9

International Trade Agreements and Private International Law: Narrowing Mutual Links

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I. Introduction

As a result of the 'fourth industrial revolution', the digital economic and social age that we live in gives rise to the 'globalisation' era,[1] which finds its deepest roots in the economic sphere. Leaving aside the debates about economic liberalisation, 'post-capitalism', 'neo-feudalism and 'techno-feudalism' theories,[2] and despite the nationalism and autarchy waves,[3] the worldwide connections and the spread of supply and logistic chains is an undeniable fact. Hence, trade, finance and investment are vital components of international economic, political and security orders. A myriad of complex issues are involved in these economic affairs. In this regard, it is sufficient to note that the United Nations 2030 quest for a general sustainable development sets a number of 'Sustainable Development Goals' (SDGs)[4] for

* Spanish Research Project, 'El Derecho del Comercio internacional en la era de la economía digital y las guerras comerciales' (PID2020-113968RB-I00).

[1] This phenomenon implies the idea of approximation, or even integration, and can be perceived in different ways depending on the academic field. As to PrIL, see H Muir Watt, 'Globalization and Private International Law' in *Encyclopedia of Private International Law*, vol II (Edward Elgar, 2017).

[2] Neo-feudalist theories rebirth policies of governance, economy and public life reminiscent of those pertaining to feudal societies: unequal rights and legal protections for common people and for powerful elitist groups that dominate societies and generate relations of lordship and serfdom between the rich and the poor. As in the medieval feudal model, assets are owned by the few techno-feudal lords. Ellen Brown, 'How America Went From Mom-and-Pop Capitalism to Techno-Feudalism' (18 May 2021), available at: scheerpost.com/2021/05/18/how-america-went-from-mom-and-pop-capitalism-to-techno-feudalism/.

[3] R Eatwell and M Goodwin, *National Populism: The Revolt Against Liberal Democracy* (Penguin, 2018).

[4] United Nations, 'Sustainable Development Goals', available at: www.undp.org/sustainable-development-goals?utm_source=EN&utm_medium=GSR&utm_content=US_UNDP_PaidSearch_Brand_English&utm_campaign=CENTRAL&c_src=CENTRAL&c_src2=GSR&gclid=CjwKCAiAqIKNBhAIEiwAu_ZLDq94bMiKPwDWaWOi54-StF3KqhewonbmtwX77G-wuwhZhcHSv5u_JRoCdC8QAvD_BwE. Along its lines, the World Economic Forum adopted the Great Reseat initiative in 2020, available at: www.weforum.org/great-reset.

which transnational economic transactions play an essential role. In particular, beyond ensuring that the international system becomes more inclusive and enables an increasing number of women to play an active role (SDG 5: Gender Equality); economic transactions are vital for economic growth (SDG 8); the reduction of inequalities between and within countries (SDG 10); and for peace and justice (SDG 16); all of these goals requiring appropriate public–private partnerships (SDG 17).

Together with states, private parties and companies are the essential transnational actors. As Basedow puts it:

> [I]t is in the first instance a matter for the private actors to implement their intentions and to find or conceive of the framework of legal rules facilitating that implementation … But this does not make the role of States superfluous. They supplement and correct private initiative in numerous contexts.[5]

In other words, though the inherent ecumenical nature of human beings explains the expansion of our activities beyond any legal community at any time in history,[6] private parties would not have reached that far without an appropriate liberalising regulatory regime. Merchants have always looked for ways to overcome the hardships created by frontiers to the point that, in Pillet's words, 'le commerce international est un pur fait, mais un fait qui a donné naissance au droit international tout entier' ['International trade is a mere fact, but a fact that has given birth to international law as a whole'].[7]

Since the globalisation phenomenon gained a starring role in the second half of last century, two of its dimensions can be highlighted. On the one hand, states' economies are intricately linked; hence, under this interdependence it is not possible to talk about 'national economies' without taking into consideration the international situation (macro). On the other hand, economic transactions take place in a global – transnational – economic space; in other words, within an 'international commercial society' (micro). These approaches can be confirmed by looking at the recent goods shortages after Brexit[8] and those following the Covid-19 pandemic[9] leading, among others, to hardship and *force majeure* cases.

[5] J Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws* (Brill, 2015) 348. As for public regulation, he focuses on commercial embargos and countermeasures.

[6] K Siehr, 'Private International Law, History of' in *Encyclopedia of Private International Law*, vol II (Edward Elgar, 2017).

[7] A Pillet, 'Sur les droits fondamentaux des États, dans l'ordre des raports internationaux et sur la solution des conflits qu'ils font naitre', *Revue General de Droit International Privé*, vol. V, 1898, 72.

[8] Brexit and tax changes contributed to a lack of heavy goods qualified drivers in the UK, also leading to petrol shortages; Grace Pocock, 'Heavy goods vehicle driver shortage' (House of Lords, 20 October 2021), available at: lordslibrary.parliament.uk/heavy-goods-vehicle-driver-shortage/ accessed November 2021. This is also the case in other professions in need of foreign workers, like farmers, food manufacturers and social care.

[9] The global supply chains have been seriously affected both by global shipping issues as well as shortages of raw materials and semiconductors. See Allianz Trade, 'Global Trade Report-Battling off Supply Chains Disruption' (Allianz Trade, 9 December 2021), available at: www.eulerhermes.com/en_global/news-insights/economic-insights/Global-Trade-Report-Battling-out-of-supply-chain-disruptions.html.

The double dimension marries well with the classic academic public and private international law divide (PIL–PrIL) and has traditionally left international trade regulation out of the scenario of the latter despite it constituting the basic framework for trans-border transactions.

