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RESEARCH NOTE

Alienated Twins – The Overlooked Private Law Dimension of Global Trade and Investment Governance

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Abstract
Two scholarly communities work on global trade and investment governance yet communicate little with each other. On the one hand, classic trade and investment scholarship focuses on states' foreign economic policies, trade and investment treaty programs, and participation in the World Trade Organisation. On the other hand, scholars of private and commercial law study how businesses draft and enforce the international contracts of a private law nature that ultimately constitute international trade and investment transactions. This research note seeks to raise awareness for this bifurcation of research on global trade and investment, develops a conceptual framework to better understand the role of private law in shaping trade and investment flows, and proposes a research agenda anchored in economics, political economy, and political science to advance our understanding of the role of private law in global trade and investment transactions and governance.

Keywords: private law; commercial law; WTO; trade policy; judicial cooperation; contract enforcement

1. Introduction

Global trade and investment scholarship – as published inter alia in the *World Trade Review* and encompassing political science, economics, and legal research – tends to focus on (1) why states opt for liberal or protectionist trade and investment policies (Hiscox, 2002; Rickard, 2015; Kim and Osgood, 2019); (2) why the design of Preferential Trade Agreements (PTAs) and International Investment Agreements (IIAs) varies over time and across country dyads (Allee and Peinhardt, 2014; Dür et al., 2014; Claussen, 2022); (3) whether such treaties and policies are legally compatible with the overarching principles of the World Trade Organization (WTO) and international economic law (Mavroidis, 2015; Pinchis-Paulsen, 2020; Hoekman et al., 2023); and (4) evaluate the complex economic, political, security, and environmental effects of these policies and treaties on societies (Bernauer and Nguyen, 2015; Roberts et al., 2019; Yildrim et al., 2020; Aggarwal and Reddie, 2021; Chaisse, 2023; François et al., 2023). Trade and investment scholarship has been highly productive over recent decades and has developed into a truly interdisciplinary and dynamic research enterprise.

Despite its dynamism and interdisciplinarity though, trade and investment scholarship has mostly overlooked the crucial role of private law in global trade and investment. Trade and investment ventures are ultimately transactions between private parties set in different jurisdictions that are governed first and foremost by commercial contracts of a private law nature and domestic dispute settlement rather than public international law, intergovernmental treaties, or the Dispute Settlement Body of the WTO (Goode et al., 2015; Baskind et al., 2022). Only a limited

number of legal scholars have paid attention to this private law dimension of international trade and investment transactions and explored the manifold complex interactions between these legal spheres (Douglas, 2009; Mills, 2011; Gaukrodger, 2014; Langille, 2018; Arato, 2019). Commercial contracts, to put it simply, encompass two sets of provisions: (1) the specific rights and obligations that the parties agree upon as part of a trade or investment transaction (e.g. price, quality requirements, delivery modalities); and (2) choice of law and forum provisions that specify which national private law regime shall inform the interpretation of unclear contract provisions and which courts or dispute settlement mechanisms the parties shall use to resolve disagreements. Choice of law and forum provisions are crucial to address incomplete contracting challenges and provide legal certainty in the absence of a global private and commercial law and enforcement system (Gottschalk et al., 2007; Basedow, 2015; Rühl, 2018). Businesses involved in trade and investment transactions indeed may either chose the law and courts of the home country of one of the parties or opt for the law and dispute resolution forum of a neutral third country. These choices matter in that some national private law regimes give parties greater freedom to define the terms of their relationship whereas others circumscribe so-called party autonomy. In a similar vein, dispute settlement mechanisms and court systems are seen to differ in terms of their procedural flexibility, commercial expertise, and enforceability of decisions across borders. Navigating this legal maze in world markets is far from straightforward and businesses spend considerable resources to draft contracts that reflect their preferences and maximize international contract enforceability.

