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STEFAN SCHLEGEL

A Bundle of Bundles of Rights – International Treaties Regarding Migration in the Light of the Theory of Property Rights

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Abstract

A growing literature discusses the access of migrants to property rights over assets as a requirement for the protection of their human rights and basic interests. Little attention, however, has been paid to the fact that the right to decide to migrate to a given place *is itself a property right*. This paper aims to close this gap by describing international treaties regarding migration as mechanisms to transfer bundles of these property rights. This approach allows for the comparison of the distributional effects of different treaties regarding migration. It also allows to demonstrate that such treaties often do not limit themselves to transactions of property rights among states but are capable of transacting property rights from states to individuals. A property rights approach highlights that the exclusion of potential immigrants from would-be receiving countries means to impose a – sometimes negative – external effect on them and their country of origin. A review of different types of treaties highlights the tendency in all of them to internalize such external effects. The paper thus predicts that the prevention of migration will get more expensive as the external effects of this activity will have to be internalized to a growing degree.

Keywords: International Migration Governance, International Treaties, Theory of Property Rights, Internalization, Non-standard agreements

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Contents

1. Introduction

The claim of this paper is that the common characteristic of the growing number[1] and the growing variety[2] of international treaties on migration is an exchange of prerogatives, or entitlements, or rights among contracting parties or with third parties. These can be the prerogatives of states, of International Organizations or the rights of individuals. They are exchanged for other prerogatives, entitlements, rights or money. I will summarize these prerogatives, entitlements or rights under the technical term of *property rights* and apply the theory of property rights to describe these forms of cooperation.

Since I have written elsewhere on the explanatory value of the theory of property rights for immigration law,[3] and I aspire to extend this analysis to international treaties here, the definition of the term property rights and the nature of the property right over migration will be kept very brief: Property rights are defined as the *socially recognized exclusive control over a good*. The property right over migration is defined as the socially (here also: legally) recognized exclusive control over the migration of a given person to a given state (see section 2 for a more extensive definition). Analysing treaties regarding migration as a transaction of such property rights (or some partial bundle of them) will proof helpful – on a conceptual level – to address the following research questions:

- Amongst which agents is value transacted by treaties regarding migration?
- Who gains what through these treaties and who obtains the possibility to impose external effects on others?
- What, in particular, is the role that individuals play in these treaties as the recipients of assets or as the agents whose opportunities in life are diminished?

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1 Particularly regarding readmission agreements, see Jean-Pierre Cassarino, 'Dealing with Unbalanced Reciprocities: Cooperation on Readmission and Implications' (2010) Viewpoints 1-29, 1, 3.

2 See the graph in Jean-Pierre Cassarino, 'Informalising Readmission Agreements in the EU Neighbourhood' (2007) 42(2) The International Spectator 179-196, 186. See also Luca Lixi, 'Beyond Transactional Deals: Building Lasting Migration Partnerships in the Mediterranean' (2017) <https://www.migrationpolicy.org/research/beyond-transactional-deals-building-lasting-migration-partnerships-mediterranean>, 3.

3 Stefan Schlegel, *Der Entscheid über Migration als Verfügungsrecht: Eine Anwendung der Ökonomischen Analyse des Rechts auf das Migrationsrecht am Beispiel der Schweiz* (Studien und Beiträge zum Öffentlichen Recht, Mohr Siebeck 2017); Stefan Schlegel, 'Is Control over Migration an Asset? And If It Is, Who Can Make the Most of It?' (2017) <https://nccr-onthemove.ch/wp_live14/wp-content/uploads/2017/03/Policy-Brief-nccr-on-the-move-06-Stefan-Schlegel-EN-Web.pdf> accessed 19 July 2018.

- The emphasis on the observation that these treaties *transact* property rights will draw attention to the question of the *costs* and the *rules* of such transactions.
- The observation that property rights over migration are *bundles of rights*, will highlight the possibility to restructure these bundles of rights to the potentially mutual advantage of all parties involved.

The paper draws almost exclusively on examples of international treaties that bind either countries in Europe amongst each other or a European country to a third country or the European Union with a third country. I will however, leave the question of what is transacted by EU law among EU-Members aside. The EU is considered only in cases in which it is the party to international treaties with third countries. Such treaties are governed by international law rather than EU law. Partly, this European focus is due to the density and variety of treaties that can be found in Europe.[4] Partly, it is because the typology of treaties, and the the vector along which entitlements are transacted that is more important for the purpose of this study than the variety of contexts in which it is done. Partly this has to do with the focus on formal treaties, or legal documents that formally transfer property rights. The numerous Memoranda of Understanding that play a role in the international cooperation on migration are therefore not included in the analysis. This research focus makes a preliminary word on the notoriously murky term of migration governance necessary, as it is used here. The concept of governance relied on here, restricts itself to the governance of migration *through law*. It is narrower than one that relies on the interaction between formal and non-formal networks and agreements.[5] This narrower concept of migration governance draws on Jürgen Bast's pluralistic understanding of governing migration. It refers to the precarious attempt – always in need of legitimization – to interfere in the process of migration by means of the law with the aim of fulfilling certain politically defined, regulatory goals.[6] A pluralistic understanding of governance is to be distinguished from a functionalist understanding of "migration management", in which the unruly phenomenon of migration is perceived as being tamed, controlled and steered in order to fulfil certain technocratically defined goals,[7] like satisfying

4 I am unaware, for instance, that a treaty comparable to a Dublin-Association can be found elsewhere in the world.

5 See for instance Alexander Betts, 'The Governance of International Migration: Gaps and Ways Forward' in Bertelsmann Stiftung (ed), *Improving the Governance of International Migration* (Online eds. Verlag Bertelsmann Stiftung 2011) 68.

6 Jürgen Bast, *Aufenthaltsrecht und Migrationssteuerung* (Mohr Siebeck 2011) 12.

7 For a critique of this notion, see Nicola Piper and Stefan Rother, 'More than Remittances: Resisting the Dominant Discourse and Policy Prescription of the Global

the need for labour in a receiving country. A functionalist understanding ignores the inherent political nature of the governance of migration and the fact that its goals and aims are multi-layered and the result of a political process, loaded with inconsistencies.[8] Although focused on the law as the tool of governance, a pluralistic understanding of this governance can therefore take into account the pluralistic and inherently political nature of the attempt to influence migration through the law.

The economic methodology that shapes the reasoning of what follows, is often associated with a functionalist and reductionist understanding of governance, which is geared to obtain efficiency. It is not, however, incompatible with a pluralistic understanding of governance. This is so because the methodology does not entail a presupposition of the preferences of the involved individuals. These might be messy, and even contradicting, and the maximization of these preferences will be very different from what is colloquially understood under the concept of efficiency.[9] If inserted into a political process, these conflicting preferences might therefore very well result in complex, multi-layered and conflicting goals that are then in turn reflected in immigration law and treaties regarding migration.[10] It is then with respect to these goals that the effects of migration governance are perceived as negative or positive external effects and it is with respect to these goals that states are expected to enter into treaties in order to internalize these external effects.

This paper is organized into four sections. The first sets out the property rights approach to immigration law. It gives a short overview of the use of the concept

„Migration-Development-Mantra"' (2014) 30(1) Journal für Entwicklungspolitik 44-66, 50, 59.

8 Bast (n 6) 10-11.

9 This broader concept of rationality that does not presuppose certain specific preferences is sometimes called „thin rationality": Tomer Broude, 'Behavioral International Law' (2015) 163 University of Pennsylvania Law Review 1099-1157, 1108. However, this concept of rationality calls into question, what should be maximized, not the rationality of the decision making as such: It still leaves open the possibility that states show patterns of irrational behaviour under specific circumstances.

10 There is a small but expanding literature on behavioural international law that seeks to improve the understanding of states (and other international actors) before the background of empirical knowledge about "bounded rationality" and biases in decision making: ibid 1118. Anne van Aaken and Tomer Broude, 'Behavioral Economic Analysis of International Law' in Eugene Kontorovich and Francesco Parisi (eds), *Economic Analysis of International Law* (Edward Elgar Publishing 2016); Anne van Aaken, 'Behavioral Economic Analysis of International Law' (2014) 55(2) Harvard International Law Journal 421-481. Tomer Broude thinks that states might well be less rational than individuals because their decisions are made both by agents and collectives: Broude (n 9) 1122.

of property rights in literature on migration and specifies the differences in these approaches. The second section embeds the approach in the literature on property rights theory in international law and applies it to treaties regarding the governance of migration. The third section exemplifies what bundles of property rights are exchanged or transacted in the most important types of treaties regarding migration. The final section lays out the benefits of a property rights approach for the analysis of international treaties on migration. It highlights the ability of this approach to map the internalization of externalities that is performed through the transaction of property rights.

2. The theory of property rights

The term property right is defined as the *socially recognized exclusive control over a good*.[11] The notion of a "good" is broad. Whatever is valued by agents for its utility, is a good in the sense of this definition.[12] Whatever agents are willing to invest time and/or effort and money in, in order to keep it or to obtain it, qualifies as a good. The term is by no means restricted to the control over physical goods or the legal institute of property.[13] Mere aspects of larger goods, such as the right to use a good for a given

11 Rupert Windisch and Peter Burgold, 'Verfügungsrechte' in Riccardo Mosena and Eggert Winter (eds), *Gabler Wirtschaftslexikon*; Robert Cooter and Thomas Ulen, *Law & Economics* (The Addison-Wesley series in economics, Pearson/Addison Wesley 2014) 77; Hans-Bernd Schäfer and Claus Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (Springer Berlin Heidelberg; Imprint: Springer 2012) 69; Richard A Posner, *Economic Analysis of Law* (Aspen Publishers 2011) 39; Rudolf Richter and Eirik G Furubotn, *Neue Institutionenökonomik: Eine Einführung und kritische Würdigung* (Mohr Siebeck 2010), 90-91; Michael B Mascia and C. A Claus, 'A Property Rights Approach to Understanding Human Displacement from Protected Areas: the Case of Marine Protected Areas' (2008) 23(1) Conservation Biology 16-23, 17; Louis De Alessi, 'The Economics of Property Rights: A Review of the Evidence' (1980) 2 Research in Law and Economics 1-47, 4; Armen A Alchian and Harold Demsetz, 'The Property Right Paradigm' (1973) 33(1) The Journal of Economic History 16-27, 17; Eirik G Furubotn and Svetozar Pejovich, 'Property Rights and Economic Theory: A Survey of Recent Literature' (1972) 10(4) Journal of Economic Literature 1137-1162, 1140; Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57(2) The American Economic Review 347-359, 347; Ronald H Coase, 'The Problem of Social Cost' (1960) 3 The Journal of Law and Economics 1-44, 44.

12 Schäfer and Ott (n 11) 69.

13 ibid 589.

time or to use it in some specific way, can also be valuable and therefore qualify as a good.[14] Every exclusively controlled aspect of a good – tiny or temporary as this control may be – qualifies as a property right under this definition. "Socially recognized" encompasses the exclusive control over a good that is *legally* recognized (not merely protected by social convention) and backed by the legal order.

Both, the *prerogatives* of states or International Organizations as well as the *entitlements* and rights of individuals – either towards other individuals or towards a state – fulfil this definition. They have some value to those who own them and they can be defended via a legal mechanism. They can, therefore, all be subsumed under the common heading of property rights.