This piece pays tribute to Professor Jonathan Fitchen by elaborating on a reasoning that aims to leave behind strict understandings of PrIL and to open up approaches closer to real practice in international trade agreements. Beyond globalisation, nowadays the digital economy keeps on challenging legal academics and practitioners, particularly PrIL ones,[10] to adapt and/or reformulate the understanding of trans-border economic operations. This attempt conforms to the holistic and interdisciplinary tendencies in academia[11] but, nonetheless, does not lose perspective of what is needed in classrooms. To this end, this contribution endeavours to present how PrIL and international trade agreements interrelate, and how PrIL theory has overshadowed or limited its practical needed role in international trade law.

II. The Private–Public International Law Divide and International Trade Agreements in Perspective: From Theory to Practice

The dividing line between PIL and PrIL as academic autonomous disciplines has been widely discussed. In Struyken's words, this subject has 'fascinated and divided the spirits'.[12] Far from being outdated, the topic is still an issue in practice and theory.[13] In particular (though not exclusively), in international economic transactions for which, relying on PIL and/or PrIL, there are also academic 'subdisciplines' under titles such as international economic law, international trade and investment law, global administrative law and international business or

[10] Nevertheless, as H Muir-Watt, above (n 1), puts it, this has only superficially affected PrIL theory and practice since its basis and reasoning models remain unaltered.

[11] eg, RB Zoellick, 'Making International Relations Research on Trade More Relevant to Policy Officials' in D Maliniak, S Peterson, R Powers and MJ Tierney (eds), *Bridging the Theory–Practice Divide in International Relations* (Georgetown University Press, 2020) 125, suggest further studying (1) the effects of private, transnational links fostered by trade, relationships between open markets, open societies and common values; (2) trade facilitation, institutional development and links to multinational enterprises and supply chains; (3) connection between international economic regimes with regimes to address other topics such as human rights and the environment; and (4) the role of trade regimes in developing the rule of law and win–win exchange.

[12] AVM Struycken, 'La contribution de l'Académie au développement de la science et de la pratique du Droit International Privé' (1998) 271 *Hague Collected Courses* 33.

[13] Among others, R Michaels, 'Public and Private International Law: German Views on Global Issues' (2008) 4 *Journal of Private International Law* 121; A Mills, 'Public and Private International Law' in *Encyclopedia of Private International Law*, vol II (Edward Elgar, 2017); V Ruiz-Abou-Nigm, K McCall-Smith and D French, *Linkages and Boundaries in Private and Public International Law* (Hart Publishing, 2018).

commercial law.[14] Simplifying the debate and departing from the social function of the law, it is possible to affirm that the societal object that each of these legal disciplines serve, alongside providing them with their academic scientific autonomy, is what helps to draw their respective theoretical boundaries.

The approximation to PrIL's object is necessarily descriptive: departing from a juridically fragmented world, it entails the presence of a foreign element in the legal situations in which private subjects, and public law ones when not acting on the basis of their *imperium* (reserved for PIL), are involved.[15] Historically, the foreign element is a clear perpetual constituent[16] which, in Siehr's words, makes 'modern' PrIL as 'any addressing of problems involving different sets of laws for different types of person'.[17] In this way, Siehr is already pointing to the function of PrIL that, as Lalive noted, has always been the same.[18] More precisely, PrIL's function consists in determining the legal regime that will be applied, including pointing out the norms as much as their application and adaptation to the particular case. Equally, the exercise of this function is always faced in accordance with a series of evolving values[19] (justice, human rights) and social aspirations (legal predictability and certainty) that take into consideration the various interests at stake (those of private subjects and states' policy objectives).[20] To this end, whilst jurisdiction,[21] relying on sovereignty, is the point of departure, territoriality,[22] together with comity,[23] reasonableness[24] is an essential legal principle and cooperation is

[14] A Mills, 'Connecting Public and Private International Law' in V Ruiz-Abou-Nigm, K McCall-Smith and D French, *Linkages and Boundaries in Private and Public International Law* (Hart Publishing, 2018) 29, perceives them as 'regimes' resulting of the development of PIL. In this realm, it is interesting to note the project on 'Global Administrative Law' headed by B Kingsbury and RB Steward, available at: www.iilj.org/gal/project/.

[15] Naturally, the evolution of the academic discipline and of the understanding of the foreign element concept can be historically analysed. See Siehr (n 6).

[16] ibid.

[17] ibid, 1390.

[18] P Lalive, 'Nouveaux regards sur le droit international privé, aujourd'hui et demain' (1994) 1–2 *Revue suisse de droit international et de droit européen* 3, 26: '(S)i le contenú du droit international privé, ses règles et ses méthodes évoluent, la finalité ne change pas, puisque,à toutes les époques, ils s'agi du mémme problème' ['Though the content, norms and methods in PrIL evolve, its goals do not change, and that is because, at all times, it faces the same problem'].

[19] LM Friedmann, 'Is there a Modern Legal Culture?' (1994) 7(2) *Ratio Juris* 117, 118–19, uses the expression 'legal culture': people's ideas, values, attitudes and opinions on the law and the legal system.

[20] J Maury, 'Règles générales des conflits de lois' (1936-III) 57 *Hague Collected Courses* 415.

[21] R Michaels, 'Jurisdiction: Foundations' in *Encyclopedia of Private International Law*, vol II (Edward Elgar, 2017).

[22] For a detailed analysis on the territoriality concept, see F Rigaux, *Derecho Internacional Privado. Parte General* (Civitas, 1986) 64–71. T Kono, 'Territoriality' in *Encyclopedia of Private International Law*, vol II (Edward Elgar, 2017).

[23] TW Dornis, 'Comity' in *Encyclopedia of Private International Law*, vol II (Edward Elgar, 2017).

[24] A Lowenfeld, *International Litigation and the Quest for Reasonableness: Essays in Private International Law* (Clarendon Press, 1996) 229–31. Along this line, FA Mann, 'The doctrine of international jurisdiction revisited after twenty years' (1984-III) 186 *Hague Collected Courses* 28–29, states that: 'principle of reasonableness … appears unobjectionable, so long as it is understood that mere political, economic, commercial or social interests are to be disregarded when it comes to weighting which every test of reasonableness implies … for arbitrariness is substantially the same as unreasonableness'.

a desirable working tool. In addition, since legal fragmentation is the cause of PrIL situations, normative harmonisation, or even, unification,[25] be it substantive, procedural or both, clearly eases the way towards resolving their difficulties.