The highly fragmented global private law landscape affects every single trade and investment transaction and imposes often significant legal trade costs on businesses. Policy-makers and private law experts have long recognized these legal trade costs and how they shape business decisions on whether, with whom, and where to transact, trade, and invest. The emerging nation states of the nineteenth century, for instance, started unifying or – in federal polities such as the USA – harmonizing private and commercial law within their territories with the express purpose to promote national economic integration (Lando, 1992). In a similar vein, the European Union (EU) has been working on the harmonization of Member States' private law regimes and developed a number of European private law codes with the objective to facilitate trade and investment and to deepen the Single Market (Bogdan and Sender Pertegas, 2019; Basedow, 2021). In 1980, the United Nations, moreover, sponsored the multilateral Convention on the International Sale of Goods (CISG), which emphasizes in its preambular that 'the adoption of uniform rules which govern contract for the international sale of goods … [shall] contribute to the removal of legal barriers … and promote the development of international trade' (UNCITRAL, 1980, p. 1). Many more examples of unilateral, regional, and multilateral efforts to facilitate trade and investment transactions with the help of private and commercial law could be given. Yet, these three instances already highlight that below the surface of the WTO, PTAs, IIAs, and alike private and commercial lawyers have been steadily working on promoting and governing trade and investment.

Trade and investment scholarship – notably in economics, political economy, and political science – has barely paid attention to this private law dimension of global trade and investment governance. And even among lawyers, conversations across private law, trade law, and investment law remain limited (see Douglas, 2009; Mills, 2011; Langille, 2018; Arato, 2019). As of today, two scholarly and policymaking communities thus seem to co-exist and profess to study international trade and investment governance yet with limited awareness of each other and intellectual cross-fertilization. On the one hand, we have the classic trade and investment policymaking and scholarship – bringing together economists, political economists, political scientists, and public international lawyers – whose mental compass points to Geneva and the WTO. On the other hand, we have scholars of private and commercial law whose professional universe revolves around London and New York as dominant legal and dispute resolution hubs for international commercial transactions.

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This research note seeks (1) to raise awareness for this bifurcation of the field notably among economists, political economists, and political scientists; (2) to review the scarce research on private law, trade, and investment that cuts across these communities; (3) to conceptualize the trade costs tied to private law heterogeneity across jurisdictions; and (4) to sketch an interdisciplinary research agenda for economists, political economists, and political scientists to bring private law into the focus of the broader trade and investment research community and to develop a more encompassing understanding of global economic governance. While the outlined research agenda is of empirical social science rather than legal nature, we nonetheless hope that relevant studies may in the long run inform and stimulate new legal scholarship at the intersection of private, trade, and investment law and lead to better policy advice.

2. Defining Terminology

Before diving deeper into the overlaps and potential synergies between research on classic trade and investment governance, on the one hand, and private and commercial law, on the other, it is important to clarify key terminology that non-lawyer readers of the *World Trade Review* may be less familiar with. First, private law is a term that is rooted in civil law yet widely understood among lawyers. Its exact meaning depends on the national socio-legal context. Broadly speaking, private law is the law that governs relationships between private parties such as individuals and businesses (Basedow et al., 2017; Bogdan and Sender Pertegas, 2019). It is the counterpart to public law in that the latter governs relations between (1) private parties and state authorities or (2) relations among state authorities. Private law is thought to encompass contract, sales, tort, liability, bankruptcy, consumer protection, transport, family, inheritance law, and the alike.

Private international law is another term that often occurs in private law research on trade and investment transactions. Private international law is not international law as its name may suggest. It is national law that governs the resolution of conflicts of law in the realm of private law (Gottschalk et al., 2007; Grušić et al., 2017). Hence, each state has its own private international law. What does that mean? If, for instance, an international commercial contract requires a party to pay compensation for the late delivery of goods yet the choice of law provision in the same contract requires the application of a national private law that does not provide for compensation under these circumstances, lawyers must evaluate which norm takes precedence and thus whether compensation must be paid. To that end, lawyers turn to the private international law – or conflict of law rules – of the state where a commercial dispute unfolds.

Third, commercial law is an amalgam of private and public law that lawyers deem relevant for international trade and investment transactions (Goode et al., 2015; Cranston, 2021; Baskind et al., 2022). Again, no universally accepted definition exists. Though, most scholars would accept that contract, transport, maritime, insurance, bankruptcy, tort, and eventually competition and state aid law form part of commercial law. Family and inheritance law, which forms part of private law in most civil law jurisdictions, in turn, have no direct bearing on commercial transactions and thus do not fall under this term.

