

## RESEARCH ARTICLE

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

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A growing body of literature has recently discussed the access of migrants to property rights over assets as a requirement for the protection of their human rights and basic interests. Little attention has been paid, however, to the fact that the right to decide over an individual's migration 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 such property rights. This approach embarks to compare the distributional effects of different treaties regarding migration. It also aims to demonstrate that such treaties often do not limit themselves to transactions of property rights among States, but are capable of transferring property rights from States to individuals. A property rights approach highlights that the exclusion of would-be immigrants from would-be receiving countries means to impose a (negative) external effect on them and their country of origin. A review of different types of treaties demonstrates the tendency in all of these treaties to internalise 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 internalised to a growing degree.

**Keywords:** International Migration Governance; International Treaties; Theory of Property Rights; Internalisation; Non-standard agreements

## I. Introduction

The claim of this paper is that the common characteristic of the growing number<sup>1</sup> and the growing variety<sup>2</sup> 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 Organisations or the rights of individuals. They are exchanged for other prerogatives, entitlements, rights or money. The author will summarise 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.

Because the author intends to restrict the analysis here on the applicability of property rights theory to international treaties, the discussion will be limited to a very brief definition of the term property rights and the nature of the property right over migration:<sup>3</sup> as such, property rights are defined as the *socially recognised exclusive control over a good*. The property right over migration is defined as the socially (here also: legally) recognised exclusive control over the migration of a given person to a given State (see section

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

<sup>2</sup> 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) 3 <<https://www.migrationpolicy.org/research/beyond-transactional-deals-building-lasting-migration-partnerships-mediterranean>> accessed 19 July 2018.

<sup>3</sup> For an extended discussion, see 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); Nutshell version: 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](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.

2 for a more extensive definition). Analysing treaties regarding migration as a transaction of such property rights (or some partial bundle of them) will prove helpful – on a conceptual level – to address the following research questions:

- From which agent to another is value transferred by treaties regarding migration?
- Who is the beneficiary, and to what extent do they benefit 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?
- The emphasis on the observation that these treaties *transfer* 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 the bundles of rights of each involved party. This entails the question of how those bundles might be restructured to the potential benefit of all the 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 (hereinafter referred to as “EU”) to a third country. The author will, however, limit the scope of the question to the agreements within the EU. 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.

The economic methodology that shapes the reasoning of what follows is often associated with a functionalist and reductionist understanding, which is geared to obtain efficiency. It is not, however, incompatible with a pluralistic approach. This is so because the methodology does not entail a presupposition of the preferences of the involved agents. These might be disordered or even contradictory and the maximisation of these preferences can be considered very different from what colloquially is under the concept of efficiency.<sup>4</sup> If inserted into a political process, these conflicting preferences might, therefore, very well end result up in complex, multi-layered and conflicting objectives as they are reflected in migration law and in treaties regarding migration.<sup>5</sup> It is then with respect to these objectives that the effects of migration governance are perceived as negative or positive external effects and with respect to these objectives that States are expected to enter into treaties in order to internalise these effects.

The paper is organised 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 of property rights in the migration literature and specifies in what respect the approach that will be taken in this article differs. 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 transferred 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 internalisation of externalities that is obtained by the transaction of property rights.

## II. The Theory of Property Rights

The term property right is defined as the *socially recognised exclusive control over a good*.<sup>6</sup> The notion of “good” is broad. Whatever is valued by agents for its utility, is a good within the meaning of this

<sup>4</sup> 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 maximised, not the rationality of the decision making as such. It, however, still leaves open the possibility that States show patterns of irrational behaviour under specific circumstances.

<sup>5</sup> There is limited 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 4) 1122.

