

# Non-Parties: The Negative Externalities of Regional Trade Agreements in a Private Law Perspective

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*In private law theory and in international trade law alike, a new strand of scholarship has emerged in recent years. This strand is characterized by a focus on market actors who are excluded from deals struck by other parties and suffer economic hardship as a result. Scholars have also focused on doctrines and legal concepts apt to identify this type of hardship and to provide non-parties with justiciable claims and remedies. Private-law and trade-law scholars involved in this mode of research are often moved by justice concerns and by the realization that rules based solely on the enforcement of bilateral deals may be structurally antithetical to a progressive distribution of resources. Towards the goal of contributing to this literature, I draw inspiration and materials from comparative private-law theory. I then review a range of private law doctrines designed to protect non-parties from the negative externalities of discrete agreements and show how the use of private law analogies in the context of trade theory yields both analytical pay-offs and normative caveats. I conclude that the ongoing attempts to identify, within the framework of international trade law, actionable remedies in favor of non-parties to trade agreements are analytically helpful, but remain distributionally ambivalent and need stronger normative vectors.*

## INTRODUCTION

In the law of contracts as in the law of international treaties, much depends on the maxim “*pacta tertiis nec nocent nec prosunt*”: covenants between two parties neither hurt nor benefit third parties. In a variety of legal disputes between individuals as well as among sovereign states, the “*pacta tertiis*” refrain routinely leads adjudicating bodies to conclude that only the parties to an agreement have cause and standing to litigate any aspect of it.<sup>1</sup> The private law doctrine of contractual privity is a direct application of that maxim, and the Vienna Convention on the Law of Treaties codifies it in Article 34 as a “general rule.”<sup>2</sup> But one need only scratch the surface of legal

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1. E. ALLAN FARNSWORTH, *CONTRACTS* 652 (4th ed. 2004) (“The performance of a contract usually benefits persons other than the parties who made it, but they cannot ordinarily enforce it.”).

2. Article 34 of the Vienna Convention on the Law of Treaties recites: “General Rule Regarding Third States. A treaty does not create either obligations or rights for a third State without its consent.”

enunciation to realize that the maxim is misleading both in fact and at law: normally, contracts and trade agreements generate abundant externalities and, across legal systems, plenty of avenues exist towards the recognition of third parties' claims. The "general rule" is really not that general.

As a matter of fact, the market value of individually owned assets is obviously affected by deals struck by other parties and by the impact of such deals on relevant competitive structures. Likewise, in the parallel context of international trade, preferential agreements concluded among some states alter, by definition, the flow of trade to and from non-party nations.<sup>3</sup> Such externalities may very well be positive. For instance, Switzerland, which has not been privy to the negotiations towards a Transatlantic Trade and Investment Partnership ("TTIP"), might stand to benefit from a deeper integration of U.S. and EU markets.<sup>4</sup> If the United States and the European Union were to agree on mutual recognition of their regulatory standards in any given sector of production, Swiss exporters could opt to comply with the less stringent standard while retaining access to the entire TTIP market.<sup>5</sup> But the externalities of contracts and trade deals may just as well be negative. Each sale of goods—a contract between a given seller and her customers—takes wealth away from that seller's competitors.<sup>6</sup> The same is true for preferential trade agreements ("PTAs"), which normally divert trade away from other countries.<sup>7</sup> At times damaged third parties are easy to identify, but more often the damage does not even appear on the contracting parties' radar screen. Third parties then become "*non*-parties" and as such are routinely excluded from any stage of negotiation, implementation or enforcement of deals struck by others.

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Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331. See Malgosia Fitzmaurice, *Third Parties and the Law of Treaties*, [2002] 6 MAX PLANCK UNITED NATIONS Y.B. 37, 38.

3. Joost Pauwelyn, *Not As Preferential As You May Think: How Mega-Regionals Can Benefit Third Countries*, in MEGA-REGIONAL TRADE AGREEMENTS 61, 62 (T. Rensmann ed., 2017). The trade agreements considered in this Article can involve either unilateral or reciprocal trade concessions between participating countries. In either case, the level of market access between the participating countries is by hypothesis deeper than it is at the multilateral WTO level, and is therefore preferential vis-à-vis the baseline Most-Favored-Nation regime. Preferential Trade Agreements ("PTAs") may encompass just two states, or have a large regional dimension, in which case they are referred to as Regional Trade Agreements ("RTAs") in this Article. Free Trade Areas ("FTAs") like NAFTA or Customs Unions like the European Union are common forms of PTAs. In international trade literature the acronyms PTA and RTA often overlap. See MICHAEL TREBILCOCK, ROBERT HOWSE & ANTONIA ELIASON, *THE REGULATION OF INTERNATIONAL TRADE* 83 (4th ed. 2013).

4. Pauwelyn, *supra* note 3, at 63.

5. The Trump Administration has officially pulled out of talks concerning the Trans-Pacific Partnership ("TPP"), but it has never formally abandoned TTIP negotiations. See Richard Bravo & Julia Chatterley, *Trump Is Willing to Reopen TTIP Amid EU-U.S. Trade Dispute*, *Ross Says*, BLOOMBERG (Mar. 29, 2018, 10:30 AM), <https://www.bloomberg.com/news/articles/2018-03-29/trump-willing-to-reopen-ttip-amid-eu-u-s-trade-spat-ross-says>.

6. The opening of a competing shop famously hurt a village barber's business and became a canonical example of unfair competition in U.S. legal scholarship. *Tuttle v. Buck*, 119 N.W. 946 (Minn. 1909); see Zechariah Chafee, Jr., *Unfair Competition*, 53 HARV. L. REV. 1289, 1304 (1940).

7. The conceptualization of trade diversion is conventionally attributed to JACOB VINER, *THE CUSTOMS UNION ISSUE* (1950).

Given the difficulty of assessing, ex ante or even ex post, the balance of positive and negative externalities of international trade agreements,<sup>8</sup> some scholars see no point in worrying about the fate of non-parties,<sup>9</sup> or remain cautiously optimistic.<sup>10</sup> Others, however, fret.<sup>11</sup> Foremost among the concerned are jurists and economists who focus on the Global South.<sup>12</sup> Unlike Switzerland and many other advanced economies, developing countries have much skin in the game of regional trade agreements (“RTAs”) concluded by other nations and many reasons to worry about their implementation. Quarters of the globe such as sub-Saharan Africa, where most of the world’s poorest states happen to be located,<sup>13</sup> may suffer particularly detrimental

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8. Quantification of trade diversion is notoriously difficult. See CHRIS BRUMMER, MINILATERALISM: HOW TRADE ALLIANCES, SOFT LAW AND FINANCIAL ENGINEERING ARE REDEFINING ECONOMIC STATECRAFT 72 (2014).

9. Pauwelyn, *supra* note 3, at 70.

10. PETER DRAPER ET AL., CAN RULES OF ORIGIN IN SUB-SAHARAN AFRICA BE HARMONIZED?, (German Dev. Inst. Discussion Paper 1/2016), [www.die-gdi.de/uploads/media/DP\\_1.2016.pdf](http://www.die-gdi.de/uploads/media/DP_1.2016.pdf) (noting that African countries could possibly benefit from a new TTIP-based regime if this included such features as mutual recognition of standards and streamlined rules of origin); see also Peter Draper & Salim Ismail, *The Potential Impact of Mega-regionals on Sub-Saharan Africa and LDCs in the Region*, in WORLD ECONOMIC FORUM, MEGA-REGIONAL TRADE AGREEMENTS: GAME-CHANGERS OR COSTLY DISTRACTIONS FOR THE WORLD TRADING SYSTEM? 30, 30–31 (2014) (“[T]he ability of African nations to diversify market opportunities, integrate their economies in global value chains and attract sustainable investment could be affected. The long-term balance of benefits against risks will depend on the design of these agreements, supportive international policies and the strategic response of African policy-makers and firms.”). A sustainability impact assessment, recently made public by the EU Commission, concludes that the TTIP could benefit least developing countries thanks to positive spill-over effects, but only if the European Union and the United States do not “turn TTIP into a transatlantic fortress with substantial RoO provisions [and] MRAs that only apply to EU and US firms,” and if the TTIP remains open to countries who later want to join. Stephanie Bouman et al., Ecorys, *SIA in Support of the Negotiations on a Transatlantic Trade and Investment Partnership (TTIP)*, at 171 (2017), [http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc\\_155464.pdf](http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc_155464.pdf).

11. See, e.g., Meredith Kolsky Lewis, *The Politics and Indirect Effects of Asymmetrical Bargaining Power in Free Trade Agreements*, in THE POLITICS OF INTERNATIONAL ECONOMIC LAW 19, 21 (Tomer Broude et al. eds., 2011) (“FTAs can have a further negative effect of constraining the future policy choices of [non-parties].”); Dan Ciuriak, *Mega Regionals and the Developing Countries*, Comments at the Trade Workshop, Centre for Global Development and the International Institute for Sustainable Development (June 24, 2014) (“[M]ega-regionals impose trade diversion costs on non-participants, which cumulatively start to look quite significant.”); Amy Wood, *Beyond 2015: Trade Reform and the Development Deficit* (Academics Stand Against Poverty, Draft Paper, 2015) (positing that megaregionals such as the TTIP would “undermine development priorities, leaving developing countries with a narrow set of options and little time to respond with appropriate economic and political measures”); Bernhard Zeilinger, *Post-Doha Reorganisation of Global Trade at the Expense of the Global South*, 32 JOURNAL FÜR ENTWICKLUNGSPOLITIK 16, 19 (2016) (concluding that “Countries of the Global South will be in an even weaker bargaining position as negotiations take place outside of the multilateral decision making process” and that “bilateral trade agreements will drive a wedge between recently arising South-South coalitions”).

12. I borrow the label “Global South” from current literature to refer collectively to the least developing countries in the world. See, e.g., PAULOS MILKIAS, DEVELOPING THE GLOBAL SOUTH: A UNITED NATIONS PRESCRIPTION FOR THE THIRD MILLENNIUM (2010); Jan Grumiller, Werner Raza & Bernhard Tröster, *The EU Trade Regime and the Global South*, 32 JOURNAL FÜR ENTWICKLUNGSPOLITIK 4 (2016) (in the international trade context).

13. See PAUL COLLIER, THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT 3 (2007).

effects as a result of such gigantic RTAs as the proposed TTIP.<sup>14</sup> New European preferences extended to U.S. exports are likely to offset existing preferences in favor of African products.<sup>15</sup> Revised rules of origin and higher non-tariff barriers resulting from transatlantic regulatory cooperation may further compound the problem.<sup>16</sup> Yet, African countries' interests have hardly been represented during the TTIP negotiations.<sup>17</sup> Should the U.S.–EU deal, now on the backburner, be revamped, non-parties would have to brace themselves for its possibly harmful consequences. This predicament is anything but marginal. In fact, the harm to non-parties may become even more significant if the current trend towards large RTAs—in trade jargon “megaregionals”—is replaced by a network of smaller, strategic bilateral

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14. The proposed TTIP, an especially large trade agreement pursuing an especially deep level of economic integration between the EU and the United States, is commonly dubbed a “megaregional.” See, e.g., Ricardo Meléndez-Ortiz, *Mega-regionals: What Is Going on?*, in WORLD ECONOMIC FORUM, MEGA-REGIONAL TRADE AGREEMENTS, *supra* note 10, at 14 (defining the TTIP a “megaregional” and “a potential new pillar of trade governance, complementary to the multilateral trade system” on the basis of the following characteristics:

[T]he agreement would affect a share of at least a quarter of world trade in goods and services and of global FDI; at least two economies party to the agreement are hubs in global value chains (“GVCs”) as evidenced by their share of trade intermediate goods and tasks in the regions involved; the agreement’s coverage goes deeper and beyond the WTO, RTAs and bilateral investment treaties (“BITs”), addressing a minimum of areas and regulatory reform essential to 21st century world markets; and parties to the agreement are engaged in multiple RTAs with third party economies and enjoy extensive trade and investment exchange with a significant number of non-members, making the partnership a potential reverse trade-diversion scheme.).

15. Trade diversion away from African exports and in favor of U.S. products or services could result from the erosion of trade preferences previously extended by the EU to African nations. U.S. citrus fruit exports, for example, are likely to increase at the expense of exports from South Africa, Egypt, and Morocco. See Zeilinger, *supra* note 11, at 32 (referring to a study by Rainer Falk & Barbara Unmüßig, *The Great Revenge of the North? TTIP and the Rest of the World*, HEINRICK-BÖLL-STIFTUNG (March 3, 2014), <https://us.boell.org/2014/03/03/great-revenge-north-ttip-and-rest-world>); see also Elwyn Davies & Lars Nilsson, *A Comparative Analysis of EU and US Trade Preferences for the LDCs and the AGOA Beneficiaries*, at 10–12 [http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc\\_150479.%201\\_February%202013.pdf](http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150479.%201_February%202013.pdf); Eveline Herfkens, *TTIP and Sub-Saharan Africa: A Proposal to Harmonize EU and U.S. Preferences*, in THE GEOPOLITICS OF TTIP: REPOSITIONING THE TRANSATLANTIC RELATIONSHIP FOR A CHANGING WORLD 151, 152 (2014) (“Poor non-members, currently enjoying preferences, see their preferential margins erode, as overall levels of protection are reduced.”).

16. See, e.g., Reeve T. Bull et al., *New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements*, 78 L. & CONTEMP. PROBS. 1, 18 (2015) (“[R]egulatory standards and measures adopted through TTIP could threaten some countries with competitive disadvantage or otherwise adversely affect them.”).

17. Important interventions like those mentioned in PAUL MERTENSKÖTTER & THOMAS STREINZ, *THIRD-PARTY EFFECTS OF TRANSATLANTIC REGULATORY COORDINATION* (2017), <http://www.iilj.org/wp-content/uploads/2017/08/TTIP-Stakeholder-Presentation-final-1.pdf>, are by no means common. See Ciuriak, *supra* note 11 (“[T]here is little scope for [non-participants] to mitigate the shocks.”); JAN KLABBERS, *MEGAREGIONALS: PROTECTING THIRD PARTIES?* (N.Y.U. Inst. for Int’l L. & Just., 2016) (“[I]t seems that the megaregionals themselves pay rather little attention to their relationship to other agreements.”); PETER DRAPER ET AL., *MEGA-REGIONAL TRADE AGREEMENTS: IMPLICATIONS FOR THE AFRICAN, CARIBBEAN, AND PACIFIC COUNTRIES* (Eur. Ctr. for Int’l Pol. Econ., 2014) (“[A]dvanced industrialized countries and a handful of developing countries should not have a monopoly on negotiating actionable rules on many of these issues, which could then be imposed on countries that had no say in negotiating them.”).

deals, as envisaged by President Trump in the United States and by Brexit advocates on the other side of the Atlantic.<sup>18</sup>

Quite laudably, a few legal scholars have recently focused on the damage to non-parties possibly resulting from other countries' trade agreements.<sup>19</sup> Among the preoccupations of this group is the identification of doctrines and conceptual tools, within the realm of international law, apt to channel and emphasize the concerns of non-participating states, with the goal of reducing the megaregionals' negative externalities and preventing the further marginalization of countries not invited to the negotiation table.<sup>20</sup> At the same time, in unrelated academic milieus, private law scholars have turned their attention to the plight of individuals or groups who are negatively affected by "other people's contracts."<sup>21</sup> In recent private law contributions, it has been argued that legal systems should "expand the circle of people [that] contract law seeks to protect."<sup>22</sup> Could private law theory provide useful matrices to analyze not just the externalities of contracts between domestic actors, but also the repercussions of international trade agreements upon non-parties?<sup>23</sup>

Most often, the notion of contract that is borrowed from private law for the purpose of crafting international law arguments remains skeletal and devoid of the other typical features of a domestic private law system. In private law, some of the negative externalities of contracts can be redressed by means of tort law, in the form of injunctions or compensatory damages in favor of specially situated non-parties. Other externalities can be prevented outright by limits placed upon contractual freedom,<sup>24</sup> or can be offset by private antitrust remedies, which in many systems are an outgrowth of the tort of unfair competition. Additional contract rules—such as the interpretive canon that favors public policy, or the unenforceability of deals *in turpi causa*—are explicitly designed to minimize the harm to others.<sup>25</sup> Finally, regulatory constraints, usually deemed a matter of public law, complete the

18. Economist Intelligence Unit, *Trade Liberalisation: Down but Not Out* (Nov. 24, 2016), <http://country.eiu.com/article.aspx?articleid=924849476&Country=Indonesia&topic=Economy> (predicting "a proliferation of smaller trade deals" and a further fragmentation of the WTO multilateral framework).