Lastly, *Lex Mercatoria* or merchant law refers to business customs, honour codes, and alike in use in international trade and investment transactions (Kadens, 2012; Schill, 2014). It complements and substitutes in many regards private and commercial law as developed by states. It is said to have its roots in medieval trading fairs and kontors and is typically of sectorial scope. Business associations, trading exchanges, and chambers of commerce have been continuously creating and developing norms governing commercial deals in view of lowering transaction costs for stakeholders. *Lex Mercatoria* is soft law in that it is not a priori backed by state authority. Yet, businesses that come to violate relevant norms may struggle to transact with peers in the future, which in concentrated markets, such as commodities, may entail the effective exclusion from markets and demise of a business (Cranston, 2021).

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3. Taking Stock – Research on Private Law, Trade, and Investment

Research cutting across private law, trade, and investment governance is predominantly rooted in law and focuses on purely legal questions. Scholars specialized in international investment law, investment treaties, and investor-to-state dispute settlement, for instance, evaluate how the former interact and impinge on national private law regimes thereby eroding legal certainty for states and businesses active in world markets (Douglas, 2009; Mills, 2011; Gaukrodger, 2014; Arato, 2019; Suraweera, 2023). Arato (2019) indeed shows how investment arbitrators have been advancing treaty interpretations that crudely interfere with national contract and corporate laws resulting in socially and economically suboptimal legal outcomes. Trade law scholars, in turn, have also come to pay greater attention to interactions with national private law regimes due to the rise of Global Value Chains and deep integration. The growing salience of non-tariff barriers, regulatory heterogeneity, and cooperation as well as concerns over heterodox political economies and related market distortions have made trade law scholars and policymakers assess the role of national private law systems in trade governance (Hoekman and Sabel, 2017; Lang, 2019; Mavroidis and Sapir, 2023). The Covid pandemic, furthermore, has rekindled discussions on the impact of the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPs) on national intellectual property law (Shu Shang and Shen, 2021; Abbott et al., 2024). Langille (2018), lastly, adopts a novel analytical perspective by applying concepts of contract law to the WTO regime and to question views of the WTO regime as a proto-constitutional order (Weiler, 2001; Trachtman, 2006). While legal scholarship at the intersection of private law, trade law, and investment law thus offers important insights on how these legal spheres interact, for the most part, it does not offer interdisciplinary findings on how private law shapes trade and investment flows and the political economy forces shaping relevant domestic and international private law regimes.

Private law scholarship indeed only touches on these questions in passing. Experts for instance reiterate that private law regimes seem to differ in their conduciveness to international contracting, which implies that national private law regimes may affect trade and investment activities. Pistor (2019), for instance, argues that the private and commercial laws of England and New York are comparatively business friendly and historically enjoy the status as default choice for international commercial contracts. Similar claims about differences in the structural features and network effects of national private law regimes reverberate throughout legal scholarship (see Goode et al., 2015; Yuand et al., 2015; Rühl, 2018; Cranston, 2021) as well as policy research. The World Bank, for instance, benchmarked a number of national private law features as part of its 'Doing Business' reports to gauge countries' attractiveness for international business (World Bank, 2023). While there seems to be agreement that private law regimes vary in their trade friendliness, the assertion that English and New York law stand out remains contested among experts. Cuniberti (2014) suggests that many national private law regimes exhibit the same features that are thought to attract businesses to English and New York law yet are rarely depicted as exceptionally trade friendly.

Beyond research on variation in the structural features of national private law regimes and their effects on trade and investment flows, scholars of international political economy have sought to explore how efforts to internationally harmonize and unify private and commercial law regimes shape trade and investment flows. States have indeed negotiated a large number of regional and multilateral conventions and model laws under the guidance of international organizations such as the UN, the EU, the Organization of American States (OAS), the International Institute for the Unification of Private Law (UNIDROIT), or The Hague Conference on Private International Law (HCCH). Like international regulatory cooperation and harmonization – a better known phenomena in international trade and investment scholarship – these efforts are seen to reduce legal trade costs by having identical norms apply across jurisdictions thereby limiting the need for country-specific expertise and contract adjustment (de Frahan and Vancauteren, 2006; Hoekman, 2015; OECD, 2015; Pelkmans, 2023). Efrat

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(2016, 2023) indeed argues that private law harmonization serves as a substitute for preferential trade agreements (PTAs). He finds that developing countries with limited administrative resources, few and shallow PTAs are significantly more likely join the UN Convention on the International Sale of Good (CISG) in order to reduce legal uncertainty and trade costs for businesses involved in trade.