Following the nineteenth-century bilateral Friendship, Commerce and Navigation treaties, multilateral and regional international trade agreements gained relevance in the second half of the twentieth century, leading to the creation of the World Trade Organization (WTO) and a large number of regional integration processes entailing both customs unions and free trade areas (FTAs).[26] In principle, these treaties essentially dealt with the conditions for the import and export of goods between the Contracting States. However, as the Friendship, Commerce and Navigation treaties did, they turned to encompass other subject matters such as services, intellectual property, investments, etc. Beyond the functioning of the international organisations (eg, the WTO, European Union) and the international nature of treaties as a legal source, these issues were automatically classified as part of PIL content. This was because the object of this legal discipline essentially comprises the ordering of relationships between states and the regulatory function of these instruments dealt with the entry/exit commercial operations – governed by public-administrative norms – from the parties' territories. PrIL seemed to have no role in this area. However, it is argued this can be considered an overly radical approach resulting from the PIL–PrIL distancing after the nineteenth-century consolidation of PrIL autonomy.[27]

Relying on the different jurisdictional dimensions (jurisdiction to prescribe, to adjudicate – including judicial and administrative authorities – and to enforce),[28]

[25] Normative harmonisation implies establishing common minimum standards that can be further implemented in different ways. Unification entails common and identical norms for a number of different legal communities (states). Whilst harmonisation is characterised as 'law that has not been created with the intention of getting rid of the existing differences, but rather with the goal of merely reducing those differences', Uniform law is defined as 'a set of identically worded legal rules that are binding on a general level in more than one jurisdiction where they are also supposed to be interpreted and applied in the same manner'. F Ferrari, 'Uniform Substantive Law and Private International Law' in *Encyclopedia of Private International Law*, vol II (Edward Elgar, 2017).

[26] See General Agreement on Tariffs and Trade (Geneva, 30 October 1947) 55 UNTS 187 (GATT), Art XIV and General Agreement on Trade in Services (Marrakesh, Morocco, 15 April 1994) 1869 UNTS 183 (GATS), Art V.

[27] F Rigaux, 'Le pluralisme en Droit International Privé' in M Pérez González (ed), *Hacia un nuevo orden internacional y europeo. Libro homenaje al profesor M Díaz de Velasco* (Civitas, 1993) 1424. In particular, he points to the following excesses of positivism, that overly narrowed the discipline coverage by ignoring the considerable contribution of public law to the regulation of private relationships.

[28] FA Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years' (1984) 186 *Hague Collected Courses* 67, states that 'the international jurisdiction to adjudicate is not a separate type of jurisdiction, but merely an emanation of the international jurisdiction to legislate … a state's right of regulation is exercised by legislative jurisdiction which includes adjudication'. On the distinction, KM Meesen, 'Drafting Rules on Extraterritorial Jurisdiction' in KM Meesen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer, 1996) 226, states 'whether it has more than a descriptive value and actually contributes to settling and defining the law from an international perspective, I do not know. At least, there is no reason for us to single out just the one or other aspect'. Nevertheless, he adds 'no one really cares before the law is implemented at which point there is still occasion to call for restraint. Only enforcement and adjudication bring matters to ahead'.

PrIL establishes the applicable legal regime on the basis of the territoriality principle. Looking at regulatory jurisdiction, Ehrenzweig referred to the different normative techniques stating that direct norms are analysed to establish their scope of application and indirect norms are studied to determine the possibilities for the application of foreign laws.[29] As Ago, put it, direct norms have a 'virtually universal' character.[30] It is basically this way, always with due respect to states' international obligations,[31] that the territorial/extraterritorial[32] application of domestic legal rules is unilaterally decided. Although it is generally accepted that public laws are not to be applied extraterritorially (coincidence *forum-ius*),[33] this is no longer obviously straightforward. Neither is it the case that PrIL situations cannot be addressed by administrative authorities.

Competition law shows a clear case of extraterritorial application both in public/administrative proceedings – where the public interest defence has a dominant role – and in antitrust damages claims before national courts.[34] Similarly, in other transnational proceedings where public interests or public law norms are prominent, such as environmental, workers or personal data protection, norms can be applied extraterritorially.[35] Moreover, in adopting such decisions, it is not strange that foreign norms are somehow taken into consideration, both in their public-administrative instance and, eventually, in the subsequent judicial claim before the courts. This is particularly the case when an FTA applies. Despite territoriality (on the basis of sovereignty) not being questioned in FTAs, even when regulatory[36] or adjudicatory[37] criteria are expressly included, the calls for cooperation[38] open up this possibility. Along this line, it

[29] AA Ehrenzweig, 'Specific Principles of Private International Law' (1964-II) 124 *Hague Collected Courses* 180.

[30] R Ago, 'Regles générales des conflits de lois' (1936-IV) 57 *Hague Collected Courses* 26.

[31] Derived, mostly, from international treaties and human rights commitments (in particular as to the jurisdiction to adjudicate). The last ones apply to individuals and do not generally extend to legal persons.

[32] See above (n 22).

[33] JD González Campos, 'Les liens entre la compétence judiciaire et la competence legislative en droit international privé' (1977-III) 156 *Hague Collected Courses* 331. The existence of an imperative/policy rule has an immediate positive impact on international jurisdiction to adjudicate.

[34] M Danov and C Otero García-Castrillón, 'Competition Law Enforcement: Private International Law and Access to Effective Legal Remedies in Cross-Border Cases' in P Beaumont and J Holliday (eds), *A Guide to Global Private International Law* (Hart Publishing, 2022).

[35] See references to data protection in section III and section IV.