The *theory* of property rights is an approach, developed in the larger field of New Institutional Economics, to analyse human interaction. It states that human interaction, the distribution of goods among individuals and the nature of the redistribution of goods through the market and through state activity is best understood if analysed as the distribution of rights – exclusively to use goods or aspects of goods and as the transaction of these rights.[15] As Harold Demsetz put it for market transactions: „When a transaction is concluded in the marketplace, two bundles of property rights are exchanged. A bundle of rights often attaches to a physical commodity or a service but it is the value of the right that determines the value of what is exchanged."[16] This insight can be extended to the analysis of transactions within hierarchically organized systems like firms or states (as opposed to horizontal transactions among agents on the market) or between subjects of international law (in a sort of international marketplace[17]).[18]

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14 Furubotn and Pejovich (n 11) 1140.

15 Richter and Furubotn (n 11) 91.

16 Demsetz (n 11) 347. See also Furubotn and Pejovich (n 11) 1139.

17 Stephan Hobe and Otto Kimminich, *Einführung in das Völkerrecht* (Francke 2014) 12; Joel P Trachtman, *The International Law of Economic Migration: Toward the Fourth Freedom* (W.E. Upjohn Institute for Employment Research 2009) 271; Jeffrey Dunoff and Joel Trachtman, 'Economic Analysis of International Law' (1999) 24(1) The Yale Journal of International Law 1-59, 11. Trachtman suggests to treat international organizations like the WTO and supranational organizations like the EU as the equivalent of a firm in the international context and ad-hoc treaties as the equivalent of market transactions: Joel P Trachtman, *The Economic Structure of International Law* (Harvard University Press 2008) 53.

18 ibid 10. A school of thought rooted in legal realism warns against an overstatement of the analogy of treaties and contracts because there exists no international government to enforce treaty law and the difficulties to monetize the stakes in the interactions between subjects of international law, which is why treaties might be better analysed as a sort

2.1 External effects

Closely related to the concept of property rights is the concept of external effects. External effects are the uncompensated effects of the actions of one agent on others.[19] The distribution of property rights in a society determines who can impose an external effect on whom. An understanding of how external effects are distributed in a society thus presupposes an understanding about how property rights are distributed. External effects can be positive as well as negative and they can be pecuniary as well as non-pecuniary, from individuals to individuals, from states to states or from states to individuals or vice-versa.

External effects play out in reciprocal relationships. Either the external effect that A can impose on B is bigger than the one that B can impose on A or vice versa. The property right of a farmer to keep the ranger's cattle off his fields imposes an external effect on the ranger just as (in an alternative allocation of property rights) the right of the ranger to let his cattle roam freely imposes an external effect on the farmer. Likewise, the right of state A to exclude citizens from state B imposes an external effect on these citizens just as the right of the citizens of state B to immigrate to A imposes an external effect on A and its citizens.[20] From a wealth-maximization point

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of letter of intent: Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press 2007) 90; Francesco Parisi and Daniel Pi, 'The Economic Analysis of International Treaty Law' in Eugene Kontorovich and Francesco Parisi (eds), *Economic Analysis of International Law* (Edward Elgar Publishing 2016) 104. Given that this paper distinguishes between international treaties and informal agreements, and given that a series of treaties analysed in this paper dispose of established mechanisms of enforcement, the assumption that international treaties bear more similarities to actually enforceable contracts than to mere statements of intend is more plausible as a starting point than the contrary assumption. However, the fact that the enforcement of treaties is frequently precarious is important to keep in mind in the analysis of treaties regarding migration and state's incentives to conclude such treaties. For an explicit treatment of international treaties as a form of contract, see Posner (n 11), 174; Alan O Sykes, 'International Law' in A. M Polinsky and Steven Shavell (eds), *Handbook of Law and Economics* (North-Holland 2007) 771.

19 Cooter and Ulen (n 11), 39.

20 See for the example of the effect imposed on Tunisia by Italy: Lixi (n 2) 9. I am aware that likening the relationship of migrants to receiving states to the relationship of rangers (or their cattle) to farmers might be considered offensive by some. Nothing in this analogy is to suggest that the two cases are comparable in any other way than in the fact that both deal with problems of reciprocal external effects. Besides the fact that almost any other familiar example to illustrate the problem (trains and wheat-fields, smoking stacks and residents, noise producers and residents, etc.) would be similarly offensive to these readers, the example serves to illustrate the wide spectrum of situations that can be described with

of view, the interesting question is how to avoid (how to internalize) the more serious of the two external effects.[21]

One of the functions of the transaction of property rights is to internalize external effects to a greater degree.[22] The possibility of negotiations and transactions is the driver of this process of internalization. If property rights are allocated in a way that will create important external effects, the concerned agents will try to negotiate in order to internalize them to a greater degree.[23] This is true for transactions among privates on the marketplace, as well as transactions among states or from states to individuals in international negotiations.[24] If a farmer thinks that the external effect which is created by the cattle of the neighbouring ranger to his crop is greater than what he would be willing to pay the ranger in order to prevent the damage, and if the ranger agrees on the price, a contract may be formed that transacts property rights. Now, it is the farmer who can impose an external effect on the ranger – he can prevent the ranger from letting his cattle stray on his property – but this external effect is smaller than the one that the ranger could previously impose on the farmer. Otherwise, they would not have entered a contract. Part of the external effects have been internalized.

2.2 The property right over migration

The property right on which this paper focuses is the right, exclusively to control the *access* of a given individual to a given state.[25] The control over this access – which

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the same technical terminology, rather than to suggest that the ranger/farmer situation is related to that of migrants and receiving states in any other way.

21 Coase (n 11) 2.

22 Demsetz (n 11) 348.

23 ibid 348. For the context of international law, see Trachtman, *The Economic Structure of International Law* (n 17) 28, 33.

24 Eric A Posner and A. O Sykes, *Economic Foundations of International Law* (Harvard University Press 2012) 63; Sykes (n 18) 768, Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press 2005) 88.

25 For the central importance that the right to access has for the use and administration of all common pool resources, see Edella Schlager and Elinor Ostrom, 'Property-Rights Regimes and Natural Resources: A Conceptual Analysis' (1992) 68(3) Land Economics 249, 250.

embodies the possibility to prevent access – is a good of considerable value.[26] It is usually termed a prerogative when it is in the hands of the state, and a right when it is in the hands of the individual. In the theory of property rights, it is a property right regardless of whether it is termed a prerogative or an individual right. It can be transacted between the two by an administrative decision, by a legal reform or – as is the focus of this paper – by a treaty.

From a property rights' perspective, immigration law can, therefore, be described as the sum of rules that allocate property rights to control access a given state. Immigration law also has to define the rules by which these property rights can be transacted from one agent to another and how they are enforced. This description also applies to international migration law that regulates these questions among states and international organizations.

2.3 Migration and property rights in the literature

The above described method of applying the theory of property rights to the realm of immigration law is admittedly uncommon. The literature that creates links between migration and property rights is scant and the literature that applies the theory of property rights to the control over somebody's migration to a given place as the relevant property right in a systematic manner, is practically inexistent.[27] Roughly, the literature at the overlap between migration studies and the theory of property rights can be subdivided into three main groups:

– A literature in migration studies that researches the nexus between the allocation and protection of property rights over commodities such as land and housing in the country of origin or transit and the migration patterns of the relevant population.[28] This literature finds its equivalent in immigration law in

26 See for the US-Context Alessandra Casella and Adam Cox, 'A Property Rights Approach to Temporary Work Visas' (2017) <https://ssrn.com/abstract=3024818> accessed 14 April 2018, 12.

27 See the extended overview over the literature in Schlegel, *Der Entscheid über Migration als Verfügungsrecht* (n 3), 80-88.

28 See for instance Michele Valsecchi, 'Land property rights and international migration: Evidence from Mexico' (2014) 110 Journal of Development Economics 276-290, 289, who finds that improved protection of property rights over land in Mexico mitigated the fear of losing land titles while abroad and therefore contributed to enhanced emigration; Eugenia Chernina, Paul Castañeda Dower and Andrei Markevich, 'Property rights, land liquidity, and internal migration' (2014) 110 Journal of Development Economics 191-215 demonstrate in a historical case study of pre-revolutionary Russia that the enhanced

the discussion on the extension of property rights over movable and immovable things to given groups of migrants in accordance to national law or international treaties like the Refugee Convention (that regulates access to movable and immovable property in its Art. 13).[29] The property right over migration (as opposed to property rights over physical assets) plays no role in this literature.

– A body of literature in political theory, discussing the validity of the analogy of property rights over houses or clubs and the right to exclude foreigners from countries. Christopher Wellman, who argues for a right to restrict migration on the basis of an analogy of states and clubs uses the term, albeit only for the rights of private owners of land, not for the right of association as a separate property right and not for the property right over the migration of a given person that could be allocated to that person or to the state.[30] A subset within this literature that makes intensive use of the concept of property rights concerns the debate on open borders within the libertarian camp.[31] Note however, that this debate restricts itself to the question of what rights to invite migrants to a certain place are included in the bundle of rights of the owner of *privately owned* land. All the rights of access to institutions (such as political systems and markets that may thrive under these institutional roofs) are ultimately derivatives of property rights to land in this debate. This has to be so because publicly owned resources are supposed to be inefficient and undesirable, and ought to be privatized to the greatest possible degree, so the question of migra-

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transferability of property rights in land stimulated internal migration; Carol McAusland and Peter Kuhn, 'Bidding for brains: Intellectual property rights and the international migration of knowledge workers' (2011) 95(1) Journal of Development Economics 77-87 model the relationship of the degree of property rights protection over intellectual property in different countries and the incentives to migrate that differences in their protection creates for knowledge workers.

29 See Ezekiel Simperingham and Scott Leckie, 'Article 13' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford commentaries on international law. Oxford University Press 2010) 884-89; James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 517-27.

30 Christopher H Wellman, 'Immigration and Freedom of Association' (2008) 119(1) Ethics 109-141, 22-27. For a short summary of the libertarian argument for open borders in order to protect the property rights (in land etc.) of the citizens of a receiving country, see Bryan Caplan, 'Why Should we Restrict Immigration? ' (2012) 32(1) Cato Journal 5-24, 17-18.

31 For an overview over this specific debate, see Walter Block and Gene Callahan, 'Is there a Right to Immigration? A Libertarian Perspective' (2003) Human Rights Review.

tion is the question of access to private land, neither a question of access to publicly owned land, nor to public institutions. Mathias Risse's approach to the question of migration bears some similarities with this, since he departs from the idea of the common ownership of the earth. All questions of access to a state and its institutions, in his approach are derivatives of the common ownership of the land, on which these institutions are erected.[32] Other authors in political theory, such as Ryan Pevnick, do account for the observation that the value of the access to land is largely determined by the access to institutions on this land[33] and for the fact that access to the territory is possible while access to (some) of its institutions remains restricted.[34] The decision over the access to either the territory or to institutions – or the decisions over both, bundled in one single decision – is not however treated as a property right that is transferable between a state and an individual.