19. Jacob Katz Cogan, *MegaReg Research Project at NYU Law*, INT'L L. REP. (Mar. 31, 2016), <http://ilreports.blogspot.com/2016/03/megareg-research-project-at-nyu-law.html> (highlighting megaregionals' "impact on non-party countries as well as excluded and under-included groups").

20. Most notably KLABBERS, *supra* note 17; and Robert Howse, *Regulatory Cooperation, Regional Trade Agreements, and World Trade Law: Conflict or Complementarity?*, 78 L. & CONTEMP. PROBS. 137 (2015).

21. Aditi Bagchi, *Other People's Contracts*, 32 YALE J. REG. 211, 217–21 (2015).

22. Jan Smits, *The Expanding Circle of Contract Law*, 27 STELLENBOSCH L. REV. 227, 237 (2016).

23. At a high level of generality and with no distinction between common and civil law, "private law" is meant here as "a unified field, of which the main branches (on contract, tort, property, family and succession) are governed by conflicts between private autonomy and countervailing principles." (JAN M. SMITS, *ADVANCED INTRODUCTION TO PRIVATE LAW* 1 (2017)).

24. MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 20 (1993).

25. Steven Shavell, *Contractual Holdup and Legal Intervention*, 36 J. LEGAL STUD. 325, 346 (2007) (noting that the management of externalities is one basic reason for judicial interference with contractual autonomy).

picture,<sup>26</sup> but enough *law* concerning contract externalities is to be found within the conceptual boundaries of private law as traditionally conceived.

This Article borrows from private law not only the archetypal idea of contractual privity, but also an array of techniques and concepts developed over time to determine whether non-parties should be granted remedies of any sort against contracts to which they are not privy. As observed, this is a question with especially high stakes in the context of trade agreements, and an issue of utmost importance for scholars and policy makers concerned with world poverty.<sup>27</sup> From a global justice perspective, the negative externalities suffered by struggling economies as a result of new RTAs are a worthwhile subject of investigation, and private law allows for some progress in this line of inquiry.

The question whether non-parties should be granted remedies against other nations' trade deals is too complex and context sensitive to find straightforward solutions in theory. Nevertheless, a nuanced survey of the private law of contracts' externalities may allow us to sharpen the question and, most importantly, to discard a few clearly wrong answers. In light of this survey, I argue that the non-party remedies currently available in international trade law partake, regrettably, of the same features of non-party strategies in private law: their indifference to distributive outcomes, the neutrality of their design, and the interchangeable positioning of relevant actors. Such remedies are therefore inherently unsuited to correct the stark asymmetries of world trade and may, in fact, be part of the problem.

A foray in the history and theory of private law may contribute in two ways, I argue, to contemporary trade law analyses. First, in a world market that lacks a centralized system of public governance, special attention is needed to the possibility of non-hierarchical arguments in favor of non-party protection. Scholars' reductionist view of the analogy between contracts and treaties has generated an unnecessary heuristic vacuum. When fully articulated, the analogy with private law calls for heightened focus on contracts' negative externalities and on the crucial policy questions that are involved in letting a system of discrete contracting replace multilateralism in world trade. Second, the private law story evoked in these pages is a cautionary tale for the handful of contemporary trade scholars who have focused on the possibility of remedies for non-parties. The experience of non-party remedies in

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26. Within national legal orders, private contracting is embedded in a frame of government regulation and macroeconomic constraints that find scant equivalents in the world order. Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94, 95 (2002). Most notably, antitrust rules, labor standards, and macroeconomic constraints have never really congealed into enforceable norms on the global plain. See Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L L. J. 353, 372 (2015) (“[I]n the international law sphere . . . no overarching sovereign exists to authorize the pursuit of other goals over and above those agreed to by states.”).

27. See, e.g., THOMAS W. POGGE, *WORLD POVERTY AND HUMAN RIGHTS* 18 (2d ed. 2008) (arguing that the benefits of free trade have eluded the global poor).

private law contexts, both in the United States and in Europe, is analytically rich and yet unyielding from the perspective of distributive justice. History shows that non-party remedies, being equally available to all market actors, work not just towards correcting power asymmetries but, just as effectively, towards reinforcing them. The idea that social welfare can be maximized by a combination of free contracting and distribution-insensitive remedies is simply untenable in a private-law game with few players, foreclosed moves, thick history, and stark inequality. Because this is precisely the game of contemporary international trade, we cannot expect a private law model, offering equal moves to all types of players, to redress in any way the plague of the global South.

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The argument proceeds as follows. Part I sets the stage by noting a resurgence of a neo-classical notion of “contract” in the discourse on regional or bilateral trade agreements. The analogy between treaties among states and contracts between private parties is dissected in this part, so as to show that a legal analysis of both domestic and international markets revolving around a reductionist version of autonomy is descriptively and prescriptively dissatisfying. Part II elaborates on the relevance of private law theory in conceptualizing the relation between parties (“A” and “B”) and non-parties (“C”), and discusses early twentieth-century attempts to address contracts’ negative externalities through private law strategies. This part aims to highlight the distributive shortcomings of private law and the early realization, among private law scholars, of the need for better tools and more direct political engagement with the problem of market power asymmetries. Part III focuses on the fate of nations excluded from emerging RTAs and on recent scholarly work aimed at addressing their predicaments. It begins with an iconic tale of trade diversion: the death of Algeria’s wine industry following the implementation of the European Economic Community (“EEC”) Treaty. It then outlines the current trade law framework concerning non-parties in RTAs. The remedies and strategic moves available to non-parties under the current trade law regime, such as Articles XXIII and XXIV of the General Agreement on Tariffs and Trade, remain inherently inadequate.<sup>28</sup> As a result, their use may worsen, rather than correct, the socio-economic asymmetries caused by nations’ freedom to pursue better trade deals. By focusing on the abstract availability of trade remedies for non-party nations, we risk ignoring a fundamental legacy of private law: a system that assumes market players as equals cannot find, within its own logic, sound ways to redress substantive inequality.

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28. See *infra* Part III.

## I. PRIVATE-LAW CONTRACTS AND REGIONAL TRADE AGREEMENTS

## A. RTAs and the Resurfacing of the Transactional Paradigm

In international law circles, RTAs, as well as preferential trade agreements (PTAs) of non-regional scope, are now the talk of the town. Since the failure of the Doha Round, the chances of agreeing on a set of new global trade rules within the purview of the WTO have become slim.<sup>29</sup> Governments around the world have intensified trade negotiations with specific state partners.<sup>30</sup> The resulting deals, allowing for deeper trade liberalization between a lower number of states than would be possible via multilateral negotiations, may be bilateral or plurilateral, and may even encompass a large region of the world. By definition, however, these deals take place off the WTO's multilateral path.<sup>31</sup> The possibility for later accession of new member states may be contemplated as an optional feature in some agreements, but it is outright excluded in others.<sup>32</sup>

The literature discussing the relation between RTAs and the multilateral WTO framework is by now immense.<sup>33</sup> Scholars have debated at length whether the creation of pockets of deep integration paves the way to multilateral consensus or, to the contrary, throws a wrench in the WTO engine.<sup>34</sup> The impact of megaregional agreements on developing countries has also been a matter of discussion and speculation: the rise of megaregionals is often correlated (as either cause or effect) to the failure of the Doha

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29. Roberto Azevêdo, 11th Ministerial Conference Closing Ceremony, Dec 13, 2017, [https://www.wto.org/english/news\\_e/spra\\_e/spra209\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra209_e.htm) ("Members did not manage to agree final, substantive agreements this time. . . . We knew progress here would require a leap in members' positions. We didn't see that.").

30. BRUMMER, *supra* note 8, at 22–52.

31. Uri Dadush, *Potential Responses to Mega-regionals by Excluded Countries*, in WORLD ECONOMIC FORUM, MEGA-REGIONAL TRADE AGREEMENTS, *supra* note 10, at 8, 28 ("[T]he negotiations of [TPP and TTIP] exclude some 160 countries, which are home to over 80% of the world population.").

32. See, e.g., Dan Hamilton, *TTIP: What are the implications for emerging powers and the international order?*, 3 BRIDGES AFRICA 10: 1 December 2014 ("[G]overnments have not stated whether and how the eventual TTIP agreement, once concluded, might be open to others willing and able to commit to similar goals and ground rules."); Michael J. Trebilcock, *Between Theories of Trade and Development: The Future of the World Trading System*, 16 J. WORLD INV. & TRADE 122 (2015). Trebilcock recommends "nudging" the various preferential trade agreements towards multilateralization, for example, by including MFN clauses and giving the DSB of the WTO jurisdiction over RTA-based disputes. *Id.* at 137.

33. See, e.g., LORAND BARTELS & FEDERICO ORTINO, REGIONAL TRADE AGREEMENTS IN THE WTO LEGAL SYSTEM (Oxford Univ. Press 2006); JAGDISH N. BHAGWATI, TERMITES IN THE TRADING SYSTEM. HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE (2008); Kyle Bagwell & Robert W. Staiger, *Reciprocity, Non-discrimination and Preferential Agreements in the Multilateral Trading System* 281, 282 (Nat'l Bureau of Econ. Research, Working Paper No. 5932, 1997) ("[P]referential agreements pose a threat to the existing multilateral system.").

34. See James Lake, *Free Trade Agreements as Dynamic Farsighted Networks*, 55 J. ECON. INQUIRY 31, 31 (2017) ("[T]he proliferation of FTAs has stimulated substantial debate on whether FTAs hinder or facilitate greater liberalization, especially given the lack of multilateral liberalization since the 1994 Uruguay Round. That is, are FTAs "building blocs" or "stumbling blocs" to global free trade?"); see also MICHAEL J. TREBILCOCK, *ADVANCED INTRODUCTION TO INTERNATIONAL TRADE LAW* 48 (Edward Elgar ed., 2015) (summarizing the literature as "developed and wide-ranging, but contentious").



Round<sup>35</sup>—a round that had started with a particular commitment to the fate of developing economies. The fact remains that forming an RTA is, per Hohfeld’s timeless taxonomy,<sup>36</sup> a presumptively privileged activity, duly codified in the world trade architecture and increasingly practiced by various clusters of WTO members.

The proliferation of RTAs is a symptom of larger developments in the world order. One such development is the re-emergence of the nation state as a monadic actor in global trade discourse. *Fin-de-siècle* scholarship on world organization was characterized by an emphasis on networks and on links, diagonal and horizontal, either between states’ disaggregated components—courts, agencies, legislators—or, more often, between private actors operating across borders and exerting indirect rule-making power.<sup>37</sup> The ascendance of the concept of “governance,” as opposed to “government,” was meant to capture the diffusion of power beyond the artifacts of traditional sovereignty and the replacement of top-down arrangements with informal, softer, but overall more productive collaborative agreements.<sup>38</sup> Within the trade arena, policy makers and scholars placed much faith in the possibility of spontaneous convergence, in “voice” (also for developing countries) as opposed to “exit” at each WTO round, and in win-win global solutions to the problem of collective risk management.<sup>39</sup> The twenty-first-century, by contrast, has so far been characterized by a resurgence of state-centered, nationalist rhetoric in all sorts of disciplines, ranging from migration policy to trade regulation. Current political discourse, voiced loudly during the Brexit campaign and in the course of the 2016 U.S. presidential election, has revived the idea of sovereignty as agency in a commercial sense. Within this

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35. See, e.g., Ciuriak, *supra* note 11 (“For development, the Doha Round was a much better deal.”); Ron Sandrey, *Mega-regional Trade Agreements and South Africa’s Trade Strategy: Implications for the Tripartite Free Trade Area Negotiations*, SAIIA Occasional Paper No. 195, July 2014 (“In a world where the World Trade Organization (WTO) has lost much of its momentum, attention has been focused on regional and bilateral trade agreements.”); Klabbers, *supra* note 17 (“Those who were critical of, say, the WTO, or thought the climate change regime does not go far enough, now come to defend these regimes—they will be replaced by something that may be a lot worse for many people.”).

36. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 43 (1913); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710, 712 (1917).

37. Many versions exist of this state-disaggregation narrative. See, e.g., Gunther Teubner, *Global Bukovina: Legal Pluralism in the World-Society*, in GLOBAL LAW WITHOUT A STATE 49, 54 (Gunther Teubner ed., 1991); Jessica T. Mathews, *Power Shift*, FOREIGN AFF., Jan.-Feb. 1997; Gabrielle Zoe Marceau, *A Call for Coherence in International Law: Praises for the Prohibition Against “Clinical Isolation” in WTO Dispute Settlement*, 33 J. WORLD TRADE 87, 88 (1999) (“Interdependencies between States, on all levels, are rapidly increasing.”). Champions of the most extreme version of the state-disaggregation theory were dubbed, somewhat derogatorily, “New Medievalists.” See Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.-Oct. 1997 (arguing that “the state is not disappearing,” but that “it is disaggregating into its separate, functionally distinct parts”).

38. R.A.W. Rhodes, *The New Governance: Governing without Government*, 44 POL. STUD. 652, 652–53 (1996).

39. See J.H.H. Weiler, *The Geology of International Law—Governance, Democracy and Legitimacy*, 64 ZAÖRV (HEIDELBERG J. INT’L L.) 547, 549 (2004) (referring to *fin-de-siècle* international developments as the accretion of a “regulatory layer” on top of earlier modes of relations between sovereign states).

rhetorical frame, a sovereign who does not aim exclusively at maximizing his/her own state's profit in each and every bargain with other nations is a political failure.<sup>40</sup> At its lowest, current state-centered discourse portrays world politics as a zero-sum game, which can be won only by tricking other nations into grabbing the short end of the stick.<sup>41</sup>

The return or re-aggregation of the state as a global actor goes hand in hand with another development, visible both in the form and in the substance of international trade discourse: the resurgence of 'contract' as a mode of interaction between sovereign states. Per Joseph Weiler's geological metaphor, the early twentieth-century predominance of bilateral treaties among states was covered, with time, by other layers of international-law accretion.<sup>42</sup> Today, however, the transactional mode of inter-state relations is returning to the surface, like an inner stratum of the earth in times of seismic shifts. The words "deal" or "bargain," typically used to refer to contracts among private parties, are now the conceptual lens through which inter-state trade relations are seen in influential political circles.<sup>43</sup>

This mode of discourse is ideologically ambivalent. On the one hand, the idea of states' contractual autonomy corroborates the false assumption that all nations are equally positioned to make sovereign choices, and therefore masks power imbalances among differently situated actors (both public and private).<sup>44</sup> The emphasis on sovereign autonomy downplays, as well, the influence that private actors and transnational regulatory entities, devoid of democratic legitimacy, exert on states' policies. Global value chains span across national borders;<sup>45</sup> multinational corporations interfere with governments' regulatory powers; and transnational lobbies defend trade interests that may well be misaligned with basic notions of the common good. The state has only limited control on trade flows, and foreign investors often

40. See Stewart M. Patrick, *Trump and World Order: The Return of Self-Help*, FOREIGN AFF., Mar.–Apr. 2017.

41. *Id.*

42. *Id.*

43. For a coarse transposition of the private-law concept of contract onto the world trade plain, see DONALD J. TRUMP, *THE ART OF THE DEAL* (1987) and Nick Corasaniti et al., *Donald Trump Vows to Rip Up Trade Deals and Confront China*, N.Y. TIMES (June 28, 2016), [https://www.nytimes.com/2016/06/29/us/politics/donald-trump-trade-speech.html?\\_r=0](https://www.nytimes.com/2016/06/29/us/politics/donald-trump-trade-speech.html?_r=0). See also, across the Atlantic, Julia Gray et al., *No, Britain Won't Get a Better Deal Now*, WASH. POST, June 28, 2016 ("Boris Johnson . . . insists that Britain could strike an attractive deal with the European Union even if they're not part of it.")

