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CONTRACTS, TREATIES, AND THE PUBLIC SPACE†

*Jérôme Sgard**

Daniela Caruso asks whether private law concepts may be instrumental in defending the interests of aggrieved third-parties to Regional Trade Agreements, or whether the former are doomed to remain ignored “non-parties.” This comment builds on her arguments and extends the discussion to the case of sovereign debts and IMF conditionality, where the parties also tend to act as “monadic,” realist, international agents. The hypothesis that emerges is pessimistic: in the absence of a developed jurisdictional order—a form of constitutionalization—third-parties and their interests are as difficult to identify as the broader public space where they should belong.

INTRODUCTION

In his 1927 doctoral thesis, *Private Law Sources and Analogies of International Law*, Hersch Lauterpacht contends that, being “a true offspring of the doctrine of sovereignty,” international law “was bound to reject any recourse to private law as concerned with interests deemed to be of an economic and lower order.”¹ He confronts this classical position and underlines, in particular, that “if the main distinction between private and public law is that the first regulates the relations of legal entities in a state of co-ordination, and the second the

† Responding to Daniela Caruso, *Non-Parties: The Negative Externalities of Regional Trade Agreements in a Private Law Perspective*, 59 HARV. INT’L L.J. 389 (2018).

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¹ HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* ix (1927).

relations of those in a state of sub-ordination to one another, then, formally, international public law belongs to the *genus* private law.”² From this point onward, he explores a number of “analogies” that could be usefully drawn from the field of private law and put to use by international lawyers: contracts and quasi-contracts, to begin, but also torts and damages, arbitration, and bankruptcy.³

In her article, Daniela Caruso follows in the steps of Lauterpacht, although she does not mention him. And whereas her predecessor did not touch on commercial or economic matters—only on abstract legal conceptions—she considers the case of international trade agreements: can private law offer conceptual tools that might help account for the large negative externalities of Regional Trade Agreements (“RTAs”) on non-members (p. 393)? She thus echoes a long line of economic research that has tried for decades to measure the “diversion effects” of RTAs.⁴ Moreover, as she draws on the private law vocabulary, she adopts a critical perspective vis-à-vis its *laissez-faire* expression, as predicated on formally neutral notions of privity, autonomy, and symmetry between the parties—a classic, nineteenth-century discourse which was, in fact, Lauterpacht’s implied reference. Caruso thus raises the political question of whether private law concepts, such as tort, may support a judicial strategy aimed at correcting uneven or unfair real-world economic relations (pp. 395, 409). She applies this questioning in particular to GATT Articles XXIII and XXIV and makes references to the Legal Realists’ progressive judicial strategy (pp. 421–26). She discusses in particular Oliver Wendell Holmes’s jurisprudence on labor relations (p. 416).

On the whole, and beyond the heuristic benefits of this

² *Id.* at 81.

³ *See, e.g., id.* at 253.

⁴ *See, e.g.,* Mian Dai, Yoto Yotov & Thomas Zylkin, *On the Trade-Diversion Effects of Free Trade Agreements*, 122 *ECON. LETTERS* 321 (2013); Christopher Magee, *New Measures of Trade Creation and Trade Diversion*, 75 *J. INT’L ECON.* 349 (2008).

comparison, the following conclusions of the Article are rather underwhelming: historically, the private law concepts have offered only partial and fragile support to aggrieved third parties; the two cited articles of the GATT Treaty are hard to leverage and their potential distributive outcomes are difficult to predict; and issues of jurisdiction add a further degree of uncertainty.

I. WHICH JURISDICTION?

A first limit of the overall argument is entirely pragmatic: Caruso's corrective ambition regarding the present state of the world economy is premised on the existence of a final adjudicative body with the authority to identify and sanction negative externalities on "non-parties." She underlines that the absence of a tax-and-transfer mechanism across countries is a key argument for drawing on private—rather than public—law concepts (p. 412). But she goes on to offer only vague suggestions regarding the judicial machinery that would be able to pass judgments and provide remedies: after raising doubts on the appropriateness of relying on the WTO Dispute Settlement Body (p.429), she mentions "arbitrators" without offering any more information on how they would have jurisdiction and guarantee execution of the judgment. In other words, we are back to square one: unless this dimension is fully considered, there are serious risks that the generic notion of a contract and the analogies it may be associated with become highly abstract and decontextualized, and thus inoperable. The debate may then rapidly flow back into the old natural rights discourse, where contracts are typically talked about as a self-contained and self-justificatory social institution.