– A body of legal literature that draws analogies between the property right over migration to other property rights over goods that are allocated by the state (such as licences or franchises). Most often, this analogy is drawn implicitly,[35] only rarely explicitly.[36] Eleanor Brown who describes visas (to the US) as a form of "new property",[37] in the sense of Charles Reich's seminal article,[38] draws this

32 Matthias Risse, 'Humanity's Collective Ownership of the Earth and Immigration' (2016) 4(2) Journal of Practical Ethics 31-66, 49, 57.

33 Ryan Pevnick, 'An Exchange: The Morality of Immigration' (2008) Carnegie Council for Ethics and International Affairs 241-248, 241-42.

34 Ryan Pevnick, *Immigration and the Constraints of Justice: Between Open Borders and Absolute Sovereignty* (Cambridge University Press 2011) 56; Pevnick, 'An Exchange: The Morality of Immigration' (n 33) 245; see also Risse (n 32) 49.

35 See for instance the policy proposition of Anu Bradford, 'Sharing the Risks and Rewards of Economic Migration' (2013) 80 The University of Chicago Law Review 29-56, aiming to distribute potential gains of migration between countries of origin, countries of destination and migrants. See also Adam B Cox and Eric A Posner, 'The Second Order Structure of Immigration Law' (2007) 59(4) Stanford Law Review 809-856, 827, introducing the problem of information asymmetry into the regulation of irregular migration.

36 See Adam B Cox and Eric A Posner, 'The Rights of Migrants: An Optimal Contract Framework' (2009) 84(1) New York University Law Review 1403-1463, 1417. The authors use the term „bundle of rights", which states might transact to migrants and they mention that this comes at a cost for the state. The idea of the transaction of a property right is not applied explicitly, however.

37 Eleanor M L Brown, 'Visa as Property, Visa as Collateral' (2011) 64(4) Vanderbilt Law Review 1047-1105, 1048.

38 Charles A Reich, 'The New Property' (1964) 73(5) The Yale Law Journal 733-787.

analogy most explicitly. A recent example also refers to visas to the US as property rights, characterizes them as bundles of rights and brings into play the possibility of unbundling those bundles and to apply different transaction rules at different times in order to obtain certain policy goals.[39] It also implies that the admission of migrants creates external effects on the labour market that have to be taken into account.[40] An important contributor to this literature is Ayelet Shachar. She describes citizenship (the fullest possible bundle of rights regarding migration in my terms) as an entitlement composed of a bundle of rights.[41] This implies that the non-allocation of citizenship of a well-developed country to people of the global south has an impoverishing effect on them (and hence a negative external effect), an effect that Ayelet Shachar suggests to partly internalize with a citizenship levy.[42] This approach has later been taken up in development economics and the wealth enhancing effect of this bundle of rights has been termed the "citizenship rent" or a "citizenship premium".[43] A particularly rich contribution to the theory of property rights in the context of migration draws from literature on the property rights over natural resources[44] and analyses displacement in its relationship to property rights over natural resources.[45]

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39 Casella and Cox (n 26) 2. I differ from the account of property rights given in this paper however in that I treat the property right over migration as an individualized property right, one that determines the right of one specific person to access one specific country and therefore describes the relationship of a specific individual and a specific state from the start. In the account of Casella and Cox it becomes personalized only upon allocation: ibid 15. What is described here as the personalization of the property right is described in my approach as the transaction of a property right from a state to an individual.

40 ibid 27.

41 Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009) 5, 44. Note that the idea of a transaction of the good citizenship is used entirely different in that approach then it is used here. Ayelet Shachar's concern is the transaction of the good citizenship from one generation to the next, not the transaction of a bundle of rights concerning the migration of *one specific individual* to a specific state. Ayelet Shachar however mentions the possibility of a reallocation of membership rights; ibid 71. For an extension of Ayelet Shachar's approach on residency permissions in European countries, see Oliviero Angeli and Holger Kolb, 'Nicht nur effizienter, sondern auch gerechter? Ein Modell preisbasierter Zuwanderungssteuerung' (2011) 31 Zeitschrift für Ausländerrecht und Ausländerpolitik 254-259, 254-56.

42 Shachar (n 43) 96-108.

43 Branko Milanović, *Global Inequality: A New Approach for the Age of Globalization* (The Belknap Press of Harvard University Press 2016) 5, 132.

44 In particular on the framework developed in Schlager and Ostrom (n 25).

45 Mascia and Claus (n 11).

> Remarkable is the unbundling of property rights over natural resources thus obtained. The bundle is subdivided in a right to access and a right to exclusion from certain geographical areas. Both these aspects of property rights play the central role in immigration law. The fundamental question it has to answer is who has access to and who can exclude from a certain state.

While my approach builds on the third of these bodies of literatures, it adds three important aspects. *First*, the insight – based on the work of Ronald Coase –[46] that property rights are not naturally allocated to their current holder, but may be reallocated through negotiations or by law of by a political process. In the context of the property right over migration, the decision of its initial allocation largely comes down to the question of whether to allocate it to the state or to the individual in question.[47] This insight entails the observation that external effects are different if different agents own the property right.[48] This is why the transaction of the property right can lower or enhance overall external effects.

Secondly, I apply a systematic analysis on the transferability of the property right over migration. I draw on the insight that the definition of the rule of transaction is just as important as the initial allocation of the property right and systematically ask, under what conditions and at what moment in time the property right is transacted between a state and an individual (or any two other agents involved in the transaction, like third states or international organizations) and what transaction rule applies to the transaction.[49]

Thirdly – the focus of this paper – the insight that property rights over migration can be allocated to alternative stakeholders is extended to the analysis of treaties. I analyse them as international transactions of these property rights. An overview of how this fits into the literature on the economic analysis of international law, is given in section 3. This step applies Coase's key insight on the relationship among states and international organizations: Hierarchical intervention (state intervention in the domestic context; supra-state-level intervention in the international context) is not the only way to deal with externalities. They can be internalized through the

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46 Coase (n 11).

47 The insight of Coase has been applied on the property right over migration but only for its trade among employers, not for its possible transaction between a state and an individual. Casella and Cox (n 26) 21.

48 Coase (n 11) 2.

49 This builds on the three rules identified in Guido Calabresi and Douglas A Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85(6) Harvard Law Review 1089-1128.

negotiated exchange of property rights if transaction costs are not prohibitively high. No "WTO for migration"[50] is strictly necessary to deal with the social costs that are caused by the way that states regulate migration, provided that transaction costs for negotiations among states are not prohibitively high.

Translating immigration law and international legal relations regarding migration into the technical language of the theory of property rights requires considerable effort. There a several reasons that make this a worthwhile undertaking. The most important one is that it can describe the prerogative of a state and the right of an individual as the same entity and therefore the relationship of a (potential) migrant and a (potential) receiving state as the concurring attempt to control the same good, which can be transacted between the two. The reciprocity of this relationship is key to understand the reciprocity of its external effects. Whoever owns the control over somebody's migration to a given place can impose an external effect on the other agent(s).[51] The value of the property right for each side can then be assessed not only as the value of its immediate utility for the current holder, but also in relation to the value of the external effect it imposes.[52]

In the specific context of international law, the emphasis on the possibility of the transaction of the property right improves our understanding of when and by which mechanism the role of an individual is enhanced and fostered in international law. The next section therefore extends the property rights approach to the international realm.

3. International migration law as an exchange of property rights

International lawyers, even the few that apply law and economics to the analysis of international law,[53] are reluctant to rely on the terminology of property rights to

50 Timothy J Hatton, 'Should we Have a WTO for International Migration?' (2007) 22(50) Economic Policy 339-383.

51 See Schlager and Ostrom (n 25) 250.

52 See Trachtman, *The Economic Structure of International Law* (n 17) 41.

53 See the fundamental contributions of Eugene Kontorovich and Francesco Parisi (eds), *Economic Analysis of International Law* (Edward Elgar Publishing 2016); Posner and Sykes (n 24); Sykes (n 18); Dunoff and Trachtman (n 17); Trachtman, *The Economic Structure of International Law* (n 17); Dunoff and Trachtman (n 17). For pioneering contributions to behavioral economics of international law, see van Aaken and Broude (n 10); Broude (n 9); van Aaken (n 10).

describe what is allocated and transacted among states. However, the fact that the term property right is unfamiliar to describe the control over goods that are commonly allocated and transacted by international law is not in itself a good reason to forego the potential insights of the theory of property rights. The theory is often applied implicitly and occasionally explicitly.[54] Property rights in international law encompass all rights to control goods backed by either a treaty or by customary law.[55]

It is a property rights approach to claim: „Politics is not the study of the distribution of goods, as is commonly suggested, but the study of the distribution of authority in society, including but not limited to authority over goods."[56] Rights, exclusively

54 Trachtman, *The Economic Structure of International Law* (n 17) 23, 15; John A C Conybeare, 'international organization and the Theory of Property Rights' (1980) 34(03) international organization 307-334; Keohane (n 24) 89.

55 The law and economics literature is sceptical regarding the legal character of customary international law. For an overview over the debate, see Sykes (n 18) 763-66; Keohane (n 24) 88. However, given that property rights, as defined above, can emerge from any social practice, not just from law in the strict sense, a custom among states that imposes some price on the state that violates such custom (and be it only reputational damage), qualifies as a system of property rights in the sense that it allocates certain prerogatives to states (like the prerogative to send migrants with an irregular status to their country of origin) and it is enforceable at least to the degree that infringement comes at a reputational price. See Eugene Kontorovich and Francesco Parisi, 'Introduction' in Eugene Kontorovich and Francesco Parisi (eds), *Economic Analysis of International Law* (Edward Elgar Publishing 2016) 1.

56 Trachtman, *The Economic Structure of International Law* (n 17), 27. Abraham Bell, 'Economic Analysis of Territorial Sovereignity' in Eugene Kontorovich and Francesco Parisi (eds), *Economic Analysis of International Law* (Edward Elgar Publishing 2016) rejects the idea to "copy directly" property rights analysis for the understanding of territorial sovereignty and subsequently the analysis of international relations among states. He draws attention to the features that makes states very special agents (like the fact that they are not supposed to maximize their own utility but that of their citizens and the fact that there is no central power to enforce property rights among states). His own analysis of trans-boundary resources uses a lot of tools of property right theory however to the degree that he relies on property right theory in all but the name. It is undeniable that the relationship among states deals with very uncommon property rights and that they can only be described when taking into account the property rights of individuals towards the state. The broad definition of property rights he uses ("the ability to derive utility or consume value from an asset") (at 93) fits for all the aspects of state sovereignty. All aspects of state sovereignty amount to the ability to derive utility from an asset, be it a tangible, physical asset or a prerogative to act in a certain way from which utility my flow for the state. For another example for the implicit use of property rights theory, see Tom Ginsburg, 'The Ineraction Between Domestic an International Law' in Eugene Kontorovich and Francesco Parisi (eds), *Economic Analysis of International Law* (Edward Elgar Publishing 2016) 207.

to control certain goods in a society are a form of authority. The allocation of property rights is, therefore, the allocation of authority. One form of authority is the right to decide over the migration of a given person to a given place. Another form of authority is the capability to allocate these property rights, in other words the capacity to set rules regarding migration. Given that this is a good itself, the control over it is a property right as well.[57]

The transfer of property rights to international or supra-national organizations occurs whenever an international or a supranational organization obtains the competence to set rules and thereby the prerogative to restructure, on a general and abstract level, the bundles of rights of migrants, would-be migrants, and its Member States. There are three basic types of property rights regarding migration that can be transacted to international organizations:

1.) The property right to set rules regarding migration (e.g. the EU obtains the prerogative to set the cornerstone of a common asylum policy);
2.) the property right to apply rules via a judicial body (e.g. the Council of Europe obtains the prerogative for its court to apply the ECHR on migration cases, thereby allocating the property right over migration in individual cases);
3.) or the property right to restrict migration to a given territory, like a state. The transaction of property rights to an international organization requires, in other words, that it obtains the prerogative to decide what was previously its Member state's prerogative (or potential migrant's right) to decide.