44. See Joel P. Trachtman, *The Antiglobalisation Paradox—Freedom to Enter into Binding International Law is Real Freedom* (reviewing DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* (2013)); cf. Claire Cutler, *Artifice, Ideology and Paradox: The Public/Private Distinction in International Law*, 4 REV. INT'L POL. ECON. 261, 264–65 (1997) (critiquing neoliberal ideology for "assert[ing] the superiority of private law in the regulation of international commerce"); Dan Danielsen, *Global Rules and a Global Economy: An Economic Policy Perspective*, 1 TRANSNAT'L LEGAL THEORY 49, 65 (2010) (noting that the notion of formal sovereign equality in international trade law scholarship makes it harder to articulate the asymmetries between states as to bargaining power and influence).

45. The IGLP Law & Global Production Working Group, *The Role of Law in Global Value Chains: A Research Manifesto*, 4 LONDON REV. INT'L L. 57, 58 (2016).

(re)write the agreements reached by sovereigns in diplomatic settings. The focus on states' sovereign autonomy tends to paper such things over and therefore stands in the way of progressive agendas.<sup>46</sup>

On the other hand, it is still the case that deals struck by national governments—regarding tariffs, regulatory barriers to imports, rules of origin and, most importantly, monetary policies—do affect the flow of goods, services and capital. Much still depends on state-led strategies and on the allegiances that nations form.<sup>47</sup> This factual basis, in some scholarly circles, sustains an intellectual commitment to state-centered welfare policies and keeps alive the faith in the state's unique capacity to steer and redistribute wealth. Authors committed to social justice emphasize the centrality of the state as an autonomous market player, in stark opposition to cosmopolitanism and to the discursive dilution of states' capacity.<sup>48</sup> Leveraging the sovereign state's power to pick and choose its trade partners and policies is therefore a broad trend in current legal scholarship—one that spans across wide-ranging world views and very different strands of reflection. Under this “big tent,” it is politically easier for domestic policy makers to opt for discrete preferential deals as opposed to WTO-based negotiations.

### B. RTAs, Contracts, and Externalities

At both the technical and doctrinal level, the analogy between trade treaties and private-law contracts encounters significant limitations. While the legal system of the state confers to a contract the status of law between the parties, in the international sphere there is no such centralizing structure, and it is for this reason that Grotius felt he had to ground positive international law upon natural law.<sup>49</sup> Moreover, treaties are often prepared through international organizations and open to the signatures of many more parties, so that their formation rather resembles the production of law with *erga omnes* effects.<sup>50</sup> Nevertheless, bringing treaties within the conceptual frame of private bargains is a move that rests on a time-honored and undying tradition.<sup>51</sup> The U.S. Supreme Court has routinely endorsed the treaty/con-

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46. *Id.*

47. See generally Ralf Michaels, *The Mirage of Non-State Governance*, 2010 UTAH L. REV. 31 (2010).

48. ALEXANDER SOMEK, *THE COSMOPOLITAN CONSTITUTION* 283 (2014) (arguing that “the nation state appears today more indispensable than ever before.”); see also Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 115 (2005).

49. Edoardo Colzani, *L'interpretazione giudiziale dei trattati internazionali* [The Judicial Interpretation of International Treaties], 127 (PhD Thesis, Università degli Studi di Milano 2014) (providing a discussion of the limits of the analogy between contract and treaty).

50. *Id.*

51. Hersch Lauterpacht, *Report on the Law of Treaties of the Special Rapporteur*, 1953 Y.B. Int'l L. Comm'n 94, U.N. Doc A/Cn.4/SER.A/1953/Add.1 (“The principle that treaties are agreements of a contractual character is believed to be not only consistent with but also dictated by the preponderant practice in the matter of their validity, interpretation and termination.”).

tract analogy.<sup>52</sup> Many jurists remain to this day convinced of the fundamentally contractual nature of treaties, and base elaborate arguments on this conviction.<sup>53</sup>

When it comes to international trade agreements among WTO parties, the contract/treaty analogy needs further unpacking. The multilateral system contemplated in the 1947 GATT famously adopted the Most Favored Nation (“MFN”) principle as its cardinal rule precisely in order to extend to all contracting parties the trade concessions agreed upon by any two states. Tariff concessions could well be negotiated bilaterally, but any commitment undertaken by GATT members had to be extended to all.<sup>54</sup> If choosing whom to deal with is the hallmark of contractual freedom, this freedom was then curtailed mid-twentieth century: in line with the win-win narrative of comparative advantage, states were meant to play the cooperative game commonly known as multilateralism. The basic rules of this game were reciprocity and non-discrimination.<sup>55</sup>

Yet two major exceptions to the MFN rule have since worked to boost sovereign states’ autonomy in trade matters. One is to be found in Article XXIV—the textual benchmark for the legality of small and large FTAs. Built into the original GATT text upon the insistence of the United States,<sup>56</sup> Article XXIV contemplated the possibility that two or more members would enter free trade areas or customs unions, abolishing virtually all tariffs on each other’s products and practically merging their markets into one. These clusters of thorough integration would operate as new single entities in the MFN world. Non-parties would have no access to such areas’ internal deals. Because of the Article XXIV exception, special trade arrangements among discrete sets of states have sprung up aplenty, eating away at the MFN rule and yet remaining GATT compatible. The other broad exception emerged in post-colonial times, based on the plight of newly sovereign states and on the rise of the law and development movement.<sup>57</sup> The Enabling Clause finally codified, within the GATT structure, the possibility to

52. See Curtis J. Mahoney, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824, 834–38 (2007) (giving examples of contract-treaty analogies over the course of legal history).

53. *Id.* at 824–26 (suggesting that “courts draw from modern contract theory in developing canons of treaty interpretation,” and positing that relational contract theory, as opposed to textualism and formalism, which is textualism’s “private law cousin,” should inform the interpretation of treaties).

54. The idea that all contracting parties would enjoy most-favored nation status was not new in 1947, but it acquired utmost prominence and conceptual centrality when codified in the General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 4 U.S.T. 639, 55 U.N.T.S. 188 [hereinafter GATT].

55. Bagwell & Staiger, *supra* note 33, at 282.

56. Kerry Chase, *Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV*, 5 WORLD TRADE REV. 1, 8–11 (2006).

57. UNCTAD, Res. 21(ii), *Preferential or Free Entry of Exports of Manufactures and Semi-manufactures of Developing Countries to the Developed Countries* (Mar. 26, 1968), in 1 Proc. United Nations Conf. on Trade & Dev. 38 (1968) (calling for the establishment of a “generalized, non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries”).

extend non-reciprocal trade concessions to developing or least developed countries, and allowed states to depart, somewhat autonomously, from multilateral rules.<sup>58</sup> Both Article XXIV and the Enabling Clause have let WTO members engage in the contract-like practice of bargaining with chosen partners in a formally autonomous manner.<sup>59</sup>

With the concept of bargain comes the idea of privity of contract, which in turn corroborates the presumptive irrelevance of non-parties' concerns. The following quote exemplifies the widespread belief that negative externalities just do not belong in contract law theory:

[T]he bad things that firms do commonly entail imposing costs on third parties, such as creating environmental harms or erecting barriers to entry. These behaviors—the creation of negative externalities—are regulated by the environmental and antitrust laws. An analysis of contract law as such therefore can assume the absence of externalities.<sup>60</sup>

Even scholars who are genuinely concerned with non-parties' predicaments are careful to frame their inquiry as a search for exceptions to an obvious rule:

There is nothing intrinsically wrong in a contract's benefitting its parties to the detriment of a third party. Such is the nature of a free market and the inevitable result of the principle of freedom of contract. Indeed, this should normally be expected.<sup>61</sup>

The "rule" is that the harm to non-parties is privileged. It is, in old parlance, *damnum absque injuria*:<sup>62</sup> real harm, but resulting from privileged conduct, and therefore not a trigger of legal remedies.<sup>63</sup>

58. GATT Contracting Parties, *Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries*, GATT Doc. L/4903 (Dec. 3, 1979) ("Enabling Clause").

59. For qualifications of the notion of sovereign contractual autonomy, see *infra* Part I.

60. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law* (John M. Olin Center for Studies in Law, Economics, and Public Policy, Working Paper No. 275, 2003). For a critique, see Sina Akbari, *Against the Reductionism of an Economic Analysis of Contract Law*, 28 CAN. J.L. & JURIS. 245, 245–64 (2015), examining the claim that commercial contract law should be limited to helping firms maximize profit and arguing that the idea of a strict normative division of labor between institutions is problematic.

61. Benjamin Porat, *Contracts to the Detriment of a Third Party: Developing a Model Inspired by Jewish Law*, 62 U. TORONTO L.J. 347, 348 (2012). Porat starts from this alleged truism to investigate possible exceptions: "The question is whether there are any exceptions[, i.e.,] circumstances in which the harm the contract causes to the third party's interest is actionable." *Id.* at 348; see also Bagchi, *supra* note 21, at 221 ("Contract law does not adequately account for the harm that we inflict on third parties by joint agreement.").

62. See generally EDWARD P. WEEKS, *THE DOCTRINE OF DAMNUM ABSQUE INJURIA CONSIDERED IN RELATION TO THE LAW OF TORTS* (1879).

63. *Vegeahn v. Gunter*, 167 Mass. 92, 106 (1896) (Holmes, C.J., dissenting) ("[T]he doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged.").

In the context of trade agreements, one finds a similarly cavalier approach to non-parties' losses.<sup>64</sup> As observed, should the TTIP come into force, even if only in part, it would open up EU–U.S. trade channels reportedly obstructed by mostly non-tariff barriers and, as a consequence, would upset preexisting trade equilibria way beyond its transatlantic axis. Yet, in line with the idea of contractual privity, TTIP negotiations do not involve third parties and do not factor in the consequences that a finalized deal might have upon other regions of the world.<sup>65</sup> A reductionist view of autonomy makes this a completely acceptable frame for discussing the economics of RTAs. Just about every deal is cause for trade diversion of some sort; yet, by neoclassical lights, we are not supposed to worry about non-parties.

The reason why this regime has long been perceived as nonetheless just and ethical is that, in principle, the harmed non-party retains its livelihood and its freedom to engage in other profitable deals with others. Insofar as all continue to enjoy the possibility to contract, all will be well. The harm caused by others' contracts can be remedied by means of additional contracts. More, not less, autonomy is the traditional answer to non-parties' plight. The universal possibility of exchange will move goods and services to those who value them the most, with a net increase of social welfare and benefits for all; per Adam Smith's celebrated adage, the network of self-interested deals will eventually bring dinner to all tables.<sup>66</sup>

Integral to private law, however, is the concept that at times a blind faith in the power of diffuse autonomy is not the solution. Other moves are possible and, in fact, necessary.<sup>67</sup> Liability rules have emerged over time precisely towards the goal of protecting non-parties.<sup>68</sup> In the international sphere, there is no real analog for the *public* law mechanisms by which domestic legal systems take care of contracts' problematic externalities.<sup>69</sup> One must therefore tap for analytical insights those *private* law rules that in western legal systems surround and complement the notion of contract and mark the limits of contracts' effects. Even when there is no public law source in sight, contracts are supplemented by other norms of private conduct, and by a network of enforceable claims available to specifically situated non-parties.

64. See *infra* Part III.

65. Pleas towards inclusion and openness can be found in informed literature. See, e.g., Bouman et al., *supra* note 10, at 171; MERTENSKÖTTER & STREINZ, *supra* note 17, at 6.

66. ADAM SMITH, *THE WEALTH OF NATIONS* 22 (1776) ("It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.").

67. See generally Mahoney, *supra* note 52.

68. See *infra* Part II.A.

69. See Roberts, *supra* note 26, at 372 ("[C]ontract law may give effect to policy and normative concerns that are independent of the contracting parties' objectives. . . . [By contrast,] in the international law sphere . . . no overarching sovereign exists to authorize the pursuit of other goals over and above those agreed to by states."); John Gerard Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, in *EMBEDDING GLOBAL MARKETS—AN ENDURING CHALLENGE* 231, 232 (John Gerard Ruggie ed., 2008) ("There is no government at the global level to act on behalf of the common good, as there is at the national level.").

The analogy between trade agreements and contracts yields much more pliable tools than stark autonomy and much more useful analytics.<sup>70</sup>

C. *Markets of States as Markets of Individuals*

The analogy between the market of sovereign states engaged in international trade and the market of profit-maximizing individuals, albeit subject to many nuances and complications, may enable effective communication between law theory circles and set the stage for deeper inquiries.

The intuition driving this Article is that a world increasingly populated by regional trade agreements and by clusters of special preferential regimes comes to resemble a private law market of a particular type—a market with a finite number of identifiable players, each looking to strike a deal with a subset of fellow-players, and each with reliable information on the negotiating capacity of everyone else. The goal of each and every cluster of players is to generate net gains for the parties, either with no regard to the negative externalities the deal may bring onto others or *precisely* towards the goal of placing others in relatively worse trade conditions. This market is also inhabited by several weak players, whose negotiating ability is null or at best sectoral, and by more or less defined groups of players whose interests happen to be aligned. In this sort of landscape, autonomy naturally works to enable strategic coalitions which in turn create blocks of economic strength and reinforce power asymmetries. In such contexts, slowly but surely, autonomy cannibalizes its own premises—freedom of contract, competition, etc. The possibility of choosing whether or not to enter new agreements exists, for weaker players, only in theory. Autonomous moves are, for many, foreclosed.

Today, the private law markets that bear such characteristics are obviously governed not just by private law rules, but also by a complex regulatory apparatus including, most prominently, robust antitrust legislation, limits to contractual freedom, and social safety nets for those unable to play the private autonomy game. Variations between and within the European Union and the United States are enormous,<sup>71</sup> but both continents share a basic appreciation for monitoring the competitiveness of their markets and for maintaining a minimum core of welfare state. These are, however, twentieth-century developments. Winding the clock back may be necessary to establish the analogy these pages rest upon.

The norms concerning the protection of others from the harmful effects of contracts began to be conceptualized, both in Europe and in the United States, at the dawn of the twentieth century—a time that required making

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70. Mahoney, *supra* note 52, at 846 (“As often as courts have repeated the axiom that treaties are contracts among nations, there has been remarkably little exploration of how contract theory should inform the law of treaties.”).