This question about jurisdiction is illustrated by the way Caruso envisions the WTO trade regime. The Article seems to consider the GATT and WTO treaties as similar in nature to RTA treaties; this view is aligned with the large body of literature referenced in the Article that construes treaties as

contracts between sovereigns.⁵ The GATT and WTO treaties would simply present a broader, more inclusive or more comprehensive basis, though ultimately, the analogy with contracts would apply to both the GATT and WTO and the RTAs treaties in similar terms. Of course, this perspective raises a host of well-known questions, such as whether countries may adhere to multilateral treaties or conventions unilaterally after promulgation, without having been party to the drafting and without the drafters having a say. This dilemma raised became a serious obstacle as soon as multilateral agreements started to be negotiated upon at the League of Nations during the 1920s.⁶

The paradox is that, at the same time, Caruso also seems to suggest that the GATT and WTO regime is more akin to some kind of public or constitutional law, common to all sovereign states, because it establishes the “level playing field”—and a jurisdiction—on which fair and unified international markets should rest. From this viewpoint, RTAs may well be seen as specific, exclusive opt-outs—hence, as a contract-like private arrangement—while the WTO rules can be construed as a set of default rules. The broad policy debate on the various possibilities offered to post-Brexit Britain underlined this point quite well: a “no-deal Brexit” was taken to imply that Britain would only trade on the basis of WTO rules, until it enters a new generation of specific “contracts.”⁷ In other words, there would be a hierarchy of norms, though no

⁵ See Curtis J. Mahoney, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824, 834–38 (2007).

⁶ See, e.g., Convention on the Execution of Foreign Arbitral Awards, Sep. 26, 1927, 92 L.N.T.S. 301.

⁷ See *Guidance: Existing Free Trade Agreements If There's No Brexit Deal*, DEPT FOR INT'L TRADE (Dec. 19, 2018), <https://www.gov.uk/government/publications/existing-trade-agreements-if-the-uk-leaves-the-eu-without-a-deal/existing-trade-agreements-if-the-uk-leaves-the-eu-without-a-deal> [https://perma.cc/H5SX-XHF9] (U.K.); see also *What Would a No-Deal Brexit Mean for Trade?*, ECONOMIST (Feb. 15, 2019), <https://econ.st/2YZEI9qk> [https://perma.cc/B4T5-DMW9].

hierarchy of jurisdictions; the WTO and its Dispute Settlement Body have not established legal authority or jurisdiction over RTAs—or opt-out contracts—so the multiplication of RTAs and opt-out contracts has led to a non-hierarchical, or “anarchic,” international trade regime.⁸ Hence, as Caruso rightly argues, the multiplication of RTAs fractures the global trade regime, destroys the underlying common good and leaves us with a more unfair, degraded (or “cannibalized,” p. 403) set of rules. But while she points to a broadly negative appraisal of the politics of the WTO, her overall perspective ultimately suggests that anything short of a return to fully-fledged, immaculate multilateralism would not work. At this point, private law tools may only offer to serve as a prop, at best.

II. THE VEIL OF SOVEREIGNTY

Moving beyond Caruso’s specific, trade-related discussion, we can take her discussion of private law analogies to other legal terrains. One problem that soon comes up is whether sovereignty is construed in terms that actually support the far-reaching contractual analogies that Caruso explores. To start with, when a country is exposed to negative externalities of an RTA to which it is not a party, those adverse effects are first perceived and recorded by private businesses whose trading conditions deteriorate. This chain of effects is significantly different than what occurs with military alliances, for instance. One should thus assume that the aggregation of these private resident agents results in a self-standing political body, with a capacity to contract with similar entities (or to sue them). But this step asks that we ignore the various underlying conditions and conflicts of interest among

⁸ See, e.g., K. Kwak & G. Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements*, in REGIONAL TRADE AGREEMENTS AND WTO LEGAL SYSTEM (L. Bartels & F. Ortino eds., 2010); Armand C.M. de Mestral, *Dispute Settlement Under the WTO and RTAs: An Uneasy Relationship*, 16 J. INT’L ECON. L. 777 (2013).

individual agents. The “Veil of Sovereignty,” or what economists call a “composition effect,” explains the difficulty of assessing the distributive effects of potential remedies.