[36] eg, Arts 135–36 and 128–29 of the Trade and Cooperation Agreement between the EU and the European Economic Community for Atomic Energy, on the one side, and the United Kingdom of Great Britain and Northern Ireland, on the other (EU–UK TCA), [2021] OJ L149/10, expressly refers to the law of the provision of services.

[37] eg, Art 360 EU–UK TCA; and Art 29.1 of its Protocol on Administrative Cooperation and Combating Fraud in the field of Value Added Tax and on Mutual Assistance for the recovery of claims related to taxes and duties.

[38] eg, EU–UK TCA, along with the general transparency and good regulatory practices (Arts 350–51), incorporates it in areas such as Technical Barriers to Trade (TBT) (Arts 96–97) and Sanitary and Phitosanitary (SPS) (Arts 79–80, 84–85), and Energy (Arts 317–18; technical cooperation; Arts 319–24, renewables and efficiency and, in a separate agreement, nuclear energy).

should not be outweighed that, in different areas, trade liberalisation is subject to decisions on the equivalence of normative and supervisory standards of the trade partner[39] or even to the maintenance of a 'level playing field'.[40]

A state's unilateral decisions on the extraterritorial application of its own norms on private parties' operations respond to economic and/or political interests. As it happened in an eminent case in the competition field that reached the WTO,[41] these situations can eventually entail a 'manipulation' of the extraterritorial application of national rules, implying what Bahgwati called 'aggressive unilateralism'.[42] Private parties are then used as a means to force ('convince' or 'sanction') other states' behaviour in a way that resembles economic coercion measures.[43] It is well established that economic coercion measures use private parties' situations and interests with political and economic ends. In such cases, although unilateralism has been criticised for reflecting a chauvinist behaviour provoking conflicts between states, it has also been defended as a useful means to reach multilateral effects through forcing other countries to change their actions.[44] From this perspective, together with countermeasures (ie, blocking statutes adopted to safeguard private parties' situations before economic coercion measures) they are traditionally left to PIL despite their consequences possibly being of great significance in private transactions.[45]

[39] eg, as to financial services (Arts 182–89) EU–UK TCA; as to sanitary and phytosanitary measures (Art 6.14) EU–Japan Economic Partnership Agreement (EU–Japan Economic Partnership), available at: trade.ec.europa.eu/doclib/docs/2018/august/tradoc_157228.pdf.

[40] The EU–UK TCA is built on the respect for individuals' fundamental rights and the compromise with the protection of equivalent standards in the labour and social (Art 386) as much as in the environmental (Art 390) fields.

[41] *Japan – Measures Affecting Consumer Photographic Film and Paper*, Panel Report (adopted 31 March 1998) WT/DS44/R, known as the *Kodak* case.

[42] J Bhaghwati, 'Aggressive Unilateralism. An Overview' in J Bhawghati and HT Patrick (eds), *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System* (Harvester Wheatsheaft 1991); AD Smith, 'Bringing Down Private Trade Barriers; An Assessment of US Unilateral Options: Section 301 of the 1974 Trade Act and Extraterritorial Application of US Antitrust Law' (1994–95) 16 *Michigan Journal of International Law* 241, 245. 'When antitrust statutes are deployed to promote export opportunities, the line between aggressive trade policy and the goal of preserving a healthy, competitive environment for the sake of US firms and consumers begins to blur'.

[43] As Basedow, *The Law of Open Societies* (n 5) 509 puts it, 'by orders directed to individuals and companies they (States) use these private actors as hostages or levers to put pressure in other States'.

[44] C Dordi, 'From West to East: Trade, IP and Investment after the Crisis' in *Global Digital Encounters*, 28 May 2020, 14–15 refers to the US measures adopted against China's illegal trans-shipments of goods with US destinations through Vietnam and other countries aiming to avoid US tariffs. They are said to explain China's leaving behind that practice and holding customs negotiations with those countries, available at: thinkfide.com/global-digital-encounters/gde-2-from-west-to-east-trade-ip-and-investment-after-the-crisis/.

[45] They do not necessarily entail a PIL breach and Basedow, 'Blocking Statutes' in *Encyclopedia of Private International Law*, vol II (Edward Elgar, 2017), recognised that this issue has not been sufficiently dealt with by PrIL. As to the COVID-19 exports bans, see B Yüksel Ripley and Ü Halatçı Ulusoy, 'COVID-19 Related Export Bans and Restrictions Under WTO Law and the Determination of their Legal Effects on International Sale of Goods Contracts Between Parties Located in WTO Member States: Interplay Between Public and Private International Law' in P Sooksripaisarnkit and D Prasad (eds), *Blurry Boundaries of Public and Private International Law*.

The PrIL academy has shown a natural preference for the study of conflict of laws and domestic courts' international competence, leaving behind somewhat the study of the scope and interactions of direct substantive regulations, particularly those more closely connected with public law, notwithstanding their impact in international transactions. In recent times, however, it is recognised that the new areas and the reinforcement of their public-unilateral (and extraterritorial) regulations (ie, data protection, environment, labour) are calling strongly for PrIL attention. Working on 'constructions which try to draw private and public international law closer together is (are) now more justified than ever'.[46]

III. WTO and Free Trade Agreements

The WTO and FTAs have been progressively incorporating new subject matters ranging from manufacturing and provision of services safety to human rights, passing through environmental and data protection and gender equality, all closely related to the SDGs. For each of them, substantive minimum standards are incorporated. It seems evident that, whilst sitting on a WTO basis, FTAs are often more comprehensive than WTO Agreements. They cover cutting-edge topics that WTO members cannot all address at the same time or stage of development. However, the expansive repercussions of FTAs – the so-called 'collective unilateralism'[47] or 'the Brussels effect'[48] – cannot be disregarded as it seems to have a stronger impact than the feared 'race to the bottom'.[49] Furthermore, admitting different (multilateral) speeds, liberalisers are often willing to work among themselves to push for freer trade bilaterally, regionally and globally.[50] Most trade negotiations are joint problem-solving exercises (reconciling differences, making trade-offs, gaming arguments, assembling coalitions and matching interests). Participants bring different political and negotiating cultures to the table and manage 'offensive' and 'defensive' interests so that they can both achieve a good result and sell it back home.[51]

[46] DP Fernández Arroyo, 'Foreword' in *Linkages and Boundaries in Private and Public International Law* (Hart Publishing, 2018).

