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FRAMING CONVERGENCE WITH THE GLOBAL LEGAL ORDER

THE EU AND THE WORLD

ELAINE FAHEY

FRAMING CONVERGENCE WITH THE GLOBAL LEGAL ORDER

This interdisciplinary book explores the concept of convergence of the EU with the global legal order. It captures the actions, law-making and practice of the EU as a cutting-edge actor in the world promoting convergence 'against the grain'. In a dynamic 'twist' the book uses methodology to reflect upon some of the most dramatically changing dimensions of current global affairs.

Questions explored include: who and what are the subjects and objects of convergence as to the EU and the world? How do 'court-centric' and less 'court-centric' approaches differ? Can we use political science and international relations as 'service tools'?

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- framing EU convergence;
- global trade against convergence;
- the EU as the exceptional internationalist; and
- positioning convergence through methodology.

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Edited by
Elaine Fahey

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FOREWORD

At a time of waning multilateralism and retreat in international cooperation, it is important that scholars ask fundamental questions about the global order and the norms that sustain this order. Over the last two decades, a rich global governance literature has emerged to examine various areas of law and policy that have transnational implications or require global solutions. While this literature has discussed many challenges associated with international institutions and supranational governance – whether related to deficiencies in democracy, accountability, or efficiency of these global governance mechanisms – the foundations of this global order have never been questioned to the extent they are today. The threat of the unraveling of the World Trade Organization's (WTO) dispute settlement mechanism or the Paris climate accord; the departure of the United Kingdom from the European Union; and the rise of nativist parties with populist anti-globalisation agendas in several countries are but some examples of the political environment that has become increasingly hostile to global institutions.

The contributions in this volume engage with the challenges underlying the global legal order while revealing forces that continue to drive convergence despite those challenges. The authors offer compelling accounts of the drivers behind, and the implications of, global convergence, by examining cutting-edge economic issues involving trade, investment, public procurement, economic sanctions, export controls, foreign lending and fiscal policy. They engage with important policy questions surrounding labour law, data protection, climate change, human rights, as well as asylum and refugee law. In doing so, they bring together a rich set of examples from multiple areas of law under a unifying theme of global convergence. This collective inquiry is all the more valuable given the authors' deployment of different methodologies and examination of convergence through various channels: multilateralism, regionalism, bilateralism, and unilateralism. The authors further show how convergence can follow both mandatory and voluntary mechanisms and how the main actors driving convergence can be both governments as well as private actors. Finally, the authors acknowledge the many benefits associated with global convergence but also engage with the criticism leveled against the efforts to write uniform rules for the countries with different needs and circumstances.

The focus of this important volume is on the role of the European Union – the champion of global convergence and international institutions – and its efforts to shape the global legal order while navigating the increasingly hostile and uncooperative international environment. Of all the major actors on the world stage, the EU has in the last decades been most committed to the international legal order, seeking to preserve the institutions and pursue treaty-based cooperation.

This raises many important questions, including why the EU has adopted this role, how it seeks to foster global convergence, if it has been successful in this endeavour, and whether the EU's efforts should be applauded or criticised.

There are likely several reasons that explain the EU's central role in the building of a global legal order based on cooperation and convergence. Being itself a construct of multilateralism, the EU can be seen as having an existential interest in preserving multilateralism as a foundation for governing international relations. Beyond this, global convergence has also served the EU's core economic interests as the EU has often been successful in promoting convergence around its own regulatory standards. When the EU successfully exports its own standards – whether through multilateral institutions, bilateral treaties or unilateral actions – the EU can level the playing field and thereby protect the competitiveness of the European industry. This allows the EU to defend its social preferences such as environmental protection without compromising the ability of its domestic industries to compete internationally. The EU also benefits from convergence by obtaining greater legitimacy for its rules. If foreign companies and governments emulate EU standards, those standards are seen as having a wider appeal and thus greater legitimacy. The EU's trade partners are also less likely to challenge the legality of EU standards before institutions such as the WTO if those standards are already replicated globally. Less tangibly, being the global standard-setter serves the EU in expanding its soft power and validating its regulatory agenda, both at home and abroad.

The EU's efforts to promote a global legal order may also be motivated by its desire to replicate its own governance model and regulatory experience abroad. The EU's own successful experience in creating a common market has encouraged it to pursue a global order based on those same rules. More regulation in the EU has meant more integration, predictability, stability, and ultimately, more economic growth. This has fostered a belief that an extensive regulatory convergence is similarly needed to preserve global public goods. In recent years, the challenges surrounding the international order have provided an additional incentive for the EU to assume a greater role in promoting global norms. The US's decision to retreat from multilateral institutions in particular has left a vacuum that the EU has felt compelled to – and has been uniquely positioned to – fill. A scandal such as the Snowden revelations that exposed extensive US government surveillance activities worldwide is just one example of incidents that have further increased the EU's resolve to act as the global guardian of personal data and the right to privacy. Finally, the EU's growing awareness that its relative share in the world economy is declining while Asia's is rising may have similarly contributed to the EU's desire to cement its rules globally at the time when the EU still has the power to do so.

The EU not only has the will but also the means to promote global convergence, and has done so through various channels. It has often entrenched its norms abroad through bilateral or multilateral treaties, most often by negotiating an extensive array of preferential trade agreements that influence the type of regulations that the EU's trade partners must adopt in order to secure access to the single market. The EU has also shaped global norms through its participation in

international institutions and standard-setting bodies. It has engaged in transgovernmental networks that provide less formal yet potentially influential settings for transferring EU's regulatory frameworks abroad. Finally, European courts have contributed towards global convergence by issuing judgments that serve as templates for foreign courts. These three mechanisms – politics, bureaucratic dialogues and courts – offer complementary and at times powerful avenues for the EU's norms and regulations to shape the global regulatory environment. Yet all of them also have important limits as they depend on the cooperation by foreign governments as well as effective implementation, both of which are not always readily available.

In addition to these cooperative mechanisms of promoting convergence, the EU has been notably successful in inducing convergence unilaterally. The EU has always seen international cooperation and multilateralism as the preferred path towards global convergence. Yet when those efforts at international cooperation have failed, the EU has increasingly acted as a 'contingent unilateralist' – advancing its preferred norms unilaterally. For example, when global climate change negotiations have faltered, the EU has gone ahead regulating greenhouse gas emissions in the EU, while indicating its readiness to impose a carbon tariff on trading partners that do not follow suit. Similarly, two decades ago, the EU advocated for a WTO agreement on competition policy but its inability to secure such an agreement has not prevented the EU from becoming the world's leading competition enforcer with the power to regulate both domestic and foreign companies with stringent standards and invasive remedies.

Often the EU's unilateral norm-setting takes place quietly under the radar. This passive power that the EU exercises is known as the 'Brussels Effect'. The Brussels Effect refers to the EU's ability to unilaterally regulate global markets. Without the need to resort to international institutions or seek other nations' cooperation, the EU has the unique ability among nations today to promulgate regulations that shape the global business environment, elevating standards worldwide and leading to a notable Europeanisation of many important aspects of global commerce. Different from many other forms of global influence, the Brussels Effect entails that the EU does not need to impose its standards coercively on anyone – market forces alone are often sufficient to convert the EU standard into the global standard as multinational companies voluntarily extend the EU rule to govern their global operations. In this way, the EU wields significant, unique and highly penetrating power to transform global markets, including through its ability to set the standards in diverse areas such as competition regulation, data protection, online hate speech, consumer health and safety or environmental protection.

While it is less commonly disputed that the Brussels Effect is real and effective, its normative implications are more contested. The EU's ability to unilaterally shape the world in its image can be viewed as normatively desirable or undesirable, depending on whom one asks. The EU's critics emphasise how the EU's unilateralism constrains the regulatory space of foreign governments and thus undermines their ability to respond to the needs and preferences of their own citizens to whom

they are politically accountable. But the Brussels Effect arguably also generates many benefits abroad. Often those benefits are diffused across a large consumer base that experiences a cleaner environment and enhanced product safety, an enhanced control over their personal data, and less exposure to hateful discourse online, to name a few. Of course, everyone does not share the same preferences and would not trust the government – even that of their own, let alone a foreign government – to make the choices for them in this regard. In the end, whether the Brussels Effect is positive or negative depends on individual preferences that vary across policy areas, individuals' socioeconomic and cultural backgrounds, values and ideologies.