Some scholars have further explored how cooperation among judicial systems in private and commercial law matters may reduce transactions costs by facilitating contract interpretation and enforcement in trade and investment relations. Hale (2014) quantifies the trade effects of joining the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. While this convention recently gained prominence in discussions on investment arbitration, it was conceived and negotiated in the 1950s to enhance the enforceability of commercial contracts and arbitration awards. Hale finds that ratifying the New York Convention has a significant positive effect on countries' trade volumes that amounts to approximately 50% of the trade boost that countries experience when joining the WTO. Taking into consideration the important positive trade effect of WTO membership (Goldstein et al., 2007), judicial cooperation in private and commercial law must be seen as an important instrument to promote trade and investment integration. Other studies indirectly point to a positive trade and investment effect of effective transnational dispute resolution and judicial cooperation (Mattli, 2001; Mattli and Dietz, 2014). They show that the design of transnational commercial arbitration institutions reflects the needs and policy entrepreneurship of businesses involved in trade and investment ventures.

Critical scholarship of political economy and economic sociology, finally, highlights how multinational businesses use private, commercial, and notably contract law to create and reproduce power relationships in global value and supply chains (Dietz and Cutler, 2017; Cutler and Lark, 2022). This critical scholarship cautions that private, commercial, and contract law are far from apolitical but have important distributive effects in world markets in that they enrich and benefit key firms in the global north and weaken and impoverish firms and workers in the global south. Lastly, Cutler (1997, 2003) argues – in what is likely the most detailed political economy account of the role of private law in global trade and investment governance – that the distinction between private and public law is artificial and meant to shelter trade and investment transactions among businesses from state interference despite their distributive, social, and environmental effects of public interest. Critical scholarship, in other words, seeks to bring the role of private law in trade and investment transactions and governance back into the limelight of the broader academic and policy debate.

4. Conceptualizing the Trade Costs of Private Law Heterogeneity

The literature survey yields several insights. For one, there is limited research but no consolidated interdisciplinary research agenda that explores the role of private law in global trade and investment governance. What is more, scholars have not conceptualized how private law affects trade and investment flows and governance. What exactly are the sources of these trade costs? When are they higher or lower? As experience with emerging economic phenomena – such as services and digital trade – has shown in the past, conceptualizations help to focus scholarly and policymaker attention to advance research and improve policy. Hence, this section offers a first tentative conceptualization of the trade costs tied to private law.

To better understand the trade costs of private law heterogeneity, it is helpful to look at research on regulatory heterogeneity – a much better understood phenomenon. Regulatory heterogeneity arises from differences in for instance safety, health, or environmental regulations and product/service standards. According to the OECD (2015), regulatory heterogeneity imposes three types of trade costs on businesses and consumers: (1) Information costs: before selling goods and services abroad, businesses need to carry out research on relevant regulations and

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standards in the target market. Gathering relevant information can be difficult, costly, and time consuming. (2) Adjustment costs: in many circumstances, businesses may need to adjust the product or service to comply with relevant regulations and standards. Such adjustments may be costly not least as they may result in breaking up economies of scale. (3) Compliance costs: lastly, businesses may need to demonstrate compliance with regulations and standards to local regulators and conformity assessment bodies. Pharmaceutical companies, for instance, may have to file comprehensive paperwork on medical trials to demonstrate that new drugs do not pose undue risks to patients as defined by relevant regulations and laws. Financial service providers, in turn, may need to submit specific accounts to regulators to get banking or insurance licenses.