<sup>6</sup> 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’

definition.<sup>7</sup> 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.<sup>8</sup> Mere aspects of larger goods, such as the right to use a good for a given time or to use it in some specific way, can also be valuable and, therefore, qualify as a good.<sup>9</sup> Every exclusively controlled aspect of a good – tiny or temporary as this control may be – qualifies as a property right under this definition. “Socially recognised” encompasses the exclusive control over a good that is *legally* recognised (not merely protected by social convention) and backed by the legal order.

Both, the *prerogatives* of States or International Organisations 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, 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.<sup>10</sup> 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*’.<sup>11</sup> Nothing, in principle, prevents us to extend this insight to the analysis of transactions within hierarchically organised systems like firms or States (as opposed to horizontal transactions among stakeholders on the market) or between subjects of international law<sup>12</sup> (in a sort of international marketplace).<sup>13</sup>

### A. 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 *vis-à-vis* others. 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 of 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

(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.

<sup>7</sup> Schäfer and Ott (n 6) 69.

<sup>8</sup> *ibid.* 589.

<sup>9</sup> Furubotn and Pejovich (n 6) 1140.

<sup>10</sup> Richter and Furubotn (n 6) 91.

<sup>11</sup> Demsetz (n 6) 347. See also Furubotn and Pejovich (n 6) 1139.

<sup>12</sup> 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 Organisations like the WTO and supranational Organisations 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.

<sup>13</sup> *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 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 7) 174; Alan O Sykes, ‘International Law’ in A. M Polinsky and Steven Shavell (eds), *Handbook of Law and Economics* (North-Holland 2007) 771.

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 free 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 State A imposes an external effect on A and its citizens.<sup>14</sup> From a wealth-maximisation point of view, the interesting question is how to avoid the more serious of the two external effects.<sup>15</sup>

One of the functions of the transaction of property rights is to internalise external effects to a greater degree.<sup>16</sup> The possibility of negotiations and transactions is the driver of this process of internalisation. 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.<sup>17</sup> This is true for transactions among privates on the marketplace, as well as transactions among States or from States to individuals in international negotiations.<sup>18</sup>

### **B. 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.<sup>19</sup> The control over this access – which embodies the possibility to prevent access – is a good of considerable value.<sup>20</sup> 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 in either case. 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 to a given State. Immigration law also has to define the rules by which these property rights can be transferred from one agent to another and how they are enforced. This description also applies to international migration law that regulates these questions among States, sometimes with the involvement of International Organisations.

### **C. Migration and Property Rights in the Literature**

The way to apply the theory of property rights on the realm of immigration law as described above 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 an individual's migration to a given place as the relevant property right in a systematic manner is practically inexistent.<sup>21</sup> Roughly, the literature at the overlap between migration studies and the theory of property rights can be subdivided into three main fields:

- 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.<sup>22</sup> This literature finds its equivalent in

<sup>14</sup> See for the example of the effect imposed on Tunisia by Italy: Lixi (n 2) 9.

<sup>15</sup> Coase (n 6) 2.

<sup>16</sup> Demsetz (n 6) 348.

<sup>17</sup> *ibid* 348. For the context of international law, see Trachtman, *The Economic Structure of International Law* (n 12) 28, 33.

<sup>18</sup> Eric A Posner and A. O Sykes, *Economic Foundations of International Law* (Harvard University Press 2012) 63; Sykes (n 13) 768, Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press 2005) 88.

<sup>19</sup> For the 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.

<sup>20</sup> See for the US-Context Alessandra Casella and Adam B. Cox, 'A Property Rights Approach to Temporary Work Visas' (2018) 47(1) *The Journal of Legal Studies* 195–227.

<sup>21</sup> See the extended overview over the literature in Schlegel, *Der Entscheid über Migration als Verfügungsrecht* (n 3), 80–88.