More generally, global convergence of any kind can be viewed as positive or negative. Many global problems require global solutions. There are enormous gains from frictionless trade under uniform rules or from a collective commitment to reduce greenhouse gas emissions to mitigate climate change. Yet all convergence may not be welfare-enhancing. There can be significant costs to convergence if it takes place around a standard that in hindsight proves to be suboptimal. Divergent regulatory regimes allow for experimentation, which can be critical for learning and ultimately provide a pathway towards better policy. A push for global rules can undermine such beneficial experimentation. Global convergence embodied by existing international institutions has also generated a backlash that cannot be dismissed wholesale. Instead, the retreat of multilateral institutions forces us to face serious questions about the uneven benefits of globalisation. The discontent surrounding global institutions today should be viewed as a call to action for politicians, inviting them to think harder on how to re-establish the normative foundations for the global legal order. It should also spur global companies to action, using their private power to drive convergence in issues such as climate change mitigation or a digital environment that safeguards personal privacy. Finally, it is a call for academics to ask new and harder questions about the global legal order, explain why cooperation has failed, and generate new and innovative ideas on how losers from globalisation can be compensated, and how trust in global institutions can be rebuilt.

The chapters that comprise this volume will chart the way for this conversation by engaging with a set of intriguing questions and advancing a debate that is both timely and important. They form a major contribution in their own right, bringing analytical clarity and exciting new perspectives to the pressing legal and policy questions of the day. At the same time, they act as a foundation for an even larger debate and as an invitation for other academics, policy experts and practitioners – across disciplines and subject-matter areas – to join the conversation.

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29 January 2020

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Introduction: On Framing Convergence of the EU with the Global Legal Order

ELAINE FAHEY

While convergence may not be a political term that captures the state of current global politics of trade wars, disruption of multilateralism and withdrawal from international organisations, it is at the heart of not an inconsiderable scholarship on international law. Convergence may also not yet be at the heart of European law and politics scholarship, but it is arguably one of the most accurate ways of depicting the EU as an actor in the world today – the lone ranger of the global legal order. This book proceeds on the premise that the EU epitomises the concept of convergence and is arguably one of the ultimate convergence actors in contemporary global politics. The EU remains a driving force explicitly behind multilateralism and a rules-based international order.[1] Indeed, as the European Council has recently stated, convergence can also have teeth: 'The EU will promote its own unique model of cooperation as inspiration for others … But to better defend its interests and values and help shape the new global environment, the EU needs to be more assertive and effective'.[2] Emmanuel Macron has called for convergence to be a European 'action': 'Europe is not a second-tier power. Europe in its entirety is a vanguard: it has always defined the standards of progress. In this, it needs to drive forward a project of convergence rather than competition ….'[3]

In this political rhetoric or mantra, EU convergence can be understood as a social ambition in a convergence of policies which has a levelling effect.[4] Yet it is not neutral and may have complex 'teeth'. It is not inhibitive of EU divergence or prohibitive of complex assertions of defence of interests.[5]

[1] European Council, European Council Conclusions EUCO 9/19 (Brussels) 20 June 2019, 10.

[2] *Ibid* 11.

[3] Emmanuel Macron, 'Dear Europe, Brexit Is a Lesson for All of Us: It's Time for Renewal' *The Guardian*, 4 March 2019, www.theguardian.com/commentisfree/2019/mar/04/europe-brexit-uk (last accessed 24 February 2020).

[4] See also K Linos, *Democratic Foundations of Policy Diffusion* (Oxford University Press, 2013).

[5] Simon Evenett, 'We Can also Do Stupid': The EU's Response to American First Protectionism' (2019) Robert Schuman Centre for Advanced Studies Research Paper 2019/52, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3424862 (last accessed 24 February 2020).

Richard Baldwin, in his masterly work on 'The Great Convergence' as to information technology and the new globalisation, portrays convergence as a 'process' bringing together the world – whilst also obliterating many traditional roles and jobs. It is a form of convergence of means and ends.[6] This *process-oriented* study thereof is arguably less positive in the sense of 'progressive'. Yet it is progressive in its technical and descriptive account thereof and also a metaphor for destruction, renewal and innovation. On the other hand, there is a 'homogeneity' at the heart of the understanding of convergence, particularly in its more scientific forms and it is this element to which this book project turns.

Scholarship, from international economic law,[7] international investment law,[8] international human rights law[9] to sources of Public International Law (PIL),[10] increasingly frames new shifts in sources, practice and jurisprudence, as an explicit narrative of 'convergence'.[11] The previously dominant narrative of *fragmentation* had been conducted within PIL often in a highly court-centric sense, focussing upon sources, their implementation and interpretation thereof.[12] Convergence means many things to many people, but appears to generally capture the direction of the relationship between organisational practices and law-making.[13] Convergence is arguably more broad-brush than fragmentation,[14] depicting coherence and unity between legal regimes from a methodological perspective, through the study of law-making and practice.[15] It depicts everyday actions of convergence, at meta and micro level and can be understood to be a part of any legal system, arguably as a Hegelian dialectic process.[16] Its combination of both

[6] Richard Baldwin, *The Great Convergence: Information Technology and the New Globalization* (Harvard University Press, 2016).

[7] See Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016).

[8] Daniel Behn, Szilárd Gáspár-Szilágyi and Malcolm Langford (eds), *Adjudicating Trade and Investment Law: Convergence or Divergence?* (Cambridge University Press, 2020).

[9] Buckley M Carla, Alice Donald and Philip Leach (eds), *Towards Coherence in International Human Rights Law: Approaches of Regional and International Systems* (Brill/ Nijhoff, 2017); Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press, 2014) Ch 12; Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press, 2010); Meryll Dean 'Bridging the Gap: Humanitarian Protection and the Convergence of Laws in Europe' (2014) 20 *European Law Journal* 34.

[10] Mads Andenæs and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press, 2015).

[11] *Ibid* (outlining convergence as a response to fragmentation, Ch 1, p 1).

[12] *cf* Mads Andenæs and Eirik Bjorge 'Introduction: From Fragmentation to Convergence in International Law' in Andenas and Bjorge, *ibid*.

[13] *cf* Eirik Bjorge, 'The Convergence of the Methods of Treaty Interpretation' in Andenæs and Bjorge, *ibid* 498 and Philippa Webb, 'Factors Influencing Fragmentation and Convergence in International Courts' in Andenæs and Bjorge *ibid* 146.

[14] See, eg, Kurtz (n 7).

[15] See, eg, Dean (n 9); Graham Cook, 'The Use of Object and Purpose by Trade and Investment Adjudicators: Convergence without Interaction' in Behn, Gáspár-Szilágyi and Langford (n 8).

[16] Andenas and Bjorge (n 10).

organisational practice and law-making appears to provide a flexible narrative of the broadest 'positive' evolution of legal orders.[17] It also enables legal narratives to be articulated focussing upon the direction of their evolution, but also includes cross-fertilisation of fields across disciplines and subjects in its midst. Convergence increasingly appears presented as a factually evident state of affairs. It takes place in law and rule-making procedures, courts and tribunals, for legal, economic, political and even sociological reasons.[18] Its methods span, inter alia, the empirical, histography, comparative law, comparative public law methods with much potential and whilst it can be 'court-centric', it is not necessarily always so.[19]

In an international law context, convergence can be viewed – perhaps pejoratively – as wishful thinking. Many international law scholars would prefer, all else being equal, to find evidence of structural or substance convergence and it is frequently a by-line for a 'progressive' narrative. As Alvarez notes, its complexity often means that legal scholars are loath to define it and instead to seek evidence of its obviousness.[20] Indeed, there are many terms which are synonyms for convergence and it becomes a vast literature of sub-disciplines to seek out commonly used narratives or terms for convergence.[21] Convergence in this context may also mean more holistic views of policies, themes or subjects, eg that trade and human rights or global trade and social justice should converge substantively in their thematic engagement, doctrines and ordering.[22] Convergence here can be commonly defined as a process or state of converging, somewhere between a noun and a verb.[23] This activeness arguably accords well with organisational practice case studies.