Private law heterogeneity may impose similar types of costs on businesses involved in trade and investment transactions. When selling a service or good abroad, businesses must analyse the relevant private law – including contract, tort, and consumer protection law – and understand whether and where this private law diverges from the private law of their home country. As in-house lawyers may not be competent to grasp detailed differences in private law, they may have to hire outside counsel to advise on the laws of the target market. Professor Ole Lando, one of the architects of EU private law harmonization, once mused how European CEOs may walk away from plans to expand their business activities within the Single Market – despite the absence of classic trade and investment barriers – due to the considerable legal costs and uncertainty tied to navigating Member States' diverse private law regimes (Lando, 1992).

In a second step, businesses may then seek to draft a contract that is embedded in the laws of (1) their home country, (2) the laws of the home country of their business partners, or (3) opt for the laws of a 'neutral' jurisdiction of a third country to avoid any one part enjoying a legal-judicial advantage. According to contract law experts, the outcome of this contract 'adjustment' process hinges on the bargaining power of the parties (Rühl, 2018). Whereas symmetric relationships often result in parties choosing the law of third countries (most commonly England, New York, or Switzerland), asymmetric relationships lead to dominant parties imposing their home law and courts on the other parties.

The analogy between regulatory and private law heterogeneity, lastly, even partially holds regarding compliance costs. Yet, whereas in the case of regulatory heterogeneity, businesses may need to prove compliance with domestic norms before selling their goods or services in the target market; compliance costs in the realm of private law only arise in the case of a dispute. As explained above, businesses often add choice of law and forum clauses to their contracts to increase legal certainty. Yet, in the case of a dispute, parties often attempt to renege on these commitments to gain the upper hand. A Chinese and a Brazilian firm may, for instance, have specified that their contract should be interpreted and enforced on the basis of English law and adjudicated in London courts. Once a dispute arises, however, the Brazilian firm may sue the Chinese partner in a Brazilian court and on the basis of Brazilian law as it may hope to stand a better chance of winning. The Chinese firm may then have to convince the Brazilian court that the choice of law and forum provisions in the contract are legal under Brazilian law and that the Brazilian court is under the obligation to refrain from ruling. The Chinese firm, in other words, must demonstrate the contract's compliance with local laws to ensure its enforcement (Table 1).

When are the trade costs tied to private law heterogeneity likely to be high? Drawing on insights from the literature survey, two factors are likely to drive variation in these trade costs: (1) the structural features of national private law regimes in crucial domains, such as contract, corporate, and transport law, as well as state participation in international harmonization and unification efforts; and (2) countries' approach to judicial cooperation at the contract interpretation and enforcement stage. As the reviewed literature suggests, national private law regimes indeed seem to vary in their normative substance. Some are seen as conducive to international trade and investment and may be called 'open', whereas others are seen as hindering trade and investment and could be labelled as 'closed'. The concept of legal openness/closure takes

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Table 1. Summary table

	Regulatory heterogeneity	Private law heterogeneity
Information costs	Costs of understanding regulatory environment in target market	Costs of understanding foreign private law regimes
Adjustment costs	Costs of adjusting goods or services to regulatory environment in target market	Costs of drafting contract that adequately reflects party preferences and ensures international enforcement
Compliance costs	Costs of demonstrating regulatory compliance to regulators and conformity assessment bodies in target market	Costs of demonstrating compliance of contract with local laws to ensure enforcement

inspiration from comparative law research on the key features of national constitutional orders and their structural openness for international and foreign law (Verdier and Versteeg, 2015; Chiam, 2018; Elkins et al., 2021). This literature shows that some constitutional orders erect high hurdles for states to enter international treaties or to give domestic legal effect to international and foreign law, while other constitutional orders are welcoming to both international and foreign law. This logic may, as the literature survey implies, also apply to national private law regimes making international contracting more or less cumbersome.

The degree of party autonomy provided under national private law is likely to be central in this regard. Party autonomy refers to the ability of parties to freely design their contracts and notably to include choice of law and forum provisions to increase legal certainty (Basedow, 2015). Whereas some jurisdictions are lenient and respect choice of law and forum provisions, other jurisdictions and private law regimes limit the ability of parties to opt in or out of their national law and court systems. Party autonomy, in other words, refers to the degree of state sanctioned private ordering in market relationships as opposed to coercive public ordering through public policy and law. High degrees of party autonomy may lower (1) information and (2) adjustment costs in that businesses may opt for well-known private law regimes and adjudication systems of third countries without having to understand all finesses of the private law regimes of the parties' home jurisdictions and drafting highly specific contracts. Whereas proponents of party autonomy stress that international trade and investment transactions are too complex for state authorities to efficiently regulate and thus plead for far-reaching private ordering (Basedow, 2015), opponents caution that party autonomy undermines state sovereignty and public policy as businesses may evade national private law and adjudication (Muir Watt, 2021; Alcolea, 2022).