Soft power and the capacity of agenda setting do not constitute for the transaction of property rights over migration to international organizations.[58]

The allocation of property rights and the transaction thereof is – according to this approach – the main object of international cooperation:[59] "The assets traded in this

57 Dunoff and Trachtman (n 17) 14. See also Pevnick, *Immigration and the Constraints of Justice* (n 34) 37. In the terminology of Schlager and Ostrom it is the right to management. See Schlager and Ostrom (n 25), 251.

58 In section 4, where different types of treaties are analysed regarding their transactional capacity, further examples for transactions to international organizations are given.

59 The idea of a transaction – broadly understood – makes up the core of the analogy between a marketplace and the economic analysis of international law: Dunoff and Trachtman (n 17) 12. For a description of international relations that starts off with the Coase-Theorem as the central explanation for state cooperation and the internalization of externalities emerging in international relations, see Keohane (n 24) 85.

international 'market' are not goods or services per se, but assets peculiar to states: components of power or jurisdiction."[60]

3.1. Treaties regarding migration as enabler of transactions

The concept or property rights laid out above is useful to pin down what is actually traded in international treaties regarding migration: states' prerogatives to control, govern and/or prevent certain forms of immigration or emigration.[61] This is partly captured in a quote by Joel Trachtman: „When states cooperate, they agree not to exercise authority that they had ex-ante, they agree to accept the exercise of authority by other states that the other state lacked ex-ante, or they agree to pool authority in an international organization."[62] As the quote suggests, this authority can be transacted from one state to another. It can also be pooled in an international organization in the above defined sense. What the quote does not hint to, however, is that this prerogative can also be transacted *to individuals.* In this case a former state-prerogative is transformed into an individuals' right. In cases where no state or international organization obtains the prerogative which other contracting states are giving up, the prerogative does not evaporate. The good, the control over a given activity, still has to be allocated to some stakeholder. It is in this case distributed among individuals. An example may clarify this point: When two or more states enter into an agreement on the free movement of persons, they do not trade the authority over immigration to another state. State A does not obtain the right to control how many citizens of A migrate to state B. Nor does the international or supranational organization that might administer the agreement on free movement obtain this right. The right is transferred to the citizens of state B instead. It is now every citizen of B who owns the right to control whether he or she will migrate to A or not. A state *prerogative* has been dispersed among the citizens of a contracting state. It is now their individual *right*.

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60 Trachtman, *The Economic Structure of International Law* (n 17) 10. See also Hobe and Kimminich (n 17) 12; James Hollifield, 'Migration and the Global Mobility of Labor: A Public Goods Approach' in Rey Koslowski (ed), *Global Mobility Regimes* (Palgrave Macmillan 2011) 234; Sykes (n 18) 762; Dunoff and Trachtman (n 17) 13. For the component of state power to rely on force in international relations, described as a property right, see Conybeare (n 56) 326, 333.

61 Trachtman, *The Economic Structure of International Law* (n 17) 119. For the possibility to trade the prerogative to trigger refugee movements, see Conybeare (n 56) 321.

62 Trachtman, *The Economic Structure of International Law* (n 17) X.

The mechanism of this metamorphosis is the transaction of a large number of property rights – each regarding the control over the international mobility of one individual to one state – from that state to individuals. It becomes clear that the property right over migration fundamentally has the nature of a *veto*. It consists first and foremost in the right to veto a person's mobility to a given place. If I obtain the right to veto my mobility to a given place, if no one but myself can legally veto my migration, it can also be said that I have a right to migrate. It follows that whenever individuals can migrate to another state, without the possibility of this migration being vetoed, they have obtained the property right over their own migration to a given place.

Whether treaties provide for the transaction of the right to set the rules or for the allocation of property rights, whether they provide for transactions among states or from states to individuals (or IOs), the common characteristics of all these treaties is a transaction of property rights. It follows that the theory of property rights allows us to compare the vectors and the values of the rights that are being exchanged.

A first step in doing this is to unbundle the property rights that are typically transferred in treaties regarding migration. The rights in question can be specified and differentiated in several dimensions: in terms of time, space, or access to markets and so on. This unbundling allows us to specify what kind of former state prerogatives are actually traded. Since these are only partial aspects of states' former competencies, they are just a part of a once fuller bundle of rights. What is exchanged are actually property rights of – or property rights over – specific actions of specific groups of people. These rights can contain the veto over somebody's migration to a given place, or much less than that (e.g. just a visa liberalization) or much more than that (e.g. access to family reunification and social transfers). The traded property rights concern an undetermined number of people or – less frequently – a determined number of people. An example of a treaty that concerns a predetermined number of people is the treaty between Tunisia and Switzerland that limits the number of young Tunisian professionals that are granted temporary access to the Swiss labour market to 150 per annum.[63]

Regardless of whether it is an undetermined or a determined number of property rights that is traded, it is not just a specific bundle of rights that is transferred (as

63 Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Tunesischen Republik über den Austausch von jungen Berufsleuten 11 June 2012, SR 0.142.117.587, Art. 3 I.

might be the case in an individual administrative or court decision or a contract among privates) but rather a *bundle of bundles of rights*.

3.2. The dimensions of the bundles of rights

This subsection tries to grasp the nature of the bundles (themselves composed of bundles) that are exchanged in treaties regarding migration. To do so, the metaphor of a wire rope is helpful. A wire rope consists of delicate filaments that are strung together five or ten a piece into a stronger wire. This one then is strung with more of the same strength to a larger bundle and these bundles again with others until a wire rope is formed.

The specific aspects of the migratory situation of a given (potential) migrant and one specific state can be thought of as the filament that composes the tiniest wire in the rope. The relationship of an individual and a foreign state can be described as the relationship of two bundles of rights. We can imagine them as two wire ropes. Their thickness depends on how much rights a (potential) migrant has towards a state or how much discretion a (potential) receiving state has over a (potential) migrant. The strength of both wire ropes can be altered if a filament or a bundle of filaments is taken out of one of the two and strung together with the other. Alternatively, filaments of every single wire rope can be taken out and strung together to a new wire rope. The first example is the case when entire bundles of rights of a given group of people are transferred, for instance in a treaty that gives a general right to migration to a restricted group of people (highly qualified service provider, say), the latter is the case when a small aspect of the previously state-owned bundle is transferred to a large group of people, for instance in a visa liberalization scheme. Since treaties create either of these effects by tying together bundles regarding an unspecified number of potential migrants or specific filaments out of these bundles, it is helpful to think of the substance of what is exchanged as *bundles of bundles*.

The filaments in individual bundles can be described as different dimensions of the good "control over migration". Two obvious dimensions are the temporal and geographical dimensions.[64] The bundle of rights of an individual regarding its international mobility can vary in the time-span for which it gives access to a given coun-

64 An instructive example of a geographically restricted bundle of rights concerning migration would be a working visa that restricts access to the Greater London Area, as it was suggested to create after Brexit: Dave Hill, 'The Case for a more Independent, post-Brexit London is gaining Strength' *The Guardian* (11 July 2016).

try. The same is true for the geographical dimension. The access that is granted can be to just a region, the whole country or a group of countries. A dimension very important for the understanding of the social impact of migration, is the market-access-dimension. It determines the markets to which a migrant gets access. Whether it is the entire labour market or only certain of its branches or only certain levels of qualifications or only under certain circumstances (like the condition that no resident could be found to fill a vacancy), and whether the market for services also is accessible. A further important dimension could be labelled the fiscal dimension. It determines the forms of contributions that migrants must make to the receiving countries and the social transfers they have access to in turn. This dimension is closely related to what could be called the consolidation dimension. It determines to what degree migrants have options to prolong and consolidate their permission to stay in a country, whether they have access to a more permanent and more secure status and whether they eventually have access to citizenship. The question of family reunification can also be included in this dimension. Finally, a procedural dimension defines what procedural rights (potential) migrants have, either in cases where they claim that they have a certain "stick" in their bundle of rights (e.g. their right to bring their family or their right to get permanent residency), or in cases in which they oppose the attenuation of their bundle of rights by the state. This procedural dimension can be thought of as a kind of auxiliary aspect of a bundle of rights that can help to protect other sticks in the bundle. Its practical importance for the protection of other sticks within the bundle can be illustrated by the fact that some treaties regarding migration contain explicit procedural guarantees. As an example, the treaty between the EU and Switzerland on the free movement of persons, guarantees the right to file complaints with the relevant authority and to an appeal at a national court (Art. 11 Free Movement Treaty). An example in which procedural guarantees in a Human Rights Treaty prove to be crucial for migrants to be able to protect the substance of their bundles of rights, is Art. 13 ECHR (Right to an Effective Remedy).[65]

How are the different parts of these bundles distributed to different stakeholders over time? To sort out this question, it is useful to start at a (fictional) point in time where states and international law are already in place, but treaties regarding migration are not. This gives us an idea of how property rights over migration might have

65 For the most recent example of the importance of this procedural right in the context of migration, *see N.D. and N.T v Spain [2017] no 8675/15 and no 8697/15, [2017] (ECtHR)* [§ 120], in which the Court identifies "an evident link" between the breach of the prohibition of collective expulsion of aliens and the breach of the right to an effective remedy.

been initially allocated. At this imaginary point in time, state control over migration was in its climax. No treaty law nor customary law restricted states' power regarding emigration or immigration. Every restriction of this prerogative that occurred in international law might then be analysed as the transfer of a bundle of bundles of rights either to other states, international organizations or individuals.

4. A description of treaties on migration in property rights terms

The aim of this section is to represent different types of treaties regarding migration and to demonstrate that the transaction of property rights over migration is their common characteristic.

The organizing principle of this section is neither the geographical scope nor the chronological order in which treaties evolved, but the nature of the bundles of rights transacted by them. What I hope to demonstrate in this section, is that a vast spectrum of types of treaties have one thing in common – they transfer property rights over migration. The chosen treaties are examples of types of treaties that transfer specific property rights or transfer them in a specific way. I begin with types of treaties that transact bundles of rights of the citizens of the contracting states (or supranational organizations), then move on to treaties that transact property rights to individuals on the basis of criteria other than citizenship of a contracting state, and then move on to types of treaties that transact only very specific "filaments" or "sticks" of the much larger bundle of rights.