[17] *cf* Stephen W Schill, *The Multilateralisation of International Investment Law* (Cambridge University Press, 2009); Joseph HH Weiler (ed), 'Epilogue, Towards a Common Law of International Trade' in *The EU, WTO and the NAFTA: Towards a Common Law of International Trade*? (Oxford University Press, 2001).

[18] For example, Kurtz (n 7) at 1.5; Bjorge (n 13); Webb (n 13).

[19] See Kurtz (n 7) 28–29.

[20] Karl P Sauvant and José Enrique Alvarez, 'International Investment Law in Transition (Introduction)' in Jose Enrique Alvarez and Karl P Sauvant, with Kamil Gerard Ahmed and Gabriela del P Vizcaino (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press, 2011) xxxi–xlii, https://ssrn.com/abstract=3167096 (last accessed 24 February 2020).

[21] '… authors take complexity as their byword, even at the risk of alienating readers looking for reassuring evidence of any of the positive-sounding synonyms for convergence, such as "harmonization," "unification," "Europeanization," "internationalization," or "defragmentation"'. See Jose Enrique Alvarez, 'Epilogue: "Convergence" is a Many-Splendored Thing' in Daniel Behn, Szilárd Gáspár-Szilágyi and Malcolm Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (Cambridge University Press, Forthcoming) iCourts Working Paper Series No 165 6 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3418891 (last accessed 24 February 2020).

[22] Harlan Grant Cohen, 'What is International Trade Law for?' (2019) 113 *American Journal of International Law* 326.

[23] Oxford English Dictionary, www.oxfordlearnersdictionaries.com/definition/english/convergence (last accessed 24 February 2020).

The EU's place in the global legal order can be understood as arguably a highly dynamic and complex process which is the antithesis of static. Arguably, convergence fits neatly with understandings of EU global actorness and global ambitions. A form of convergence ethic dominates the EU's actions. Convergence has a prevalence to it but yet may be also said not to be well understood in the context of EU studies and political science with respect to its legal peculiarities. Analytical blind spots may not be easily 'taxonomised'.[24] Arguably, today much convergence of EU law and the EU in the world comes from the mimicking/ transfer/ copying or integration of European rules, practices or ideals into other third party contexts, from the formal to the informal, direct to the indirect. Yet who and what should be the form of study of these analytical blindspots of the world? Some argue that the Court of Justice of the European Union (CJEU) is the main agent of *divergence* practices as to internal matters, internal competences and internal views of EU integration. From a legal perspective, placing the Court inside and outside of the narrative can have a dramatic impact on convergence narratives.[25] It also may depend upon a particular moment in (political) space and (political) time(s). For example, the EU's responses to the demise of the World Trade Organization (WTO) have been to formulate divergence therefrom.[26] The most significant dimension of the new political strategy of the European Commission of late 2019 is a 'Green New Deal', predicated ultimately upon *convergence* of all EU policies as to the environment.

This book project seeks to delve into the forms and action component of EU convergence and isolate its meaning and plot its direction in context. All authors subscribe to the notion of the EU as an exceptional convergence actor within the global legal order. The book isolates the *methodology* of this exceptionalism as a normative and descriptive state of affairs. All authors subscribe to the idea that the EU, in its own unique way, increasingly practices and preaches convergence in the global legal order with an explicitness, openness and directness which is sometimes at odds with international law and/ or international politics.

The book has three distinct sections – corresponding to the following themes: framing the EU as a global convergence actor; the global legal order against convergence; and when is EU law and policy more 'inside-out' than 'outside-in'? These are now outlined in the following paragraphs.

[24] Jacco Bamhoff, 'Comparative Dysfunctionalism: How to Study Comparative Global "Legal Failure" in Elaine Fahey, Jed Odermatt and Elizabeth O'Loughlin (eds), *Whose Global Law? Comparative, Regional and Cyber Approaches to Law-Making* (2019) City Law School (CLS) Research Paper No 2019/02, http://openaccess.city.ac.uk/id/eprint/22706/ (last accessed 24 February 2020).

[25] R Bellamy, *A Republican Europe of States* (Cambridge University Press, 2019) 173.

[26] European Commission, 'Statement by Commissioner for Trade Phil Hogan on the Suspension of the Functioning of the WTO's Appellate Body' (Brussels, 10 December 2019), https://trade.ec.europa.eu/doclib/press/index.cfm?id=2089 (last accessed 24 February 2020).

I. Framing the EU as a Global Convergence Actor

Despite the provenance of convergence in PIL and related sub-fields, convergence is argued here to have a powerful resonance with how we understand the EU as an emerging global legal actor, in the post-Lisbon era.[27] The EU increasingly sets new international agendas, standards and rules and is referred to in a vast literature as a 'norm promoter'.[28] The EU also appears as a distinctively consistent internationalist in a world shifting towards populism, and localism, both within and beyond the EU.[29] It even has an express mission to be a 'good' global governance actor, differing from many other international organisations and states. It has done this, in particular, through consistently advocating the creation of *new* international institutions.[30] It is of significance because it shows its highly orchestrated alignment with the international legal order in law-making. Yet, independently there is also a widespread use of external norms now in EU internal law-making in a wide variety of fields of law which will be developed here further,[31] such that it can be argued that this can also be understood as a form of regular practised convergence at the heart of EU law. There is also widespread use of external norms in CJEU jurisprudence, albeit which varies from field to field and according to competence.[32] These organisational practices and law-making techniques may indicate substantial practices of convergence. Nonetheless, the esoteric nature of the EU challenges much about how institutions are understood to act within the global legal order.

As Cremona and Scott outline, there is a significant challenge in formulating EU global action and its effects.[33] This is particularly the case with respect to some of the most complex topics of global governance, eg migration, data, the environment where the EU seeks to have global effects and lead global change despite asymmetric competence and institutional formulations therein. To similar effect, the amount of case studies of Bradford's iconic 'Brussels Effect' work make it a formidable task to go from the descriptive to the normative as a phenomenon – which they purposefully avoid.[34] Convergence, arguably, is not well understood as to EU integration studies, divergence is arguably mainstream in political science,

[27] See Weiler (n 17) for a historical view.

[28] See the iconic Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies* 235.

[29] John G Ikenberry, 'The End of Liberal International Order?' (2018) 94 *International Affairs* 7; Karen E Smith, 'The European Union in an Illiberal World' (2017) 116 *Current History* 83.

[30] Samuel Issacharoff, 'Democracy's Deficits' (2017) 85 *University of Chicago Law Review* 485.

[31] Elaine Fahey, 'Joining the Dots: External Norms, AFSJ Directives and the EU's Role in Global Legal Order' (2016) 41 *European Law Review* 105.

[32] See, eg, Jan Wouters, Geert De Baere, Jed Odermatt and Thomas Ramopoulos (eds), *Oxford Reports on International Law in EU Courts* (Oxford University Press, 2016).

[33] Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders The Extraterritorial Reach of EU Law* (Oxford University Press, 2019).