Another question, following the contractual analogy as applied to sovereign, is what holds together the parties to a treaty-as-a-contract in a world without a credible adjudication and enforcement authority. The reference that Caruso makes to the “transactional” diplomacy of the Trump administration underlines the point and asks whether this new class of inter-state transactions rests on anything other than crude power relationships or strictly-aligned interests (p. 398). In other words, these “transactional” treaties would be self-enforceable. But in turn, we are prompted to ask, what was different about classic multilateral treaty-making? The fact that a major treaty member threatens to exit these treaties suggests that the latter do exercise a degree of practical constraints on the members’ discretion. Should we thus conclude that there are two classes of treaties, one of which is endowed with some kind of legal-contractual force and the other which might not?

The core question is therefore whether “contracting with a sovereign” is a proposition that makes any sense at all. Economists and specialists of International Relations have long underlined both the seminal and the problematic characters of this analogy.⁹ Many economists, for example, defend that a sovereign debt contract does not rest on the “capacity to pay”—hence on a (private) notion of solvency—but on “the willingness to pay”—in other words, on the discretionary, unilateral decision of the sovereign. At this point, we are fully in the language of “the nation-state as a monadic actor” (p. 397), an animal that will only engage its peers in a self-interested, norm-free, realist mode.

A classic example in this discussion is to ask why there is

⁹ See, e.g., ERIC POSNER, *THE PERILS OF GLOBAL LEGALISM* (2009); John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT’L SECURITY 5, 5 (1994).

such a thing as a sovereign debt market, if no rule and no court can ever bear on the behavior of a debtor country. The realist answer is that private institutions lend to sovereigns and rationally expect to be serviced because of the economic costs that a default would cause to the debtor: closed access to international finance, intense difficulties to finance foreign trade, a probable direct hit on the domestic banking sector. Debtor states would thus have a powerful incentive to protect their good reputations, which they should see as some sort of capital, the return of which would take the form of easy and cheap access to the capital markets. From this perspective, any support provided to a distressed debtor by a third party, like the International Monetary Fund, is doomed to reduce the incentives to serve the contract *à la lettre* and protect one's reputation. Because such support would mitigate the costs of a possible default, it would inevitably make it more probable.¹⁰ In other words, in a "transactional" or realist world—and contrary to the context described by Caruso—an institutional mechanism for crisis management and dispute resolution would become a source of moral hazard, and hence, of a structural decline of the market. Here, contractual discipline rests entirely on a logic of dissuasion, that is on a credible threat of retaliation. Powerful forces seem here to oppose any attempt at internalizing a concern for third-parties, or for externalities.

We may also refer here to a long list of historical or socio-legal contributions that explore how this microeconomic logic can sustain a variety of market structures. Examples include Avner Greiff's analysis of the medieval Maghribi trade,¹¹ Lisa

¹⁰ Jonathan Eaton, *Sovereign Debt, Reputation and Credit Terms*, 1 INT'L J. FIN. ECON. (1996); D. Gale & M. Helwig, *Reputation and Renegotiation: The Case of Sovereign Debt*, 30 INT'L ECON. REV. 3 (1989); Roland Vaubel, *The Moral Hazard of IMF Lending*, 6 WORLD ECON. 291 (1983).

¹¹ Avner Greiff, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525 (1993).

Bernstein's classic study of New York diamond dealers,¹² or the broad literature on micro-credit or cases of privately-ordered market platform.¹³ In all those cases, the exclusion of a delinquent party is loosely mediated or formalized, so that the legal character of the underlying transaction is generally narrow, if not dubious. The question from our present discussion is whether these private orders have a capacity to address the interests and grievance of non-members. And the presumptive answer is, as a rule, no.

III. HOW THE IMF SHAPES TRANSACTIONS WITH A SOVEREIGN: CONDITIONALITY AND THIRD-PARTIES

At the 1944 Bretton Woods Conference, the IMF received the mandate and the financial resources to support member-states at times of crisis. The problem was how the Fund could structure these financial operations to guarantee good policy outcomes and capital reimbursement. Remarkably, the solution was not found before 1953, under the form of the Stand-By Agreement ("SBA"), which was construed explicitly as neither a contract nor a treaty:¹⁴ the father of the Fund's legal doctrine, Joseph Gold, insisted many times that it should not be analogous to either a private bank loan nor a UN registered treaty like World Bank loans. The most visible correlate of this founding rule is that SBAs have been comprised, since then, of two separate unilateral commitments: one document is sent by the country to the Fund, where the country lists its

¹² Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

¹³ BEATRIZ ARMENDARIZ & JONATHAN MORDUCH, *THE ECONOMICS OF MICRO-FINANCE* (2005); Jérôme Sgard, *The Simplest Model of Governance Ever Seen? The London Corn Market (1885-1914)*, in OXFORD HANDBOOK OF INTERNATIONAL ECONOMIC GOVERNANCE (Eric Brousseau, Jean-Michel Glachant & Jérôme Sgard eds., forthcoming).