71. See ALBERTO ALESINA & EDWARD GLAESER, *FIGHTING POVERTY AND INEQUALITY IN THE US AND EUROPE: A WORLD OF DIFFERENCE 2* (2004).

sense of the notion of autonomy in a context of burgeoning cartels and workers' unions.<sup>72</sup> It was in that context that jurists became acutely aware of the risks that the dogma of private autonomy poses for non-parties and began to work on refining the balance between bilateral contracts and the general economic order. Regulatory frameworks were then absent or, at best, incipient. The struggles of collective bargaining in the work economy were already acute, but labor law as we know it now did not exist.<sup>73</sup> Likewise, the welfare state was not yet an established concept, nor was there anything like today's enforcement capability in antitrust. With time, legislatures and executive branches would conquer such politically salient arenas and equip them with firmer boundaries, but for decades the task of adjudicating the conflict between the free consent of some and the economic interests of others fell exclusively upon private-law judges and scholars, occasionally enlightened by realist intuitions.<sup>74</sup> Doctrines aimed to protect non-parties from the deals of others were culled *from within* private law's architecture, and non-parties came to be a factor in the judicial enforcement of such deals long before the creation of public regulatory structures. The protection of third parties took the guise of remedies in tort, injunctions against unfair competition, or even fully contractual claims. To this day, even in heavily regulated contexts, courts are called to redress non-parties' claims simply on the basis of private law rules and principles.

I turn now to these claims towards the goal of corroborating two points: first, *pacta nocent* (contracts hurt), and time-tested rules demonstrate the importance of recognizing at law the harm caused by the contracts of others, even if only to maintain a market's competitive livelihood. Second, the design of rules for non-parties' protection cannot be indifferent to distributive concerns.

## II. NON-PARTIES IN PRIVATE LAW

### A. *Contracts as Torts to Others: Early Reflections*

It is by now well documented that, both in Europe and in the United States, the dawn of the twentieth century was a time of exceptional depth in private law theory.<sup>75</sup> It was a time when the connections between abstract legal concepts and a fast-changing organization of the economy came to the fore and when jurists began to articulate, in sharp terms, the ambivalent

72. See *infra* Part II.

73. See WILLIAM FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 23 (1991).

74. See *infra* Part II.A.

75. See Anna di Robilant, *Abuse of Rights: The Continental Drug and the Common Law*, 61 *HASTINGS L. J.* 687, 736 (2009); Duncan Kennedy, *A Transnational Genealogy of Proportionality in Private Law*, in *THE FOUNDATIONS OF EUROPEAN PRIVATE LAW* 185, 186 (Roger Brownsword, Hans-W. Micklitz, Leone Niglia & Stephen Weatherill eds., 2011).



distributive implications of seemingly straightforward torts, contracts, and property rules.<sup>76</sup> A full intellectual history of the notion that contractual conduct may not be privileged, but rather deemed actionable injury to others, exceeds the scope of this Article. It may be helpful, however, to briefly trace the birth of the scholarly reflection on “contracts to the detriment of others” in the United States and Europe.

As observed, the proliferation of large and small preferential trade agreements has brought up the question whether the economic harm caused to non-parties by new trade arrangements should be judicially remediable. In private law, a primary point of departure for analogous reflections is the tort of interference with contractual relations.<sup>77</sup> *Lumley v. Gye*<sup>78</sup>—an old chestnut of English law—provides useful analytics. When Mr. Gye, manager of the opera house at Covent Garden, offered to hire opera singer Joanna Wagner, Mr. Lumley took offence.<sup>79</sup> Ms. Wagner was already engaged to sing at Her Majesty’s Theater, then run by Lumley, but Gye’s offer was obviously more attractive.<sup>80</sup> In the famous dispute that ensued from these facts, English judges gave Lumley both an injunction against Wagner, restraining her from singing for others,<sup>81</sup> and a tort remedy against Gye. The latter judgment was no less remarkable than the former. Lumley, a non-party to the contract between Gye and Wagner, was given a way of redress against the harm caused by that contract. *Lumley v. Gye* was therefore an early judicial instantiation of the very concept at the heart of these pages—namely, the idea that a contract, when detrimental to non-parties, does not always count as a privileged exercise of autonomy. Insightful commentary has since highlighted the questionable equities of the case.<sup>82</sup> In mid-nineteenth century London, private law remedies were granted to protect a prominent theater manager from competition. By contrast, the fact that Ms. Wagner was deprived of the chance to make the most of her exquisite voice did not move the English judiciary to compassion, and her plea remained wholly unexpressed.<sup>83</sup>

The reflection on the possibility that contracts between two parties may cause actionable harm to others was bound to deepen, and depth came in the increasingly politicized context of competition among employers for the

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76. The rapid economic transformations of the time led to sudden peaks of wealth and new valleys of poverty, prompting new thinking in private law adjudication. See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 15 (1992).

77. BIANCA GARDELLA, *L’INTERFERENZA DEL TERZO NEI RAPPORTI CONTRATTUALI: UN’INDAGINE COMPARATISTICA* [The Interference of Third Parties in Contractual Relationships: A Comparative Inquiry] 20–25 (2008).

78. 118 Eng. Rep. 749 (K.B. 1853).

79. *Id.*

80. *Id.*

81. *Lumley v. Wagner*, 42 Eng. Rep. 687 (Ch. 1852).

82. See Sarah Swan, *A New Tortious Interference with Contractual Relations: Gender and Erotic Triangles in Lumley v. Gye*, 35 HARV. J.L. & GENDER 167, 170 (2012); Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men’s Consciences and Women’s Fidelity*, 101 YALE L.J. 775, 775–76 (1992).

83. VanderVelde, *supra* note 82, at 793.

most qualified workforce. In 1903, exactly fifty years after *Lumley*, an article on ‘contracts to the detriment of third parties’ appeared on the first issue of the *Rivista del Diritto Commerciale*.<sup>84</sup> The author was Angelo Sraffa, a notable jurist and a politically savvy individual in pre-fascist Italy.<sup>85</sup> Sraffa’s scholarly intervention had been prompted by certain commercial practices he had learned about as an attorney.<sup>86</sup> These were confidential agreements between insurance companies, obliging each of them to obtain the others’ consent before poaching their best agents. Sraffa visualized the situation in the triangular mode earlier stylized by the *Lumley* court: two rival companies and one employee ready to accept the better offer.<sup>87</sup> But Sraffa tilted the *Lumley* triangle and focused on providing the employee, rather than the employer, with a remedy in tort.<sup>88</sup> The original employer’s denial of assent—a possibility expressly contemplated in the arrangement between the insurance companies—should be deemed a tortious assault on the contractual freedom of the employee.<sup>89</sup>

Private law rules are supposed to be indifferent to the economic stance of a particular plaintiff or defendant, and Sraffa’s doctrinal move, which re-oriented the vector of corrective justice in tortious interference, was formally not radical. The political implications of this move, however, did not go unnoticed. A lively debate ensued on the pages of the *Rivista*. Sraffa defended his strategy (using tort rules to constrain the contractual autonomy of the insurance companies) as necessary to restore employees’ ability to command better wages.<sup>90</sup> Another Italian jurist, Silvio Perozzi,<sup>91</sup> quickly authored a passionate rebuttal, asserting the impeccable legality of the companies’ confidential agreements and denying the possibility of a remedy in tort for the employees.<sup>92</sup> Perozzi preached the importance of letting all sorts of “negative” pacts (not to do, not to buy, not to sell, not to hire) be legitimate and unimpeded, so as to allow for the natural balancing of competing interests. In Perozzi’s view, curbing private autonomy through tort moves

84. Angelo Sraffa, *Contratto in Danno a Terzi* [Contract to the Detriment of Third Parties], 1 RIVISTA DEL DIRITTO COMMERCIALE E DEL DIRITTO GENERALE DELLE OBBLIGAZIONI [Review of Commercial Law and of the General Law of Obligations] 453 (1903).

85. Angelo Sraffa was a distinguished jurist, a founding member of modern Italian commercial law, and an engaged anti-fascist intellectual. He founded with Cesare Vivante the *Rivista del Diritto Commerciale e del Diritto Generale delle Obbligazioni*. See ANNAMARIA MONTI, ANGELO SRAFFA: UN “ANTITEORICO” DEL DIRITTO [Angelo Sraffa: An “Anti-Theorist” of the Law] 42–55 (2011).

86. Sraffa, *supra* note 84, at 455; see GARDELLA, *supra* note 77, at 263.

87. Sraffa did not hint at *Lumley*, nor at any other judicial pronouncement in this Article. Sraffa, *supra* note 84.

88. *Id.* at 456.

89. *Id.* at 457.

90. *Id.* at 453.

91. Silvio Perozzi, *Ancora sui contratti a danno di terzi* [Still on Contracts to the Detriment of Third Parties], 2 RIVISTA DEL DIRITTO COMMERCIALE E DEL DIRITTO GENERALE DELLE OBBLIGAZIONI [Review of Commercial Law and of the General Law of Obligations] I, 64 (1904).

92. See GARDELLA, *supra* note 77, at 263.

would go against the grain of sensible economic law.<sup>93</sup> In a counter-reply, Sraffa took pains to highlight the high stakes of this scholarly diatribe. Such questions, he argued, ran deeper than mere legal deduction and could only be addressed through social judgment, moral choices, and “*idee direttrici*” (vectors).<sup>94</sup>

Another prominent jurist, Oliver Wendell Holmes, had meanwhile made analogous observations in the United States, but with regard to a different type of triangular situation: two (or more) workers, one employer.<sup>95</sup> Holmes had been preoccupied with the courts’ inclination to grant companies injunctions against their workers, so as to prevent them from unionizing. Dissenting from this judicial trend, Holmes famously took apart the traditional justification for anti-union injunctions.<sup>96</sup> He showed that in the “struggle for life” there was no reason for granting workers a lesser degree of autonomy than the one enjoyed by their employers. If competition was determined to be a good thing, it had to be good for all, not just for capital. Even more famously, Holmes argued that jurists should not pass as mere legal deduction what was instead a politically sensitive choice; that the decision to enjoin union organizers from peaceful picketing could not be explained away by the need to protect the contractual rights of employers; and that the policy choice behind granting or denying anti-union injunctions had better be made through legislative intervention (an intervention that famously came in 1932, with the passage of the Anti-Injunction Act, after decades of enjoined labor struggles).<sup>97</sup>

The private law moves argued for by Sraffa in his article and by Holmes in *Vegeban* were different. Sraffa posited that the detriment stemming from the contracts of others should be redressed in tort; Holmes instead defended the autonomy of workers to organize into unions, so as to counteract the phenomenon of employers’ *de facto* cartelization. In his words,

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is

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93. Perozzi, *supra* note 91, at 66 (“[H]armed parties are not given recourse at law. And they shouldn’t! Today’s economic struggle depends on [this].”) (author’s translation). Referring to this statement, Sraffa dubbed Perozzi “a social Darwinist.” Angelo Sraffa, [Untitled Reply to Perozzi], 2 *RIVISTA DEL DIRITTO COMMERCIALE E DEL DIRITTO GENERALE DELLE OBBLIGAZIONI* [Review of Commercial Law and of the General Law of Obligations] I, 66, 68 (1904).

94. Sraffa, *supra* note 93, at 68.

95. There is no evidence, to my knowledge, of direct connections between Sraffa’s scholarship and Holmes’s writings, though references to social Darwinism are common to both authors. See Richard Hofstadter, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 47, 121 (Beacon Press 1992) (1944).

96. *Vegebahn v. Gunter*, 167 Mass. 92, 106 (1896) (Holmes, C.J., dissenting).

97. Oliver Wendell Holmes, *Privilege, Malice and Intent*, 8 *HARV. L. REV.* 1, 3 (1894) (“Questions of policy are legislative questions.”).

the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.<sup>98</sup>

Whereas Sraffa aimed at constraining the contractual freedom of capital, Holmes vouched for expanding the contractual freedom of labor. Nonetheless, the similarity—indeed, the identity—between the two men’s quest for explicit policy vectors is striking. Both were acutely aware that the mere identification of a private law move (more, or less, autonomy for either labor or capital) would lead to indeterminate results, depending on which party would be found worthy of protection in the triangular structures of labor/capital relations.

Holmes had much to say, as well, on the difficult choices involved in determining when, exactly, the exercise of private autonomy should no longer be privileged. Could private agreements produce externalities that are undesirable from a policy perspective, and hence become unlawful?<sup>99</sup> On his mind were both yellow-dog employment contracts, aimed at suppressing workers’ bargaining power, and labor agreements aimed at boosting it.<sup>100</sup> The radically different portents of such deals made it clear, in Holmes’s view, that assessing their lawfulness would involve not just deduction from abstract principles, but rather consideration of conflicting interests and settlement of divergent views of the common good.<sup>101</sup> A simple belief in the benefits of competition, or in the value of private autonomy, would not solve the question of which types of agreements should be presumptively privileged.<sup>102</sup> The U.S. Supreme Court would soon decide precisely such questions as matters of antitrust and interstate commerce.<sup>103</sup> But Holmes had laid out all relevant issues simply by articulating, in private law terms, the analytical stance of non-parties.

98. *Vegeleben*, 167 Mass. at 106 (Holmes, C.J., dissenting); see also *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 263 (1917) (Brandéis, J. dissenting). A prominent example of “patent and powerful” combination on the side of capital, at the time, was to be found in the English case *Mogul Steamship: Mogul Steamship Co. Ltd. v. McGregor, Gow, & Co.*, [1889] 23 Q.B.D. 598, aff’d [1892] A.C. 25 (Eng.) (“[D]efendants have been guilty of none of these acts [fraud, misrepresentation, intimidation, obstruction and molestation]. They have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade.”).

99. Holmes, *supra* note 97, at 13 (“[T]here is no absolute privilege to make agreements which are not unlawful on their face. . . . An agreement may be unlawful, because under the particular circumstances it tends to produce [a result that the law wishes to prevent].”).

100. Early cases concerning the protection of yellow-dog employers from the interference of labor activists and union organizers were decided simply on the basis of state common law. See Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L. J. 779, 779–82 (1917).

101. Holmes, *supra* note 97, at 7 (“Views of policy are taught by experience of the interests of life. Those interests are fields of battle. Whatever decisions are made must be against the wishes and opinion of one party, and the distinctions on which they go will be distinctions of degree.”).

102. *Id.* (“Even the economic postulate of the benefit of free competition, which I have mentioned above, is denied by an important school.”).

103. See, e.g., *Loewe v. Lamlor*, 208 U.S. 274 (1908) (holding that the Sherman Antitrust Act prohibited a secondary boycott organized by a union and aided by the American Federation of Labor).

### B. *Examples of Non-Parties' Remedies Today*

The analysis of non-compete clauses in employment agreements and of private remedies for antitrust violations has evolved tremendously over the past century. Many of the issues identified in early private-law scholarship have been subsumed into statutory rules, duly vetted in the political arena, and fully articulated in economic terms.<sup>104</sup> It is still the case, however, that the law of private remedies continues to fill in the blanks of public law in the regulation of market economies. It is also the case that the issue of non-parties in private law discourse attracts, for a variety of reasons, increasing attention today. For instance, in the context of sovereign debt repayment obligations, the voice of non-parties can be heard loud and clear:

[T]he very notion of a “contract,” with its strong legal underpinning in private law, has been blurred to the point that it now encompasses ambiguous and contested principles and expectations by which third-parties outside the contracted exchange claim a stake at the table of negotiation.<sup>105</sup>

Indeed, while freedom to compete still occupies the center stage of western legal systems, the fact that contracts can cause harm to others is well known in multiple fields, and remedies against other people's contracts are regularly granted in several settings. Prominent among such settings is the law of unfair competition, built into private law through the interplay of torts, contracts, and property entitlements. Publicly enforced antitrust rules make up the backbone of competitive markets, but salient questions of economic policy characterize, to this day, the adjudication of private claims in the shadow of public antitrust enforcement. The law of unfair competition is particularly well suited to monitor the current debate on non-parties in private law discourse. The ongoing controversy on umbrella pricing provides a case in point.