[47] P-M Dupuy, 'The Place and Role of Unilateralism in Contemporary International Law' (2000) 11 *European Journal of International law* 19, 20.

[48] A Bradford, 'The Brussels Effect' (2012) 107 *Northwestern University Law Review* 1. Pointing to the use of power to encourage positive changes, see B Cooreman and G van Calster, 'Trade and Sustainable Development Post-Lisbon' in M Hahn and G Van der Loo (eds), *Law and Practice of the Common Commercial Policy* (Brill 2020).

[49] AA Berle and GC Means, *The Modern Corporation and Private Property* (Macmillan, 1932), pointing to the overall standards reduction as a result of regulatory competition.

[50] Along this line, Zoellick (n 11) 126–27, sees negotiations in the WTO based on coalitions of the willing that share extensive and exclusive rights and responsibilities (their precedents could be Tokyo Round codes).

[51] In Zoellick's words (n 11) 124, 'Good negotiators seek to understand their counterparts' sensitivities and help to solve their problems in a win–win fashion. Negotiators help others provide explanations to use domestically. Even trade negotiators who recognize the economic benefits of reducing their own country's barriers of subsidies often need to manage the politics of such concessions'.

In this scenario, different domestic standards can become the most common international trade obstacle. Therefore, the search for common multilateral or regional standards opens up as the necessary means to challenge existing and future trade barriers. Beyond setting their basic canons (regarding substantive as much as procedural issues), WTO and FTA agreements often refer this task, expressly or impliedly, to international organisations[52] as well as to the work of specialised committees.[53] It is also important to acknowledge the regulatory work achieved by international private institutions in this field.[54] At the end of the day, with (compulsory or recommended) or without this international harmonisation, states adopt domestic unilateral imperative norms (in principle, territorial) for private parties involved in cross-border operations.

It is clear that the ultimate beneficiaries of the WTO and FTA systems are the economic actors.[55] For obvious reasons, they are the group first interested in the existence and compliance with agreed standards as well as in the working of the whole system. With this in mind, it cannot be a surprise that these agreements regularly compel states to have administrative and judicial procedures (without entering into the determination of international jurisdiction to adjudicate) available for private parties' defence of their own interests.[56] The achievement of this goal could be reinforced when international (or institutional) norms are recognised as self-executive in character. Though this can be the case when international norms are sufficiently clear and unconditional, the tendency in trade agreements is precisely the opposite. The ordinary approach in FTAs is to expressly state that their norms do not create rights for private parties that they can directly claim.[57] It must be admitted that accepting the self-executive character of certain international treaty norms could ease and promote their application through private parties' actions before national authorities. Moreover, in this way they could further contribute to the surveillance of states' compliance with their international obligations. But this is not yet the case.

[52] eg, Codex Alimentarius, dependent on the UN World Health Organization (WHO) and Food and Agriculture Organization (FAO), available at: www.fao.org/fao-who-codexalimentarius/about-codex/members/es/. The OECD does also work on establishing evidence-based international standards and finding solutions to a range of social, economic and environmental challenges.

[53] eg, in the Technical Barriers area, the WTO Committee adopted in 2000 a Decision on Principles for the development or international standards, guides and recommendations, available at: www.wto.org/english/tratop_e/tbt_e/principles_standards_tbt_e.htm, which are also relevant in the work of the specialised committees established in FTAs.

[54] eg, the International Organisation for Standardisation (ISO), available at: www.iso.org/about-us.html; and the Internet Corporation for Assigned Names and Numbers (ICANN), available at: www.icann.org/resources/pages/welcome-2012-02-25-en.

[55] eg, the EU–UK TCA refers to the service providers (Arts 135–36) and investors (Arts 128–29).

[56] eg, Arts 31(i) and 31(j), 32 and 41.4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (Marrakesh, Morocco, 15 April 1994) (TRIPS), Art VI.2(a) GATS, Art X.3(b) GATT.

[57] eg, Art 5 EU–UK TCA. See, among others, Case C–280/93 *Germany v Council* [1994] ECR I-04973, paras 109–10.

As has been noted, whilst insisting on the availability of procedures to review administrative decisions,[58] neither the WTO nor FTAs enter into judicial adjudication or cooperation aspects. On the contrary, for example, the General Agreement on Trade and Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) specify that their general most favoured nation treatment (MFNT)[59] – and even national treatment (NT)[60] – do not extend to judicial benefits. Leaving aside this exclusion, and the effects that trade norms can have in traditional PrIL conflict of laws and jurisdiction,[61] some PrIL doctrine in the European Union has regretted the missed opportunity to introduce judicial cooperation standards in FTAs.[62]

For the time being, the active role of private parties in international trade surveillance is essentially stimulated through instruments such as EU Regulation 654/2014 on the exercise of the Union's rights for the application and enforcement of international trade rules.[63] This Regulation provides a procedure for direct complaints before EU authorities from community industry, community enterprise and providers of services[64] looking for a reaction before third states (arguably) infringing their trade liberalising commitments (bilateral or multilateral).[65] This entails that the instrument is meant to defend private parties' interests in open international trade. Under the procedure, they acquire a protagonist role as 'police' and 'claimants' of third states' non-compliance with international trade compromises. Nevertheless, final decisions on how to proceed are exclusively adopted by EU institutions on the basis of the Union's policy and economic interests. It is true that the mere threat of acting on this basis can contribute to 'motivate' a change on a third state's allegedly infringing measure. Nonetheless, the EU final decisions can be appealed before the Court of Justice of the European Union (CJEU).[66] From the opposite perspective, private parties can always claim before the CJEU against

[58] eg, See above (n 56) and Art 62 TRIPS.