<sup>22</sup> 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 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 this protection creates for knowledge workers.

immigration law in the discussion which property rights over movable and immovable things have to be granted to given groups of migrants in accordance with national law or international treaties like the Refugee Convention (that regulates access to movable and immovable property in its Art. 13).<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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 – in this view – ultimately derivatives of property rights to land. 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 literature in law, specifically in law and economics that analogises implicitly<sup>26</sup> (rarely explicitly)<sup>27</sup> the property right over migration (or a partial bundle of rights thereof or citizenship) to other property rights over goods that are handed out by the State (such as licences or franchises). Most explicitly, this is done by Eleanor Brown who describes visas (to the US) as a form of “new property”,<sup>28</sup> in the sense of Charles Reich’s seminal article.<sup>29</sup> A recent example also refers to visas to the US as property rights, and characterises them as bundles of right, and brings into play the possibility of unbundling those bundles and applying different transaction rules at different times in order to obtain certain policy goals.<sup>30</sup> It also implies that the admission of migrants creates external effects on the labour market that have to be taken into account.<sup>31</sup> 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.<sup>32</sup> This implies that the non-allocation of

<sup>23</sup> See Ezekiel Simeringham 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* (CUP 2005) 517–27.

<sup>24</sup> Christopher H Wellman, ‘Immigration and Freedom of Association’ (2008) 119(1) *Ethics* 109–141, 130–137. 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.

<sup>25</sup> 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*.

<sup>26</sup> 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.

<sup>27</sup> 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 transfer 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.

<sup>28</sup> Eleanor M L Brown, ‘Visa as Property, Visa as Collateral’ (2011) 64(4) *Vanderbilt Law Review* 1047–1105, 1048.

<sup>29</sup> Charles A Reich, ‘The New Property’ (1964) 73(5) *The Yale Law Journal* 733–787.

<sup>30</sup> Casella and Cox (n 20) 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 individualised 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 individual State from the start. In the account of Casella and Cox it becomes personalised only upon allocation: *ibid* 15. What is described here as the personalisation of the property right is described in my approach as the transaction of a property right from a State to an individual.

<sup>31</sup> *ibid* 27.

<sup>32</sup> 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 differently in that approach than 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.

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 internalise with a citizenship levy.<sup>33</sup> This approach has later been taken up in development economics. The wealth enhancing effect of this bundle of rights has been termed the “citizenship rent” or a “citizenship premium”.<sup>34</sup> 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,<sup>35</sup> and analyses displacement in its relationship to property rights over natural resources.<sup>36</sup> 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 the approach of this article builds on the third of these bodies of literatures, it adds three important aspects.

*Firstly*, the insight – based on the work of Ronald Coase<sup>37</sup> – that property rights are not naturally allocated to their current holder, but may be reallocated through negotiations or by regulatory intervention. In the context of the property right over migration, the decision of its initial allocation is largely focused on the question of whether to allocate it to the State or to the individual in question.<sup>38</sup> This insight entails the observation that external effects are different if different agents own the property right.<sup>39</sup> This is why the transaction of the property right can lower or enhance overall external effects.

*Secondly*, it systematically analyses the transferability of the property right over migration. It does so in drawing on the insight that the definition of the rule of transaction is just as important as the initial allocation of the property right and in systematically enquiring, under what condition and at what moment 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 Organisations) and what transaction rule applies to the transaction.<sup>40</sup>

*Thirdly* – this is 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 property rights. An overview of how this fits into the literature on the economic analysis of international law is given in section III. This step applies Coase’s key insight to the relationship among States and International Organisations: hierarchical intervention (State intervention in the domestic context; supra-State-level intervention in the international context) is not the only way to deal with external effects. They can be internalised through the negotiated exchange of property rights if transaction costs are not prohibitively high. No “WTO for migration”<sup>41</sup> 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.

It is argued that there is a number of reasons to make the translation of migration law into the technical language of property rights theory worthwhile. 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, the control over which can be transacted between the two. The reciprocity of this relationship is fundamental to understanding the reciprocity of its external effects. Whoever owns the control over an individual’s migration to a given place can impose an external effect on the other agent(s).<sup>42</sup> The value of the property right for

<sup>33</sup> Shachar (n 32) 96–108.