In a market characterized by cartels, and therefore by artificially high prices for goods or services, new entrants may be able to reap equally inflated profits simply as a result of “intelligent adaptation,” i.e., by mimicking a cartel's price without in any way joining it. The cartel provides a convenient “umbrella” that shelters other vendors from potentially aggressive price competition. Consumers who purchase goods or services from such vendors will therefore suffer the price increase due to the cartel, even though

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104. Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 108 (2008).

105. Grégoire Mallard & Jérôme Sgard, *Contractual Knowledge: One Hundred Years of Legal Experimentation in Global Markets*, in CONTRACTUAL KNOWLEDGE: ONE HUNDRED YEARS OF LEGAL EXPERIMENTATION IN GLOBAL MARKETS 1, 2 (Grégoire Mallard & Jérôme Sgard eds., 2016). The quoted passage refers to the debt bond between thousands of private investors and the Greek State—a transaction somehow still deemed a contract.

they never bought anything from any of the cartel members. Should they be allowed to seek reparation in a tort lawsuit against the concerted vendors?

Both in Europe and in the United States, this question may well receive an affirmative answer in court. The Court of Justice of the European Union has recently provided a cautious and qualified green light for the courts of the member states to award umbrella-pricing damages.<sup>106</sup> In 1977, the U.S. Supreme Court took a negative stance on the claims of “indirect purchasers,”<sup>107</sup> but since then many states have enacted statutes allowing indirect purchasers to recover provable damages.<sup>108</sup> The policy debate on either side of the Atlantic typically weighs, on the one hand, deterrence from anti-competitive conduct and, on the other, the loss of market efficiency that might result from over-deterrence. In the European Union, a moralist streak marbles the condemnation of anticompetitive conduct and corroborates the argument *for* umbrella damages.<sup>109</sup> By contrast, the arguments *against* recovery are based on issues of institutional competence: given the distributive ambiguity of damage recovery, shouldn’t courts wait for clear legislative guidance?<sup>110</sup> In the United States, much emphasis has been placed on the impossibility of “getting it right” in court given the difficulty of determining both causation and quantifiable damages.<sup>111</sup>

The fact that umbrella-pricing recovery remains a hotly debated topic in the Global North corroborates the intuition at the core of these pages: contracts concluded by a subset of powerful market players, as well as contracts that create clusters of power where no such clusters existed before, generate consequences that private law may well qualify as unlawful harm. A generalized increase of prices, way beyond a cartel’s confines, cannot simply be archived as *damnum absque injuria* or as “mere redistribution among [innocent] market participants.”<sup>112</sup> The decision whether to provide injured parties with remedies is never easy and never unqualified.

Equally unsettled is the corner of unfair competition law occupied by the tort of interference with prospective contractual relations.<sup>113</sup> Much has changed since the days of *Lumley*, but courts still have a hard time deciding

106. See Till Schreiber & Vasil Savov, *Kone v Commission: Umbrella Damages Claims*, 5 J. EUR. COMPETITION L. & PRAC. 548, 548–49 (2014).

107. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 725 (1977).

108. *Id.* at 740–46.

109. See C-577/12, *Kone v. ÖBB-Infrastruktur* ¶ 68, ECLI:EU:C:2014:45 (“[T]he model for trading on the internal market should come in the form of undertakings that comply with the competition rules, not those that seek to engage in illegal practices there at the expense of others. Should the recognition of an obligation on cartel members to pay compensation for umbrella pricing have the effect of keeping black sheep away from the market, this would hardly be detrimental to competition.”).

110. Jens-Uwe Franck, *Umbrella Pricing and Cartel Damages under EU Competition Law*, 11 EUR. COMPETITION J. 135, 153 (2015).

111. See Spencer Weber Waller, *Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207, 208 (2003).

112. Franck, *supra* note 110, at 140.

113. I focus on this tort, rather than on its twin “tortious interference with performance of contract by third person,” RESTATEMENT (SECOND) OF TORTS § 766 (AM. L. INST. 1979), because the former

whether or not to grant damages (or injunctions) when the prospects of an existing business relation between two parties are sabotaged by new competitive activities. The judicial space for restoring pure economic loss is famously narrow. The rule that economic loss is not recoverable in tort still holds sway and is supposed to preserve the boundary between tort and breach of contract.<sup>114</sup> Yet the rule lacks real theoretical foundations and still begs fundamental questions: *when* does public policy commend the imposition of duties upon market actors? *Which* of the infinite competitive activities, precisely designed to hurt other businesses, should be deemed tortious? Unsurprisingly, the rule is riddled with exceptions and the exceptions are in turn ill-defined.<sup>115</sup> Interference with business relations is to this day actionable in tort,<sup>116</sup> but the defendant is allowed to plead that her conduct is justified.<sup>117</sup> The wrongfulness of her conduct or her motive for acting will need to be assessed in court with very little doctrinal guidance.<sup>118</sup> Recent commentary has highlighted judicial uncertainty and criticized the definition of tortious interference provided by the Restatement (Second) of Torts as hopelessly open-ended.<sup>119</sup>

Such unsettled legal issues stem entirely from within the fabric of private law and are not resolved, or even enlightened, by the solid regulatory apparatus of contemporary antitrust law. This is precisely why tortious interference, umbrella pricing remedies, and other mechanisms for the protection of non-parties are relevant to the discussion of RTAs' negative externalities: even in the absence of global governance, even with no world-wide antitrust rules, and even if one espouses an entirely pre-constitutional understanding of international law, one cannot posit the existence of untrammelled contractual freedom to form RTAs at leisure. The extent of this freedom, as well as the need to balance it with the interests of non-parties, are contestable issues

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lends itself better to comparisons with the so-called non-violation provision in Art. XXIII of the General Agreement on Tariffs and Trade, *supra* note 54, discussed *infra* in Part III.

114. Catherine M. Sharkey, *The Remains of the Citadel (Economic Loss Rule in Products Cases)*, 100 MINN. L. REV. 1845, 1846–47 (2016).

115. *Id.* at 1881 (“[D]ebates about the economic loss rule have obscured the fundamental issue: the justification for recognizing public policy imposed duties in tort, especially in the sphere of commercial or financial losses. Only once this is decided—namely the appropriate domain for tort law—can the economic loss rule police the borders.”).

116. RESTATEMENT (SECOND) OF TORTS § 766B (AM. L. INST. 1979) (“One who intentionally and improperly interferes with another’s prospective contractual relation is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relations, whether the interference consists of: a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or b) preventing the other from acquiring or continuing the prospective relation.”).

117. *Id.* § 768(1).

118. Ryan M. Connor, *Revisiting the Restatement’s Tortious Interference Provisions*, A.B.A. (June 3, 2014), <http://apps.americanbar.org/litigation/committees/businesstorts/articles/spring2014-0513-revisiting-restatement-of-torts-tortious-interference-provisions.html> (documenting and endorsing several critiques of the Restatement’s “muddled standard”). See also Swan, *supra* note 82, at 168–69 for further critical references.

119. Orrin K. Ames III, *Tortious Interference with Business Relationships: The Changing Contours of This Commercial Tort*, 35 CUMB. L. REV. 317, 324–25 (2004).

posing unavoidable policy choices. The larger point to be drawn from such reflections is that the principle of autonomy, in any market characterized by finite numbers of players and goods, will unavoidably generate its own limitations, whether logical or functional, and will have to be shored up by rules and mechanisms of control in order to guarantee its own survival. The distributive impact of such rules and mechanisms will then be of paramount importance.

### C. *Recent Developments in Private Law Theory*

In recent years the cause of finding private-law avenues for the protection of non-parties has found new champions.<sup>120</sup> The mode of analysis adopted by these private law scholars (i.e. their focus on triangular situations) is in several ways analogous to current debates about negative externalities in the context of trade agreements, and is therefore highly relevant to this inquiry.

Ian Smits, a jurist trained in the civil law of continental Europe, starts from the well-known assumption that the negative externalities of contracts are a natural part of the private law system and that mere economic disadvantage suffered by non-parties is by definition non-actionable. A different approach, he argues, might however be required towards interests that are not merely economic. The non-party interests that Smits contemplates as possibly within the purview of contract law are “social.”<sup>121</sup> He thinks of labor rights in sweatshops and human rights to air and water in developing countries, thereby paying attention to transnational externalities: the practice of competitive merchandise sales in one part of the globe may be the reason for child labor in another. In a globalized marketplace populated by value chains and based on the practice of outsourcing, the Global North easily inflicts environmental damage or exploits poor labor conditions in far-away places, yet Adidas shareholders or Walmart customers—to name just two examples—are wholly insulated from such harms. Smits points out, correctly, that in transnational scenarios the usual division of labor (private law for corrective justice, public law for redistribution) cannot possibly work, because there is no tax-and-transfer between, say, U.S. tax revenue from clothing retail and the Bangladeshi welfare system. This leads Smits to surmise that distributive justice might one day inform private law doctrines.<sup>122</sup> Smits acknowledges that the private law frame of corrective justice

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120. Porat, *supra* note 61, at 348; Bagchi, *supra* note 21, at 218; Smits, *supra* note 22, at 215.

121. It bears noting that the sharp distinction between social harm (in the form of poor labor or environmental standards) and economic harm (as measured by average income level) is a building block of EU law’s architecture. The distinction is, as well, the target of radical critiques. See Damjan Kukovec, *Law and the Periphery*, 21 EUR. L.J. 406, 407–08 (2015) (denouncing the fact that the social/economic distinction, while conceptually untenable, ends up privileging social rights in the EU’s most prosperous centers, thereby keeping the “periphery” in a permanent state of disadvantage).

122. The centrality of corrective justice in private law continues to have significant support in both Europe and North America. See generally ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 2 (2d ed. 2012).



is currently too narrow to include non-party interests, yet he contemplates the possibility of change in contract law as a reflection of the public's growing concern for contracts' negative externalities.<sup>123</sup> Smits notes that other legal scholars have explored theoretical rationales for bringing remote social costs to bear on business or consumer transactions at strategic points along the value chain.<sup>124</sup> He mulls over the argument that contracts producing socially repugnant externalities should be outright prohibited as against public policy or *in turpi causa*, but dismisses this solution as "crude" and unable to nudge contracting parties towards more socially conscious practices.<sup>125</sup> In his view, judges should rather grant injunctions against the performance of contracts that would cause egregious humanitarian damage to non-parties.

In contrast to Smits, Benjamin Porat focuses exclusively on business issues.<sup>126</sup> Porat makes the argument that some types of economic harm to non-parties can and should be remediable. He draws a distinction between contracts having an "internal business logic," only incidentally harmful to non-parties, and contracts designed specifically towards the goal of causing harm to others. He identifies discrete areas of the law (bankruptcy, family, and taxation) in which a non-party, economically burdened by a transaction among others, can access legal remedies. Building on such foundations, and resorting to principles of Jewish law, Porat stretches the general duty of good faith beyond the confines of privity and argues that contracting parties also owe such a duty to potential "victims" of their transactions. Porat posits, therefore, that "in some cases"<sup>127</sup> the harm to third parties—a product of "bad faith" as redefined—should not be privileged. Per Porat's admission, the task of distinguishing between actionable and non-actionable harm under his test is not easy; yet, by his lights, it would not be any harder than the usual good faith analysis, which is—most clearly in U.S. courts—always a thorny question of fact.

Porat's intuition is interesting, but it may not survive Holmesian scrutiny. In *Privilege, Malice and Intent*, Holmes famously made it clear that the judicial quest for a malicious element into such arrangements as boycotts or workers' unionization was no more than an attempt to cast policy choices in

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123. Smits identifies in recent literature some evidence of such growing concern. See ALAN FAIRINGTON, *THE AGE OF SELFISH ALTRUISM: WHY NEW VALUES ARE KILLING CONSUMERISM* 25 (2010); MAKING GLOBALIZATION GOOD: *THE MORAL CHALLENGES OF GLOBAL CAPITALISM* 305–19 (John H. Dunning ed., 2005).

124. LYN KIM LAN TJON SOEI LEN, *THE EFFECTS OF CONTRACTS BEYOND FRONTIERS: A CAPABILITIES PERSPECTIVE ON EXTERNALITIES AND CONTRACT LAW IN EUROPE* 161–62 (2013).

125. Smits, *supra* note 22, at 229 ("[I]llegality [is] a crude instrument. . . . Declaring the multinational's contract with a global supplier unenforceable means throwing away the baby with the bathwater: the contract must not be unenforceable, it must be *different*."); see also Bagchi, *supra* note 21, at 212 ("We rely too much on the blunt instrument of outlawing terms without attending to the effects of *enforceable* agreements.").

126. Porat, *supra* note 61, at 238.

127. *Id.* at 350.

the language of legal deduction.<sup>128</sup> Porat's main examples—fraudulent conveyance, the hiding of marital assets, and tax avoidance—are rather extreme cases of fraud. But when the issue is even slightly subtler, Porat's good faith test is as indeterminate today as malice was in 1894.

On this line-drawing exercise, Aditi Bagchi has more to say. Like Porat and unlike Smits, Bagchi considers it plausible for a private law system to redress negative externalities of a purely economic character. Contrary to Porat, however, she looks for solutions *within* contract law and does not discuss any remedies that would be directly actionable by non-parties, for example in tort. Remedial action would occur in court, by means of an interpretive canon that resolves ambiguity in favor of non-parties' interest and minimizes the extent of the harm they suffer. Non-parties would remain outside this judicial process and could in no way initiate it, but they would nonetheless benefit from it *if* one party were to sue the other. This is an obvious limitation in Bagchi's construct: her solution, dependent on judicial interpretation, presupposes that contracts be litigated in court and also that textual ambiguity be a plausible issue. Bagchi's work, however, remains substantively helpful.

First, Bagchi discerns *concentrated* negative externalities from *diffuse* ones and argues, persuasively, that it is fully within the purview of private law to try and minimize (only) concentrated externalities. To be sure, the distinction between concentrated and diffuse externalities comes to resemble other open-ended legal quests such as causation, proximity, or standing, and does not seem to advance the cause of non-parties in an operational way. More insightful is the divide she identifies *within* the category of concentrated externalities: most of these are normal byproducts of transactions; but some of them must be judicially minimized when possible. The latter category shall consist, in Bagchi's argument, of externalities that run against interests already recognized through explicit public policies in the legal system of reference.

Here is where Bagchi clearly departs from Porat. Recall that Porat's good faith test would leave intact just about every transaction that has an independent economic rationale. His net would only catch cases of "bad faith" against non-parties—a very wide mesh indeed. Besides, as pointed out by the legal realist literature discussed earlier in these pages, "bad faith" could mean everything and nothing, and judicial decisions taken on this ground would beg Holmesian questions as to the value choices underlying each judgment. Bagchi's proposal, by contrast, requires a judicial finding of specific policy vectors (Sraffa's "idee direttrici") and explicit reasons to protect, at private law, some non-parties rather than others in the course of contract

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128. Holmes, *supra* note 97, at 3–4.

interpretation.<sup>129</sup> This sort of judicial activity would not introduce new value hierarchies in the system, but rather reflect, and therefore amplify, already existing public policies. Bagchi's construct is elegantly built and fully compatible with mainstream contract law theory—in fact it only requires a marginal reworking of already existing contract rules, such as the canon of reasonable interpretation of ambiguous clauses.<sup>130</sup> Porat's proposal, more comfortably situated in the realm of injunctive remedies, could be sturdier and immediately available to non-parties, but it says nothing about the legal system's values. If Smits's intuition is correct, however, new values are infiltrating our understanding of private law, and it is in the name of such values that avenues for non-party protection should be devised.