[34] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press, 2020).

for example as to views on Europe and its status quo, ie as to disintegration. The movement of EU rules beyond borders is not ultimately well understood as an interdisciplinary ideal.[35]

There is a body of literature on 'EU rules beyond its borders' which is influenced by 'Europeanisation' scholarship.[36] Yet, this exact same scholarship is now also immersed in rationalising de-Europeanisation predicated upon Brexit and the challenges of the empirics of evolving Europeanisation here remains to be seen.[37] One of the chief advantages of studying the legal dimension of EU rules beyond their borders is precisely that EU law is underpinned by an internationalist tendency. From an EU law perspective, homogeneity is a problematic outcome of EU global convergence potentially where it is unending, unstructured or there is too much of it in the wrong entities, places or peoples. One of the most controversial aspects of EU law remains its tendency to provoke convergence with entities not seeking, wanting or striving for the active components of convergence. Litigation as to territory often shows the 'worst' side of the global reach of EU law or projected convergence.[38] It is precisely the active component of convergence here as an idea that attracts the most controversy. Naturally, the CJEU has downplayed any understanding of extra-territoriality in this context.[39]

Yet, territory and global reach constitute one of the most murky dimensions of convergence.[40] In the EU's manifold new trade negotiations, the place of convergence is never openly advertised or advanced. As Young states, there is much misconception concerning the scientific contours of convergence and what is envisaged and proposed with third country partners and contrasted with what is agreed as an outcome.[41] To some extent, then, to explore the methodology of convergence as action alone is possibly to denigrate the EU's success or lacks sophistication. After all, convergence is nowadays highly institutionalised, often involving a plethora of actors, agencies, entities and multilateralism. To isolate action here is arguably impossible.

[35] Karina Shyrokykh and Davilė Rimkutė, 'EU Rules Beyond its Borders: The Policy-specific Effects of Transgovernmental Networks and EU Agencies in the European Neighbourhood' (2019) 57 *Journal of Common Market Studies* 4.

[36] *Ibid*.

[37] Frank Schimmelfpennig, 'Brexit: Differentiated Disintegration in the European Union' (2018) 25 *Journal of European Public Policy* 1154; Frank Schimmelfennig and Thomas Winzen, 'Grand Theories, Differentiated Integration' (2019) 26 *Journal of European Public Policy* 1172.

[38] See Jed Odermatt (n 32) Ch 2 and Cardwell and Wessel in chapter 8 of this volume: C-266/16 *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs* (Grand Chamber, 27 February 2018) or Case C-363/18 *Organisation Juivre Europeenne Vignoble Psagot Ltd v Ministre de l'Economie et des Finances* (Grand Chamber, 12 November 2019).

[39] *Western Sahara*, *ibid*.

[40] Joanne Scott, 'The New EU Extra-territoriality' (2014) 51 *Common Market Law Review* 1343.

[41] Alasdair Young, 'The European Union as a Global Regulator? Context and Comparison' (2015) 22 *Journal of European Public Policy* 9.

II. A Global Legal Order *against* Convergence?

Despite the wording of Art 21 of the Treaty on European Union (TEU) mandating to the EU an entitlement to participate in the global legal order, in general, the external environment is less hospitable to its ambitions.[42] Only the Member States and not the EU have full membership in most international organisations.[43] This renders convergence as an organisational practice of the EU self-evidently complex to unpack as an idea, a practice or a methodology. The path of the EU in the global legal order is not simplified through its newfound legal personality, or consistency and unity as legal goals.[44] The EU has also been confined in its treaties to specific arrangements for the Food and Administration Organization (FAO), the European Bank for Reconstruction and Development (EBRD), the WTO, *Codex Alimentarious* and the Hague Conference of Private International law.[45] It is not a member of the UN, International Labour Organisation (ILO), World Bank, International Monetary Fund (IMF) or Council of Europe for reasons of sovereignty of the Member States as much as the rules of the organisations themselves.[46] While far from coherent, however, the EU and its Member States continue to co-exist and function together, globally. While the EU is often referred to as a 'global actor', its 'actorness' is not always shared across disciplines, vexed by its complex structure.[47] To speak of 'EU convergence' is thus easily contested, challenged and asserted to be incoherent in the world. It demonstrates conceptually the need to reflect more broadly on the specific parameters of 'EU convergence'. There are many examples of the EU seeking to lead organisational practice and engage in evident convergence activities within the global legal order despite its challenges, which are explored next.

[42] See Geert De Baere and Essa Paassivirta, 'Identity and Difference: The EU and the UN as Part of Each Other' in Henri de Waele and Jan-Jaap Kuipers (eds), *The Emergence of the European Union's International Identity – Views from the Global Arena* (Brill, 2013) 21, 26.

[43] Diana Panke, 'The European Union in the United Nations: an Effective External Actor? (2014) 21 *Journal of European Public Policy* 1050.

[44] See Anthony Arnull and Damien Chalmers (eds), *Oxford Handbook of European Union Law* (Oxford University Press, 2015) Parts I, II and VII.

[45] Article 220 TFEU: '1. The Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development. The Union shall also maintain such relations as are appropriate with other international organisations.' Article X1 of the Marrakesh Agreement 1994 (WTO); Constitution of the Food and Agriculture Organization of the United Nations (2017) I-II Article 6. See also Christine Kaddous (ed), *The European Union in International Organisations and Global Governance: Recent Developments* (Hart Publishing, 2015).

[46] Jan Klabbers, 'The Rise of International Organisations' in *An Introduction to International Institutional Law*, 2nd edn (Cambridge University Press, 2009) 16; Frank Hoffmeister, 'Outsider or Frontrunner? Recent Developments under International and European Law: On the Status of the European Union in International Organizations and Treaty Bodies' (2007) 44 *Common Market Law Review* 41.

[47] Elaine Fahey (ed), *The Actors of Postnational Rule-Making: Conceptual Challenges of European and International Law* (Routledge, 2015) Introduction, especially section 2.1; Chad Damro, Sieglinde Gstohl, Simon Schunz (eds), *The European Union's Evolving External Engagement* (Routledge, 2017).

Convergence in organisational practice is arguably well represented through the EU's efforts to create *new* international institutions. The EU is committed in its treaties to being an internationalist as a matter of law and to pursuing multilateral solutions, eg pursuant to Art 21 TEU.[48] Significant entities in the world currently wish to leave or threaten to leave or defund several international organisations (eg African Union from the International Criminal Court (ICC), the UK from the Council of Europe and the EU, the US from the WTO, NATO or UN, amongst others).[49] The EU, by contrast, has and continues to support the development of both existing and new international organisations through institutionalisation. For example, in the European context, the EU has a recent history of promoting and 'nudging' institutional multilateral innovations, from the ICC,[50] a UN Ombudsman[51] to a Multilateral Investment Court[52] in its efforts to promote internationalisation, accountability, legitimacy and the rule of law as a broad global agenda. This committal to internationalisation is expressed through the EU's advancement of institutionalisation.[53] Institutionalisation here is understood as the processes of formalisation and stabilisation of procedures, institutional coordination and the ability of individual actors to influence institutional development, through and by institutions.[54] The EU's newest latest EU Global Strategy on Foreign and Security Policy is also of note here.[55] The central thesis of the Strategy is that the EU will promote a 'rules-based' global order with multilateralism as its key principle and with the United Nations at its core.[56] It seeks to promote a significant amount of unity and consistency across actors and institutions, both inside-out and outside-in, converging around the leading multilateral organisations of the world, in particular the UN.[57] The EU's commitment to the external multilateral legal order explicitly through converging around multilateral institutions and developing new institutions might also be seen to be evidence of concrete convergence. Such processes of institutionalisation may thus be understood as EU convergence *around and into* international norms and institutions. It takes place contrary to the perceived wisdom of renowned international relations

[48] *cf* Bruno De Witte, 'The European Union as an International Legal Experiment' in Grainne de Búrca and Joseph HH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press, 2012).

[49] Smith (n 29); Ikenberry (n 29).

[50] See International Criminal Court, *The Rome Statute of the International Criminal Court* (1998) 2, United Nations, Treaty Series 2187 No 38544.

[51] See: UN Ombudsman: See United Nations Security Council, UNSC Resolution 2083 (2012).

[52] See Multilateral Investment Court: See Council of the European Union, 'Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes' 12981/17 (Brussels, 20 March 2018).

[53] Elaine Fahey, *Institutionalisation beyond the Nation State: Transatlantic Relations, Data, Privacy and Trade Law* (Springer Law, 2018) 4–8.

[54] *Ibid* 6–8.

[55] 'Shared Vision, Common Action: A Stronger Europe' (Global Strategy for the European Union's Foreign and Security Policy, June 2016).