The openness/closure of national private law regimes should further hinge on state participation in international harmonization and unification efforts. As mentioned earlier, throughout the twentieth century, states have negotiated manifold multilateral conventions – such as the CISG – and developed model laws with the express purpose to facilitate trade and investment transactions. The resulting approximation in national private laws should limit information and adjustment costs in that private law heterogeneity visibly decreases. This reasoning echoes efforts in the OECD, WTO, ISO and alike to promote the adoption of international regulatory approaches and standards so as to limit regulatory heterogeneity and thereby trade costs for businesses and consumers (Basedow and Kauffmann, 2016; Mavroidis, 2016).

The trade costs of private law heterogeneity should moreover, as Hale (2014, 2015) shows, vary in function of a jurisdiction's approach to international judicial cooperation. Judicial cooperation refers to courts recognizing and enforcing foreign judgements, mediation, or arbitration awards, and deferring disputes to other courts, dispute settlement mechanisms, and legal systems if pertinent and/or stipulated in the choice of forum clause of the relevant contract. Cooperative judicial systems should lower trade costs by reducing legal 'compliance' costs. If a business has won damages in a court trial or arbitration proceeding in country A, for instance, it may have to

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Table 2. Theorizing legal trade costs in bilateral trade and investment transactions

	Cooperative judiciaries & open private law regime	Non-cooperative judiciaries & closed private law regime
Cooperative judiciaries & open private law regime	Low trade costs	Intermediate to high trade costs
Non-cooperative judiciaries & closed private law regime	Intermediate to high trade costs	High trade costs

enforce this judgement or award in another jurisdiction against an unwilling defendant in country B. If the judicial system of country B is cooperative, it may recognize and enforce the foreign verdict against the defendant and make them pay without revisiting the substance of the judicial decision. If the judicial system in country B is uncooperative, in turn, the plaintiff may have to go through complex proceedings to have the foreign verdict scrutinized and recognized or indeed launch an entirely new trial against the defendant in country B resulting in a significant surge of legal costs even if all involved legal systems exhibit good rule of law records. Cooperative court systems may, furthermore, decide to refrain from hearing a case, if the dispute is already underway or contractually assigned to a different forum. In this situation, cooperation prevents a surge in legal trade costs through the avoidance of parallel and competing proceedings in multiple fora and jurisdictions. Despite the likely positive effects of judicial cooperation, countries' willingness to cooperate, nonetheless, considerably varies (Michaels, 2009).

To sum up, private law heterogeneity is likely to impose information, adjustment, and compliance costs on businesses involved in global trade and investment ventures. These costs are likely to be high for transactions involving jurisdictions with closed private law regimes and uncooperative courts; and low for transactions exclusively touching upon jurisdictions with open private law regimes and cooperative judiciaries. If transactions touch on both – cooperative open private law regimes as well as non-cooperative closed private law regimes – we should expect intermediate to high costs depending on how closed and uncooperative the relevant jurisdiction is. Table 2 summarizes this reasoning for international transactions involving businesses from two jurisdictions.

5. Outlook – Towards an Interdisciplinary Research Agenda

While lawyers have studied the complex interactions between private law, trade law, and investment law, we still lack an interdisciplinary research agenda to fully appreciate the role of private law in global trade and investment. This last section seeks to outline such an interdisciplinary research agenda in view of developing a more accurate understanding of the norms and institutions governing world trade and investment. A key purpose must be to put private law notably on the radar of social scientists and thus to identify research questions, which they may explore on the basis of their disciplinary theoretical and methodological toolkits.

