing obligations so that they both can be complied with.³⁷⁵ And as already stated, international law is dualistic and does not oblige a certain modus of compliance, but simply that compliance is in fact achieved.³⁷⁶

Hence, even in the highly unlikely event where both EU fundamental rights *and* freedoms (the opposing rules which EU proportionality aims to reconcile) are regarded as *erga omnes* obligations, this *erga omnes* quality would not extend to the principle of EU fundamental rights proportionality. Consequently, on this ground it does not meet the requirement of inter-party applicability and is therefore not possible to invoke as an application of an IIA external conventional norm.

5.2.2.2. EU fundamental rights proportionality as general international law

5.2.2.2.1. The difference between CIL and general principles of law

Initially the point must necessarily be made that a full elaboration on the status of proportionality in general, or EU fundamental rights proportionality in particular, as CIL or a general principle is in itself enough to cover the entirety of a graduate thesis. Hence, departing from the works of others, the study here conducted only briefly covers points of overwhelming unity in the academic literature and the practice of international actors, while instead devoting more thorough attention to issues of contention, as well as the practical task of deploying EU fundamental rights proportionality specifically within a CETA FET dispute.

³⁷² Cf Section 4.1.3.2.

³⁷³ See ILC, 'Fragmentation of international law' (n 72) para 381.

³⁷⁴ Cf *Barcelona Traction, Light and Power Company, Limited* (Judgment) [1970] ICJR 32 [34]; ILC, 'Fragmentation of international law' (n 72) para 391; and De Wet (n 282).

³⁷⁵ As seen in an intra-EU context where it aims to reconcile the (sometimes) conflicting obligations of respecting fundamental freedoms whilst also respecting fundamental rights, see Section 3.4.

³⁷⁶ See *LaGrand* (n 286); and Wouters et al. (n 65) 958.

All the same, a suitable starting point for this examination is to clarify an international law fundamental up until this point largely neglected, namely the difference between CIL and general principles of law. The proportionality principle could unquestionably fall under any of the two categories and they both share similarities what concerns their identification and formation,³⁷⁷ but despite common denominators however, it is here submitted that it is considerably more difficult for proportionality to qualify as a CIL norm than to acquire the status of a general principle. The reason for this being that identifications of these sets of norms concern themselves with different legal arenas. If a principle is to become a general principle of law recognized by civil nations,³⁷⁸ it must be sufficiently established in all main *domestic* systems of law,³⁷⁹ and it must be possible to transpose to an international law level without doing either this legal system or the principle's core functions in domestic legal orders injustice.³⁸⁰ It must not however, be a norm actually applied *in international law* before this point, and it must furthermore not be recognized by the *international community* as a norm to which it is legally bound in its common exchanges.³⁸¹ Conversely, CIL norms shall tick both latter boxes, and their usage must additionally be of a constant and uniform nature.³⁸² Consequently, whereas proportionality as CIL would require that international actors in some way have decided on a specific usage of the principle for regulation of their inter-relationships, proportionality as a general principle necessarily calls for some type of generalization and change to prepare the principle for application in an international context.³⁸³ Because there are no international law sources indicating exactly how these principles are to be applied once identified, this leaves the

³⁷⁷ See Samantha Besson, 'General Principles and Customary Law in the EU Legal Order' in Stefan Vogenauer and Stephen Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing, 2017) 107.

³⁷⁸ After the formulation in the ICJ Statute, see the ICJ Statute, article 38(1)c.

³⁷⁹ Cf Harold Cooke Gutteridge, 'Comparative Law and the Law of Nations' (1944) 21 BYIL 5; Alain Pellet and Daniel Müllerand, 'Article 38' in Karin Oellers-Frahm et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (3rd ed., Oxford University Press, 2019) 928; and Bücheler (n 69) 32–33; Some argue that general principles can also be of a completely international law nature, but as Bücheler notes it is only distillation of principles from comparative analysis of domestic legal orders that is widely recognized as a method for abstracting general principles as international law sources, see Bücheler (n 69) 31–32.

³⁸⁰ Cf Gutteridge (n 379); Sir Arthur Watts and Sir Robert Jennings, 'Foundation of international law' in Sir Arthur Watts and Sir Robert Jennings (eds.), *Oppenheim's International Law: Volume 1 Peace* (9th ed., Oxford University Press, 2008) 36–37; and *Barcelona Traction, Light and Power Company, Limited* (Separate Opinion of Judge Sir Gerald Fitzmaurice) [1970] ICJR 66–67 [5].

³⁸¹ Cf Wouters et al. (n 65) 756–759.

³⁸² See ILC, 'Identificación del Derecho Internacional Consuetudinario' [2018] 2 ACIDI (Segunda parte) 97.

³⁸³ Cf Sir Watts and Sir Jennings (n 380) (in particular 36 note 3); and *Barcelona Traction*, Separate Opinion of Judge Fitzmaurice (n 380).

question open as to which version of a principle to resort to in a given context.³⁸⁴

5.2.2.2.2. Proportionality in domestic and international legal systems

Against this backdrop it becomes significantly easier to understand the position held by the principle of proportionality in international law today. Proportionality assessments are well-entrenched concepts of both civil law,³⁸⁵ common law³⁸⁶ and mixed system³⁸⁷ jurisdictions and have on this basis been transposed into a variety of international law sub-regimes.³⁸⁸ In as much as it means ‘that a State’s acts must be a rational and reasonable exercise of means towards achieving a permissible goal, without unduly encroaching on protected rights of either the individual or another State’³⁸⁹ it is held to be a general principle of law.³⁹⁰ On an abstract level this principle can further be synthesized into the classical three-leg test of suitability, necessity and *stricto sensu* balancing,³⁹¹ but be that as it may, these three steps are not necessarily catered for in every substantial area of international law nor is the internal assertion of weight

³⁸⁴ Cf *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (ICTY) para 48 <<https://www.icty.org/x/file/Press/nato061300.pdf>> accessed December 29th 2022; Emily Crawford, ‘Proportionality’ (2011) in Anne Peters (ed.) *Max Planck Encyclopedias of Public International Law* (Oxford University Press) para 24; Stone Sweet and Della Cananea (n 70) 912 and 941; and Bücheler (n 69) 62; On the relative flexibility of general principles as compared to CIL, see further Besson (n 377) 123.