[56] *Ibid* 3.5.

[57] See 'Shared Vision, Common Action' (n 55).

theorists about post-World War US hegemony, that it is easier to maintain existing international institutions than to create new ones.[58]

The EU treaties and EU law jurisprudence alike reveal a quantifiable panoply of interests, actors, objects and subjects, scattered across them. Convergence may link into these new inquiries and research contexts. It may further the interaction of EU and PIL as an interaction of subjects and objects manifesting.

A. Thematic Reflections for Contributors

Areas of reflection posed to contributors were as follows:

- Does it resonate with shifting debates as to the EU as a norm promoter across fields and sub-disciplines?
- To what extent is the study of the EU as a global actor predominantly qualitative? Is empirical research increasingly data driven or less so?
- How should we understand the EU as an internationalist in this new era?
- How do we understand a broader view of the EU's approach, both now and going forward? Which institutions are most appropriate to study?
- Yet how can we achieve a more nuanced understanding of the widespread vision of the EU as a positive and committed internationalist? Its place within the UN system is often studied autonomously or apart from broader depictions of its role within international organisations, although as a research agenda both are vibrant.
- Can it ever be a veritable 'convergence' actor?
- Is it merely a socialised participant of the global legal order?

Despite the trends outlined in PIL scholarship, it is arguably not an accurate description of the current state of the international political economy. There has never been a more contentious moment in time for the study of convergence in global trade.[59] Many understand the global legal order based upon institutionalised multilateralism and convergence around institutionalised multilateralism in the field of threat to be under threat.[60] Instead, the American isolationism in the era of withdrawal from the Paris Agreement in 2020 and blockages as to the

[58] See generally Robert O Keohane, *After Hegemony Cooperation and Discord in the World Political Economy* (Princeton, 2005).

[59] Sophie Meunier and Jean-Frederic Morin, 'No Agreement is an Island: Negotiating TTIP in a Dense Regime Complex' in Jean-Frederic Morin, Tereza Novotná, Frederik Ponjaert and Mario Telò (eds), *The Politics of Transatlantic Trade Negotiations: TTIP in a Globalized World* (Routledge, 2015) Ch 14.

[60] Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017); Samuel Issacharoff, 'Democracy's Deficits' (2018) 85 *University of Chicago Law Review* 485; Karen Smith, 'The European Union in an Illiberal World' (2017) 116 *Current History* 83.

existence and reform of the WTO form the new status quo. However, the US nonetheless renewed its interest in regionalism in North America, ie through the Agreement between the United States of America, the United Mexican States, and Canada (USMCA). Arguably, different forms of institutional convergence are emerging, perhaps on a significantly less grander or visionary scale beyond the state.

A rare joint appearance by the IMF, the World Bank and the WTO in 2017 saw an unlikely confluence of global institutions seeking to appear jointly to defend global trade against rising anti-global trade sentiments and rising American protectionism.[61] Its exceptionalism has faded fast. Others seek different forms of convergence. In the Namur Declaration, a broad collation of distinguished scholars in political economy, international economic governance, economics and law, sought to change the parameters of how international economic agreements must be negotiated (or renegotiated), moving away from an era where the negotiation of international trade agreements was an esoteric study for a small number of doctrinal lawyers and diplomats.[62] This refashioned interest in the configurations of global trade has occurred for a reason, perhaps beyond mere rising economic nationalism and a backlash against globalisation by ordinary citizens and workers. The role of the 'mega-regionals' as initiatives of change by the Obama-led administration, which amounted to a pivot outside of the WTO, has invited much reflection on its meaning going forward for the future of global trade and multilateralism, which arguably would have seen convergence on a vast scale *outside* of the WTO to a degree. The individual institutional units of the global trading order face uncertain and difficult times, for example, the WTO but predominantly as to non-tariff barriers. The efforts of the Trump administration to derail appointments to the Appellate Body (AB) body, has resulted in an unprecedented dilemma as to the functioning of the body and the rule of law going forward.[63]

The new era of economic nationalism and protectionism is a particularly difficult moment in globalisation for the Nation State and a difficult background tableau for the study of convergence. It is perhaps a longer-term step towards better and even deeper globalisation and arguably progress thereto, when we reflect on the history of globalisation.[64] In this regard, convergence may not be viewed as anything other than downwards and raises the question as to its understanding at global, regional and national levels.[65]

[61] 'Global Institutions Mount Joint Defence of Trade Benefits' *Financial Times*, 2017.

[62] Namur Declaration (5 December 2016), http://declarationdenamur.eu/doc/NamurEN.pdf (last accessed 26 February 2020).

[63] Gregory C Shaffer, 'A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations' (2018) *Yale Journal of International Law*, UC Irvine School of Law Research Paper No 2018-64 at SSRN: https://ssrn.com/abstract=3292361 (last accessed 26 February 2020).

[64] See, eg, Susanne Berger, 'Globalization and Politics' (2000) 3 *Annual Review of Political Science* 43.

[65] See Anu Bradford, 'The Brussels Effect' (2012) 107 *Northwestern University Law Review* 1.

Nonetheless, there has also been an important move to an era of deeper trade agreements in recent times and to address concerns about globalisation, moving towards more sophisticated agreements beyond mere tariff-setting arrangements in a form of grand convergence. The recent movement towards WTO + agreements (ie, adding in data, labour standards, the environment, etc and beyond conventional trade agreements) has put pressure upon the idea of what legitimately can be in an international trade agreement and what forms of additional matters can be subject thereto. However, anti-corruption, data protection, money laundering, statistic harmonisation and tax evasion constitute the issues of this new era. The WTO lacks rules concerning data flows or cyber matters and lacks provisions on a host of matters, for example e-commerce, thereby lacking a clear jurisdictional mandate to deal with many significant contemporary disputes as new actors therein.[66] The new parameters of international engagement in trade on the horizon in these new agreements have been subject to critique, for example, those who deny any legitimacy to such forms of cooperation beyond 'true trade'.

The EU has the convergence of good norms at the centre of its latest trade policies on globalisation, pitching globalisation as a positive force for change, inside and outside of the EU.[67] Here, multilateralism is important, for example, evidenced through EU reform of WTO, Agenda 2030 and the full integration of Sustainable Development Goals into EU policy. An EU Global Adjustment Fund has evolved to assist displaced workers – addressing employment and social consequences of globalisation. EU convergence of good norms is also centre-stage in new generation free trade agreements (FTAs), for example, requiring partner participation in the Paris Agreement or Trade and Sustainable Development chapters. Also, civil society fora and domestic advisory groups are increasingly significant entities in new generation FTAs and in important chapters there, for example EU-Korea FTA, 2011; the Comprehensive Economic and Trade Agreement (CETA) 2016; EU-Mexico FTA.[68] The depth of this convergence still remains to be seen and is under review and evaluation, albeit significant lack of transparency exists as to who forms civil society in EU trade law and how they should be selected.

As indicated above, the EU's responses to the demise of the WTO has been to formulate divergence but also reform from within and without – thus a complex but useful example of how the EU always speaks the language of both convergence and divergence through its own unilateralism.[69]

[66] See Mark Wu, 'The China Inc. Challenge to the Global Trade Governance' (2016) 57 *Harvard Journal of International Law* 261, 263–64.

[67] European Commission, 'Reflection Paper on Harnessing Globalisation' (2017) COM (240) 10 May 2017.

[68] See Bhardwaj and Kenner in chapter 13 of this volume.

[69] See European Commission (n 26).

B. Thematic Reflections for Contributors

Areas of Reflection posed to contributors were as follows:

- How do convergence shifts relate to other fields and branches? Do international relations or political science or political economy mirror this shift? Is convergence more normative than descriptive?
- Is convergence as to trade compatible with debates in other disciplines and subjects? What place is there for convergence in legal and non-legal scholarship going forward?
- What is a useful temporal limit upon convergence if any? How should we frame this limit?
- Does convergence constitute a useful methodological tool of an integration rime within regimes?
- Is convergence a useful methodological device or is it solely normative?
- Does convergence help us/ allow us to avoid getting lost in exceptionalist rhetoric of the EU as a global legal actor?
- Is convergence an enabling 'positive' vision? Is it unduly positive? Does its method overcrowd its normative usefulness?