[59] eg, Art 4(a) TRIPS.

[60] eg, Art 2.3 TRIPS.

[61] See above, section IV.

[62] M Weller, 'Judicial Cooperation of the EU in Civil Matters in its Relations with Non-EU States – A Blind Spot?' (2018), available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=3134324.

[63] Regulation (EU) 654/2014 of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, [2014] OJ L189/50, amended by Regulation 2021/167 of 10 February 2021, [2021] OJ L 49/1.

[64] For definitions, see Art 2 and, on the procedures, see Arts 3 and 4 of Regulation 3286/94 of 31 March 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the WTO, [1994] OJ L349/71.

[65] Recital 10 of the Regulation states that it is meant to 'ensure the coherent application of the enforcement mechanism in trade disputes relating to international trade agreements, including regional or bilateral agreements' and their trade and sustainable development chapters.

[66] Consolidated Version of the Treaty on the Functioning of the European Union, [2008] OJ C115/50 (TFEU) Art 263: 'The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission … other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties'.

alleged EU violations of its trade commitments as long as they are directly affected by the measure.[67]

Moreover, the EU Commission statement on this Regulation expressly states that '(W)hen preparing draft implementing acts, the Commission will undertake extensive consultations … expects to receive input from private stakeholders affected by third country measures or by possible commercial policy measures to be adopted by the Union'.[68] Along this line, it is important to note that the participation of the civil society is progressively gaining traction in trade events and negotiations[69] as well as in trade agreements themselves.[70] This clearly contributes to the pervasive transparency commitments of trade agreements, therefore assisting surveillance and, moreover, helping in the surrounding regulatory legitimisation debates.

Together with standardisation, cooperation is a major tool in the WTO and FTAs. In addition to the cooperation with other international organisations,[71] technical and even financial cooperation between states is previewed.[72] It is meaningful to single out the promotion of cooperation in the competition law field.[73] There is no multilateral mechanism to facilitate international cooperation in this area but some bilateral agreements facilitate cooperation between national competition authorities within[74] or outside trade agreements[75] and recently, the EU–UK Trade and Cooperation Agreement (TCA) incorporated some substantive law principles and provisions.[76] However, the definition of 'enforcement activities'[77] provided in these agreements indicates that international cooperation is limited to collaborations between public-administrative competition

[67] ibid. 'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'.

[68] Commission Statement on Regulation (EU) 654/2014 of 15 May 2014, [2014] OJ L189/50, 'Similarly, the Commission expects to receive input from public authorities that may be involved in the implementation of possible commercial policy measures to be adopted by the Union'.

[69] eg, as to the WTO, Civil Society Organizations (CSO) working on trade-related issues attended the Director General's briefing on possible deliverables at MC12, concerning how the WTO is going to ensure inclusive participation of all members at the conference and how CSOs can contribute to efforts to reach a positive outcome at the 12th Ministerial Conference; see: www.wto.org/english/news_e/news21_e/ngo_24nov21_e.htm.

[70] eg, Arts 12, 13 and 14 EU–UK TCA.

[71] Art XXVI GATS and Arts 68–69 TRIPS.

[72] Art XXV GATS and Art 67 TRIPS.

[73] Art IX.2 GATS and Art 40.3 TRIPS.

[74] eg, Chapter 11 of the EU–Japan Economic Partnership.

[75] eg, Agreement between the Government of the United States of America (US) and the Commission of the European Communities regarding the application of their competition laws, [1995] OJ L95/47 (US–EC Agreement). See others in: ec.europa.eu/competition-policy/international/bilateral-relations_en.

[76] Arts 358 and 359 EU–UK TCA.

[77] eg, Art I.2(c) US–EC Agreement.

authorities in different jurisdictions.[78] In antitrust matters, as in other international trade areas, there are no mechanisms for judicial cooperation.[79]

Finally, the cohabitation of the WTO regime with international investment agreements (IAs), particularly their respective dispute settlement mechanisms, cannot be disregarded. It entails the risks for private operators that the same international legal standards be interpreted differently.[80] In this line, it is interesting to briefly note the increasing formal link between FTAs and IAs[81] reinforcing the need for legal coherence between the systems.

As has been noted, there is a '[M]ultiplication of regimes and institutions giving rise to a rather uncoordinated, fragmented and rather deformalized regulatory landscape'[82] which, obviously, has a particularly relevant impact in transboundary economic transactions and calls for a thoughtful analysis. PrIL, focused on the legal fragmentation with implications for private parties' transactions, should not be disparate from this reality.

IV. Narrowing Links: From Practice to Theory

In an internationally open world, it is essential for private parties, firstly, to be aware of the legal system that can be applied in their transboundary economic operations (scope of regulatory jurisdiction), which initially depends on the states' unilaterally or multilaterally decided norms on the determination of the applicable law (be they conflict of law or substantive rules). In this context, the states' regulatory jurisdiction is being limited/conditioned by the WTO, FTAs and IAs. In addition, it seems clear that the existence of some degree of cooperation between the states linked to the transactions can have a positive impact when facing conflictive situations.

Recently, PrIL scholarly works have started to approach the international trade regime. An express entry on the WTO has been included in the Encyclopaedia of PrIL.[83] This entry points out that, when deciding on the applicable law, the conflict of laws rule (presiding the entry orientation) also decides on the horizontal assignment

[78] Art 361.2 EU–UK TCA refers to 'the European Commission or the competition authorities of the Member States, on the one side, and the United Kingdom's competition authority or authorities, on the other side'.

[79] The EU–UK TCA refers to Law Enforcement and Judicial Cooperation in Criminal Matters (Part III).