³⁸⁵ See e.g. *R v. Oakes* [1986] 1 SCR 105–106; See also Bücheler (n 69) 43–45.

³⁸⁶ See Stone Sweet and Della Cananea (n 70) 940; and Bücheler (n 69) 35–40 and 43; One possible anomaly is the common law system of the US, which has to some extent rejected down-right proportionality analysis. However, balancing exercises similar to proportionality testing have in fact been performed several times by the US Supreme Court, as convincingly elaborated on by Bücheler, see Bücheler (n 69) 51–61; On this last note it must furthermore be recalled that a general principle does not require establishment in all domestic *laws*, but simply all domestic *systems* of law, see Section 5.2.2.2.1.

³⁸⁷ See e.g. *S v. Makwanyane and Another* (CCT3/94) [1995] ZACC 3, para 104; and Bücheler (n 69) 43 and 45–50.

³⁸⁸ See Stone Sweet and Della Cananea (n 70) 916 and 921; A good overview of its use in international law is given by Crawford, see further Crawford (n 384) paras 9–22.

³⁸⁹ Crawford (n 384) para 1.

³⁹⁰ See Crawford (n 384) para 1; Thomas Cottier et al., ‘The Principle of Proportionality in International Law: Foundations and Variations’ (2017) 18 *JWIT* 660 and 671; and Stone Sweet and Della Cananea (n 70) 938.

³⁹¹ See Benedict Kingsbury and Stephan W. Schill, ‘Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest – the Concept of Proportionality’ in Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 86; Cottier et al. (n 390) 629; and Crawford (n 384) para 2; For a more thorough description of these three steps, see Section 3.1.

between them identical.³⁹² In e.g. ECtHR jurisprudence, the test of necessity, albeit sometimes occurrent, is devoted a significantly smaller focus than it is in EU law, instead focusing more extensively on the balancing *stricto sensu* with which the latter rarely meddles.³⁹³ Moreover, many international law regimes, in contrast to EU and domestic law, do not touch upon the test of suitability in the slightest.³⁹⁴ These differences all convey that application of the principle will in the end be very contingent upon the underlying structures, values and purposes of the relevant system of law.³⁹⁵

As there is thus no uniformity in its application, it is almost self-explanatory that the principle does not enjoy CIL status, the exception here being its specific roles in international law on self-defence and humanitarian law.³⁹⁶ EU proportionality therefore does not constitute a principle of CIL possible on that ground to apply in a CETA FET dispute. If the same conclusion on lack of uniform application generates a similar verdict for its position as a general principle of law is less certain. The general features of proportionality do certainly not automatically mimic EU fundamental rights proportionality, but neither do they automatically exclude it. As mentioned above, there is no definitive answer to the question of how to apply proportionality having once identified it as a general principle.³⁹⁷ One possible approach to this issue could be to conclude that since a general principle of international law does not correspond exactly to any of its national dittos,³⁹⁸ EU fundamental rights proportionality is on that basis excluded from being invoked as such in a CETA FET dispute. Because it is meanwhile contended that proportionality *lato sensu* is in fact a general principle of law, hence that it can be invoked in CETA ISDS,

³⁹² Cf Kingsbury and Schill (n 391); and Cottier et al. (n 390) 634, 653 and 666.

³⁹³ Cf Cottier et al. (n 390) 666; and Sections 3.1–3.2.

³⁹⁴ See Cottier et al. (n 390) 667; On the sometimes more rigid CJEU approach towards suitability in fundamental rights cases, see Sections 3.3–3.4.

³⁹⁵ See Kingsbury and Schill (n 391) 80 and 86; Bücheler (n 69) 62; and Cottier et al. (n 390) 634 and 665.

³⁹⁶ See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJR 245 [41]; and Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I – Rules* (Cambridge University Press, 2005) 46; Cottier et al. are of the opinion that the second leg of the principle, necessity, has in fact acquired CIL status. Whether this is the case is questionable judging from the fact that the ECtHR e.g. far from applies it in all of its jurisprudence. Regardless, no matter the status of the second leg even Cottier et al. explicitly avoid labeling the entirety of the principle a norm of CIL. For their discussion, see further Cottier et al. (n 390) 630 and 671.

³⁹⁷ Cf *Final Report to the Prosecutor* (n 384); Crawford (n 384); Stone Sweet and Della Cananea (n 70); and Bücheler (n 69) 62.

³⁹⁸ See *Norwegian shipowners' claims (Norway v. USA)*, PCA (Award) [1922] 1 RIAA 331.

stopping at such a declaration however comes closer to *non liquet*³⁹⁹ than a solution to actual legal disputes. Another approach is instead one that crystalizes around the discussions surrounding the *Continental Casualty* case.

5.2.2.3. Continental Casualty and systemic compatibility

In this case, a general derogation clause of the US-Argentinian BIT was interpreted by the relevant tribunal applying the principle of proportionality as developed in jurisprudence relating to the derogation clause of the General Agreement on Tariffs and Trade (GATT) of the WTO. Motivated by the view that the latter's clause had acted as blueprint for the provision of the BIT,⁴⁰⁰ the tribunal thereby essentially transposed the principle from trade to investment law.⁴⁰¹ The subsequent academic reception of this move has been one of both appraisal and severe critique. Kingsbury, Schill and Cottier et. al look keenly upon the case as a groundbreaking leap for proportionality in the realm of IIL.⁴⁰² Continuing, in their exhaustive response to Alvarez's critical account on the same, Della Cananea and Stone Sweet endorse the approach of the Casualty tribunal by stressing two points: (a) that it is justifiable considering that the tribunal only applied what is in fact a general principle of international law⁴⁰³ and (b) that diffusion of this principle across international law has in fact never been restrained by any demands as to its exact application in a given area.⁴⁰⁴ In the other ring corner there is Alvarez, who considers what he refers to as 'boundary crossing' between trade and investment law as lacking lawful basis.⁴⁰⁵ Alvarez takes the view that the balancing test of WTO law firstly is not reconcilable with the rationale of the relevant BIT,⁴⁰⁶ secondly that it does not constitute a norm possible to invoke through article 31(3)c of the VCLT and lastly that it is not a general norm of international law possible to invoke

³⁹⁹ See Franziska Knur and Ulrich Fastenrath, 'Non liquet' in *Oxford Bibliographies* <<https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0130.xml>> last reviewed April 12th 2019.