III. Framing External Effects: Is EU Law more 'Inside-out' than 'Outside-in'?

Contributors to this book project seek to pin down the complexity of external effects and EU law as a methodological challenge. They do this by developing an organic understanding from practice and the methods used by the contributors drawing from a range of case studies in external relations, human rights, the area of freedom, security and justice (AFSJ) and international economic law. Contributors are asked to isolate the phenomena of convergence in their key instructions, by self-selecting their method (historical, empirical, qualitative, quantitative, etc). Most contributors do not proceed from a purely empirical basis or indeed from case studies or case law, but rather attempt to outline narratives of convergence as they arise in the evolution of a subject, eg EU public procurement law or EU trade agreements and labour law. This entails that there are important methodological challenges of external effects tacked here and explicitly. This question of methodology is usually overlooked in the development of global effects.

Contributors will be asked to pinpoint temporal periods. The mapping period is thus normative salient and distinctive. 'Mapping' may ostensibly lack normative ambition. Yet contrariwise, it has the merit of enabling the dynamism of convergence to be identified through temporal isolation in select case studies and is thus

essential to capture the zeitgeist of convergence and its application to the EU in the world. It is thus essential that the contours of mapping are more clearly communicated and explicitly in case studies themselves after appropriate direction. Convergence is mainly 'court-centric' by method in most other disciplines: case studies here will chart new unpublished studies of areas and fields of law, more holistically and not explicitly limited to court-centric views of mapping which will accordingly render it novel. Convergence is now a contemporary political ambition of the EU of much topicality. The volume charts the theoretical development thereof and is thus timely. Latest debates about the methods and methodology of EU and PIL are largely data driven[70] or advocate deeper law-in-context methods or historical studies,[71] but are often heavily 'court-centric'.[72] Arguably, the study of the EU as a global actor in law is predominantly institutionally-focussed and is arguably in need of a more diverse methodology to reflect organisational practice and law-making. Isolated studies of the use/ citation of PIL in EU law in legislation or jurisprudence arguably provide a limited snap-shot of practice and need to be pursued in a range of areas and time-periods to have meaning as a methodology. EU legal scholarship has tended to adopt a highly 'court-centric' approach to the EU and the global legal order. This is not to denigrate such an approach – nor is PIL so apart – which should be clearly stated – but rather to emphasise that organisational practice *and* EU law-making look rather different to the isolated study of international law *in* CJEU case law or *in* law-making alone or apart. In other words, a resolutely non-court-centric look at EU action in the global legal order may be considered to be understudied. As a broader study, the EU's attempts at institutional convergence in the global legal order in a systemic sense, beyond its own law-making, are deserving of attention and may be viewed as distinctive and 'apart' in the conventional study of EU international relations law. However, the EU's efforts, effects and intents as to convergence are arguably deserving of being unpacked more carefully, being different to specific organisational practices or the use and citation of PIL in law-making. This enables a systemic view of EU action to be considered, going to the heart of convergence.

To paraphrase seminal work on empirical research, some questions can be answered more easily than others and convergence must be acknowledged to be paradoxically a verb, adverb and noun if legal literature is to be understood correctly.[73] The direction of 'activeness' is problematic here – how time-bound should case studies be? Legal scholarship also has undergone a profound shift in recent times where qualitative empirical research has become far more common and regularised. This shift has the capacity to alter the nature of scholarship and

[70] See, eg, Wolfgang Alschner, Joost Pauwelyn and Sergio Puig, 'The Data-Driven Future of International Economic Law' (2017) 20 *Journal of International Economic Law* 217.

[71] See Rob Van Gestel and Hans-Wolfgang Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20 *European Law Journal* 292, 313–16.

[72] *cf* Michelle Egan, 'Toward a New History in European Law: New Wine in Old Bottles?' (2013) 28 *American University International Law Review* 1223.

[73] See Paul Holland, 'Statistics and Causal Inference' (1986) 81 *Journal American Statics Association* 945.

the direction of its development.[74] Yet how empirical are convergence debates? The tendency of lawyers to rely upon cases, statutes, political debates and other sources in an unsystematic fashion and armed only with doctrinal tolls for analysis is increasingly thought to be highly limiting given how qualitative methods are particularly well suited for analysing evidence and development arguments. Legal scholars may miss, as a result, the ability to answer profound and critical research questions through their more 'limited' methodology. Legal scholars have typically depended rather heavily on doctrinal analysis to conduct research. Such doctrinal tools invariably have lead legal scholars to focus upon cases from, for example, the highest national courts, which introduce a significant ruling that breaks from precedent. To be sure, it is compelling as a technique. However, its utility to make sound generalisations about law and society may be said to be overrated. Moreover, one may state that systematic reviews are not at the core of legal research scholarship, a method typically employed in medical and psychological sciences. While lawyers regularly make claims about law and case law, a minimal number of cases will often satisfy a research question or problem. With this method, a researcher must clearly state the question to be answered, must justify it and be clear about how to define it, must explain any weighting that is to be applied and needs to justify and be transparent about it in a manner which analyses the sample cases to be reviewed, all of which have considerable force and logic to them.[75] Convergence is embedded usually in a narrative and indicates a 'participation' journey. However, its subjects and objects are easily shrouded in the broader narrative. It arguably requires more transparent methodology than ever.

To speak of convergence of legal orders also presupposes a lot about legal ordering beyond the State which this book seeks to explicitly outline. There is also an inherent uncertainty in the depiction of law beyond the Nation State which is challenging from a scientific perspective, and which needs more explicit identification methodologically. More cooperation beyond the Nation State amongst a variety of actors and international organisations may be overwhelmed by discord and betwixt by a need to run faster to stand still. Much of the structure of contemporary legal, political and economic theory is about a concern of the meanings of what may be termed here 'triangulation'. For example, fragmentation, verticalisation and constitutionalisation have been said to 'form the holy tribute of international legal debate in the early 21st century' according to leading public international law theorist Klabbers.[76] Sovereignty, territory and jurisdiction are the greatest challenges to law

[74] Katerina Linos and Melissa Carlson, 'Qualitative Methods for Law Review Writing' (2017) 84 *University of Chicago Law Review* 101; Rob Van Gestel, Hans-Wolfgang Micklitz and Miguel Poiares Maduro, 'Methodology in the New Legal World' (1 May 2012) Working Paper, EUI LAW, 2012/13, http://hdl.handle.net/1814/22016 (last accessed 26 February 2020.

[75] See William Baude, Adam S Chilton and Anup Malani, 'Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews (2017) 84 *University of Chicago Law Review* 37.

[76] See generally Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalisation of International Law* (Oxford University Press, 2009) Ch 1.

across borders in the global legal age; self-determination, democracy and hyper-globalisation are the 'trilemma', which cannot co-exist in the contemporary legal order.[77] Ordering thus matters for those engaging in accounts of the contemporary legal and political order. Yet does a concern to simplify and engage with a broader audience activate reductionism? At each and every one of the so-called stages of conventional legal theory, ie the semantic, jurisprudential, doctrinal and judicial review stages, convergence invariably poses incredible challenges for 'ordering'.[78]

There is a certain practical and political vulnerability posed by international and transnational law which is arguably at the heart of much EU global convergence. Interactions between two legal orders conventionally focus upon the national reception of formally binding treaties and customary international law. It is far more complex to restate the international reception of national law or the domestic reception of non-binding standards formulated by transnational bodies.[79] The vulnerability posited here specifically lies in the interactions between public and private international law and other private and public standards. Non-binding transnational standards can be very persuasive, for example. As a result, national deference to transnational standards may result in the scientific integrity of transnational standards being contested and invoked so as to avoid domestic political debates. In the case of scientific standards, there can be a fragility to scientific and regulatory standards, subject to contrariwise both defence and contestation. This results in a question of methodological ordering. Where do we begin from? Where do we end our analysis of convergence? Which direction does our analytical prism take us? If we begin from the perspective of the Nation State, we frame the question in one way; to then begin from the perspective of law beyond the State, we take matters another way, and so on.