4.1 Friendship- and Equal Treatment Treaties

Friendship- and Equal Treatment Treaties sprang up in large numbers in the second half of the 19th century and came in different forms. Walter Stoffel distinguishes treaties between industrialized western countries and treaties between industrial countries and economically less developed countries such as China and Siam.[66] After 1860, treaties among industrialized countries were typically modelled along the lines

66 Walter A Stoffel, *Die völkervertraglichen Gleichbehandlungsverpflichtungen der Schweiz gegenüber den Ausländern: Eine Untersuchung über die Bedeutung der Gleichbehandlungsklauseln in den Niederlassungsverträgen* (Schweizer Studien zum internationalen Recht vol 17, Schulthess 1979) 68-72.

of the influential Cobden-Chevalier-Treaty between France and the United Kingdom, a preferential trade agreement that also contained clauses regarding the legal situation of citizens of one of the contracting states in the other.[67] Typically, these treaties contained rules regarding the entry and the stay in the contracting state, legal capacity, freedom to choose an occupation, freedom to acquire property and provisions regarding the migrant's fiscal situation. While many of these treaties explicitly gave a guarantee of equal treatment, treaties with non-industrial countries typically contained mere most-favoured-nation clauses.[68]

Despite the many different forms in which these treaties can be found throughout Europe in the second half of the 19th century, they mostly transferred property rights to states and hardly ever to individuals. Potential receiving countries transferred property rights that were formally their sovereign prerogatives to potential sending countries; they did not become the individual rights of the migrating subjects of the contracting parties. It was only by way of diplomatic protection by the country of origin by which migrants could oppose a violation of these treaties.[69] This is at least true until after the end of World War II when some of these treaties started to give some procedural protection to the individuals concerned.[70] Interestingly, it is the procedural aspect of the bundles of rights in which we first observe a transfer to individuals, rather than to states.[71]

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67 ibid 68.

68 ibid 72.

69 Bast (n 6) 85; Niraj Nathwani, 'The Purpose of Asylum' (2000) 12(3) International Journal of Refugee Law 354-379, 359. Stoffel, in 1979, was of the view that diplomatic protection was still at the time the more effective way to enforce the legal position of a foreigner than International Human Rights protection. Stoffel (n 69) 63.

70 An example is the German Gesetz zu dem Niederlassungs- und Schifffahrtsvertrag vom 27. Oktober 1956 zwischen der Bundesrepublik Deutschland und der Republik Frankreich 29 October 1957 (Bundestag mit Zustimmung des Bundesrates)"Niederlassungs- und Schifffahrtsvertrag" of 1957, Art. III, 2. See also Bast (n 6) 85.

71 See for instance European Convention on Establishment, and Protocol thereto 13 December 1955 (Council of Europe), Art. 3 II. It reads: "Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority."

4.2 Free movement of persons

Late to arrive but easy to describe in terms of property rights, are schemes regarding the free movement of persons. Here, the bundle exchanged is the property right to control whether or not a specific migration of a given individual to a given place can happen or not. While the receiving states beforehand owned that property right, they hand it over by entering the treaty (this handover takes place, at the latest, by the end of a transitional period). The individual bundle of rights that is transferred to citizens of the contracting states might vary (workers, service suppliers and students might be allowed to migrate under different conditions, their access to markets might vary as might their right to family reunification). But the bundle that those different beneficiaries obtain is typically fairly robust and gives access not only to the territory of a country but also to its markets, to permanent residency, family reunification and some social services.

These treaties do not – first and foremost – transfer bundles of rights to a contracting state, but rather to its citizens. It is a sort of third-party beneficiary contract. The states involved are not the primary beneficiaries of the treaty in the sense that it is not *their* bundle of rights that is thickened by the transfer. The veto over the potential immigration of their citizens to a contracting state has not been transferred to the countries of origin but rather to its citizens. These citizens thereby obtain the right to immigrate into a contracting state.

In the most paradigmatic cases of this sort of treaties, the agreements that link the countries of the EEA (with the exception of Liechtenstein) and Switzerland to the free movement of persons' area of the EU, the contracting states do not only gain – for their citizens – the same rights as they transfer to the citizens of EU countries, they also gain partial access to the common market for goods and services. Potential migrants, therefore, are not the only beneficiaries of these treaties. The treaties are also a precondition for the access to markets of goods and services.

While the association of Switzerland to the system of free movement is static and does not evolve automatically, Norway and Island, as Members of the EEA (again, exceptions apply for Liechtenstein) have to take over the evolving EU-law on the matter.[72] The transaction of property rights over migration is embedded in a transfer of legislative prerogatives to the Union. It is an example in which treaties transacted property rights to set rules to a supra-state organization.

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72 Stephen Booth, 'Britain's EU immigration debate: Norway and Switzerland are not the Answer' (2014) <https://openeurope.org.uk/intelligence/immigration-and-justice/norway-and-switzerland/> accessed 18 April 2018.

4.3 Treaties concerning the protection of refugees

According to the above definition of property rights, Human Rights are property rights that are allocated to the concerned individuals in the sense that they grant these individuals exclusive control over certain spheres of their life, like their private life, their religious beliefs, their political views and so on; these spheres are generally valued and therefore qualify as goods. These goods are not granted or allocated for economic reasons, nor are they suitable for transactions in the marketplace. Nevertheless, they are goods, the rights to control them need to be allocated, there are alternatives to their allocation (they could be allocated to states, for instance) and there are transactions of these rights or of aspects of them.[73] Human Rights are therefore not excluded from a fruitful analysis through a property rights' lens. If that holds true, it also applies to the right to migrate (or at least the right to not be sent back) for refugees, the group of migrants whose Human Rights are threatened in a particular way by the prosecution the endure in their country of origin.

The bundle of rights that is transferred by the Refugee Convention does not contain a right to legally migrate. Under the Refugee Convention, "(…) migrants must already have moved in order to become eligible for the right to move"[74]. But for refugees lawfully staying in a foreign country, it includes a bundle of rights that is granted independently of other individuals' rights, like the protection against refoulement,[75] freedom of internal movement and access to self-employment.[76] Other rights are defined in relation to the threshold of the rights of citizens or citizens of the most favoured nation,[77] such as access to labour.[78] People acquire the bundle of rights in question not because of their relationship with a signatory state but because they qualify as refugees. Theoretically, they can choose in which of these states to claim this bundle. The bundle of rights they acquire has considerable value. In principle

73 Trachtman, *The Economic Structure of International Law* (n 17) 16.

74 Jaya Ramji-Nogales, 'Moving Beyond the Refugee Law Paradigm' (2017) 111(1) American Journal of International Law 8-12, 9.

75 This refers to the non-refoulement as guaranteed by the Convention relating to the Status of Refugees 28 July 1951Art. 33 I. It only applies to refugees in the sense of the Convention. Hathaway (n 29) 304.

76 ibid 657.

77 ibid 155.

78 Which means a full access to the labour market in countries who grant free movement of persons to citizens of some other countries: Alice Edwards, 'Article 17-19 1951 Convention' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford commentaries on international law. Oxford University Press 2010), n. 40 on Art. 17.

they acquire it from each of the signatory states they manage to reach.[79] People get instantly wealthier – in the sense of the thickness of their bundle of rights – when they cross the thin red line from just being an involuntary migrant to being a refugee. Note that this holds true even when merely the non–refoulement of the Convention is respected and is independent of whether receiving countries grant refugees a legal status or socio-economic rights. In that case, the bundle of rights of refugees is attenuated – and arguably wrongfully attenuated –[80] but still bolder than the one of involuntary migrants without the guarantee of non-refoulement as it is set out in Art. 33 I of the Convention. Refugees, in this case, are still distinguished by the *right to remain*, which has still considerable value.

The example of the Refugee Convention points to a central distinction in treaties concerning migration: Those who benefit individuals with regard to their relation to a signatory state (most commonly as its citizens) and those who benefit people in relation to their characteristics (other than citizenship).

With Art. 35 and 36 and Art. II and III of the Protocol of 1967, both of which oblige the state parties to cooperate with the UNHCR and to provide it with the information necessary for the exercise of its function, the Convention may also serve as an example of a treaty by which states transfer some prerogatives to an international organization, albeit not property rights over migration in the above defined sense. These prerogatives are of a rather rudimentary nature when compared to the supervisory mechanism of Human Rights Treaties.[81]

4.4 Human Rights Treaties

Human Rights treaties are an example of treaties that only partially concern migration and only partially transfer bundles of rights concerning migration. In fact, there is evidence, that in some cases, signatory state actors underestimated the impact that the ratification of a Human Rights Treaty has on the state's ability to decide discre-

79 Anna Lübbe, 'Migrationspartnerschaften: Verweisung auf Transitstaaten ohne Rücksicht auf die Familieneinheit?' (2017) 37(1) Zeitschrift für Ausländerrecht und Ausländerpolitik 15-21, 17.

80 For arguments that point to the conclusion that the Convention ultimately demands to grant a legal status to refugees, see Hathaway (n 29) 658-59.

81 Marjoleine Zieck, 'Art. 35-36 Convention and Art. II-III Protocol 1967' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford commentaries on international law. Oxford University Press 2010) 1508 (n. 91 on Art. 35).

tionarily on the migration of certain groups of people.[82] This is true especially for the European Convention on Human Rights.[83]

Four aspects of bundles of rights in the context of migration are typically transferred from signatory states to individuals by Human Rights treaties: A right – under specific circumstances – to enter a country and to stay there in cases of family reunification, protected by a Right to Family Life. A right to remain in a country in cases where removal would amount to cruel or inhuman treatment or a violation of the Right to Family Life or Private Life, protection of discrimination and procedural rights.

By ratifying Human Rights Treaties, states agree to transfer substantial bundles of rights to individuals who fulfil specific conditions. If in some cases, fulfilling certain conditions leads to a claim to enter a country or to remain there, it also transfers property rights over migration to (potential) migrants. By ratifying a Human Rights Treaty that is equipped with some sort of enforcement mechanism (like most prominently the ECtHR), states also agree to forgo some authority over subsequent transactions that might be triggered by an expansive jurisprudence of this enforcement mechanism.[84] In Joel Trachtman's terminology, this prerogative to extend an individual right's protection by way of an evolving jurisprudence is the transfer of former state prerogatives (and thereby of property rights) to an international organization. Note, however, that the existence of an enforcement mechanism properly speaking, albeit important for the practical value of the property right, is not decisive for the question of whether the property right itself has been transacted or not. The right is also transacted by conventions whose mechanism of enforcement is rudimentary or non-binding, as long as the substantive rights guaranteed by the treaty in question are indeed rights (and not mere declarations of intent). The practical difference between property rights that are merely granted and property rights that are backed by an enforcement mechanism illustrates the importance of the procedural dimension within a bundle of rights, a dimension that is attenuated in the case of treaties without a proper mechanism of enforcement.

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82 Alexander Betts, 'The Refugee Regime and Issue-Linkage' in Rey Koslowski (ed), *Global Mobility Regimes* (Palgrave Macmillan 2011) 80.

83 Moria Paz, 'Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls' (2016) 34(1) Berkley Journal of International Law 1-43, 20.