<sup>34</sup> Branko Milanović, *Global Inequality: A New Approach for the Age of Globalization* (The Belknap Press of Harvard University Press 2016) 5, 132.

<sup>35</sup> In particular on the framework developed in Schlager and Ostrom (n 20).

<sup>36</sup> Mascia and Claus (n 6).

<sup>37</sup> Coase (n 6).

<sup>38</sup> The insight of Coase has been applied to 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 20) 21.

<sup>39</sup> Coase (n 6) 2.

<sup>40</sup> 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.

<sup>41</sup> Timothy J Hatton, ‘Should we Have a WTO for International Migration?’ (2007) 22(50) *Economic Policy* 339–383.

<sup>42</sup> See Schlager and Ostrom (n 19) 250.

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 allows to impose.<sup>43</sup>

In the specific context of international law, the emphasis on the possibility of the transaction of these property rights 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.

### III. 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,<sup>44</sup> are reluctant to rely on the terminology of property rights to describe what is allocated and transferred 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.<sup>45</sup> Property rights in international law encompass all rights to control goods backed by either a treaty or by customary law.<sup>46</sup>

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'*.<sup>47</sup> Rights, exclusively 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.<sup>48</sup>

A transaction of property rights to International or Supranational Organisations occurs whenever an International or a Supranational Organisation 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 of its member states. There are three basic types of property rights regarding migration that can be transacted to International Organisations: The property right to set rules regarding migration (e.g. the EU obtains the prerogative to set the cornerstones of a common asylum policy [Art. 78 TFEU] and a common immigration policy [Art. 79 TFEU]); 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

<sup>43</sup> See Trachtman, *The Economic Structure of International Law* (n 12) 41.

<sup>44</sup> See the fundamental contributions of Eugene Kontorovich and Francesco Parisi (eds), *Economic Analysis of International Law* (Edward Elgar Publishing 2016); Posner and Sykes (n 18); Sykes (n 13); Dunoff and Trachtman (n 12); Trachtman, *The Economic Structure of International Law* (n 12); Dunoff and Trachtman (n 12). For pioneering contributions to behavioral economics of international law, see van Aaken and Broude (n 5); Broude (n 4); van Aaken (n 5).

<sup>45</sup> Trachtman, *The Economic Structure of International Law* (n 12) 23, 15; John A C Conybeare, 'International Organisation and the Theory of Property Rights' (1980) 34(03) *International Organisation* 307–334; Keohane (n 18) 89.

<sup>46</sup> The law and economics literature is sceptical regarding the legal character of customary international law. For an overview over the debate, see Sykes (n 13) 763–66; Keohane (n 18) 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.

<sup>47</sup> Trachtman, *The Economic Structure of International Law* (n 12) 27. Abraham Bell, 'Economic Analysis of Territorial Sovereignty' 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 might flow for the State. For another example for the implicit use of property rights theory, see Tom Ginsburg, 'The Interaction Between Domestic and International Law' in Eugene Kontorovich and Francesco Parisi (eds), *Economic Analysis of International Law* (Edward Elgar Publishing 2016) 207.

<sup>48</sup> Dunoff and Trachtman (n 12) 14. See also Ryan Pevnick, *Immigration and the Constraints of Justice: Between Open Borders and Absolute Sovereignty* (Cambridge University Press 2011) 37. In the terminology of Schlager and Ostrom it is the right to management. See Schlager and Ostrom (n 19) 251.

right over migration in individual cases), or the property right to regulate migration to a given territory, like a State. The transaction of property rights to an International Organisation 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 Organisations.<sup>49</sup>

### **A. Treaties Regarding Migration as Enabler of Transactions**

The allocation of property rights and the transaction thereof is – according to the approach developed here – the main object of international cooperation:<sup>50</sup> *'The assets traded in this international 'market' are not goods or services per se, but assets peculiar to States: components of power or jurisdiction'*.<sup>51</sup>