'Knowledge' is a critical challenge to our understanding of convergence in the global legal order. Many of its prime case studies are not necessarily very transparent or obvious or easy to understand. From the perspective of many scholars, convergence beyond the State is neither fully known nor agreed (especially not as an autonomous agreed data set).[80] Information technology, particularly as to automated decision-making and artificial intelligence, also challenges our views

[77] Hannah Buxbaum, 'Territory, Territoriality and the Resolution of Jurisdictional Conflict' (2009) *American Journal of Comparative Law* 631; Dani Rodrik, *The Globalisation Paradox* (Oxford University Press, 2012) 88.

[78] See Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2006) 9ff.

[79] Yuval Shany, *Regulating Jurisdictional Relations between National and International Courts* (Oxford University Press, 2007); Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57; Machiko Kanetake and Andre Nollkaempfer (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing, 2016); Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (Oxford University Press, 2011).

[80] However, many political scientists in particular are currently working on mapping international delegations of authority, international power or are mapping international court and tribunal delegations. This work has the potential to significantly shift legal understandings of the global legal order, eg Eugénia da Conceição-Heldt, ERC Project, DELPOWIO.

on convergence and will require development going forward.[81] Social science scholars are attempting to map borders in the age of globalisation using global satellite technology and attempting to document transnational border crossings. They question whether globalisation stimulates thicker or thinner borders.[82] What is clear is that the shared consensus that legal distinctions between private law and public law (eg between the regulation of persons, things and actions, contract law and property law, family law and inheritance law and constitutional and administrative law) have been significantly eroded in several legal systems because of, inter alia, globalisation and supranationalism. Yet precise agreed data is difficult to pinpoint.[83] In this sense, methodology matters.

IV. Outline of Contributions in this Volume

In Part I, *Framing EU Global Convergence*, Frank Hoffmeister sets out in chapter one that the European Union (EU) is one of the world's major trading powers, accounting for 15 per cent in the world share of global exports and imports. He argues that it has held considerable influence in the WTO and brings a lot of negotiating power to the table when it engages in bilateral FTAs. Since 2006, when Commissioner Mandelson announced the 'Global Europe' strategy, it has indeed concluded numerous new 'Deep and Comprehensive Free Trade Agreements' (DCFTAs) with partners such as Korea, Canada or Singapore. Moreover, between 2013 and 2017 it attempted to bring about Transatlantic Trade and Investment Partnership (TTIP) with the United States. With the election of President Trump in November 2017, however, this project came to an end. Primarily, the EU's DCFTAs embody the joint will of the parties to liberalise trade between them. Against that background, the question whether the EU's practice sets global standards is very pertinent. The chapter focusses upon CETA and considers whether the EU's DCFTA's are the most progressive ones, which other nations would like to imitate? Could they serve as global standards that inspire new multilateral conventions? Or are they more a symbol of European exceptionalism that mainly serve European interests and cannot be regarded as a global blueprint?

In chapter two, Jed Odermatt argues that in recent years, many EU policies have been criticised for being 'unilateral', 'extra-territorial', or even violating international law. In areas such as climate change mitigation, financial market regulation, data protection and human rights, the EU's unilateral approach often stems, not from a disengagement with multilateralism, but from an inability to make progress through multilateral institutions. Its push for greater convergence

[81] Baldwin (n 6).

[82] See Beth Simmons et al, Harvard Institute of Quantitative Social Science project on borders and globalisation (on file).

[83] Ernst-Ulrich Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods: Methodology Problems in International Law* (Hart Publishing, 2017).

towards its own values and norms can be seen as also weakening the multilateral system. The chapter first discusses the EU's commitment to multilateralism, which is enshrined in the EU Treaties and a part of the EU's foreign policy. It then turns to fields of law where the EU has been challenged and criticised for pursuing a unilateral approach, focusing on climate change policy, data protection and the use of autonomous restrictive measures (sanctions). It argues that 'EU unilateralism' can be understood in terms of divergence and convergence: on the one hand, the EU is seeking to push forward the law and promote greater convergence around its norms, yet by pursuing this policy in a unilateral manner this also leads to greater fragmentation of the very multilateral order it seeks to promote.

Machiko Kanetake in chapter three shows how use of surveillance technology can significantly undermine the rights of individuals not only within the EU but also in its trading partners. In his report of May 2019, the UN's Special Rapporteur on the freedom of opinion and expression raised serious concerns about the status of 'surveillance exports'. The UN Special Rapporteur foremost recommended that states impose an immediate moratorium on the export of surveillance tools and urged the countries to devise appropriate safeguards. 'Dual-use export control' is one of such legal safeguards available to states. Within the EU, the export of dual-use items has been governed foremost by Council Regulation (EC) No 428/2009 of 5 May 2009, which forms an integral part of the EU's Common Commercial Policy. The chapter analyses political initiatives within the EU in the aftermath of the Arab Spring to integrate consideration to human rights risks into the EU's export control. Such initiatives, in a nutshell, oscillate between convergence and divergence at multiple levels. The EU is, in principle, mandated to facilitate convergence of its external action with human rights. The initiatives for human rights convergence are also in line with the UN's Guiding Principles on Business and Human Rights. Yet the integration of human rights into the EU's export control inevitably involves a policy choice which may diverge itself from international human rights law. Furthermore, the attempts to strengthen human rights protection signify divergence from the international regimes on export control, and more fundamentally, from the idea of regulatory harmonisation across participating states. Regardless of the outcomes of the EU's legislative process, the deliberative process itself has unveiled some of the normative and political challenges that underlie the EU's ambition to accommodate human rights in its external action.

In chapter four, Mauro Gatti focuses on international agreements and the decisions of domestic and international tribunals. Recent developments, such as the EU's enlargement and the public outcry about Investor-to-State Dispute Settlement (ISDS), have changed the dynamics of convergence in the external investment policy of the Union. EU institutions and states are reconsidering parts of the international investment protection system, within the EU and at the global level. The new policy of the EU and of its members might suggest a certain divergence of the EU from the paradigm of international investment law, accompanied by greater convergence between the policies of the Union and capital-importing countries.

This is followed by an Epilogue by Michelle Egan, who argues that the EU is at the forefront of setting standards as an internationalist. However, other visions of principled pragmatism, for example as to security, reflects a more nuanced view of Europe's role in the global order.

In Part II, *A Global Order against Convergence?*, Fernanda Nicola in chapter six maps different types of local resistance to global convergence that have worked in tension to the creation of global trading and regulatory regimes by institutional actors such as the WTO, regional international organisations like the EU, and more recently, the Chinese investment and landing regime of the One Belt and One Road Initiative (BRI). Early on, scholars studying these different forms of global convergence explored the dialectics between convergence and local differentiation, by addressing successes or failures of legal transplants, and the philosophies justifying convergence narratives. However, such focus has left in the background the types of resistance and how they operate in tension, by criticising or shaping narratives of global convergence. Nicola outlines four examples of local resistances drawing on theories of economic differentiation and local culture, institutional change and regulatory path dependencies, the Eurocentrism of global convergence and the democratic resistance to an encasement of neoliberalism in global law as a lens for framing global convergence narratives.

In chapter seven, David Henig examines what we can learn about regulatory leadership as exercised by the US and EU from TTIP talks. He argues that it demonstrates how one of the key drivers behind the proposed TTIP between the US and EU was to create a platform to finally make serious progress on tackling their regulatory differences, generating economic growth and responding to the threat from emerging economies to their global regulatory hegemony. TTIP talks stalled after three years with the election of President Trump in 2016, arguably due more to differences on traditional trade issues like procurement and agriculture rather than regulatory differences. Yet progress on regulatory coherence had been slow, reflecting the different approaches of the two parties, which could be characterised as an EU regulator-led process, as against a US private sector-led process. These differences were being discussed, but progress was mostly halted by the end of talks.