⁴⁰⁰ See *Continental Casualty* (n 91) para 192.

⁴⁰¹ See *Continental Casualty* (n 91) paras 192–205; Cottier et al. (n 390) 663–664; and Kingsbury and Schill (n 391) 101.

⁴⁰² See Cottier et al. (n 390) 664; and Kingsbury and Schill (n 391) 101.

⁴⁰³ See Stone Sweet and Della Cananea (n 70) 937–938.

⁴⁰⁴ See Stone Sweet and Della Cananea (n 70) 937, 939, 940 and 943.

⁴⁰⁵ See Alvarez (n 68) 194 and 196; On a temporal note it must be explained that the article of Alvarez essentially builds on two of his earlier works, in relation to which the article of Della Cananea and Stone Sweet was written, see Alvarez (n 68) 195; and Stone Sweet and Della Cananea (n 70) 915–916.

⁴⁰⁶ See Alvarez (n 68) 192–201.

on a freestanding basis.⁴⁰⁷ Contrary to the authors referred to above neither does he look to view proportionality as a general principle of law.⁴⁰⁸

In each of these diverging opinions lies a grain of truth, grinding them together might produce, at least in this author's opinion, a rule of interpretation to follow in application of the proportionality principle in a specific regime of international law. For starters, both points raised by Della Cananea and Stone Sweet have bearing in relation to the examinations conducted above; proportionality is a general principle and there are no guidelines on how to apply it in a specific context. What these two ignore however is a point stressed by several authors, namely that its application on the international law arena in the end is very context specific. In contrast to their essentially negative justification of the Casualty approach, the conclusion cannot therefore be that purely because application of a specific proportionality principle is not an excluded fit, it is a good one. At the same time, it must be stressed, contrary to what Alvarez suggests, that the proportionality assessment of the Casualty tribunal as such is not prohibited. To begin with, he makes a moot point when arguing for the impossibility to invoke such a test under the VCLT rules on interpretation, since proportionality as a general principle is invocable without reference to this rule set.⁴⁰⁹ Conversely, when he states that it is a norm not possible to apply independently, he bases this on his arguably faulty declaration on the principle as lacking such status.

Despite what is instead a lawful *direct* application of the norm, it must nonetheless still answer to the constraints of the *specialis* rule set⁴¹⁰ (ie the US-Argentinian BIT). If the specific proportionality assessment invoked, albeit not doing violence on its general meaning in domestic legal systems, does not respect the purpose and values of the regime in which it is used, such invocation inevitably clashes with established rules on conflict.⁴¹¹ It is this factor that Della Cananea and Stone Sweet overlook and it is in relation to this factor that Alvarez's search for compatibility between trade and investment law emerges as a sound strategy. Therefore, going further than Della Cananea and Stone Sweet, without adhering to Alvarez's views on the applicability of proportionality as a general principle, what must be established is whether it is possible to apply EU fundamental rights proportionality to assess a CETA FET claim without undermining the rationale of this provision in particular, nor the treaty or IIL in general. Interestingly enough, no matter his preceding statements on inter-

⁴⁰⁷ See Alvarez (n 68).

⁴⁰⁸ Cf Alvarez (n 68) 189.

⁴⁰⁹ See Sections 4.1.2.1. and 4.1.3.1.

⁴¹⁰ See Sections 4.1.2.3. and 4.1.3.1.

⁴¹¹ Cf ILC, 'Fragmentation of international law' (n 72) paras 88, 91, 104 and 410–412.

pretational and applicational constraints, it almost looks as if Alvarez in the end suggests as similar *modus*.⁴¹²

5.2.2.4. EU fundamental rights proportionality as a general principle of law applied in CETA FET disputes – A compatibility test

The underlying rationale of IIL in general, and of the CETA in particular, is that there is value to collect in FDI. In light of this assumption it is regarded as beneficial for states to forfeit a certain amount of regulatory sovereignty, in favor of laying down autonomous standards for the removal of all barriers standing in the way of foreign investors wishing to pursue economic activity within their territories.⁴¹³ The FET standard of the CETA constitutes a rule of this kind, which prohibits national authorities from exercising their sovereign prerogatives if these are employed e.g. arbitrarily or unpredictably.⁴¹⁴ To assure that states follow these prescriptions, investors are empowered by the CETA to judicially enforce this rule.⁴¹⁵ Looking at EU law and EU fundamental rights proportionality from this perspective of IIL, an uncanny similarity emerges. As is the case for IIL, Union law too presumes that it is in the interest of all Member States to facilitate economic exchange between them by removing all impediments to foreign nationals (even those of a non-discriminatory nature⁴¹⁶) engaging in economic activity in other EU countries.⁴¹⁷ This is achieved through the fundamental freedoms of EU law, which, just as FET provisions in IIL, effectively reduce Member States' regulatory authority and enable individuals to access judicial remedies should the former not respect those limits.⁴¹⁸

While both systems, aiming to further the economic presence of aliens in concerned states, thus introduce limits on state sovereignty by creation of extra-national economic rights, none of them makes these limits boundless. The CETA's FET clause contains a closed list of characteristics which can make regulatory actions of host states prohibited,⁴¹⁹ factors which are furthermore delimited by their superlatives, only targeting public authority that is exercised

⁴¹² See Alvarez (n 68) 203.

⁴¹³ See the CETA, Preamble; and Dolzer, 'History, Sources, and Nature' (n 58) 26–29 and 31.

⁴¹⁴ See Sections 2.1. and 2.3.1.; Cf also Dolzer, 'History, Sources, and Nature' (n 58) 32.

⁴¹⁵ See the CETA, article 8.18(1)b; and Dolzer, 'History, Sources, and Nature' (n 58) 27.

⁴¹⁶ See Section 3.4.

⁴¹⁷ See Pedro Caro de Sousa, *The European Fundamental Freedoms: A Contextual Approach* (Oxford University Press, 2015) 58–59; and de Nanteuil (n 102) 87–88 and 398.

⁴¹⁸ See de Sousa (n 417) 56–57.