84 Nathwani (n 72) 360.

4.5 Readmission agreements

Readmission agreements are markedly different from the previous examples since they do not create any new right to migrate or any new obligation to undo migration (by the country of origin). Readmission agreements (as long as they do not concern the readmission of third-country nationals) solely insist that states have an obligation to take back citizens that reside abroad unlawfully.[85]

The key to understand readmission agreements from a property rights perspective is the insight that the migration has some value, even if it is unlawful.[86] To use an analogy with property rights over land: squatting illegally on land owned by someone else has some immediate utility, even if only a fraction of the utility it would have for the same person if he/she could build on that land and be protected by law against interferences. Likewise, irregular migration has some utility to those who engage in it but only a fraction of what it could have as compared to migration that is protected by the law. Legally, it is the country of destination that still has the veto right over the concerned individual's migration to this state. But re-establishing the distribution of property rights as they are allocated by immigration law proves to be unpractical because it is too expensive (enforcement costs are prohibitively high). In cases in which irregular migrants are not deported, despite the fact that their irregular status prevails, it is the irregular migrants themselves that hold a factual veto over their deportation because it proves to be prohibitively expensive – either for practical or for political reasons – to deport them. When the costs of deportation would be lower than the utility that a state sees in re-establishing the legal allocation of property rights over migration, the deportation would be executed. As long as costs are prohibitively high, the factual veto remains and irregular migrants can stay until they decide to leave. The enforcement of land rights against squatters can be difficult and expensive in an environment of weak property rights protection and rapid urban growth. Likewise, it can be expensive and difficult to enforce immigration law against irregular migrants. The high transaction costs (enforcement costs in this case) have to do with the difficult cooperation with countries of origin or transit.

Part of the difficulty can be explained by the problem of the *contractibility of the desired behaviour*.[87] The desired behaviour of countries of origin and transit (to

85 Kay Hailbronner, 'Readmission Agreements and the Obligation on states under Public International Law to Readmit their Own and Foreign Nationals' (1997) 57 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1-49, 7.

86 Cassarino, 'Dealing with Unbalanced Reciprocities' (n 1) 6.

87 Posner and Sykes (n 24) 25; Sykes (n 18) 772.

cooperate in the identification and readmission of migrants) is hard to observe and difficult to enforce.[88] Unlike other domains of international cooperation, it is also difficult to replace the desired behaviour by tangible results or "observable outcome"[89] since the results (more readmissions) depends on the swift and reliable recognition of the citizenship of migrants (or their transit route through the territory of the contracting state) by the alleged country of origin (or transit), which is precisely the desired behaviour that is difficult to observe or to enforce.

In stipulating rules, procedures, and documents etc. for the identification, documentation and readmission of migrants, readmission agreements are supposed to lower transaction costs – not for a lawful transaction of property rights but for a re-establishment of the actual allocation of property rights over migration.[90]

However, this enforcement of the lawful allocation comes at a cost for those who benefit from the irregular use of this property right. These are first and foremost the irregular migrants themselves who legally have no means to migrate. But to a degree, it is also their countries of origin who might have an interest in irregular emigration, even if this interest is unarticulated. It might reduce unemployment and poverty at home and it might create some remittances[91] even if they remain just a tiny fraction of the remittances that could be generated by legal migration.[92] This might be one of the reasons why many countries of origin are reluctant to enter these kinds of agreements,[93] or to honour them. The establishment of the legal allocation of prop-

88 See Lixi (n 2) 11.

89 Sykes (n 18) 772.

90 Sergio Carrera, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights* (Springer Briefs in Law, Springer 2016) 63.

91 Trachtman, *The International Law of Economic Migration* (n 17) 54-57.

92 Cassarino, 'Informalising Readmission Agreements in the EU Neighbourhood' (n 2) 182.

93 Sergio Carrera and others, *EU-Morocco Cooperation on Readmission, Borders and Protection: A model to follow?* (CEPS paper in liberty and security in Europe no. 87, Centre for European Policy Studies 2016) 2; Carrera (n 94), 45-46; Natasja Reslow, 'EU "Mobility" Partnerships: An Initial Assessment of Implementation Dynamics' (2015) 3(2) Politics and Governance 117, 122; Cassarino, 'Dealing with Unbalanced Reciprocities' (n 1) 6; Martin Schieffer, 'Community Readmission Agreements with Third Countries– Objectives, Substance and Current state of Negotiations' (2003) 5(3) European Journal of Migration and Law 343-357, 343. For the example of a readmission agreement (that also encompassed the readmission of third country nationals) between Senegal and Switzerland which was not even submitted to the Senegalese Parliament for ratification due to intense internal hostility towards the treaty, see Antje Ellermann, 'The Limits of Unilateral Migration Control: Deportation and Inter-state Cooperation' (2008) 43(2) Government & Opposition 168-189, 168.

erty rights over migration is simply not in their best interest.[94] In addition, decision-makers in these countries might have understood the crucial role they play in the immigration policy of countries of destination for migrants and they might want to capitalize on their strategic position.[95]

A newer and more inclusive form of agreements with respect to avoiding and undoing irregular migration tries to overcome these shortfalls by offering countries of origin an incentive to enter and honour treaties that lower the transaction costs of readmission.

4.6 Non-standard agreements linked to readmission

Under the loose heading of non-standard agreements, I assemble the various different forms of agreements that deal with readmission but not exclusively so. The variety of these agreements – they differ not only in content but also in their form and formality – has increased, as have their number.[96] Since 2002, the EU systematically links trade and cooperation agreements to the condition of readmission clauses.[97] Their common feature is that they link readmission or other measures against irregular migration to some other issue, be it in the larger context of migration governance or not.[98] The extension of the scope of a given agreement is a technique to create a common basis of interests.[99] Issues within the greater context that are typically linked to readmission are visa liberalization schemes.[100] An example in which a mere

94 For the example of the interests of Morocco towards Spain, see Lixi (n 2) 5. One of the reasons why countries of origin or transit are reluctant to enter into such agreements is the risk such agreements pose for the relationship with neighbouring countries, whose citizens might as well be negatively affected by such an agreement, especially if it encompasses the readmission of third country nationals: Carrera and others (n 97) 6.

95 Cassarino, 'Dealing with Unbalanced Reciprocities' (n 1) 16.

96 ibid 11, 28.

97 Sandra Lavenex, 'Multilevelling EU External Governance: The Role of international organizations in the Diffusion of EU Migration Policies' (2016) 42(4) Journal of Ethnic and Migration Studies 554-570, 561.

98 Cassarino, 'Informalising Readmission Agreements in the EU Neighbourhood' (n 2) 185.

99 Lixi (n 2) 4; Marion Panizzon, 'Readmission Agreements of EU Member states: A Case for Subsidiarity or Dualism? ' (2012) 31(4) Refugee Survey Quaterly 101-133, 121; Jennifer Gordon, 'People are not Bananas: How Immigration Differs from Trade' (2010) 104(3) Northwestern Universtiy Law Review 1109-1145, 1139; Trachtman, *The International Law of Economic Migration* (n 17) 284; Sykes (n 18) 769; Hollifield (n 62) 235; Betts, 'The Refugee Regime and Issue-Linkage' (n 86) 75.

100 The concept of linking refugee-burden-sharing with a travel regime has a tradition, going back to the 80s, ibid 86.

visa facilitation helped to convince the weaker of the two parties, is the partnership for mobility between Cape Verde and the EU.[101] From the perspective of the EU, as one party in readmission agreements, concessions on visa issues are only rarely an option, especially when dealing with countries with which readmission agreements are most interesting to conclude – source countries of irregular migration.[102]

In rarer cases, these partnerships offer some possibility for legal labour migration. Examples are the agreements of France and Spain with African countries that list professions for which there is a shortage of domestic labour and for which temporary permissions can be issued to citizens of partner states.[103] Issues outside of the context of migration are things like investment- or development agreements.[104]

In the language of property rights, these agreements are characterized by the fact that they – unlike traditional readmission agreements – actually *do transfer* some property rights. They either transact an entitlement to some payment or engagement by the receiving country to the country of origin or they transact rights to potential migrants who fulfil certain conditions. But they do so merely in exchange for the reduction of the transaction costs of the reestablishment of the initial legal allocation of the property right over migration. States trade some of their authority in one field to regain part of their authority in another field – the field of irregular migration.[105]

4.7 Visa agreements

The description of visa agreements in property rights terms relies heavily on the idea of a bundle of rights. The filaments that are traded in visa agreements are just a comparatively tiny aspect of the much larger bundle that might usefully be described as the bundle that contains the property right over someone's migration. One rather tiny

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101 José Pina-Delgado, 'The Current Scheme to Manage Migration between Europe and Cape Verde: Promoter of Development or Tool for Border Closure? ' (2013) 19 Population, Space and Place 404-414, 406.

102 Schieffer (n 97) 356.

103 Panizzon, 'Readmission Agreements of EU Member states: A Case for Subsidiarity or Dualism? ' (n 103) 120; Marion Panizzon, 'Bilateral Labour Agreements and the GATS: Sharing Responsibility for Managing of Migration and MFN Trade Reciprocity' (2010) Compas Working Paper No 77 14-16. For the agreement between Spain and Morocco, see Lixi (n 2) 8.

104 Schieffer (n 97) 356.

105 For an early warning regarding the dangers of such an issue-linkage for the capacity to control migration, see Hailbronner (n 89) 46.

aspect of the bundle of rights over migration is the possibility to travel to a country without having to obtain a confirmation that the conditions of entry are fulfilled beforehand. It is normally just this tiny aspect of the bundle that is traded in visa agreements. But given the difficulty to get a visa to an OECD-country for many citizens of poorer countries, and given the relatively high value that business- and tourist trips and family visits have for many people, merely the possibility to enter a country without previous visa formalities and to remain there for a visit that usually must not exceed some months, is of considerable value.[106] The importance of the perspective of visa liberalization in the non-standard-agreements described above corroborates this high value.[107]

4.8 Dublin Associations

Dublin associations, treaties which link the four EFTA Member States to the Dublin-System,[108] is very different in the form of property rights transferred by it. It is distinct from most other types of treaties described so far, due to the degree by which migrants themselves are not beneficiaries of the deal. Nevertheless, their property rights situation changes. Their rights as asylum seekers are diminished to the extent that they have access to only one asylum-procedure within the Schengen area, and they are no longer free to choose the country within that area, in which they would like to seek asylum as soon as they set foot into the Schengen area.

But that is not the bulk of what is traded by an association to the Dublin Regulation[109]. The more important aspect is that states exchange their former prerogative (and hence the property right) to refuse – under certain conditions – to readmit non-citizens. The most important of these conditions is that a third country national has

106 For the Example of the value of visa facilitation by the Schengen area to Cape Verde, see Pina-Delgado (n 105) 407.

107 Matthias Czaika, Hein de Haas and María Villares-Varela, 'The Global Evolution of Travel Visa Regimes: An Analysis based on the DEMIG VISA database' (2017) International Migration Institute Working Paper Series 11.

108 Astrid Epiney and Andrea Egbuna-Joss, 'Schengen Border Codes Regulation (EC) No 562/2006' in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law: A Commentary* (Second edition. C.H. Beck; Hart 2016), 60. The EU Commission has plans to negotiate migration partnerships with more third countries, particularly countries of transit, with the goal to allocate the responsibility to treat asylum claims to these countries. See Lübbe (n 83) 15.