5.1 Measuring the Openness/Closure of National Private Law Regimes

A first priority should be to identify the key features of national private law regimes that are likely to promote or obstruct international trade and investment ventures. This line of work may aim at the creation of an index that captures variation in the openness/closure of national private law regimes and thereby renders cross-national differences visible and comparable. Such an index would follow in the footsteps of efforts to measure for instance regulatory openness/closure of economies for digital and services trade (OECD, 2021; Ferracane, 2022). At first sight, six components are likely to affect the openness/closure of national private law regimes: (1) the overall

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quality of the rule of law of a country (see World Justice Project, 2024); (2) the openness/closure of national constitutional systems to international law (Verdier and Versteeg, 2015; Elkins et al., 2021); (3) general features of domestic private law – such as contract and corporate law – and their suitability for complex international business operations (Kötz, 2010; Cuniberti, 2014; Pistor, 2019); (4) state participation in international substantive private law harmonization efforts in areas including in contract, transport, or shipping law (Efrat, 2016; Bogdan and Sender Pertegas, 2019); (5) unilateral and treaty-based judicial cooperation regarding the recognition and enforcement of foreign commercial awards and judgements as well as through comity and deferral practices (Hale, 2015; Nielsen, 2020); (6) private international law – or in other words national conflict of law rules – including the degree of permitted party autonomy, choice of law, and forum selection (Gottschalk et al., 2007). This list is not definitive or exhaustive. Further legal and empirical research – through expert interviews with corporate lawyers and commercial associations on the key aspects of legal orders that businesses perceive to affect their operations – is needed to build a high-quality and meaningful index with an accurate underlying weighting methodology.

5.2 Quantifying the Trade and Investment Effects of Private Law

Building on the first line of research, quantitative scholars may seek to identify statistical associations and causal relationships between national index scores, trade, and investment flows. Do countries with comparatively open private law regimes indeed experience higher trade and investment activity than countries with comparatively closed private law regimes? If yes, does the openness of private law regimes cause increased trade and investment activity; or, in contrast, do historically high trade and investment activity cause private law regimes to be open? The use of difference-in-differences analysis and instrumental variables and time series data may help to shed a light on these long-standing questions in legal scholarship. Further, are trade and investment ventures in legally complex settings more responsive to variation in the openness/closure of national private law regimes than less complex transactions? One may indeed assume that business transactions in global value chains, complex service industries, or of considerable financial volumes and embedded in intricate financing structures are more sensitive/elastic to changes in the legal environment than less complex transactions. While measuring associations between private law openness/closure, trade and investment volumes, and specific types of trade and investment transactions may yield important insights for policymakers on national growth and development trajectories, as of now we have little data to shed any light on this question. Finally, it may at last attach a 'price tag' to private law and thus kindle the interest of trade and investment policymakers and help deliver better national policies and global economic governance.

5.3 The Political Economy Foundations of Private Law

Last, the role that private law plays in global trade and investment transactions suggests that it is indeed misleading to see it as apolitical and technical in nature. It likely has distributive and power effects on societies and world markets as notably critical scholarship has been arguing (Cutler, 1997, 2003; Dietz and Cutler, 2017; Muir Watt, 2021; Alcolea, 2022; Cutler and Lark, 2022). Despite these inherently political effects though, we have only the most rudimentary understanding of the social, political, and economic forces shaping the domestic and global private law landscape. Why have some countries 'open' or 'closed' private law regimes? Why do some countries take part in international harmonization efforts and others not? Why are some countries willing to engage in international judicial cooperation in commercial matters whereas others seem highly reluctant? And why did WTO members never seriously discuss the potential of private, commercial, and contract law for trade and investment governance and liberalization?

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Does this merely reflect organizational structures within governments – with private and commercial law development coming under the purview of ministries of justice and trade law and politics falling under the auspices of ministries of trade and economics – or are there other forces at work? These are political economy and political science questions, and legal scholarship does not offer exhaustive and satisfying answers. More research on the political economy foundations of private and commercial law is needed to complete our understanding of global economic governance and the political economy of international trade and investment. Such research may draw on qualitative methods, such as in-depth comparative case studies or qualitative comparative analysis to shed a light on the forces shaping national and international private law frameworks, yet also build on quantitative methods and above sketched index to identify relevant forces and causalities.

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