⁴¹⁹ See Section 2.3.1.

in ‘*fundamental breach*’ or by ‘*manifest arbitrariness*’.⁴²⁰ Moreover, a general derogation clause is provided in connection to the provision, maintaining the right of states to regulate in relation to certain legitimate public objectives.⁴²¹ In a comparable fashion, the fundamental freedoms of EU law are also possible to infringe by reference to such aims, aims to be found either in the TFEU⁴²² or the CFR^{423, 424}

Albeit both regimes thus provide derogations from their initially economic ambitions, a first incompatibility between the two seemingly surfaces from the fact that the CETA does not explicitly list fundamental rights as a public policy objective justifying such derogations.⁴²⁵ Because EU fundamental rights proportionality has been developed specifically to strike a balance between economic and rights protective interests, it would naturally not be fit for CETA FET application if these latter cannot form part of a proportionality assessment of this provision. However, it is here submitted that since the enumeration of legitimate objectives is not apparently exhaustive in the CETA,⁴²⁶ since its preamble clearly highlights the dedication of both parties to protect fundamental rights⁴²⁷ and as the listed term *public morals* usually is read to include fundamental rights,⁴²⁸ protection thereof should in fact be labeled a legitimate public policy objective under the treaty.

Fundamental rights can accordingly under both systems be invoked to derogate from either the FET clause or from fundamental freedoms. But while these are not absolute in nature, neither are the former.⁴²⁹ In an EU fundamental rights milieu, a proportionality test is applied to determine how far the pursuit

⁴²⁰ Cf Opinion 1/17 (n 42) paras 158–159.

⁴²¹ See Section 2.3.1.

⁴²² See TFEU, articles 26, 45(3) 52, 62 and 65.

⁴²³ See the CFR, articles 52(1)–(2) and 53; Cf also *Schmidberger* (n 19) paras 73–74.

⁴²⁴ See Sections 3.3–3.4.

⁴²⁵ See the CETA, article 8.9(1).

⁴²⁶ The right to regulate in relation to FET merely gives examples of legitimate objectives, using the formulation ‘such as’, see the CETA, article 8.9(1).

⁴²⁷ The Preamble includes the following formulations on fundamental rights: (a) ‘[...] Reaffirming their strong attachment to democracy and to fundamental rights as laid down in The Universal Declaration of Human Rights [...]’ and (b) ‘[...] Recognizing the importance of international security, democracy, human rights and the rule of law for the development of international trade and economic cooperation [...]’. See the CETA, Preamble.

⁴²⁸ See *Bartels* (n 12) 214.

⁴²⁹ As a general rule, the exception obviously being absolute rights (ie *jus cogens* norms), cf ILC, ‘Fragmentation of international law’ (n 72) para 174; and Bruno Simma and Philip Alston, ‘The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles’ (1992) 12 *Aust YBIL* 103.

of their protection can be taken to the detriment of their freedom counterparts.⁴³⁰ For the CETA's FET clause, the limit to public interest regulation is not established, but both evaluation of several of its sub-elements (i.a. arbitrariness) as well as its general derogation clause *in fine* require that borders of this kind are drawn.⁴³¹ Both systems thus face a two-way balancing exercise, although it is in the way they approach this task that their mutual incompatibility ultimately appears.

Because while two-way balancing is foundational in EU fundamental rights proportionality, it is still the demands of EU internal market law that take precedence as far as this is possible. If there is no answer to be found in this law on how to protect the fundamental right of dispute, then the Member State concerned is awarded discretion to solve the issue, but if the right is already catered for in relevant secondary legislation, then the CJEU opts for a traditionally strict review of the Member State's measure.⁴³² Member State initiated fundamental rights protection in an intra-EU context can therefore rightly be described as an *infringement* of economic rights, and as an extraordinary measure which Member States generally have no authority to take.⁴³³ This does not rhyme well with the CETA, whose construct of the FET clause indicates that the relation between this provision and Member State initiated fundamental rights protection is oppositely balanced. While the treaty, as does EU law, restricts exercise of regulatory sovereignty to certain policy areas, it also offers a closed list on behaviors capable of breaching the FET provision. Behaviors that, in light of the reinforcing adjectives connected to them, reasonably must be of a certain grossness. Compare this to EU law, which instates an extensive ground rule striking down all measures capable of impeding market access.⁴³⁴ Contrary to the norm of economic integration in EU law it is therefore submitted that the CETA, in light of the many efforts its authors have made to highlight the right to regulate therein,⁴³⁵ rather implies that the party intention has been to make the legitimacy of public policy measures the norm. With the consequence that such manoeuvres only in extraordinary cases can be held to be unfair or inequitable.

Despite the ideological and structural likeness between EU law and the CETA, the former's proportionality review is thus too strict to be reconcilable with the sovereignty oriented values of the latter. Of course it could be argued that the

⁴³⁰ See Sections 3.3–3.4.

⁴³¹ See Sections 2.3.2. and 5.1.2.

⁴³² See Section 3.4.

⁴³³ Cf Section 3.2.

⁴³⁴ See Van Cleynenbreugel and Miny (n 168) 290; Cf also TFEU, articles 34, 45, 49, 56 and 63; *Dassonville* (n 150); and *Etimine* (n 145) para 59.

⁴³⁵ See Section 2.3.1.

version of the EU test that does leave discretion to Member States avoids this issue, but it is not possible to land in this softer test without first closely examining whether the surrounding legal framework of economic integration already regulates the object of this discretion. And this is an examination which the CETA, by presuming that there is almost always reason behind a regulatory action, excludes. EU fundamental rights proportionality is in its entirety therefore not fit to apply as a general principle of law in CETA FET disputes.

5.2.2.2.5. Conclusions

For EU fundamental rights proportionality to constitute a principle of CIL it must represent a specific permutation of proportionality used on the international arena in capacity of a binding legal norm. To make up a general principle of international law it suffices that its core values can be identified in all major domestic legal systems, and that it could be applied internationally without violating either these core values or the dittos of the international legal order. The principle of proportionality meets these latter criteria, but its application in international law is far too divergent for it to qualify as CIL. Hence EU fundamental rights proportionality, as all version of this principle, is not characterizable as applicable CIL in CETA FET disputes.