109 Regulation (EU) No 604/2013 26 June 2013 (European Parliament and Council of the European Union).

entered the Schengen-area irregularly via their border (Art. 13 I). In the absence of a treaty, this does not create an obligation to readmit this person. It is mainly this property right that is traded away to the state that can now send asylum seekers back by associating to the Dublin system.[110] In exchange, Member States get the right to send back asylum seekers to other Member States that fulfil the same conditions (Art. 3 I). They acquire the former right to block readmission of other states; at least in certain cases. On paper, the exchange is perfectly symmetrical. Every Member State gets from the other states what it gives away in exchange. Still, the bundles that are exchanged are very different in their value because some states are far more exposed geographically and their former right to block the readmission of transit migrants had a far greater value than for countries that are rarely the first country within the Schengen area in which asylum seekers set foot.

4.9 Free trade agreements with mode IV provisions

Migration issues do not typically stand in the centre of free trade agreements. Some of them, especially regional ones, grant some access to the labour market.[111] But many agreements, including the GATS, exclude the regulation of labor market access explicitly from their scope.[112] If they concern human mobility at all, it is typically restricted to service providers. However, the very moment a free trade agreement guarantees access to a contracting state for service providers in a way that it becomes impossible for the state to exclude such a service provider (eg on the grounds that quotas are exhausted), a bundle of bundles of property rights is traded. It might be a tiny bundle since the conditions for guaranteed access to a country are normally quite high for service providers.[113] It is still a transfer of a previously sovereign pre-

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110 There are other transactions of prerogatives of course. E.g. the prerogatives to prevent the readmission of Asylum-Seekers who have family members in the respective Member State (Art. 9 and Art 19) or to whom the Member State issued a visa (Art. 12) are also bartered.

111 Julia Nielson, 'Labor Mobility in Regional Trade Agreements' in Aaditya Mattoo and Antonia Carzaniga (eds), *Moving People to Deliver Services* (Trade and Development. World Bank and Oxford University Press 2003) 93 and 101-106. For an overview, see Charlotte Sieber-Gasser, 'Variationen der regionalen Personenfreizügigkeit: Die schrittweise Öffnung des Arbeitsmarktes' (2013) Jusletter.

112 For post-NAFTA US FTAs see Demetrios G Papademetriou, 'The Shifting Expectations of Free Trade and Migration' (2004) <http://carnegieendowment.org/pdf/files/nafta_report_chaptertwo.pdf> accessed 23 February 2018 40.

113 Nielson (n 115) 97.

rogative from a state to individual service providers. Free trade agreements are also an interesting case in point on the level of the individual property right. The bundle of rights traded to each individual that fulfils the conditions is rather restricted. FTAs are the typical case in which the property right transferred is restricted in its market dimension. It does grant access to a country (for a limited time usually) but not to its labour market, only to its service market.

In sum, this overview shows that the different forms of treaties concerning fully or partly the international governance of migration can be described – all of them except treaties that are strictly concerned with the readmission of nationals irregularly staying in another state party to the treaty – as a set of rules for the transaction of bundles of property rights. The bundles within the bundle vary greatly; some are rather thick, like in the case of the free movement of persons, and some are very thin, like in the case of visa liberalization. For some, enabling or preventing migration is the actual goal of the transaction, for some, this transaction has an auxiliary function like the protection of Human Rights or enabling trade in services.

An interesting case in point (especially regarding the topic of internalization to which I turn next) are treaties that transact property rights in just one direction in order to enforce property rights as they were previously allocated.

5. Transaction of property rights over migration as internalization

The property rights approach to treaties concerning migration not only allows us to better compare them and their distributional effects. It also enables us to clarify a concept that is far less understood in international migration law than in other fields of international cooperation: external effects of migration governance as well as of migration.

In international environmental law, for instance, the impacts on one country's environment by the actions of another country is more intuitively understood as an external effect than is the case with the impact on the life-opportunities of citizens of foreign countries by immigration law.[114] The concept is also more often referred to in international trade law than in immigration law.

In the few examples, in which the problem of external effects of migration policies has been touched upon, there is a certain confusion regarding what good is exactly at

114 See e.g. Dunoff and Trachtman (n 17) 14.

stake. Is it the "control over migration" (the property right over somebodies migration to a given country) or is it migration governance,[115] i.e. a (common) organization of two or multiple states to govern migration that required some costs to set up and to maintain?[116] The property rights approach helps to clarify the concept of external effects in this context. The following section addresses the "control over migration", and the external effects of this control.

5.1 The general coasian argument applied in relations regarding migration

It was shown in section 2.1 that whenever an alternative allocation of property rights creates smaller over-all external effects than the current allocation, a space of negotiations for mutually beneficial transactions of property rights opens up.

What are external effects in the context of the international regulation of migration? Probably the most important external effect linked to property rights over migration, and the one that most readily lends itself to an economic analysis is the effect of access to markets, or – in the reversed allocation of property rights – the restriction of market access. Being able to enter a market and to compete, imposes external effects (some of which are usually negative) on those who are already in the market. Potential receiving states, being able to lock out individuals from a given market, impose a (negative) external effect on those locked out. This specific (and most common) allocation of property rights over migration (that entails the right to impose the external effect of market exclusion) is a means of non-fiscal redistribution from those who would profit from the possibility to migrate to those who profit from the ability to prevent migration.[117] Since both groups are typically represented by a state[118] that pays a price – politically or fiscally – if it is unable to internalize this effect, these states are concerned by secondary effects regarding market access and will seek to negotiate.

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115 Which is what Hollifield seems to have in mind: Hollifield (n 62) 229.

116 An example of this confusion seems to be Christopher Rudolph, 'Prospects and Prescriptions for a Global Mobility Regime: Five Lessons from the WTO' in Rey Koslowski (ed), *Global Mobility Regimes* (Palgrave Macmillan 2011) 281. At least unclear in this respect is Alexander Betts, 'Conclusion' in Alexander Betts (ed), *Global Migration Governance* (Oxford University Press 2011) 312-13.

117 Howard F Chang, 'The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory' (2008) 41 Cornell International Law Journal 1-25, 11.

118 Trachtman, *The Economic Structure of International Law* (n 17) 9.

Consider the situation in which state A or a group of states A finds that the external effect imposed on its citizen by state B, by excluding them from its attractive labour market,[119] is greater than what it would be willing to pay state B to open its labour market. Consider that state B agrees on the price, This can be – say – a partial opening of state A's market of goods and services. A treaty can then be established that transacts property rights. It is now the citizens of state A that can impose an external effect on state B and its citizens, by competing with them on the labour market of B. But this external effect is smaller than the one that was previously imposed on the citizens of state A by way of excluding them from the labour market B. Otherwise, absent a situation of outright coercion, irrational behaviour by one of the state parties or critical influence of minority interests in one of the states,[120] the two countries would not have concluded a treaty. The overall sum of negative external effects is reduced. Part of the external effects have been internalized.

While the agents in question in the context of international immigration law are mainly states or Supra-State Organizations or international organizations, the external effects they might want to internalize through negotiations and reallocations of property rights are often effects borne first and foremost by individuals for whom the involved states might have a responsibility to defend their interests (and the political will to do so or not).

5.2 A trend towards internalization?

Is there a trend towards internalization in international migration law? Internalization means that states or individuals have to take the external effects their behaviour regarding migration is causing into account, at least partly. Internalization can be obtained by refraining from causing external effects, or by getting compensation if they are positive. The ranger is compensated by the farmer for keeping the fence between the two properties intact, or he quits this activity, thereby reducing his costs. Likewise, a state that takes in more refugees than its share (according to some shar-

119 For the observation that the restriction of market-access causes an external effect, see ibid 11.

120 Note that it can even be rational for a government to conclude a treaty that overall does more damage than good to the country overall, if those who gain from its conclusion have crucial leverage: Xinyuan Dai, 'International Institutions and National Policies' (2007) <https://www.princeton.edu/~pcglobal/conferences/institutions/papers/dai_T500.pdf> accessed 16 April 2018 85. See also Posner and Sykes (n 24) 265; Trachtman, *The Economic Structure of International Law* (n 17) 148.

ing mechanism) can either get compensation or refrain from providing this positive external effect. Second, internalization can be obtained by refraining from causing external effects, or compensate others if they are negative. The ranger takes costly measures (like erecting a fence) to prevent his cattle from straying on the fields of the farmer or, if he does not, he must compensate the farmer for the damage done (or for the costs of a fence).

Likewise, a state that excludes would-be migrants from its attractive labour market can internalize this negative external effect either by refraining from further exclusion or by compensating those excluded. If it were the migrants who have to internalize – in the reverse allocation of property rights – they could do so, either by refraining from migrating or by paying the receiving country some sort of compensation, like e.g. a discriminatory tax.

It seems that the increasing density of treaties regarding migration should contribute to such an internalization.[121] Otherwise, states would enter treaties against their interests (or just in the interest of a powerful minority) and would end up suffering more negative external effects or forgoing more of the positive effects.[122] An increased internalization of external effects is therefore what we should be observing as the result of a growing density of treaties. Having an idea of the bundles of rights that are exchanged in international treaties regarding migration, it should be possible to substantiate this hypothesis.

5.3 Examples for internalizations in international treaties regarding migration

Treaties on the free movement of persons seem to be the most obvious example of an internalization of the external effects of migration governance. The external effect of excluding people from a labour- and service market is more or less entirely internalized. Member States have to refrain from causing this external effect. Of course, the new situation creates its own external effects. These effects may be imposed on inhabitants of the regions that are most affected by immigration and those most affected by *emigration*. But it is very likely that the external effects are smaller than in the status quo ante.

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121 Sykes (n 18) 768.

122 Which of course is a possibility to keep in mind. The acknowledgment of that possibility however does complement rather than replace the presumption of a rational behaviour of states: van Aaken and Broude (n 10), 255, 269; van Aaken (n 10) 449. It may also happen that it is rational for governments to enter a treaty that is over all not beneficial to the country, if it is beneficial to a well-organized interest-group: Dai (n 124) 85.

Actual examples of free movement treaties in Europe are achieved by issue-linkage with other treaties on market access, etc., which indicates that states had to broaden the scope of the negotiation in order to find a common basis of interest.[123] The so-called Guillotine-clause in the Free Movement of Persons Treaty between Switzerland and the EU[124] is an example. It states that not only the treaty on free movement but six other treaties will be terminated in the case of withdrawal from the treaty on free movement (Art. 25 IV). The EU made it clear to Switzerland (who had no inclination to open up its labour market to EU-citizens and their family members) that only if linked to free movement of persons, there will be a common basis of interest regarding partial access to the single market.[125] The external effects of blocking access to the labour market are internalized, in the sense that they have to be taken into account by the acting country, at least so far as it would suffer these costs itself by losing partial access to the single market. If the conceding country would have valued the possibility to restrict migration higher than the value of market access, it would not have entered the treaty. Hence, the treaty led overall to a reduction of external effects.

Treaties on the free movement of persons seem to lead to the outcome that maximizes the preferences of individuals. The right to control someone's migration has, in all likeliness, a greater value to the person whose migration is at stake than to any other agent. It is therefore likely that the property right over their own migration would generally end up in their possession if transactions of the property right were permitted and costless.[126] Treaties on the free movement of persons simulate this outcome most accurately. They allocate the property right to those agents who impose – in general – smaller external effects on others, than in all the alternative allocations.[127]

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123 Eytan Meyers, 'Multilateral Cooperation in International Labor Migration' <https://escholarship.org/uc/item/4zv454f5> accessed 16 April 2018, 13.