[80] Fortunately, this did not happen in the investment arbitration dispute parallel to the one maintained within the WTO regarding the respect for trademark rights substantive content; *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Uruguay Occidental Republic* ICSID No ARB/10/7, on the one hand and, on the other, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Panel Report (adopted 28 August 2018) WTO/DS435 and DS467.

[81] eg, EU–UK TCA (Part II; first rubric –trade, transport and other dispositions; third title – services and investment).

[82] Ruiz-Abou Nigm, McCall-Smith and French (n 13) 5.

[83] TW Dornis, 'WTO and Private International Law' in *Encyclopedia of Private International Law*, vol II (Edward Elgar 2017).

of the normative power and, as a consequence, the PrIL 'regulatory function' can conflict with the state's international obligations. This could occur when the application of the *lex causae* entails the violation of WTO agreements; particularly the non-discrimination commitments (NT or MFNT). In other words, even if the determination of the applicable law does not restrict trade by itself, the application of the intended law can eventually cause discrimination (legal of factual) in goods or service imports. Hence, this international trade obligation reaches both substantive and conflict of laws provisions.[84] Recognising the obvious difference in the vertical integration level between the WTO and the European Union (multilateral versus regional liberalisation), it is concluded that the WTO does not have a 'direct impact' in PrIL.[85] Therefore, even from a 'traditional' conflict of laws approach, an indirect impact of international trade regulation in the resolution of foreign legal situations cannot be excluded and thus there is need, at least, to take it into consideration.

In this persistent PrIL approach the analysis seems to be limited to the law applicable to a contractual or non-contractual case, basically through conflict of laws rules. Following this line, reference could also be made to the use of the public policy concept/exception.[86] But, moreover, it is through the adoption of imperative rules that states maintain a certain degree of intervention in order to preserve the standards/protection level that they consider adequate in international commercial transactions. Beyond the confluence of territorial norms in these transactions, the standard-setting goal (harmonisation) – conditioned by international trade regulation – brings another connecting point between PrIL and international trade agreements that calls for their paths be narrowed.

For example, in the area of personal data protection, though a formulation through conflict of laws norms is possible (and even desirable), the tendency is to regulate through unilateral norms, turning back to the statutory school and its extension of policy rules. In other words, the tendency is to regulate by establishing the extraterritorial reach of national substantive standard-setting rules. This resort to unilateralism has been explained considering the 'public law' character of these data protection legal instruments.[87] Of course, states are aware of the consequent operational difficulties for transnational operations which, in addition to regulatory overlaps or gaps,[88] can entail trade obstacles.[89]

[84] Basedow, *The Law of Open Societies* (n 5) 217–18, states that, however, where the unequal treatment results from the agreement of private parties, the rule will not be infringed since it does not result from a state's measure.

[85] Dornis, 'WTO and Private International Law' (n 83) 1846.

[86] P Lagarde, 'Public Policy' in *International Encyclopedia of International Law*, vol III (1994); I Thoma, 'Public Policy' in *Encyclopedia of Private International Law*, vol II (Edward Elgar 2017).

[87] Analysing the EU Data Protection Regulation, E Rodríguez Pineau and E Torralba Mendiola, 'La protección de las transmisiones internacionales de datos transfronterizas; una tarea por completar' in E Rodríguez Pineau and E Torralba Mendiola (eds), *La protección de las transmisiones de datos transfronterizas* (Tirant lo Blanch 2021) 209.

[88] ibid, 146.

[89] C Otero García-Castrillón, 'Protección de datos en la economía digital. Una aproximación desde la regulación del comercio internacional' in E Rodríguez Pineau and E Torralba Mendiola (eds), *La protección de las transmisiones de datos transfronterizas* (Tirant lo Blanch 2021).

Technology and global communications expansion is unstoppable in the present digital economy. Therefore, it is vital to look for pragmatic ways to guarantee, on the one hand, personal data protection as much as, on the other hand, legal certainty and efficiency for economic operators, for which adapting to different legal regimes has a tremendous economic cost. In this area as in others, such as human rights and the SDG connected topics, in addition to more international rapprochement (mutual concessions), coordination and cooperation (for which stakeholders' contributions seem a necessity), together with self-limitation/comity attitudes (such as the position of the CJEU in the case of the right to be forgotten)[90] states are required to pursue the most efficient protection possible.[91] Hence, whilst more stringent standards or more efficient enforcement mechanisms may be desirable, it is not clear that the situations can be tackled solely from a PrIL perspective focused on conflict of laws rules, overriding mandatory provisions and public policy. There is a need for a more collaborative, sharing, multilateral world to overcome these difficult situations affecting both private parties and states.

In this realm, e-commerce (including data transfers and personal data protection), is presently part of WTO negotiations[92] and has special chapters in FTAs.[93] On a different scale, it is interesting to note the recently created EU and US (who are not yet linked by an FTA) bilateral Trade and Technology Council (TTC) to coordinate approaches to key global trade, economic and technology issues steering mutual cooperation through different working groups. Looking to enhance mutual trust both between states and private parties, the importance of and commitment to consulting closely with diverse stakeholders is expressly highlighted.[94]

It must be admitted that trade agreements have not as yet been expressly combined with concrete judicial cooperation measures; and probably will not be, at least in the short run. In the case of EU FTAs, it has been considered unfortunate to not even try to incorporate commitments of accession to the Hague Conference PrIL instruments. Therefore, there is support for some explicit connection between the EU's civil cooperation and its common commercial policy[95] through the incorporation of rules in trade agreements. This trend is possibly building on

[90] Case C-507/17 *Google Inc v Commission nationale de l'informatique et des libertés* (CNIL) [2020] 1 WLR 1993, para 62.

[91] C Kuner, 'Reality and Illusion in EU Data Transfer Regulation Post *Schrems*' (2017) 18 *German Law Journal* 881, 917.

[92] WTO, 'Joint Initiative On E-commerce', available at: www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm#:~:text=A%20group%20of%2071%20WTO,intention%20to%20commence%20these%20negotiations.