A mirroring conclusion cannot be drawn for the norm as a general principle, since there are no demands in the rules on identification of this source concerning which exact form it must take when applied. On a general level it must violate neither its own core values in domestic systems, nor the core values of international law, but apart from these constraints it appears as if anything goes. However, in light of the *Continental Casualty* case and the parallels that can be drawn from these proceedings to the rules on conflict of international law, evident is that these latter require a ‘systemic compatibility’ between the specific proportionality principle a tribunal wishes to apply and the sub-system of international law in which it purports to do so. EU fundamental rights proportionality as a general principle of law must thus house the same structure and values as IIL in general and the CETA in particular if it is to be applied to analyse FET claims made under the latter.

To a certain extent the principle appears to be a good fit for such evaluations. Both EU law and the specific IIL regime of the CETA stand on equal ideological foundations and to determine the borders of an EU Member State’s regulatory sovereignty they both allow for a two way balancing exercise, where fundamental rights protection can be invoked as counterbalance vis-à-vis interests of economic integration. But no matter these similarities it is an inescapable truth that while EU proportionality views exercises of Member State regulatory sovereignty as an anomaly, it is FET under the CETA that is viewed as the anomaly, to the otherwise untouchable legitimacy of exercising the former right. EU fundamental rights proportionality therefore cannot be invoked to assess the lawfulness of this prerogative, it would simply be overly-infringing upon the latter’s construction in the CETA. To note is that had the principle

been *lato sensu* applicable either as an IIA external conventional norm or as CIL, the same result would have produced itself also for these sets of norms.

5.2.3. EU proportionality as applicable domestic law

EU fundamental rights proportionality as applicable domestic law would not run into the same issue of conflict as does the norm applied as a general principle of law. The reason for this being that since the former is not appointed by the CETA's choice of law clause as generally applicable, it may only be applied where a question of domestic law needs answering to settle the meaning of FET in a given case, e.g. in order define whether a host state has acted arbitrarily^{436,437} In an operation of this kind it is not applied to strike a balance between a Member State's regulatory interest and the rights of an investor, but between the former and conflicting interests of Union law.⁴³⁸ By reason thereof it comes nowhere near of threatening the values that inform the balancing between economic and sovereign regulatory interests under the CETA, as it is solely applied to an intra-EU situation.⁴³⁹ While it thus ducks the issue of *lex specialis* incompatibility, fact remains that it may only be applied to settle issues where the domestic (EU) proportionality of a measure is of relevance, and the FET provision must consequently provide reason to perform such inquiries.⁴⁴⁰

Generally, the proportionality of a Member State measure can inform if it should be regarded under the CETA's FET clause as (a) arbitrary (b) taken against legitimate expectations (c) taken in bad faith or (d) *intra* or *ultra vires* of the state's right to regulate.⁴⁴¹ When deciding if that measure matches any of these factors, the CETA Tribunal can consider if it respects the constraints bestowed upon it under domestic law (hence i.a. under EU law⁴⁴²).⁴⁴³ Because it is EU fundamental rights proportionality that determines the lawfulness of a Member State's rights protective measure under EU law, the norm can consequently be applied in this latter 'sub-assessment' of that action to see if it is in fact legal or not.⁴⁴⁴ This is a very specific inquiry which directs itself towards domestic law to find its answers, in other cases proportionality assessments of FET sub-criteria do not take this route. On the contrary, arbitral jurisprudence

⁴³⁶ See Sections 2.1–2.2.

⁴³⁷ See Sections 4.1.2.1. and 4.1.3.1.

⁴³⁸ See Sections 3.2–3.4.

⁴³⁹ Cf Section 5.2.2.2.4.

⁴⁴⁰ See Sections 2.2 and 4.1.2.1.

⁴⁴¹ See Section 2.3.2.

⁴⁴² See Section 4.2.

⁴⁴³ See Sections 2.2 and 2.3.2.

⁴⁴⁴ See Sections 3.2–3.4.

shows that proportionality tests in relation to these factors are conducted separately from solving issues of domestic law.⁴⁴⁵ Hence except when the domestic (il-)legality of a measure is argued as an indication of e.g. a behaviour against an investor's legitimate expectations, there is no need to resort to domestic law and by extension no cause for holding it to be applicable.⁴⁴⁶ This means that for EU fundamental rights proportionality to be applicable as domestic law in examinations of arbitrariness, legitimate expectations, good faith conduct or the right to regulate, the issue of domestic legality must be raised in connection to these. In light of arbitral practice domestic legality could in principle also constitute a FET determinant in its own right, but as much is arguably precluded by the way in which the CETA's FET clause has been constructed.⁴⁴⁷

In the following, domestic legality is therefore analyzed solely as a link between domestic proportionality tests and evaluations of the aforementioned elements of the CETA's FET provision. While it in theory suffices that a *general* point of domestic legality can be raised in FET evaluations to make EU fundamental rights proportionality, as an indicator of that factor, applicable, attempt is made to highlight arbitral jurisprudence where questions of domestic legality have been raised *specifically* in relation to domestic proportionality.

5.2.3.1. EU proportionality and arbitrariness

Laws are enacted by states to guide i.a. their very own conduct, and if they then act contrary to these guiding rules it would be very easy to describe this behaviour as arbitrary.⁴⁴⁸ Yet from the reigning authority on the matter, the *ELSI* case, it becomes clear that the mere fact that a host state measure is unlawful under municipal law does not equate that it is also arbitrary.⁴⁴⁹ As formulated by the tribunal of these proceedings: '[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to *the* rule of law'⁴⁵⁰. Under the requirement of respect for the rule of law, additional factors than simple unlawfulness are required, yet doubtless is that the legality of a

⁴⁴⁵ See e.g. *Noble Ventures* (n 97) paras 177–178; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13 (Award, 8 October 2009) paras 284–286; and *Elettronica Sicula SPA (ELSI) (United States of America v Italy)* (Dissenting Opinion of Judge Schwebel) [1989] ICJR 109 and 114–115.

⁴⁴⁶ Cf Sections 4.1.2.1. and 4.1.3.1.

⁴⁴⁷ Cf the CETA, article 8.10(7); and Section 2.3.2; For domestic legality as an independent FET determinant, see Hepburn (n 71) 18–26 and further therein cited cases; and Schill, 'Fair and Equitable Treatment' (n 89) 162–163.