124 Accord entre la Confédération suisse, d'une part, et la Communauté européenne et ses Etats membres, d'autre part, sur la libre circulation des personnes 21 June 1999

125 See the report of the Swiss Government on the so-called Bilateral I: Schweizerische Eidgenossenschaft, 'Botschaft zur Genehmigung der sektoriellen Abkommen zwischen der Schweiz und der EG' (23 June 1999) BBl 1999 6128 <https://www.admin.ch/opc/de/federal-gazette/1999/6128.pdf> accessed 16 April 2018, 6156 and 6309.

126 Schlegel, *Der Entscheid über Migration als Verfügungsrecht* (n 3), 167.

127 The argument here is twofold. It states first that potential migrants generally value the property right over their own migration to a given place higher than anybody else (also than any potential receiving state) because the risk of being stuck in a state with a hopeless political and economic environment for them is greater than the risk for a receiving society to be overwhelmed by immigration and because they alone have the

They, therefore, do the most advanced job in internalizing external effects of migration governance. Again, to minimize external effects does not imply that they have been eliminated altogether nor that the new situation does not create new external effects. It merely claims that the overall sum of external effects has been reduced.

Treaties concerning the protection of refugees and the protection of Human Rights go much less far in internalizing the external effects of migration governance. They limit themselves to allocating a property right over migration (or at least to remain in a country), to only those individuals who would be exposed to prosecution, cruelty, degrading or inhuman treatment in the case of deportation, or where the impossibility to migrate would separate individuals permanently from their families. Blocking migration would in these cases thus cause particularly strong negative external effects. At least those are internalized. Again, these are effects that are felt by individuals, rather than states.

Since the Dublin regime helps to avoid *refugees in orbit*, it avoids similar external effects – a lack of protection for those most in need of it. This is true at least for the comparatively rare cases of people who would otherwise end up as refugees in orbit. What the Dublin regime is not very good at, however, is the internalization of *positive external effects*. The geographically exposed countries that have to take responsibility for a disproportionally high share of asylum procedures provide a service to all the other Member States. But they do not get anything in return, at least not within the Dublin regime (here again, issue-linkage, with all the different issues regulated in European law help to explain, why these countries are willing to remain part of that system).[128] This lack of the internalization of the positive effects is one of the keys to understanding the malfunctioning of the Dublin-System. The EU-Commission's proposal to make those countries that temporarily receive fewer asylum seekers than their proportional quota, pay a quarter of a Million Euros as a "solidarity contribu-

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incentives and the information to invest in the value of the property right. In a world without transaction costs, they could therefore generally obtain this property right. Second, this implies that the negative external effects that migrants impose on receiving countries by their immigration are in general smaller than the negative external effects that potential receiving countries impose on potential migrants by preventing their immigration. Otherwise the receiving states would be willing to pay a larger sum for the property right over this particular migration (to avoid the external effect imposed by it) which is why they would have obtained it in a world without transaction costs.

128 Meyers (n 131) 54.

tion" to the state who is examining the application instead,[129] is a suggestion on how to internalize the positive effect that other states provide. It is also a hint at how big the Commission thinks this effect is.

The most interesting case in point to substantiate the hypothesis that treaties regarding migration tend to internalize the external effects of migration governance are non-standard agreements linked to readmission. The point can best be made by starting with standard readmission agreements. These have the goal to ensure the possibility to further impose the negative external effects that traditional migration governance causes, on both migrants and their country of origin. Put differently: they ensure that would-be migrants cannot impose the external effects that their migration might have on receiving societies. This is why their basis for a common interest is limited. Often, negotiation or ratification or implementation fail.[130] Issue-linkage, the concept of extending the scope of the treaty, allows to sweeten it for the other party and therefore to broaden the possible basis of interest.[131] The linked issue allows the party who accepts the implementation of migration restrictions to gain something in turn. This is a compensation for an external effect it *continues to accept*. Reciprocity of interests, a characteristic that is often lacking in relations regarding migration, as opposed to relations regarding trade,[132] is achieved in these cases in that one of the two states promises some additional good, while the other merely promises to commit what it was obliged to do at the outset but factually could not be forced to do.

From a point of view of state interests, these sort of agreements, will often seem unbalanced with respect to the countries of origin. It seems that countries of origin are lured into agreements, from which they apparently cannot gain any true benefit.[133] But from a point of view of the property rights that are actually transferred, these agreements seem to be asymmetrical, and operate to the detriment of the potential receiving country. This is the case because receiving countries have to transfer some property rights – meagre as they may be – for the simple aim of enforcing the prop-

129 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)' (Brussels 4 May 2016) COM(2016) 270 final, Art. 37 III.

130 See the examples given in Section 4.5 and 4.6.

131 Panizzon, 'Readmission Agreements of EU Member States: A Case for Subsidiarity or Dualism? ' (n 103) 121; Hatton (n 52) 368.

132 Gordon (n 103) 1133; Hatton (n 52) 366; Meyers (n 131) 8.

133 Lixi (n 2) 4; Cassarino, 'Dealing with Unbalanced Reciprocities' (n 1) 28.

erty right over migration as it is legally already allocated to them – the right to control and undo immigration from the contracting state.

This is not in contradiction with the observation that interests are unbalanced in these agreements. Interests are highly unbalanced in the *initial allocation* of the property rights over migration, which was established by and serves the interests of typical receiving countries. It is highly unlikely that the property right over migration is most valued by the receiving countries (who control it initially), and therefore highly unlikely that it would have been allocated to receiving countries (rather than to migrants or their countries of origin), if either had had a say in the original allocation. Since this asymmetry of interests is only superficially addressed by non-standard forms of readmission agreements, they do not establish a situation in which interests are truly balanced. But they cause some shift of property rights from the stronger to the weaker party,[134] and thereby some internalization of the detrimental effects of the restriction of migrations to would-be migrants and their societies of origin. In the rare cases in which these agreements open migration channels to migrants, and in cases, in which they grant some procedural rights, they even cause a shift of some property rights from receiving states to migrants. In other words, they rely on carrots rather than sticks.[135]

Sticks, in this context, are e.g. the withdrawal of advantages toward a country of origin, like development aid. But sticks seem to have failed; otherwise, the carrot option would hardly have been considered. The problem with carrots is that they create an incentive to look for bigger carrots. It might not only lead to more countries creating a negative external effect (in this case by encouraging or merely enabling irregular emigration), in order to gain a carrot in exchange for refraining from producing the external effect, those countries who already get compensation for their cooperation have an incentive to enlargen the external effect in order to press for a bigger carrot.[136] Unlike in the case of environmental pollution (in which this observation has first been made), in the context of migration, the carrot is handed out merely for honouring an international obligation that pre-existed.[137]

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134 Hollifield (n 62) 235.

135 For the tendency of the EU to rely on a carrot-and-stick-approach when negotiating migration with third states, see Pina-Delgado (n 105) 406.

136 Howard F Chang, 'An Economic Analysis of Trade Measures to Protect the Global Environment' (1995) 83 The Georgetown Law Journal 2131-2213, 2154-2156. For the example of Tunisia, applying this strategy against Italy, see Lixi (n 2) 11, 14.

137 Stefan Schlegel and Gabriela Medici, 'Partnerschaftliche Instrumente in der schweizerischen Migrationsaußenpolitik' (2014) 34(9) Zeitschrift für Ausländerrecht

These agreements might therefore well be the beginning of a process of empowerment of countries of origin, or the symptom of their growing leverage.[138] The downside of this is that it is very rarely the (potential) migrants who are compensated for the opportunities they sacrifice but their countries of origin. Such compensations for external effects that are mainly endured by citizens rather than states are therefore easier to accept for governments that do not risk to pay a political prize for such agreements. Generally, these would be governments that are little responsive to the demands of their citizens. Countries of origin do not only suffer the smaller external effect, it is also highly questionable whether the compensation they receive finds its way to the citizens that bear the negative external effect. The internalization of the external effect is riddled with a principal-agent problem, in which potential migrants are the principals and governments of their countries of origin the agents. Still, every form of compensation for the prevention of migration enhances its price and therefore helps to bring down the volume of migration prevention closer to an overall optimum.[139]

If this trend is to continue, less and less migration can be prevented if its added value (for those who benefit) outweighs its costs (for those who lose). On the other hand, it continues to be unlikely that those countries who create positive external effects by offering protection to refugees and strive for better Human Rights protection will be able to internalize this positive effect to an increasing degree and will, therefore, have better incentives to provide this protection.

6. Conclusion

The property rights approach not only allows us to describe a vast variety of treaties regarding migration in a common frame of analysis, and to describe how these treaties redistribute the valuable control over individual's mobility. It also helps to

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und Ausländerpolitik 316-324, 321; Hailbronner (n 89) 46.

138 Cassarino, 'Dealing with Unbalanced Reciprocities' (n 1) 17.

139 The overall optimum here means the aggregated optimum for all those affected by the outcome of the initial allocation and/or the subsequent transactions. The criterion of overall optimum would become meaningless if it allowed excluding some of the concerned agents from the assessment of its effects. The overall optimum therefore has to take into account the interests not just of citizens of a given country but also of potential immigrants and other affected agents.

detect a trend towards internalization of the external effects created by the initial allocation of property rights over migration. Interestingly, this trend towards an increasing internalization seems also to be at work where the production of negative external effects is perfectly legal under international law – in the context of exclusion of would-be migrants without any entitlement of admission. The difficulty in enforcing the legal allocation of property rights (and to thereby creating strong negative external effects) leads to agreements, by which states agree to pay some sort of price in exchange for cooperation in migration governance. This leads to an increasing internalization. Non-standard readmission agreements are not the only examples, where this is observable. Free movement of persons agreements by which interesting labour markets are gradually unlocked in exchange for access to markets in goods and services are another example.

In sum, a property rights approach to international treaties regarding migration, tells quite a surprising story of the development of international migration governance: states – once agents that delineated property rights over migration and allocated them to themselves – have to transact more and more of these valuable assets. Not just towards contracting states and international organizations but even more so to individual migrants. The bundle of rights of (potential) migrants has become bolder since property rights over migration were first defined, and the prevention of migration by receiving states gradually becomes more costly. This is not in contradiction with the observation of newly emerging barriers against migration and ever more sophisticated technology to manage migration. The pressure to internalize the cost of preventing migration works selectively.[140] While highly qualified migrants from rich countries can rely on the bold legal protection of their market access abroad, for the most precarious groups of migrants, this trend is slow to have a visible effect. But non-standard agreements are examples to show that the restriction and reversal even of irregular migration increasingly comes at a price that has to be paid to the countries of origin. If the trend is to continue that migration governance relies more and more on the cooperation with countries of origin, it is also likely that the trend towards internalization of the costs of the prevention of migration is to continue. In the long run, the agents (countries of origin), will likely have to share part of the compensation with even the most marginalized of the principals. One way of doing so is to press for legal paths for migration.

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140 Hein de Haas, Katharina Natter and Simona Vezzoli, 'Growing Restrictiveness or Changing Selection? The Nature and Evolution of Migration Policies' (2016) International Migration Review 1-44, 30.

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