This is useful to understand what is traded in international treaties regarding migration: (States') prerogatives to control, govern and/or prevent certain forms of immigration or emigration.<sup>52</sup> *'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 Organisation'*.<sup>53</sup> The quote captures part of the problem we are facing when trying to specify what kind of property rights are exchanged when States agree to cooperate on the issue of migration. Quite often it is the right to "exercise authority" or in other words the "allocation of authority",<sup>54</sup> in this case, it is the allocation of authority over migration that is traded. As Joel Trachtman's quote suggests, this authority can be transferred from one State to another (if the other State newly acquires the prerogative to decide, what initially was the first State's prerogative to decide) or pooled in an International Organisation in the above defined sense. What the quote does not hint to, however, is that this prerogative can also be transferred *to individuals*. In cases where no State or International Organisation obtains the prerogative which the contracting States are giving up, the prerogative does not evaporate. The good, the control over a given activity, still has to be somewhere. It is 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 their territory to another State. It is not State A that obtains the right to control how many citizens of State A migrate to State B (nor is it the international or supranational organisation that might administer the agreement on free movement). They transfer it to the citizens of the contracting State instead. Now every citizen of State B owns the right to control whether he or she will migrate to State A. A State prerogative has been dispersed among the citizens of a contracting State. It is now their individual right.

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 those 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 State. 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 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 rules or for the allocation of property rights according to these rules, whether they provide for transactions among States or from States to individuals (or to 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 systematise and to compare the vectors and the values of the rights that are being exchanged.

<sup>49</sup> In section IV, where different types of treaties are analysed regarding their transactional capacity, further examples for transactions to International Organisations are presented.

<sup>50</sup> 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 12) 12. For a description of international relations that starts with the Coase-Theorem as the central explanation for State cooperation and the internalization of externalities emerging in international relations, see Keohane (n 18) 85.

<sup>51</sup> Trachtman, *The Economic Structure of International Law* (n 12) 10. See also Hobe and Kimminich (n 12) 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 13) 762; Dunoff and Trachtman (n 12) 13. For the component of State power to rely on force in international relations, described as a property right, see Conybeare (n 45) 326, 333.

<sup>52</sup> Trachtman, *The Economic Structure of International Law* (n 12) 119. For the possibility to trade the prerogative to trigger refugee movements, see Conybeare (n 45) 321.

<sup>53</sup> Trachtman, *The Economic Structure of International Law* (n 12) X. See also Posner and Sykes (n 18) 24.

<sup>54</sup> *ibid.*



A first step to 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 liberalisation) 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.

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

### **B. 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 the number of 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 constellation 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 (e.g. diplomats or highly qualified service provider), 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 liberalisation 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.<sup>55</sup> The bundle of rights of an individual regarding its international mobility can vary in the time-span for which it grants access to a given country. 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 within a geographical area 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 is also 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 access to 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 “filament” 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

<sup>55</sup> 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) <<https://www.theguardian.com/uk-news/davehillblog/2016/jul/11/the-case-for-a-more-independent-post-brexit-london-is-gaining-strength>> accessed 16 July 2018.

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<sup>56</sup> guarantees the right to file complaints with the relevant authority and to an appeal at a national court (Art. 11 III).

#### **IV. 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 organising principle of this section is neither the geographical scope of treaties nor the chronological order in which treaties evolved, but the nature of the bundles of rights that they transfer. What the author hopes to demonstrate is that the vast spectrum of types of treaties has one thing in common – that they transfer property rights over migration. The chosen treaties are not case studies therefore, but representatives of types of treaties that do transfer specific property rights or transfer them in a specific way. The discussion will begin with the types of treaties that transfer bundles of rights of States or of the citizens of the contracting States, then move on to types of treaties that transfer property rights to individuals on the basis of criteria other than their citizenship and then move on to types of treaties that transfer only very specific “filaments” or “sticks” of the much larger bundle of rights.