⁴⁴⁸ See Hepburn (n 71) 31–32.

⁴⁴⁹ See *ELSI* (n 188) para 124.

⁴⁵⁰ *ELSI* (n 188) para 128 [my highlight].

measure can constitute the foundation to which additional factors are added.⁴⁵¹ Several investment cases second this conclusion, while simultaneously providing illuminating examples of situations where domestic legality has been evaluated under proportionality-like circumstances, and of the aforementioned differentiation between proportionality as inherent in legality requirements vis-à-vis freestanding tests performed on FET sub-elements.⁴⁵² One pertinent case is e.g. the one of *Genin v Estonia*, where the tribunal on the question of domestic legality directed attention to the fact that public authorities had acted within their statutory discretion, but apart from this also conducted an independent assessment of the legitimacy of host state measures, to conclude that they were not arbitrary.⁴⁵³

De lege lata on FET arbitrariness consequently supports the notion that the lawfulness of Member State measures under EU fundamental rights proportionality can, while not in itself capable of settling the definition of what is arbitrary, affect the outcome of that determination. Whether this conclusion is partially qualified by the CETA's FET clause striking down only *manifest* arbitrariness is a question that can be looked at from two different angles. Either the addition of *manifest* makes it many times unnecessary for the CETA Tribunal to initiate any thorough examinations of the domestic proportionality of measures,⁴⁵⁴ or its exactly this demand that makes it sufficient to stress nothing but domestic legality, since host state measures lawful under domestic law would rarely meet such a high threshold.⁴⁵⁵

5.2.3.2. EU proportionality and legitimate expectations

The room for any kind of assessment of an investor's legitimate expectations, or by extension of the specific expectation for stable legal environments, is quite slim to begin with under the CETA's FET clause.⁴⁵⁶ What concerns expectations related to domestic legality they are moreover usually considered to be too general to be legitimate, making its stipulation to the effect that only specific representations can legitimize expectations all the more prevalent in

⁴⁵¹ See *ELSI* (n 188) para 124; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Award, 22 May 2007) para 281; *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL (Award, 8 June 2009) para 626; and *Hepburn* (n 71) 33 and 36–39.

⁴⁵² Cf *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22 (Award, 23 September 2010) para 7.6.9; *EDF* (n 445) para 303; and *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2 (Award, 25 June 2001) paras 361, 363 and 370.

⁴⁵³ See *Genin* (n 452).

⁴⁵⁴ As discussed in Section 2.3.2.

⁴⁵⁵ Cf *Lemire* (n 91) paras 409 and 417–418; and *Hepburn* (n 71) 38–39.

⁴⁵⁶ See Section 2.3.

this context.⁴⁵⁷ If a host state has all the same made representations of this kind, perhaps stating that a certain law would govern the investment in question or that it would be implemented in a particular way, then investors might legitimately expect that the law as it then stood would be followed by the state.⁴⁵⁸ By this reasoning it is plausible that an examination of the legitimacy of an expectation could incorporate EU fundamental rights proportionality as a question of domestic legality, to divine whether frustrations of Union law in pursuit of domestic public objectives were to be reasonably expected in light of the Union legal acquis at the time of investment.⁴⁵⁹

5.2.3.3. EU proportionality and the principle of good faith

Cheng's definition of good faith provides a good explanation of the adjacent roles that domestic and freestanding proportionality can play in CETA FET adjudication. According to Cheng, here referred to by Ortino, 'the principle of good faith prohibits (a) the malicious exercise of a right [...]; (b) the fictitious exercise of a right (ie for the purpose of evading [...] a rule of law [...]); and (c) abuse of discretion (ie when a discretionary power is not exercised reasonably [...] and with due regard to the interests of others)⁴⁶⁰. Point (c) clearly invites a freestanding proportionality assessment,⁴⁶¹ whereas it should be possible to introduce an evaluation of domestic proportionality under point (b). As much perhaps crystallizes by elaborations on this criteria made by the tribunal in *Frontier Petroleum*, which describes measures taken in bad faith as e.g. measures that use 'legal instruments for other purposes than for which they were created'⁴⁶². EU fundamental rights proportionality is, at least what concerns the leg of legitimacy, ie a test designed to scrutinize whether derogations from EU law pursue aims that justify them – aka if actions of Member States use dero-

⁴⁵⁷ See the CETA, article 8.10(4); *Glamis Gold* (n 451) paras 619–622 and 766; and *Hepburn* (n 71) 26–28.

⁴⁵⁸ Cf *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16 (Award, 8 November 2010) paras 122, 386 and 422; and *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04 (Award on Jurisdiction and Liability, 17 March 2015) paras 470, 570–571 and 589.

⁴⁵⁹ Cf e.g. the statements of the tribunal in *Bilcon et al*, which held that '[a] series of encouragements by Nova Scotia in policy pronouncements and directly by elected officials and civil servants [...] created the expectation in the Investors, on which they could reasonably rely, that an environmental impact assessment of a coastal quarry and marine terminal project in the Whites Point area would be carried out fairly and impartially within the legislative framework provided by federal Canada and Nova Scotia', *Bilcon* (n 458) para 470 [my highlight].

⁴⁶⁰ Federico Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness* (Oxford University Press, 2019) 128.

⁴⁶¹ Cf *Gami Investments Inc. v. Mexico*, UNCITRAL (Final Award, 15 November 2004) para 97; and *Bewater Gauß* (n 94) paras 526 and 674.

⁴⁶² *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL (Award, 12 November 2010) para 300.

gations, provided for in the treaties, for intended purposes.⁴⁶³ Thus, while feasibly not applicable in its entirety, EU fundamental rights proportionality as domestic law could be referred to in good faith determinations of whether rights protective measures taken by Member States had any legal bases under EU law.