¹⁴ Joseph Gold, *The Interpretation by the International Monetary Fund of its Articles of Agreement II*, 16 INT'L & Q. L. REV. 289 (1967); Joseph Gold, *The Law and Practice of the International Monetary Fund with Respect to "Stand-By Arrangements"*, 12 INT'L & COMP. L.Q. 1 (1963).

policy commitments; and another one, issued by the Fund, then specifies that a specific amount of money will be made available to the country to use. In other words, the money is not explicitly lent—a step which would imply contractual language; it only “stands by.” More generally, no single document is ever signed by the two parties together during the whole life cycle of this proxy of a “loan.” Institutionalized rules of monitoring and enforcement (that is, conditionality) then add credibility to the word of the debtor country, in a well-structured, sequential, strategic game where both parties are expected to act in a means-end rational way.

In Joseph Gold’s writings, the rejection of the contractual language is first justified by the sheer complexity of all the variables that might affect the capacity—or indeed the willingness—of the sovereign government to remain faithful to its word. If a private law language had been adopted, breaking such contractual commitments would have proved too disruptive and therefore unhelpful.¹⁵ Deviations over time are normal under an SBA and they should be the object of continuing discussion and negotiation, though under the ever-present threat that the whole program might be suspended or cancelled. But even at that point, the expectation built into the Fund’s rules of engagement is that negotiations should start again and a new transaction be entertained in the not-too-distant future. Membership to the IMF thus constrains how this relationship is imagined, if only because exclusion is not an option.

This strategic, non-contractual game comes with a significant correlate: the IMF has never asked that an SBA be voted on by the parliament of a crisis-country, submitted to a referendum, or be approved by a crisis-country’s highest court.¹⁶ The Fund’s legal doctrine is also adamant that any dispute over the interpretation and execution of the initial

¹⁵ Joseph Gold, *The “Sanctions” of the International Monetary Fund*, 66 AM. J. INT’L L. 737 (1972).

¹⁶ *Id.*

two-way transaction should never be opened to a dispute-resolver, such as an international court or an arbitration panel; rather, it should remain entirely within the scope of the bilateral strategic discussion, which should thus be allowed to work as a self-contained forum where only two parties can enter: the IMF and the executive power of the member-country. Any extension of this discussion to a third party, even if it were affected by the agreement, is alien to this transactional logic. The logic of the realist, non-contractual SBA appears to thus confirm an emerging hypothesis, namely that in a post-multilateral trade regime, just as in a sovereign debt (or micro-credit) market, transactions between monadic borrowers remain possible. Legal engineers have designed viable models of transactions in which enforcement do not rest on a judicial authority with enforcement capacities. There is a suggestion, however, that there is no room here for third parties or for a recognition of their interests and claims.

CONCLUSION

At least three salient and converging questions thus emerge from the present discussion: can private law concepts be leveraged in favor of third parties, or non-parties, in an environment devoid of a binding hierarchy of jurisdictions? Should the GATT and WTO treaties be envisaged as some kind of default rules, or indeed as the multilateral Grundnorm of international trade, that may potentially support “non-parties” in RTAs as they ask for redress? And does the self-contained structure of the IMF SBA illustrate a more general rule, whereby transnational legal orders may have strong, specific regulatory effects, although without ever being in a position to interact and negotiate formally with third parties?¹⁷

These three themes, in other words, all raise a question of constitutionalization, defined as a set of norms and norm-enforcing authorities that establishes the division between

17 TRANSNATIONAL LEGAL ORDERS (T. Halliday & G. Schaffer eds., 2015).

private and public, allowing for both a capacity to govern and for the defense of a set of basic rights. We know that these conditions are absent from today's global world, where the public and the private are undifferentiated. Hence, the question that Caruso ultimately raises is whether the present state of third parties reflects the impossibility in general to identify, in legally effective terms, the notions of a public good and of a public space. Who are "non-parties," if not the silent and invisible representatives of "the public"?