##### **A. Friendship- and Equal Treatment Treaties**

Friendship- and equal treatment treaties sprang up in large numbers in the second half of the 19<sup>th</sup> century and came in different forms.<sup>57</sup>

They mostly transfer property rights to States and hardly ever to individuals. Potential receiving countries transfer property rights that were formally their sovereign prerogatives to potential sending countries. They did not become individual rights of migrating citizens of the contracting parties. Migrants have the opportunity to oppose a violation of these treaties solely through the diplomatic protection exercised by the country of origin.<sup>58</sup>

##### **B. Free Movement of Persons**

Comparatively late to be introduced, 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 (or by the end of a transitional period). The individual bundle of rights that is transferred to citizens of the contracting States might vary but the bundle that the 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 welfare benefits.

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 a 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 obtained 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.

<sup>56</sup> 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.

<sup>57</sup> 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) 63, 68–72.

<sup>58</sup> Jürgen Bast, *Aufenthaltsrecht und Migrationssteuerung* (Mohr Siebeck 2011) 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.

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.<sup>59</sup> 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 transfer property rights to set rules to a supra-State Organisation.

### **C. 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, such as their private life, their religious beliefs, their political views and so on, this control is 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 needs to be allocated, there are alternatives to their current allocation (they could be allocated to States for instance) and there are transactions of these rights or of aspects of them.<sup>60</sup> 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 seek asylum (or at least the a right to not be sent back) for refugees, the group of among migrants whose Human Rights are threatened in a particular way by the prosecution through they 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'.<sup>61</sup> But for refugees lawfully staying in a Member State, it includes a bundle of rights that is granted independently of other individuals' rights, like the protection against *refoulement*,<sup>62</sup> freedom of internal movement and access to self-employment.<sup>63</sup> Other rights are defined in relation to the threshold of the rights of citizens (or citizens of the most favoured nation),<sup>64</sup> such as access to labour.<sup>65</sup> People acquire the bundle of rights in question not because of their relationship with a Member State but because they qualify as refugees. The bundle of rights they acquire (in principle from each of the signatory States they manage to reach<sup>66</sup> theoretically, they can choose in which of these states them to claim this bundle) has considerable value. People get instantly wealthier (in the sense of the substantiveness 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* provision 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<sup>67</sup> – 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 personal characteristics other than the characteristic of their citizenship.

With its 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,

<sup>59</sup> 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.

<sup>60</sup> Trachtman, *The Economic Structure of International Law* (n 12) 16.

<sup>61</sup> Jaya Ramji-Nogales, 'Moving Beyond the Refugee Law Paradigm' (2017) 111(1) *American Journal of International Law* 8–12, 9.

<sup>62</sup> This refers to the non-refoulement as guaranteed by the Convention relating to the Status of Refugees 28 July 1951, Art. 33 I. It only applies to refugees in the sense of the Convention. Hathaway (n 23) 304.

<sup>63</sup> *ibid.* 657.

<sup>64</sup> *ibid.* 155.

<sup>65</sup> Which means a full access to the labour market in countries that 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* (OUP 2010), n. 40 on art. 17.

<sup>66</sup> Anna Lübke, 'Migrationspartnerschaften: Verweisung auf Transitstaaten ohne Rücksicht auf die Familieneinheit?' (2017) 37(1) *Zeitschrift für Ausländerrecht und Ausländerpolitik* 15–21, 17.

<sup>67</sup> For arguments that point to the conclusion that the Convention ultimately demands to grant a legal status to refugees, see Hathaway (n 23) 658–59.

the Convention may also serve as an example of a treaty by which States transfer some prerogatives to an International Organisation, *albeit* not property rights over migration in the above defined sense. These prerogatives are rather rudimentary nature when compared to the supervisory mechanism of Human Rights Treaties.<sup>68</sup>

#### **D. 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.

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 breach of a Right to Family Life or Private Life, protection against 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 specific 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 (most prominently the European Court of Human Rights), States also agree to forgo some authority over subsequent transactions that might be triggered by an expansive jurisprudence of this enforcement mechanism.<sup>69</sup> 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 Organisation.