5.2.3.4. EU proportionality and the right to regulate

The connection between the right to regulate and the CETA's FET clause introduces a general proportionality test to balance Member State measures contra the right of investors to receive FET.⁴⁶⁴ In this form proportionality is applied to settle if a Member State should be relieved of a duty to compensate a FET breach which in all essence exists, hence it is used to possibly alter the consequences stemming from the Member State's behaviour as reviewed under the provision.⁴⁶⁵ This is not an issue for domestic law to settle, whether a lawful balance has been struck between the derogative measure and EU law can as demonstrated contribute to finding an action to be contra-FET, but it cannot from its *inferiori* position determine the consequences of that action under IIL.⁴⁶⁶ To recall is of course that the situation would have been another if domestic law had been applicable by reason of a choice of law clause and not by renvoi,⁴⁶⁷ but since this is not the case, international law will have to supply the proportionality standard used to evaluate the right to regulate.⁴⁶⁸

5.2.4. Partial summary – EU proportionality as applicable law in assessment of FET breaches under the CETA

From the applicable law clause of the CETA it can firstly be inferred that both general international law and IIA external treaties applicable between the parties form part of sources that can be drawn upon to perform any type of proportionality review of Member State measures under the treaty's FET clause. EU fundamental rights proportionality however constitutes a norm neither of CIL, or of an IIA external treaty applicable between the EU and Canada, and no support can accordingly be found to apply it in the form of any of these. Support can instead be presented for applying the norm as a case specific incarnation of proportionality as a general principle of law, but because it (as it

⁴⁶³ See Chapter 3.

⁴⁶⁴ See Section 2.3.2.

⁴⁶⁵ Cf Aikaterini Titi, *The Right to Regulate in International Investment Law* (Nomos | Hart Publishing, 2014) 33 and 36–37; See also Sections 2.3.2, 5.1.2 and 5.2.2.2.4.

⁴⁶⁶ See Section 4.1.2.3.

⁴⁶⁷ See Section 4.1.2.1.

⁴⁶⁸ See Section 5.2.2.

would under all its international law shapes) conflicts with the inherent balance of values struck in the CETA also this would be an application *contra legem*.

Further inferable from the treaty's choice of law clause is that domestic law does not constitute a source of law generally applicable to CETA ISDS, and it can therefore only be applied by reason of 'renvoi'. If such reason exists however, it will be *de facto* applied and not merely considered as fact. Employed as domestic law, EU fundamental rights proportionality runs into no value conflicts, as it is then only applied to settle issues of proportionality in an intra-EU context. These issues present themselves, as relevant to settling FET disputes, in relation to domestic legality, which by means of certain FET sub-elements can inform adjudication on the standard. Whether a Member State's measures breach these criteria is however affected also by i.a. freestanding proportionality assessments, assessments which can moreover be applied to the clause in its entirety through the right to regulate. For these examinations, it is applicable international law, of which EU fundamental rights proportionality does not form part, that supplies the standard of scrutiny after which proportionality is to be assessed.

5.3. Summary

The FET clause of the CETA invites proportionality assessments of Member States' fundamental rights protective measures to either inform, or determine, if the standard has been complied with or not. Contrary to what looks to be the intra-EU analysis, performance of such reviews must thus be within the jurisdiction of the CETA Tribunal. Also within its jurisdiction is to execute these examinations by recourse to EU fundamental rights proportionality, no matter its form. In its shape of international law, the norm could be applied to perform any of these assessments, but since it either does not constitute applicable international law, or constitutes international law irreconcilable with the CETA by reason of *lex specialis*, it can in fact perform none. If instead invoked as domestic law, the principle *can* be *applied*, but only to review proportionality under national law in the course of examining specific sub-elements of the FET clause. Adjacent to this application, other proportionality tests can be employed; firstly just as EU fundamental rights proportionality to define certain FET criteria, but secondly and more importantly to perform a general balancing test between Member State measures and investors rights, to ultimately decide if the former should be tolerated, or not.

6. Finishing conclusions

Respect for fundamental rights is a central Union value, to which the EU adheres internally by i.a. allowing for proportional derogations from internal market law in pursuit of protection of these rights, but also externally by promoting their adherence in its external action. When that area of competence is exercised on the arena of IIL however, just as is the case internally, fundamental rights are not the only interests to consider. To attract FDI and through this the economical influx needed to remain a big fish in the pond of global economy, a portion of regulatory sovereignty must be forfeited by the Union to the possible detriment of i.a. intra-EU rights protection. This *quid pro quo* materializes through the conclusion of IIAs that include autonomous investment protection standards such as the right to FET, provisions whose enforcement can be completely disconnected from national fora in favor of ISDS governed by international law. If Member State measures taken to protect fundamental rights are challenged by foreign investors in ISDS tribunals, their lawfulness will therefore be evaluated in light of this legal regime as materialized through the relevant IIA, not by EU law. That is a worrisome conclusion according to those who view the standards of IIL as encroaching far too deeply on the right of these Member States to pursue such objectives as they themselves see fit, or rather as they are obliged to, under EU law and their domestic counterparts.

As reasonable as these opinions may be, it must however be underlined that it is inherent in the structure of IIL itself that parties to IIAs have not, simply by conclusion of these agreements, agreed to subdue all of their regulatory interests to the goal of investment protection. This is perfectly exemplified by the crucial IIA provision of FET, which as a method for public review firstly has been constructed to target only certain host state demeanours and which secondly incorporates proportionality assessments of host state measures to at least help determine if they tangent several of these earmarked behaviors. Despite such features, perhaps still not entirely convinced by the regulatory room left to states under IIL, it can be seen through the specific FET clause of the CETA that its authors have decided to advance the protection of this space. Something which they purport to achieve partly by further restricting the scope of possible FET breaching measures, but also by directly interlinking FET with the right to regulate. While these modifications have no doubt made it more difficult for Member States' rights protective measures to pass the threshold of contra-FET behavior, they have moreover clearly added a general proportionality test to divine whether these measures, despite in principle meeting certain FET criteria, should anyhow be permitted. By thus introducing a FET clause of a slimmed down scope, where the proportionality of Member State measures can affect both if a *prima facie* breach is to be found *and* if that breach should entail any consequences, the CETA most distinctly attempts to counter the perceived threat to regulatory sovereignty that IIL allegedly brings.