Part III below shall zoom precisely onto the question of which values, or policies, the world system of trade law espouses, so as to determine not *whether* non-parties' interests should be factored into the negotiations of new RTAs and/or compensated ex post facto, but rather *which* non-parties deserve protection, and through which tools. The proposed TTIP provides a case in point. The aforementioned argument that any harm to the Sub-Saharan economy, predictably stemming from the TTIP, should *not* be dismissed as *damnum absque injuria* does not rest on the belief that the EU and the United States should *begin* to care about Africa's economic prospects. It is rather based on the fact that they have *already* chosen to care. As recently as 2015, the U.S. administration renewed its commitment to African development through the AGOA,<sup>131</sup> an Act that establishes preferential trade rules for imports from Africa.<sup>132</sup> The EU's pledge of a generous trade relation with Africa continues to be attested by the negotiation of new preferential agreements with African states.<sup>133</sup> In other words, African states already hold a bundle of legal interests that Bagchi would identify as "recognized." Even if only for the sake of foreign policy coherence, the deepening of U.S.–EU trade relations should not interfere negatively with such commitments. Yet it may very well do so.

#### D. *Lessons from Private Law Theory*

Before returning to the issue at the heart of these pages, namely the negative externalities of new RTAs in world trade law, it may be helpful to

129. Bagchi, *supra* note 21, at 226 ("Not all externalities are legally cognizable harms. . . . Only when we burden a legally recognized entitlement does the law undertake either to deter us from imposing externalities on others or force compensation.").

130. *Id.* at 216–17 ("Where third party interests are reflected in background legal norms, courts interpret ambiguous agreements in ways that minimize harm to those third parties.").

131. African Growth and Opportunity Act, 19 U.S.C.A. § 3701 (2000).

132. Joshua P. Meltzer, *Deepening the United States-Africa Trade and Investment Relationship*, BROOKINGS (Jan. 28, 2016), <https://www.brookings.edu/testimonies/deepening-the-united-states-africa-trade-and-investment-relationship/> (testimony of Joshua P. Meltzer before the U.S. International Trade Commission).

133. For a critical discussion of such arrangements, see generally MARK LANGAN, *THE MORAL ECONOMY OF EU ASSOCIATION WITH AFRICA* (2016).

summarize two basic insights gained through the foregoing private law inquiry.

The first is a lesson in technique. The issue of contract externalities in an allegedly competitive market can be addressed by two alternative types of “moves” in private law. One consists of making sure that injured non-parties retain the same degree of autonomy enjoyed by others, letting them reap the rewards that new contracts may bring and letting them inflict, as necessary, new externalities on others. This move insists on *symmetry* between all market actors before the law and draws its strength precisely from the resilience of symmetry lines in most private law constructs.<sup>134</sup> It is a move that *expands the contractual autonomy of weaker parties*. Holmes’s view of labor organization at the dawn of the twentieth century was that workers should be given freedom to peacefully unionize or “conspire” through contract, simply because a similar freedom was widely enjoyed by employers. Anti-union injunctions—technically “property rules” in favor of employers—unduly altered the labor/capital symmetry and should not, in his view, be granted. Per Holmes’s *Vegeiban* dissent, removing anti-union injunctions from the picture would restore a competitive balance between labor and capital. This could be done in common-law courts simply by dispelling the assumption of maliciousness in employees’ organization.

The other move available at private law rests on the acknowledgment that the system may be better off by preventing, minimizing, or offsetting certain types of contract externalities. This can be done through injunctions and tort remedies in favor of non-parties, or through regulatory and contractual limits on the contracts of others.<sup>135</sup> This move *constrains the contractual autonomy of stronger parties* so as to preserve the competitive space of other market actors. The choice between the first move and the second one depends on circumstances and availability, but they are both based on the private law axiom of a non-hierarchical market populated by symmetrically situated actors. Both the expansion and the contraction of autonomy can be based on existing private-law doctrines and derived from established theoretical premises.<sup>136</sup>

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134. The presumption of symmetry is a conceptual feature that sets private law apart from the public law sphere, where relations between sovereign and subjects, or state and citizens, are understood as asymmetrical. Private law’s symmetry comes in trite formulations (as per C-26/13, Árpád Kásler Hajnalka Káslerné Rábai v. OTP Jelzálogbank Zrt ¶ 104, ECLI:EU:C:2014:85 (invoking the baseline “equality between the sellers or suppliers and the consumers”)) as well as innovative ones, see Hans-W. Micklitz, *Introduction to THE MANY CONCEPTS OF SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW* 3 (Hans-W. Micklitz ed., 2011) (introducing the concept of access justice, understood as the ability for all to be market participants, in the context of EU consumer law).

135. The three prongs of this move clearly map onto the famous triad of property rules, liability rules, and inalienability. See Guido Calabresi & Douglas A. Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089–93 (1972). Bagchi’s proposed rule of interpretation would count as an indirect (judicial) regulatory constraint on the contracts of others.

136. Other moves are certainly possible, but they require abandoning both “market rationality” and conventional symmetry lines. See Marija Bartl, *Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political*, 21 EUR. L.J. 572, 579–83 (2015).

A second lesson to be drawn from private law theory is that the choice to either expand or rein in the privilege to inflict negative externalities in trade law shall depend on larger issues of global justice. Typical of the literature discussed in this part, on both sides of the Atlantic and across different epochs, is an acute awareness of the distributive work that both types of moves (more or less autonomy) regularly perform.<sup>137</sup> Contemporary law and economics scholars echo the basic realist insight that “[l]aw is present whenever gains are distributed, facilitating their aggregation or ensuring their dispersion.”<sup>138</sup> Given the fact that the base-line allocation of resources is not symmetrical, allowing all players to have access to the same moves may lead not just to the triumph of corrective justice, but to a private law system of distribution that is distinctly and emphatically regressive. As discussed in Section II.A above, the negative externalities stemming from the agreement of others—say, from a yellow-dog contract or from concerted workers’ picketing—are very different and may carry opposite distributive consequences. Equipping an employee with a remedy in tort against the agreement of two insurance companies, as per Sraffa’s example, is politically and philosophically at odds with granting (as per *Vegehan*’s majority) an injunction against picketing. While symmetrically allocated, the possibility to constrain others’ autonomy in one case and in the other serves divergent interests and values. The flatly symmetrical application of private law rules to all players is therefore not a recipe for justice—not even, as suggested by Smits, for corrective justice alone.<sup>139</sup>

These lessons carry much weight for the analysis that follows. In the world of trade regulation, where the possibility of entering preferential agreements is in principle open to all states, authors confronting the question of negative externalities run the risk of absorbing, unreflexively, the private law presumption of symmetry among market players. It is neither plausible nor commendable to discuss the availability of remedies against an RTA’s negative externalities as if it were a matter of doctrinal clarity, logic, and systemic coherence. Private law moves—more autonomy to states in some cases, less autonomy in others—cannot be devised in the abstract and made available to all just because they can be “found” in the existing trade law regime. Trade law, like the private law of local markets, is part and parcel of the machinery through which allocation and distribution occur.

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137. See, e.g., Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 603–07 (1943); DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* 171–72 (2016).

138. KENNEDY, *supra* note 137, at 204; see also Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051, 1114–16 (2016) (contesting the claim that tax-and-transfer is superior, as a welfare enhancing mechanism, to rules that aim to achieve distributive fairness, as opposed to sheer efficiency: “an efficient legal rule may produce an enduring distributive deficit that is more costly in welfare terms than a less efficient rule that generates better distribution”).

139. Smits, *supra* note 22, at 237. The work of Hanoch Dagan articulates most effectively the convergence—indeed the inseparability—of corrective and distributive strands in private law adjudication. See Hanoch Dagan, *The Limited Autonomy of Private Law*, 56 AM. J. COMP. L. 809, 810–11 (2008).

The lack of tax-and-transfer mechanisms of global scale makes it even more imperative than in domestic legal systems to take stock of distributive effects when devising proper rules for redressing the negative externalities of contracts between states.<sup>140</sup> It is therefore essential to identify which interests, if any, the granting of more or less autonomy should serve, and to engage in explicit discussions as to which externalities should count as actionable harm, as opposed to *damnum absque injuria*.

### III. MEGAREGIONALS AND NON-PARTY STATES

#### A. *An Illustration: The EEC and Algeria*

Had the current terminology been already in use in 1957, the EEC Treaty would have been dubbed a megaregional trade agreement. Catalyzed by multiple post-WWII developments,<sup>141</sup> the Treaty of Rome established a customs union among six sovereign nations in Europe. Like some contemporary megaregionals, the EEC remained open to the accession of other European nations, but not to non-European countries. Algeria—then a French colony—was technically in Africa, but due to France’s EEC membership it found itself somehow included in the club.<sup>142</sup> The party was short-lived. Only five (tumultuous) years later, Algeria proclaimed its independence, which meant automatic exit from the EEC. This sudden shift from insider to outsider status resulted in a precipitous reduction of once flourishing exports—most notably wine. In the 1950s Algeria had been the largest exporter of wine in the world. The new Community logic, however, required boosting agriculture inside the new trade block, which in turn necessitated

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140. It has been famously posited that *efficiency*, rather than distributive fairness, should be the goal to be pursued in court whenever the application of a rule calls for the balancing of competing interests. Once the size of the pie is maximized—because, say, a transaction of questionable fairness has nonetheless moved goods into the hands of higher-value users, or because a shift in diligence standards has rendered costly precautions unnecessary—then a fair distribution of the “pie” can be achieved by tax-and-transfer, allegedly a method both more robust and more precise to redress substantive inequality. See Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 822–25 (2000). This argument has been extensively contested, see McAdams & Fennell, *supra* note 138, at 1114–16, and has not fully conquered the realm of common or civil law adjudication, given that distributive motives continue to surface in judicial opinions, see, e.g., Daniela Caruso, *Contract Law and Distribution in the Age of Welfare Reform*, 49 ARIZ. L. REV. 665, 679 (2007), but it continues to hold sway in legal scholarship.

141. Current historiography attributes the 1950s’ start of European legal integration not only to the political desire to intertwine the economies of the member states (most notably Germany’s) so as to make war impossible, or to build a solid European bulwark against Soviet expansion, but also to enable and legitimize through the EEC the continued management of member states’ colonies. See PEO HANSEN & STEFAN JONSSON, *EURAFRICA: THE UNTOLD STORY OF EUROPEAN INTEGRATION AND COLONIALISM* 1–16 (2014).

142. This meant participation in the EEC’s common market for Algerian goods, including agricultural products. Algeria was never a member state, but as a territory of France it was expressly mentioned in EEC Treaty Article 227 as part of the common market for goods. See Kalypso Nicolaidis, *Southern Barbarians? A Post-Colonial Critique of EUniversalism*, in *ECHOES OF EMPIRE: MEMORY, IDENTITY AND COLONIAL LEGACIES* 283, 286–87 (Kalypso Nicolaidis, Berny Sèbe & Gabrielle Maas eds., 2015).

protecting EEC wine production from competitive imports. France therefore altered its established patterns of trade with North Africa, and the EEC rapidly erected trade barriers and regulatory obstacles to Algerian wine.<sup>143</sup> Algeria—a predominantly Muslim country surrounded by neighbors of similar faith—had little internal demand for wine and failed to find alternative wine purchasers abroad. This sudden loss of market share, coupled with the realization that the wine industry had always been—symbolically and at law—a purely French creation, led to the complete abandonment of Algerian wineries. Visually, the change was stunning. One can still find 1950s’ posters depicting thousands of wine barrels ready to be shipped from Algerian ports to Europe. Within a decade, however, that picture would be replaced by sights of uprooted vineyards and deserted cellars.<sup>144</sup>

The 1960s dismantlement of Algeria’s wine trade was good news for Southern Italy, which had comparable weather conditions, plenty of vineyards, and much to gain from the elimination of barriers on their wine exports within the EEC. In a Eurocentric perspective, facilitating agricultural expansion in post-WWII Italy was a matter of fairness in North-South relations.<sup>145</sup> Tackling the “Southern Question” (*la questione meridionale*)<sup>146</sup> required moving wealth around, and it was clear that the Common Commercial Policy of the newly established Community would have to protect southern European markets from foreign competitors. The impoverishment of Algerian agriculture served more or less directly the goals of an internally progressive European agenda.

The Algerian story just outlined is not only an early illustration of trade diversion resulting from a megaregional. Even more relevant here is the distributive complexity of its background. The founding fathers of the EEC were institutionally bound to boost trade inside the Common Market. It was not at all in their interest, however, to ruin Algerian export prospects. If anything, they would have had an interest in sustaining the Maghrebi economy, not least because, were the African continent to realize its yet under-tapped mineral wealth, it would become a great market for European exports.<sup>147</sup> Indeed, the Evian Accords of 1962 were followed by a complex

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143. An EEC Regulation designed to launch a Common Wine Policy also determined that bottles identified as EEC products could not contain wine of non-EEC origin. Council Regulation 816/70, art. 26, 1970 O.J. (L 99) 1; see Jeffrey A. Munsie, *A Brief History of the International Regulation of Wine Production* (2002), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:8944668>.

144. Giulia Meloni & Johan Swinnen, *The Rise and Fall of the World’s Largest Wine Exporter (and its Institutional Legacy)* (Am. Ass’n of Wine Economists, Working Paper No. 134, 2013), [http://www.wine-economics.org/laawe/wp-content/uploads/2013/02/AAWE\\_WP134.pdf](http://www.wine-economics.org/laawe/wp-content/uploads/2013/02/AAWE_WP134.pdf); see also Keith Sutton, *Algeria’s Vineyards: An Islamic Dilemma and a Problem of Decolonization*, 1 J. WINE RESEARCH 101, 113–15 (1990) (noting how “culturally inappropriate” the wine industry was in Algeria).

145. See Pier Paolo D’Attorre, *Italian Reconstruction and “Depressed Areas”: The Marshall Plan in the “Mezzogiorno”* (Ctr. for Eur. Stud., Working Paper No. 11, 1987), [http://www.ces.fas.harvard.edu/publications/docs/pdfs/CES\\_11.pdf](http://www.ces.fas.harvard.edu/publications/docs/pdfs/CES_11.pdf).

146. See NELSON J. MOE, *THE VIEW FROM VESUVIUS: ITALIAN CULTURE AND THE SOUTHERN QUESTION* 1–2 (2006).

147. HANSEN & JONSSON, *supra* note 141, at 125–28.

network of agreements (between Algiers on one side and Paris or Brussels on the other) aimed at maintaining or reinstating trade channels and preferences.<sup>148</sup> Shoring up Algeria's economy in the aftermath of independence would then be a "recognized interest" for Bagchi or, per Smits' aforementioned construct, a "value" in the ethos of post-colonial Europe.

The Algerian example sets, therefore, the stage for the inquiry that follows: how does the trade law system protect non-parties whose interests are harmed by a megaregional? Should the law give them agency to protect their prerogatives, especially when megaregional parties are, for whatever reason, also invested in the welfare of non-parties?