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 transferred or not. The right is also transferred 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.

#### **E. 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 restrict or 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.<sup>70</sup>

The key to understanding readmission agreements from a property rights perspective is the insight that migration has some value, even if it is unlawful.<sup>71</sup> To use an analogy with property rights over land: squatting illegally on land owned by someone else has some immediate utility *albeit* even if only a fraction of the utility it would have for the same person if 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 if migration that is was protected by the law. Legally, it is the country of destination that still has the veto over the concerned individual's migration to this State. But establishing the actual 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, it would deport those irregular migrants. 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

<sup>68</sup> 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* (OUP 2010) 1508. (n. 91 on Art. 35).

<sup>69</sup> Nathwani (n 58) 360.

<sup>70</sup> 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.

<sup>71</sup> Cassarino (n 1) 6.

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 in part to do with the difficult cooperation with countries of origin or transit.

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 enforcement of the actual allocation of property rights over migration.<sup>72</sup>

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. To a degree, it is also their countries of origin who might have an – albeit unarticulated – interest in irregular emigration. It might reduce unemployment and poverty at home and it might create some remittances,<sup>73</sup> even if they remain just a tiny fraction of the remittances that could be generated with the option of legal migration available.<sup>74</sup> This might be one of the reasons why many countries of origin are reluctant to enter these kinds of agreements<sup>75</sup> or to honour them. The re-establishment of the legal allocation of property rights over migration is simply not in their best interest.<sup>76</sup> 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 capitalise on their strategic position.<sup>77</sup>

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.

### **F. 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.<sup>78</sup> Since 2002, the EU systematically links trade and cooperation agreements to the condition of readmission clauses.<sup>79</sup> 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 outside of it.<sup>80</sup> The extension of the scope of a given agreement is a technique to create a common basis of interests.<sup>81</sup> Issues within the greater context that are typically linked to readmission are visa liberalisation schemes.<sup>82</sup> An example in which a mere visa facilitation

<sup>72</sup> Sergio Carrera, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights* (Springer Briefs in Law, Springer 2016) 63.

<sup>73</sup> Trachtman, *The International Law of Economic Migration* (n 12) 54–57.

<sup>74</sup> Cassarino, 'Informalising Readmission Agreements in the EU Neighbourhood' (n 2) 182.

<sup>75</sup> 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 72) 45–46; Natasja Reslow, 'EU "Mobility" Partnerships: An Initial Assessment of Implementation Dynamics' (2015) 3(2) *Politics and Governance* 117, 122; Cassarino (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.

<sup>76</sup> 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 they pose for the relationship with neighbouring countries, whose citizens might as well be negatively affected, especially if it encompasses the readmission of third country nationals: Carrera and others (n 75) 6.

<sup>77</sup> Cassarino (n 1) 16.

<sup>78</sup> *ibid.* 11, 28.

<sup>79</sup> Sandra Lavenex, 'Multilevelling EU External Governance: The Role of International Organisations in the Diffusion of EU Migration Policies' (2016) 42(4) *Journal of Ethnic and Migration Studies* 554–570, 561.

<sup>80</sup> Cassarino, 'Informalising Readmission Agreements in the EU Neighbourhood' (n 2) 185.