Paul James Cardwell and Ramses A Wessel in chapter eight examine primarily divergence rather than convergence. Since EU law was, at the outset at least, a creation of international law then the starting point would be that on such fundamental questions as territory, these definitions should be the same. However, in the context of the EU as a maturing legal system, the aim of the chapter is to consider the extent of *divergence* between EU and international law. First of all – using an *internal* perspective – it will examine the effects of EU norms and rules by looking through a 'territorial' lens and by considering the EU's own definition and understanding of territory in its legal order. Secondly – using an *external* perspective – it will specifically look at the response by one of the EU institutions, the CJEU, in cases where international territorial questions have arisen. Though questions on territorial scope are some of the most politically-charged in international law, they often emerge through seemingly mundane and technical matters of trade.

This part of the chapter explores the extent to which the Court, which was set up to deal with matters of EU law and not to resolve 'general' international law quandaries, has developed its own methods to grapple with such inherently 'political' and thorny questions.

Juan Santos Vara and Laura Pascual Matellán in chapter nine argue that the EU has been strongly and continuously engaged in the process of elaboration of the Global Compact for Migration, delivering EU coordinated statements through the EU delegations in the consultative phase that preceded the adoption of the Compact. Despite the engagement in the process of the elaboration of the Global Compact, several EU Member States decided not to support the final text of the document. The chapter analyses the convergence or divergence between the Global Compact and EU migration policies and the implications arising from the internal division between Member States as regards the implementation process. It seems that the controversies surrounding the adoption of the Global Compact in the last months of 2018 and the lack of consensus among them have probably led EU Member States not to discuss it at EU level since then, avoiding re-opening Pandora's Box.

In chapter 10, Magdalena Forowicz evaluates whether EU and international law converge in the area of solidarity measures and thereby contribute to the development of the principle of solidarity. In its first part, the chapter briefly reviews the development of the principle of solidarity in international law and then evaluates how it has been implemented as part of the newly concluded Global Compact on Refugees. In its second part, the contribution evaluates the evolution of the principle of solidarity and in EU law and then reviews how it was implemented as part of the EU's response to the recent crisis. In both sections, an emphasis is laid on the analysis of resettlement as a key solidarity measure. In its third part, the chapter compares the EU principle of solidarity and cooperation, as well as the corresponding EU burden-sharing measures with the principles and measures contained in international law. The aim is to assess whether there is convergence between the international and EU levels and to evaluate the development of the principle of solidarity and cooperation in general.

Gabriel Siles-Brügge in chapter 11 shows how the EU's external action is not the product of a unitary set of political values or objectives – even if some authors, have pointed out that there has been a move towards more neoliberal (external) policies over time. This runs counter to many of the essentialising arguments expressed by both right-wing Brexiteers and Lexiteers that the EU is – respectively, either an over-regulated Social Democratic space or simply a 'capitalist club'. What approach the EU takes to global convergence is ultimately the product of broader political struggles. We could still see the flagship European Green Deal push the EU in a more environmentally sustainable direction, with the carbon border adjustment mechanism allowing the EU to push global convergence towards lower carbon intensity.

In Part III entitled, *When is EU Law and Policy More 'Inside out' than 'Outside in'?*, Kornilia Pipidi-Kalogirou in chapter 12 considers how FTAs are expanding

their utility, turning into governance mechanisms of the EU armoury instead of pure trade-relation regulators. This transformative capacity primarily stems from the inclusion of commitments in FTAs that go beyond pure economic governance, such as the chapters on regulatory cooperation. Although regulatory cooperation does not constitute a new trend in EU trade, under the present state, it represents an original shift. Indeed, the placement of regulatory cooperation within a legally binding treaty is at odds with the past choices of negotiation and commitment. The chapter depicts this 'move to law' by using the concept of 'legalization', an International Relations concept developed to depict the augmenting preference of law for the regulation of international agreements. The findings on the legalisation are later used to examine whether and to what extent regulatory convergence is promoted. In that way, it links legalisation of regulatory cooperation to regulatory convergence.

Aakriti Bhardwaj and Jeff Kenner in chapter 13 outline how until the EU started negotiating new generation FTAs, trade-related obligations on labour standards were implicit under the 'essential elements' clause which underscored their protection as human rights. The coverage of labour standards in EU FTAs now falls under the purview of 'trade and sustainable development' chapters that seek convergence of domestic labour law with ILO standards. Furthermore, through these FTAs, the EU is expanding its normative agenda and addressing regulatory issues such as corruption within national systems and governance issues concerning civil society participation in trade policy. Taking the proposed EU-Mexico FTA as an example, the chapter analyses the potential for vertical and horizontal convergence on labour standards through trade. Vertical convergence refers to the EU's pursuit of international labour standards, whereas horizontal convergence refers to the provisions within the FTA that have an indirect bearing on labour standards and, therefore, are relevant to advancing labour standards in trading countries. The analysis unfolds in the light of the EU's trade policy, external factors that may impact regulatory changes in Mexico such as US-Mexico trade relations and the objective to protect rule of law in economic relations.

In chapter 14, Enrico Partiti demonstrates how private standards and corporations' internal regulatory processes are increasingly used by rule-makers in the EU and its Member States in the transnational discipline of global value chains. The effects of this use could lead to convergence of global production practices with international law through the use of external norms. By harnessing the regulatory capacity of voluntary standards, the EU is capable of fostering compliance with international environmental and social obligation – including by businesses and producers established in extraterritorial jurisdictions. Convergence with international provisions, however, may in fact prove to be shallow. The presence of an additional layer of private regulators, combined with the interplay of private rules with those applicable in the countries of operation, may limit convergence of business conduct with international provisions. To ensure effective convergence, appropriate legal structures are likely to be necessary. Furthermore, convergence with social and environmental domains takes place in the simultaneous divergence

with the spirit of international trade obligations. Through a use of private authority which mostly escapes review under WTO provisions, the EU and its Member States are capable of indirectly regulating the conduct of foreign business entities in a manner which would otherwise be constrained, and possibly even sanctioned, by WTO rules.

In chapter 15, Francesco Pennesi outlines how the process of globalisation and the cross-border nature of capital markets are increasingly challenging the ability of domestic jurisdictions to set financial rules in their own jurisdictions. The contribution identifies two determinants of the capacity of equivalence to act as a mechanism of regulatory convergence, particularly in the Brexit context. First, the convergence effects of equivalence are directly dependent upon the capacity of the Commission to preserve its broad discretionary powers and institutional monopoly over the management of EU equivalence policies, in a period when both features are heavily contested, both inside and outside the European Union. Second, the capacity of the EU to employ equivalence as a convergence mechanism will also depend upon the success of recent legislative reforms adopted by the EU to make the equivalence regime a more flexible and proportionate mechanism to extract regulatory alignment in exchange for market access.

In the final chapter, Isabella Mancini explores how a key feature of the latest EU trade negotiations was the pursuance of a 'deep trade agenda' for 'deep integration' with the trade partners. The concept of 'deep' has yet remained unexplored from a fundamental rights perspective. The central question of the chapter asks how a methodological framework of 'convergence' can help the exploration and understanding of 'deepness of fundamental rights' in the new generation of EU trade agreements. Using the Civil Society Forum under CETA as a case study, the chapter argues that while convergence can justify the targeting of certain analytical elements as opposed to others, its usefulness remains limited for more normative explorations.

V. Conclusions

The book project thus wrestles with the framing of the challenges of our times – how can the EU be a global actor? How does it make a difference? What is the nuance of power through law in this context? The book project is unashamedly a methodology project, which seeks to zoom in on the complexity of dynamism and action and also never-ending competence expansions. The breadth of disciplines in the book – lawyers, political scientists, political economy scholars to practitioners hopefully lends some depth to the efforts. To the extent that the development of these themes is at the heart of the European trajectory right now, it also constitutes a vibrant future agenda. This book project thus seeks to delve into the forms and action component of EU convergence and isolate its meaning and plot its direction to depict the EU as an exceptional convergence actor within the global legal order. The book isolates the methodology of this exceptionalism as a normative and