As noted earlier in Section I.A, there is by now a large body of literature, in law as in economics, pointing out that RTAs may negatively interfere with the *general* goals of multilateralism. Until recently, not much had instead been said about the harm that RTAs may inflict on *specific* non-parties—in Bagchi's language, about *concentrated* externalities.<sup>149</sup> This gap is now filling up. Prominent trade law scholars have been concerned with the possibility that countries in dire economic straits find themselves shut out of once promising lines of export due to the mushrooming of new RTAs among other countries.<sup>150</sup> This vein of scholarship partakes, in many ways, of the same themes and conceptual hurdles faced in private law theory by Smits, Bagchi, and Porat, but it strives to find avenues for non-parties' protection within the special toolkit of WTO law and international law doctrines.

As already observed, a few avenues for non-parties' redress exist and, mirroring private-law taxonomies, come in two broad types: expansion of autonomy on one hand, and the legal policing of its limits on the other.<sup>151</sup> Non-parties, if harmed by trade deals entered by other nations, can in principle turn to forming RTAs of their own.<sup>152</sup> Alternatively, an aggrieved non-party can attempt to constrain the reach of the RTA entered into by other nations to its detriment. Sections III.B and III.C below discuss various legal techniques used to limit the scope and reach of RTAs when they inflict negative externalities on non-parties. Section III.D, drawing insight from Part II,

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148. "Even with the signing of the [Evian] Accords on 19 March 1962, Algeria's relationship with France and, by extension, with the European Community was not clear. Although Title II of the Evian Accords specified the institution of preferential tariffs and the maintenance of trade flows to France of Algerian products, it was not until the 1970s that Algiers and Brussels formalized the relationship." GREGORY WHITE, A COMPARATIVE POLITICAL ECONOMY OF TUNISIA AND MOROCCO 52 (2001). EU-Maghrebi relations were characterized by association agreements, now evolving into cooperation agreements. See Adel Abdel Ghafar, *Toward a Recalibration of EU-North Africa Relations* (Brookings Inst. 2017), [https://www.brookings.edu/wp-content/uploads/2017/05/paper\\_toward-a-recalibration\\_english\\_web\\_final3.pdf](https://www.brookings.edu/wp-content/uploads/2017/05/paper_toward-a-recalibration_english_web_final3.pdf).

149. Bagchi, *supra* note 21, at 219.

150. Most notably KLABBERS, *supra* note 17, and Howse, *supra* note 20.

151. See *supra* Section II.D.

152. See *infra* notes 193–195 and accompanying text.



subjects such legal techniques to critical scrutiny, and concludes that the problem with each of these mechanisms lies in their distributive neutrality.

*B. RTA Formation as “Breach of Contract”: Violation of Article XXIV or Breach of the Enabling Clause*

In private law, one straightforward way to complain about contracts to the detriment of others is to characterize the impugned agreement as a breach of pre-existing contractual obligations. In stylized form: *C* could sue *A* for entering into a contract with *B*, if a prior agreement between *C* and *A* prohibited, more or less explicitly, the contract that *A* and *B* would later enter into. The ordinary enforcement of non-compete clauses in employment contracts exemplifies this move. Transposed onto the landscape of WTO law, *C*'s plea would consist of the argument that the free trade agreement reached by *A* and *B* is not within the scope of either GATT Article XXIV or the 1979 Enabling Clause—the two main enablers of preferential arrangements between sub-groups of contracting parties—and is therefore in breach of the contractual obligations stemming from the baseline multilateral regime. This has been the subject of several WTO disputes,<sup>153</sup> two of which—*Turkey—Textiles*<sup>154</sup> and *EC—Tariff Preferences (GSP)*<sup>155</sup>—stand out as particularly effective examples. India—a rapidly emerging economy—happened to be the initiator of both cases.<sup>156</sup>

In the mid-1990s India was opening up its markets and experiencing an unprecedented rate of growth. It was in this context of aggressive liberalization that the Indian government decided to initiate a WTO complaint against Turkey's reinstatement of quotas on Indian textiles. In turn, Turkey invoked the privilege of entering a customs union with the EC, which—it alleged—required and justified the renewed textile quota.<sup>157</sup> The dispute ended with a decision by the Appellate Body (“AB”) which famously hinged on the concept of necessity: while Turkey was indeed privileged to enter a customs union, the privilege only encompassed activities that were strictly necessary to the livelihood of the Turkey-EC deal. The AB's report

153. “Since 1994, the DSU has dealt with at least 13 cases in which the existence of an RTA has been pleaded or argued in one way or another.” Armand C.M. de Mestral, *Dispute Settlement under the WTO and RTAs: An Uneasy Relationship*, 16 J. INT'L ECON. L. 777, 789 (2013).

154. Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS34/AB/R (adopted Oct. 22, 1999) [hereinafter *Turkey—Textiles*].

155. Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc. WT/DS/246/R (adopted Dec. 1, 2003) [hereinafter *EC—Tariff Preferences (GSP)*].

156. See Biswajit Dhar & Abhik Majumdar, *Learning from the India-EC GSP Dispute: The Issues and the Process*, in *DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE* 174, 176 (Gregory C. Shaffer & Ricardo Meléndez-Ortiz eds., 2010).

157. The EC allegedly required that Turkey reinstate quotas on Indian textiles to avoid the result of Indian products flooding the EC market through the backdoor of Turkey. The AB found that rules of origin, clearly distinguishing between Turkey's own products and merchandise imported from India, would provide sufficient protection to the EC textiles market. The AB therefore ruled the Turkish quota unnecessary. *EC—Tariff Preferences (GSP)*, *supra* note 155, ¶ 190(e).

did what it could to pin down the shifty requirement of necessity and to heighten the bar of legality in Article XXIV.<sup>158</sup> India prevailed.

Again in 2002, India filed a WTO complaint against the EC, this time denouncing Brussels for granting special preferences to twelve developing countries (including Pakistan) in exchange for their collaboration in the fight against international drug trafficking.<sup>159</sup> The Indian government felt unduly left out and discriminated by such special preferences, which hurt its textile market share by giving a boost to Pakistani exports.<sup>160</sup> This plight also found sympathetic ears in Geneva: the AB clarified that the granting of special preferences towards developing countries must respect fixed parameters of legality, such as non-discrimination among similarly situated beneficiaries.<sup>161</sup> India prevailed again.

This double victory drives home the following point: the privilege to enter treaties that depart from the multilateral mold, through either the Enabling Clause or the Article XXIV exception, is not unqualified. *Pacta nocent* and, like private law, trade law makes room for remedies in favor of harmed non-parties. Rob Howse adds strength to this argument by further narrowing the scope of Article XXIV.<sup>162</sup> He argues that this authorization to enter non-MFN deals is quite broad only with regard to special *tariff* concessions. By contrast, for non-tariff obstacles to trade such as product requirements, the scope for entering special deals is much narrower: the technical barriers to trade (“TBT”)<sup>163</sup> or the sanitary and phytosanitary (“SPS”) measures<sup>164</sup> *do not* make exceptions for RTAs. This means, for instance, that an agreement reducing such non-tariff barriers as technical or sanitary product requirements exclusively within a given group of countries could be invoked, on MFN grounds, by other WTO parties that have been left behind.<sup>165</sup> This argument for the enhancement of non-parties’ protection has been endorsed as “cogent” and “subtle” by Jan Klabbers.<sup>166</sup>

Klabbers develops analogous moves at the level of general international law. He starts from the assumption that trade agreements are ordinary treaties, therefore subject to the Vienna Convention on the Law of Treaties

158. See Joost Pauwelyn, *The Puzzle of WTO Safeguards and Regional Trade Agreements*, 7 J. INT’L ECON. L. 109, 141 (2004) (critiquing the AB).

159. EC—*Tariff Preferences (GSP)*, *supra* note 155, ¶ 3.

160. Dhar & Majumdar, *supra* note 156, at 176.

161. EC—*Tariff Preferences (GSP)*, *supra* note 155, ¶¶ 142–43.

162. Howse, *supra* note 20, at 138, 142.

163. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT].

164. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS].

165. Lorand Bartels, *The Legality of the EC Mutual Recognition Clause under WTO Law*, 8 J. INT’L ECON. L. 691, 703 (2005) (arguing the mutual recognition clauses in EU member states’ legislation, aimed to facilitate Turkey and EFTA countries’ exports to the EU, might be invoked by third countries on the basis of the TBT’s non-discrimination obligation).

166. KLABBERS, *supra* note 17, at 3.

(“VCLT”) and to other international law norms. Klabbers notes that international law rules on treaty succession can be invoked in this context.<sup>167</sup> He points out that the norms on *inter se* treaty modification can be relevant whenever the original deal was signed by *A*, *B*, and *C*, and the second one (a preferential trade agreement) only by *A* and *B*.<sup>168</sup> Accordingly, he posits that *C* might find solace in such norms and seek remedies in proper fora.<sup>169</sup> In support of his argument, Klabbers also refers to EU law and finds in the Treaty on the Functioning of the European Union (“TFEU”) fodder for non-parties’ remedial action.<sup>170</sup>

Klabbers himself acknowledges, however, that such avenues of redress may be impervious.<sup>171</sup> The unabated proliferation of RTAs in the 21st century shows how difficult it is to halt, in the name of textual strictures in the GATT, any given sub-group of WTO members from entering exclusive deals to the detriment of others. As demonstrated by the paucity of successful challenges to the legality of RTAs, proving a violation—or a “breach”—is hard. Alternative avenues, assuming no violation of any WTO rule but only privileged conduct, may be more promising.

### C. RTA Formation as “Tort”: Non-Violation Nullification or Impairment Provision of GATT Article XXIII

Contrary to other GATT provisions, Article XXIII:1(b) has remained in force since 1947 and has even been cloned, with minimal changes, in other WTO agreements.<sup>172</sup> This provision concerns the possibility of a trade remedy for state *C* when two other states—*A* and *B*—have not violated any particular GATT articles, yet have taken “measures” which have “impaired or nullified” the benefits that *C* expected from the GATT trade regime.<sup>173</sup>

167. Vienna Convention on the Law of Treaties art. 41, May 23, 1969, 1155 U.N.T.S. 332.

168. KLABBERS, *supra* note 17, at 6; see also William A. Kerr et al., *Conflicting Rules for the International Trade of GM Products: Does International Law Provide a Solution?* 17 *AGBIOFORUM* 105, 106 (2014) (considering the role of VCLT Article 30 in the context of successive WTO and non-WTO agreements with different parties).

169. KLABBERS, *supra* note 17, at 6.

170. *Id.* at 5 n.8 (“[TFEU] Article 351 is generally seen as protecting the rights of third parties under treaties concluded with EU member states prior to the creation of the EU or its entry into force for those who acceded later. While the provision does not always work to the benefit of third parties (the Court of Justice of the European Union has been creative in finding ways to leave it without application), at least it does suggest that some kind of third party protection is not impossible.”).

171. KLABBERS, *supra* note 17, at 8.

172. Cf. Frieder Roessler, *Should Principles of Competition Policy Be Incorporated into WTO Law through Non-Violation Complaints?*, 2 *J. INT’L ECON. L.* 413, 415 (1999) (“Most of the WTO Agreements contain a provision that [references] Article XXIII . . .”).

173. GATT Article XXIII:1 recites:

If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of . . .

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

The word “measure” might seem to refer exclusively to states’ unilateral policies; yet it appears capacious enough as to include the act of entering new trade deals with other parties.<sup>174</sup> Indeed, in a few cases, Article XXIII:1(b) has been successfully invoked by a non-party to challenge respondent states’ accession to a new trade agreement.<sup>175</sup> Forming an RTA is a privileged activity and cannot be considered a violation of any GATT rule; yet, just like the contracts between *A* and *B* discussed in Part II, the RTA may result in the nullification or impairment of *C*’s expectations stemming from pre-existing trade equilibria. If that is the case, the nullification or impairment ceases to be mere *damnum absque injuria*, and instead justifies *C*’s recourse to dispute resolution.<sup>176</sup>

The *Citrus* dispute is a well-known application of GATT Article XXIII.<sup>177</sup> In 1982 the United States asked that a GATT panel be convened. The complaint alleged that the EEC had caused the nullification or impairment of certain benefits from trade in fresh lemons and oranges that the United States had come to expect on the basis of the EEC’s bound tariffs on citrus fruit.<sup>178</sup> To the United States’ dismay, the EEC had recently granted preferential treatment to a number of Mediterranean countries: not only Spain and Malta, destined to accede the Community at some future point, but also north-African states with which the EEC had recently negotiated special partnerships in the context of a broader geopolitical strategy for the Mediterranean basin.<sup>179</sup> The panel never determined whether the impugned preferences met the requisites for GATT legality, and therefore was unable to identify any “violation,” but it found that the competitiveness of U.S. citrus

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the contracting party may [resort to dispute settlement]. General Agreement on Tariffs and Trade 1994 art. XXIII:1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

Professor Klabbbers does not refer to Article XXIII:1(b), *see supra* note 17, but his reference to the objective regime doctrine of international law seems to partake of the same logic: if the trade equilibrium resulting through WTO multilateral negotiations at any given point in time can be considered an “objective regime,” then—Klabbbers suggests—non-parties can complain against new RTAs that have upset their competitive status, *see supra* note 17, at 6.

174. Especially if read in conjunction with Article XXIII:1(c).

175. *See, e.g.*, Report of the Panel, *European Community—Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*, L/5776 (Feb. 7, 1985) [hereinafter *Citrus*].

176. As noted in Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WTO Doc. WT/DS44/R (adopted Mar. 31, 1998) [hereinafter *Japan—Film*], non-violation claims are “exceptional.” The general rule—one can infer—is that any trade policy which is not in conflict with GATT/WTO provisions is a privileged activity.

177. *Citrus, supra* note 175, at 84.

178. ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 157–61 (1993).

179. Rosine M. Plank-Brumback, *GATT Dispute Settlement Practices: Setting the Stage for Reform*, in *A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM* 151, 154 (Gabrielle Marceau & Roberto Azevêdo eds., 2015). The EEC had also enacted preferential regimes with other states, members of the 1975 Lomé Convention, but such regimes were clearly driven by widely shared development goals and the United States did not include them in its complaint. *Id.*

fruit in the European market had suffered and that remedies were warranted.<sup>180</sup>

Several authors, relying on various GATT panel reports,<sup>181</sup> have described the non-violation provision as a trade-law equivalent of the good faith obligation that binds the parties to a contract—not just those who negotiated a particular trade concession, but also everyone else in a multilateral dimension.<sup>182</sup> At a closer look, however, the provision seems rather analogous to the tort of interference with legitimate business expectations, discussed earlier in Part II. This is because the complainant does not base its claim upon a bilateral, privity relation with a particular contracting party, as would be the case in a breach-of-good-faith suit, but rather upon *general* trade conditions pre-dating the respondent's conduct. Moreover, the finding of impairment does not depend on establishing a specific loss of trade, but can instead be based on proof of “an abstract adverse change in competition.”<sup>183</sup> The complainant (*C*) cannot ask that the respondent state(s) (*A* and/or *B*) discontinue or withdraw the measure,<sup>184</sup> but it can demand compensation—a feature that further corroborates the analogy with private-law liability rules. Seen through the lens of private law, this provision seems strikingly analogous to the rules addressing the harm to non-parties resulting from other people's contracts.