[93] eg, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP or TPP-11), available at: www.sice.oas.org/Trade/TPP/CPTPP/Spanish/CPTPP_Index_s.asp; US, Mexico and Canada Free Trade Agreement (USMCA), available at: ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between, EU–UK TCA, EU–Japan Economic Partnership.

[94] Launched in June 2021, available at: ec.europa.eu/commission/presscorner/detail/en/IP_21_2990, the TTC initiated its works in September 2021. The Commission has set up a one-stop-shop on its online 'Futurium' platform, to collect input from all interested parties; see: futurium.ec.europa.eu/en/EU-US-TTC.

[95] Weller (n 62), the EU's competence would be based on Arts 207 and 81 TFEU.

the success of FTAs in fostering cooperation and approximation of its members in the variety of areas – with public and private interests closely related to SDGs – that are being progressively incorporated. Nonetheless, after all that has been said, it does not seem necessary to reach that point in order to perceive the practical and theoretical narrowing links between PrIL and international trade law. The general isolation of PrIL theory from the WTO and FTAs is not a response to the apparent reality.

V. Conclusions

Globalisation continues to be the socio-economic phenomenon that dictates the evolution of PrIL academic tendencies. In PrIL, a primary dimension of globalisation can be said to reside in the generalised claim of the 'private' aspects of relationships and of the individualism, particularly around the defence of human rights (without losing sight of multiculturalism) and sustainability. There is a 'global' assumption of the values associated with the respect for the individual's dignity and freedom in an open world. In this scenario, the self-regulation initiatives add up to the public intervention tendencies in line with UN SDGs and the 'Great Reset' initiative.

As a natural consequence, it is possible to perceive the development of attitudes and instruments providing for the individual's defence against the state's actions (a 'proceduralisation' phenomenon) as well as the 'materialisation' (or substantive direction) of PrIL techniques.[96] The substantive trend of PrIL is perceived in sectors covered by private law as much as in those governed by public law, where the classic regulatory interventionism takes place. Together, proceduralisation and materialisation – with open legal criteria and margin for evaluating the legal interests at stake in a certain case (reasonableness)[97] – contribute to raising the relevance of the adjudicatory body (judicial and administrative) in the development of PrIL.

In this context, the need to deal 'globally' with the difficulties of international transactions requires permeable frontiers between PIL and PrIL. Beyond their historical links, Van Loon concedes that they are forced, together with national law, to grow and develop inter-connectedly.[98] Lowenfeld expressly recognised their reciprocal influence and stated that the frontiers between those two disciplines

[96] With a different origin – international, institutional, national, private, and with a different nature – treaty, model laws, guides, and regulatory methods – direct and indirect.

[97] As Lagarde (n 86) 15, puts it, justice requires that each State considers the potentially applicable legal system merits not just on the parties' expectations but also on the stability of transnational socio-economic transactions and the materialisation of foreign states' legitimate interests.

[98] JHA Van Loon, 'The Increasing Significance of International Co-operation for the Unification of Private International Law' in Universiteit van Amsterdam (eds), *Forty Years On: The Evolution of Post War Private International Law in Europe* (Kluwer, 1990) 117.

are unavoidably diluted[99] and, from the European Economic Community experience, Mengozzi expressly pointed to international trade law and PrIL interactions by analysing the impact of WTO law on the judicial protection of the rights and interests of traders as well as to the administrative means they can use to face trade barriers.[100] For his part, Petersmann sees the need to assist both states and individuals in reacting against public and private abuses (government and market failures), whilst contributing to the improvement of public goods, including human rights (which are at the core of the matter and have a functional relation with it), such as the fight against global warming. His approach not only transcends the international public–private divide as much as the national–transnational one, but also resorts to social sciences, especially international and development economy and the economic analysis of law.[101]

Jonathan Fitchen's work provides an exemplary model on how PrIL research does not just live in an ivory tower, but builds bridges between theory and practice fostering collaboration between the legal actors, the academy and the policy communities. He cared about the pressing real-world problems and ventured outside the university walls offering useful insights to help develop policy solutions. In an attempt to follow this approach, it is argued that PrIL could better integrate (and be integrated) into the study of international trade agreements with a pragmatic view in line with present holistic academic tendencies, and, henceforth, promote international cooperation towards the attainment of SDGs.

[99] A Lowenfeld, *International Economic Law* (Oxford University Press, 2008) v and vii, states that 'everything is related to everything else – trade to investment to monetary affairs, dispute settlement to sanctions and to unilateral vs collective action, economic law to public international law and to private international law'. R Bismuth, D Carreau, A Hamann and P Juillard, *Droit international économique*, 6th edn (Dalloz, 2017): 'trois piliers du droit international économique que sont le commerce international, l'investissement étranger et les relations monétaires et financières internationals … ces différentes disciplines ne sont pas pour autant analysées de manière cloisonnée tant les interactions entre les trois branches sont nombreuses' ['the three pillars of international economic law are international trade, foreign investment and international monetary and financial relations … therefore, these different disciplines are not analysed in a compartmentalised manner as the interactions between the three branches are numerous'].

[100] P Mengozzi, 'Private international law and the WTO law' (2001) 292 *Hague Collected Courses* 253. Along these lines, B Hess, 'Private Public Divide in International Dispute Resolution' (2017) 388 *Hague Collected Courses* 49, argues that it would be misleading to qualify parts of the current dispute resolution system as purely 'commercial' and other parts as purely 'public or administrative'. There are revolving doors between the systems and the same procedures are often applied; what really matters is the proper delineation of different remedies which functionally protect the same interests and rights.

[101] EU Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Hart Publishing, 2012) 11, 14 and 57. From a cosmopolitan citizen perspective, he conceptualises and justifies international economic law as a system of legal norms and practices aimed at the promotion of the economic efficiency and sustainable development, but also the compliance with human rights and democratic self-governance.