All good and well, proportional rights protective measures will then probably not amount to *prima facie* FET breaches and will most certainly not result in awards for compensation to investors. But what is a proportionate measure? This question will always find its answer in the values underlying the relevant system of law, it is these values that will determine what the standard of scrutiny to pass a proportionality test should be, and consequently to which extent e.g. domestic protection of fundamental rights will be permissible. Despite conveying certain values, whilst introducing the need for proportionality assessments, neither IIL at large, nor specifically the CETA and its FET clause, present a specific standard of this kind. They therefore do not give a definitive answer to the question of what is proportionate, and accordingly they neither settle the matter of which Member State rights protective measures that meet this criteria.

Yet an IIA, such as the CETA, does not have to supply all answers itself. As long as it provides jurisdiction to settle a claim, the tribunal authorized to adjudicate on disputes related to the treaty can draw upon external norms to complement it, in as much as these external norms are in some way applicable and possible to reconcile with the contents of the former. In evaluation of rights protective measures tribunals can therefore supplement their assessments with external proportionality tests. Should the EU then wish to protect fundamental rights to the same extent as it does internally, it should want Union law to provide the supplementing test. If what is proportionate under EU law is also proportionate under IIL, the protection of fundamental rights under both is in theory lawful to the same extent and in exactly the same situations. To try and have it applied in IIL, as has been attempted throughout this thesis in relation to specifically the CETA and its FET clause, however sheds light upon the inherent obstacles to this effect therein residing. Barriers that essentially originate in the hierarchy between specialized international law regimes on the one side, and external international law regimes and more importantly domestic law on the other.

For the first criteria that an external norm needs to meet to be applicable, jurisdiction, the attempts from the EU, to have the CETA's version thereof restricted, show how difficult it is for an external norm system to impose on IIL constraints as for which authority the relevant tribunal must be allowed to exercise as long as it stays within the boundaries of reviewable claims. The CETA Tribunal is empowered by this IIA to settle FET claims, FET claims demand that questions of public interest protection are reviewed and in this exercise the tribunal may use all means permissible under the treaty. EU concerns of autonomy and internal levels of protection cannot change this state of affairs, by handing over the authority to settle FET claims through conclusion of the IIA, it has to accept also the consequences this instrument entails for such adjudication. As concerns internal levels of protection the Union, as can be seen through analysis of the CETA construct of proportionality, need

of course not worry about handing over jurisdiction to the latter's tribunal, but this turns out to be a question of applicable law, not of jurisdiction.

The question of applicable law, regardless if generally applicable by reason of an IIA's choice of law or of its general international law character, *directly* applicable as a source identified by the IIA as relevant to provide certain definitions, or merely *interpretatively* applicable through rules on treaty interpretation, is in the end (just as with jurisdiction) governed by – the IIA and general international law. As the *superior* sets of norms, these two indicate when application of external norms is relevant, and as the *specialis* legal instrument the treaty alone draws the limits for when such application cannot be allowed in the specific case. For CETA FET adjudication these relationships present themselves by international law determining that EU fundamental rights proportionality can constitute neither a CIL principle or an IIA external conventional norm, and in the fact that it is its *specialis* regime of IIL that defaults the norm from being transposed into a CETA FET milieu as a general principle of law.

The treaty lastly decides when it is relevant to consult the EU principle under the shape of domestic law, and in light of the monopoly which international law claims as to the consequences of its breaches, the former is effectively limited to merely a contributory factor, incapable of *stricto sensu* determining the balance between domestic interests and IIL dittos. Moreover, that the norm is capable of playing a supporting role in FET ISDS in itself further accentuates the *inferiori* character that domestic law endures on the IIL arena. Because contrary to the ambitions of the CJEU it is then actually applied as law, which entails the risk that the case specific results it generates will not be identical to what they would have been in an intra-EU context. In this way, even if only as one step of many in determining whether FET in the end prohibits the relevant Member State's rights protective measure, IIL can actually meddle with the level of fundamental rights protection asserted by EU law. In light of this finding it would have been understandable that the EU wishes to ward off application of its norms in their domestic form, but this the EU rather motivates with autonomy concerns, not with fundamental rights related precautions. Since the IIL attempt will anyhow be to have EU fundamental rights proportionality applied in conformity with the EU legal system, the risk of some incompletion is perhaps nonetheless worth taking for the Union, since this is the only way in which its fundamental rights protection might affect FET adjudication to the effect that the former is permitted.

Apart from this intrusion into the regulatory sovereignty of the Union, the comparative analysis between EU law and the CETA however shows that the treaty nearly assumes that i.a. fundamental rights protection is a legitimate interest left for national (or supranational) authority to cater for itself. That it does not provide any specific proportionality standard virtually in its own right evidences that it is not intended to interfere with interests of this kind. Notwithstanding that EU fundamental rights proportionality cannot be applied to per-

form freestanding proportionality assessments of the FET clause, the protection it aims of providing for Union fundamental rights is therefore, with the exception of possible disharmony in interpretation of EU proportionality as domestic law, at long last respected in the specific IIL realm that is the CETA. This conclusion does naturally not purport that IIL offers a level of fundamental rights protection higher than does EU law, but solely that it in the CETA has been constructed as to not overtake this regulatory question from the sovereignty of the parties.

What can then finally be established is that after an EU IIA has been concluded, it is this treaty and the international law milieu in which it is situated that govern to what extent EU regulatory interests, as well as EU law in the form of either municipal or treaty external international norms, are allowed to influence ISDS under that instrument. In the CETA, as an example of contemporary EU IIAs, this legal hierarchy entails that the intra-Union norm of fundamental rights proportionality generally cannot be applied in IIL to provide an EU standard of protection for therein scrutinized fundamental rights. A qualification to this conclusion is the norm applied as national law, but as the norm under this shape can also generate less protection than in internal EU situations, it is uncertain whether this scope of applicability actually contributes to the protection of Union fundamental rights. What is not uncertain is instead that the way in which an EU IIA is constructed, while ironically possibly the very reason for a limited applicability of EU fundamental rights proportionality therein, can make Union fundamental rights almost impossible for this treaty regime to affect. Ultimately then, it is by and large not the forfeit of sovereignty, which EU external action in the area of FDI entails, that poses a threat to respect for EU fundamental rights. Instead the risk lies in not, in the IIA, defining to what extent this loss of regulatory power covers their protection. For once the IIA has entered into force, one cannot hope to have them shielded by application of EU norms, naively referencing their binding character within the European Community.

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