The private law tort of interference with prospective business relations (discussed in Part II) and the trade law claim of non-violation have a lot in common. First, in both cases, the conduct of the defendant (or respondent state) is on its face legal—a Hohfeldian privilege, if not a right. Second, both are premised on the assumption that pre-existing arrangements between two parties should sometimes be protected against the interference of other actors. In WTO law, the non-violation claim allows for protection of “legitimate expectations” stemming from a prior arrangement (say, from MFN-based tariffs concessions). Third, and most important, both the cause of action of tortious interference with business prospects and the non-violation

180. *Id.* at 158. The panel report was not adopted due to the EEC's opposition. After a series of retaliatory measures, the parties eventually settled the dispute.

181. In Panel Report, *Korea—Measures Affecting Government Procurement*, ¶ 7.93, WTO Doc. WT/DS163/R (adopted May 1, 2000), the panel linked Article XXIII to the customary international law principle that treaties must be performed in good faith and quoted Article 26 of the Vienna Convention: “Every treaty . . . must be performed by [the parties] in good faith.” The panel further explained that actions in violation of the spirit (as opposed to the letter) of prior commitments could “deny the competitive opportunities which are the reasonably expected effect of such commitments.” *Id.* ¶ 7.99. Yet, as noted by Robert W. Staiger & Alan O. Sykes, *Non-Violations*, 16 J. INT'L ECON. L. 741, 753–54 (2013), the panels do not seem to require evidence of bad faith by non-violation complainants.

182. MARION PANIZZON, *GOOD FAITH IN THE JURISPRUDENCE OF THE WTO: THE PROTECTION OF LEGITIMATE EXPECTATIONS, GOOD FAITH INTERPRETATION AND FAIR DISPUTE SETTLEMENT* 127–96 (2006).

183. Sung-joon Cho, *GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?*, 39 HARV. INT'L L.J. 311, 318 (1998) (with reference to a somewhat analogous dispute: Report of the Panel, *Treatment by Germany of Imports of Sardines*, G/26 (Oct. 31, 1952), GATT BISD (1st Supp.), at 53 (1953)).

184. Staiger & Sykes, *supra* note 181, at 748.

tion provision are startling oddities, because they are “superimposed on an economic order committed to competition.”<sup>185</sup>

Just like the amorphous torts of unfair competition or interference with business expectations, the non-violation measure has not met with universal praise among scholars.<sup>186</sup> Sung-joon Cho, for instance, has argued that the non-violation provisions under the WTO dispute settlement system have severe disadvantages, including “their inherent ambiguity and the concomitant risk that they might be misused.”<sup>187</sup> Cho characterizes the panel’s approach in the above-mentioned *Citrus* dispute as “lax” because it interpreted the concept of nullification and impairment as to “also protect[] the broader balance of benefits that governments had a right to expect as a result of reciprocal undertakings . . . .”<sup>188</sup> Cho further laments that the inherent ambiguity of non-violation remained unaddressed through the Uruguay Round, in spite of attempts to define the concept of ‘reasonable legitimate expectations’ in the Brussels Draft Final Act.<sup>189</sup> Equally skeptical remarks on non-violation complaints are to be found among economists.<sup>190</sup>

On the other hand, scholars less interested in free trade as a dogma than in the elasticity of trade rules and in the preservation of states’ regulatory capacity have looked with interest at the concept of non-violation nullification or impairment. In the aftermath of the *Tuna—Dolphin* disputes,<sup>191</sup> for instance, Howse and Trebilcock pointed to GATT Article XXIII as a welcome valve in the WTO system.<sup>192</sup> A non-violation complaint—they argued—might allow for contestation of formally legitimate state practices that trigger a race to the bottom in matters of environmental standards.<sup>193</sup> Just like tortious interference, the notion of non-violation makes room for considerations of social justice in otherwise coldly competitive market regimes.

185. Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 78 (1982).

186. See *supra* Section II.C, note 118 and accompanying text, referring to Connor’s and other scholarly critiques.

187. Cho, *supra* note 183, at 311.

188. *Id.* at 319.

189. *Id.* at 320.

190. Staiger & Sykes, *supra* note 181, at 743 (“[T]he modest observed role played by the non-violation doctrine over the history of the GATT/WTO system may well be appropriate, and . . . both the drafters of GATT and inferences drawn directly from existing economic theory may have been overoptimistic about what the doctrine can realistically accomplish.”).

191. Panel Report, *United States—Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991), GATT BISD (39th Supp.), at 155 (1993); Panel Report, *United States—Restrictions on Imports of Tuna*, DS29/R (June 16, 1994).

192. Robert Howse & Michael J. Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labor, and the Environment*, 16 INT’L REV. L. & ECON. 61, 78 (1996).

193. *Id.*

#### D. *Non-Party Complaints and Their Limitations*

From this sketchy survey of the trade law literature on non-party complaints, five points emerge. First, like their analogs in private law, the existing avenues for non-party redress remain narrow exceptions. The freedom of contracting parties' sub-groups to enter an RTA—even a megaregional one—is paramount. The fact that GATT Article XXIV is cast as an exception to the rules of multilateralism is irrelevant: decades of state practice have turned regional or bilateral preferences into a *Grundnorm* of the trade game.<sup>194</sup>

Second, non-party claims are hard to adjudicate, and the difficulty of policing the fuzzy borders of Article XXIV has certainly facilitated the rise of trade regionalism. Additional uncertainty stems from the jurisdictional overlap of the WTO's own dispute settlement body and alternative adjudicatory sites set up by some RTAs.<sup>195</sup> The parameters of the Enabling Clause—the other major “exception” to the MFN rule—are even less firm than the parameters of GATT Article XXIV.<sup>196</sup> There is, as a consequence, ample discretion to devise preferential policies towards sub-groups of developing countries, and outsiders have correspondingly narrow ways to challenge such policies. Of equally difficult justiciability are non-party claims based on the vague words of GATT Article XXIII or on the flimsy limb of the objective regimes doctrine.

A third important yield of the analysis conducted in this Part is the distributive ambivalence of non-party complaints when they happen to succeed. The scholarly search for non-party remedies is genuinely inspired by the desire to offer struggling states the possibility to “contest” the regionalism of “the great powers.”<sup>197</sup> A David-and-Goliath undertone characterizes this strand of literature. But it is not at all clear that the highlighted non-party remedies can move forward the ball of justice in international trade. Recall India's victory in *EC—Tariff Preferences*: India, a non-party vis-à-vis the EC's Drugs Arrangements, risked a competitive setback on the world textile market; it therefore summoned the WTO Dispute Settlement Body (DSB) and managed to prevail. But was this strategy in any way related to global justice? India's victory resulted in economic harm for Pakistan—a

194. See de Mestral, *supra* note 153, at 784–85.

195. See Songling Yang, *The Solution for Jurisdictional Conflicts Between the WTO and RTAs: The Forum Choice Clause*, 23 MICH. ST. INT'L L. REV. 107, 109 (2014); Jennifer Hillman, *Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO—What Should the WTO Do?*, 42 CORNELL INT'L L.J. 193, 202 (2009).

196. Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 173, WTO Doc. WT/DS246/AB/R (adopted Apr. 7, 2004) (“[W]e conclude that the term ‘non-discriminatory’ in footnote 3 does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause.” (emphasis added)).

197. Klabbbers's concern for world inequality is explicit: “[I]nternational law is not completely silent when it comes to the activities of the great powers, and offers something of a vocabulary for contestation, however embryonic and tentative.” *Supra* note 17, at 8.

state that struggled to expand its share in a market for textiles dominated by giants such as China and, indeed, India itself. From the viewpoint of Pakistani exporters, the equities of India's WTO victory must have seemed questionable at best.<sup>198</sup> Like the private cause of action for interference in the hands of Lumley, which ultimately lessened the economic power of Ms. Wagner, the avenues for non-party redress that one can find within the WTO or international law architecture have no clear distributive vector and may corroborate, rather than correct, baseline inequalities.

The fourth point of note has to do with the extreme difficulty of identifying (and agreeing upon) desirable distributive outcomes in trade law. Recall the drama of Algerian vineyards in the aftermath of independence. Recall, as well, Italy's struggle to conquer the international wine market. The EEC's tough stance towards imports from North Africa in the 1960s was a response to the plea voiced by Italian delegates during the negotiation of the EEC Treaty.<sup>199</sup> And indeed, in the short term, Italy's exports benefited from the decline of Algerian viticulture. With time, however, new difficulties have emerged. The irony of the present day is that the predicaments of the Maghreb and the Sahel are part and parcel of the socio-economic troubles of Italy's south. Dwindling agricultural exports undermine economic diversification in North Africa and contribute to the region's political instability.<sup>200</sup> The ensuing social strife prompts large numbers of migrants to venture across the Mediterranean and leads to unspeakable tragedies right at the doorsteps of Europe.<sup>201</sup> Especially at times of sovereign debt crises in Southern Europe, the reception of migrants further complicates financial and political equations.<sup>202</sup> Beggar-thy-neighbor policies, like wine trade protectionism in early EEC life, can easily backfire in the current geopolitical context.

A fifth takeaway from the foregoing inquiry is that the protection of non-parties raises crucial issues of institutional competence. In the abstract, the possibility of prevailing before the DSB might allow a non-party to force changes upon the structure of a harmful RTA or PTA (as India did in *Turkey—Textiles* and *EC—Tariff Preferences*), or to negotiate reparations for trade injuries received, or to engage in retaliatory conduct with Geneva's blessing.

198. Dhar & Majumdar, *supra* note 156, at 177 (noting that the Pakistani share of the world textile market was "not very significant" at the time of the *EC—Tariff Preferences (GSP)* dispute).

199. HANSEN & JONSSON, *supra* note 141, at 227–28.

200. See Daniela Caruso & Joanna Geneve, *Trade and History: The Case of EU-Algeria Relations*, 33 B.U. INT'L L.J. (2015), <http://www.bu.edu/ilj/category/eu-algeria-trade/>.

201. Efam Awo Dovi, *Migration: Taking Ricketty Boats to Europe*, AFRICA RENEWAL ONLINE (Feb. 23, 2017), <http://www.un.org/africarenewal/magazine/special-edition-youth-2017/migration-taking-ricketty-boats-europe>.

202. See Alessandra Corrado, *Clandestini in the Orange Towns: Migrations and Racisms in Calabria's Agriculture*, 4 RACE/ETHNICITY: MULTIDISCIPLINARY GLOBAL CONTEXTS 191, 197 (2011) (recounting riots between locals and immigrants in the southern Italian town of Rosarno); Mark Langan, *The Moral Economy of EU Relations with North African States: DCFTAs Under the European Neighbourhood Policy*, 36 THIRD WORLD Q. 1827, 1828 (2015) (highlighting the EU's interest in "creating jobs for young North Africans who otherwise might be drawn into migration or, worse, into radicalisation").



But given the fragile equilibrium of multilateral, regional, and bilateral deals, and in light of the political salience of development issues, the DSB may very well *not* be the appropriate arbiter of RTAs' and PTAs' legality. The closing remarks that follow are devoted to this issue.

### CONCLUSION

The search for non-party remedies against the negative externalities of trade agreements yields a handful of doctrinal moves and occasionally justiciable claims. It is indeed possible, in theory, to entrust the protection of non-parties to international arbitration panels (within and perhaps also without the dispute settlement system of the WTO). This is indeed already the case to a modest extent, but the current scholarly emphasis on the need to protect non-parties from megaregionals would give more prominence to their pleas. Summoned more forcefully by emboldened non-parties, arbitrators might more frequently find that the impugned trade agreement violates prior contractual commitments or that it alters settled equilibria and expectations. The now slim strand of jurisprudence concerning the claims of non-parties would expand. New regional or bilateral agreements would be bargained for in the shadow of this growing body of law, and the very likelihood of non-parties' recourse might induce parties to minimize the negative externalities of their deals.

The problem with this scenario is the super-imposition of a premodern private law culture onto a postmodern world trade reality. Because the envisaged trade law game would be premised on the symmetry of all players, the same remedies would be available to non-parties of all kinds—small and large economies, most and least developed countries. Like civil- or common-law courts in the early twentieth-century, panels would be expected to evaluate each claim discretely and to remain insensitive to broader questions of justice. But when any party *C* can prevent *A* and *B* from entering the deal they would like, justice is not necessarily served: Lumley—an already stronger party—goes to court to keep Ms. Wagner from growing more competitive; the factory owner gets to enjoin the concerted action of his employees; India keeps Pakistani textiles from conquering Western markets; and so on.

By the same token, in a scenario characterized by distributively neutral non-party remedies, every player would retain the same degree of autonomy and would freely enter bilateral or regional deals with selected playmates. To be sure, this might be wonderful. In the spirit of Holmes's *Vegeban* dissent, developing countries would perhaps respond to the rise of megaregionals by entering additional trade deals. Africa would at last de-balkanize.<sup>203</sup> South-

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203. Patrick N. Osakwe & Karl Vohlmuth, *Towards Transformative Regional Integration in Africa – An Introduction*, in Achim Gutowski et al., *Africa's Progress in Regional and Global Economic Integration—Towards Transformative Regional Integration*, 18 AFR. DEV. PERSP. Y.B. 3, 4 (2015/16) (positing that

South allegiances would strengthen, like early labor unions in the 1900s.<sup>204</sup> And because autonomy means just that—the ability to make one’s own rules, if necessary by means of contracts—clusters of fragile economies would be able to design their own special forms of integration, rather than adopting RTA models based on inapplicable legal and political assumptions.<sup>205</sup>

But once again private law lends us a cautionary tale. If all *A* and *B* parties have the same degree of contractual freedom, then we may have no way to stop cartels of “haves” from forming, and from crowding out the market opportunities of the “have-nots.” It is worth noting that the contemporary favor for RTAs in the international sphere mirrors the favorable view of international cartels in 1920s Europe. Cartels were then perceived as a means of rationalizing the world economy and even preventing world conflicts. Only with time did Europe come to realize the cartels’ less than benign impacts on their respective markets.<sup>206</sup> A free-for-all, neoliberal embrace of bilateralism or regionalism might exacerbate global wealth asymmetries rather than cure them. The level of synergy that the megaregionals of advanced economies could bring about could never be matched by parallel allegiances among developing countries. The question of global inequality requires stronger commitments to redistribution than the ones contemplated in current trade law.

Like the legal realists of a century ago, we must pursue the opportunities for greater justice that may stem from the presumed symmetry of all players on a level playfield. But we must also be swift to recognize when the ball of justice is simply stuck. If that is the case, moving that ball forward requires tilting the table. Private law theory is most useful when it lets us see with clarity the limits of a private law game. When transposed onto the field of international trade, private law theory sheds welcome light on the need for explicit distributive commitments and on the limits of the legal method in our quest for justice.

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“[r]egional integration can foster structural transformation in Africa”). CFTA is at present the most ambitious regionalization project for Africa. See *CFTA—Continental Free Trade Area*, AFR. UNION, <https://au.int/en/ti/cfta/about> (last visited Aug. 1, 2017).

204. James Thuo Gathii, *AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES* 414–23 (2011) (discussing South-South trade as a possible survival strategy for developing countries). For recent scholarly encouragement towards regionalism in the Global South see, for example, Dan Ciuriak, *India’s Possible Response to the Challenge of the Mega-Regionals*, Conference Paper at Changing Global Economic Scenario: Implications for India’s Trade Policy and Make in India Programme, New Delhi, India (May 12, 2015), <http://ssrn.com/abstract=2606720>, and Ron Sandrey, *Mega-Regional Trade Agreements and South Africa’s Trade Strategy: Implications for the Tripartite Free Trade Area Negotiations* (SAIIA, Occasional Paper No. 195, 2014).

205. See GATHII, *supra* note 204, at 8–15 (emphasizing the inapplicability of neo-liberal assumptions to the context of African trade regionalism).

206. DAVID GERBER, *GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION* 27–28 (2010).