<sup>81</sup> Lixi (n 2) 4; Marion Panizzon, 'Readmission Agreements of EU Member States: A Case for Subsidiarity or Dualism?' (2012) 31(4) *Refugee Survey Quarterly* 101–133, 121; Jennifer Gordon, 'People are not Bananas: How Immigration Differs from Trade' (2010) 104(3) *Northwestern University Law Review* 1109–1145, 1139; Trachtman, *The International Law of Economic Migration* (n 12) 284; Sykes (n 13) 769; Hollifield (n 51) 235; Alexander Betts, 'The Refugee Regime and Issue-Linkage' in Rey Koslowski (ed), *Global Mobility Regimes* (Palgrave Macmillan 2011) 75.

<sup>82</sup> The concept of linking refugee-burden-sharing with a travel regime has its roots in the 80s, *ibid.* 86.

helped to convince the weaker of the two parties, is the partnership for mobility between Cape Verde and the EU.<sup>83</sup> From the perspective of the EU as one party in readmission agreements however, 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.<sup>84</sup>

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.<sup>85</sup> Issues outside of the context of migration are things like investment- or development agreements.<sup>86</sup>

In the language of property rights, these agreements are characterised by the fact that they – unlike traditional readmission agreements – actually *do transfer* some property rights. They either transfer an entitlement to some payment or engagement by the receiving country to the country of origin or they transfer 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.<sup>87</sup>

### G. 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 an individual's migration. One rather tiny 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 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 the possibility of business- and tourist trips and family visits have for many people, merely the ability 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.<sup>88</sup> The importance of the offer of visa liberalisation in the non-standard-agreements described above corroborates this.<sup>89</sup>

### H. Dublin Associations

Dublin associations, treaties which link the four EFTA member States to the Dublin-System,<sup>90</sup> are very different in the form of property rights transferred by them. The most important aspect of what States exchange is their former prerogative (hence a property right) to refuse – under certain conditions – to readmit noncitizens. The most important of these conditions is that a third country national has entered the Schengen-area irregularly via their border (Art. 13 I). In the absence of a treaty, there is no obligation to readmit such a person. It is mainly this property right, the right of refusal, that is traded away (to the State that can now send asylum seekers back) by associating to the Dublin system. There are others of course. For example, the right not to admit people who have family members in the contracting State (in the sense of Art. 9 and 10) or to whom the contracting State issued a residence document or visa (Art. 12). In exchange, member States acquired 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 from other States.

<sup>83</sup> 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.

<sup>84</sup> Schieffer (n 75) 356.

<sup>85</sup> 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.

<sup>86</sup> Schieffer (n 75) 356.

<sup>87</sup> For an early warning regarding the risks of such an issue-linkage for the capacity to control migration, see Hailbronner (n 70) 46.

<sup>88</sup> For example, the value of visa facilitation by the Schengen area to Cape Verde, See Pina-Delgado (n 83) 407.

<sup>89</sup> 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.

<sup>90</sup> 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* (2 edn, 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 Lübke (n 66) 15.

### **I. 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.<sup>91</sup> But many agreements, including the GATS, exclude the regulation of labour market access explicitly from their scope.<sup>92</sup> 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 (e.g. 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 a guaranteed access to a country are normally quite high for service providers.<sup>93</sup> It is still a transfer of a previously sovereign prerogative from a State to individual service providers.

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 – as a set of rules for the transaction of bundles of property rights. The bundles within the bundle vary greatly, some are rather substantive – like in the case of the free movement of persons – and some are very thin – like in the case of visa liberalisation. For some, enabling or preventing migration is the actual goal of the transaction, for some, this transaction has an auxiliary function like for the protection of Human Rights or to enable trade in services.

### **V. Transaction of Property Rights over Migration as Internalisation**

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

In international environmental law, for instance, the impacts on one country's environment by another country's environmental law is more intuitively understood in terms of external effects than is the case with the impact of migration law on the life-opportunities of citizens of foreign countries.<sup>94</sup>

#### **A. The General Coasian Argument Applied in Relations Regarding Migration**

It was shown in section 2.1 that whenever an alternative allocation of property rights would create 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, but certainly the one that most readily lends itself to an economic analysis, is the effect of that 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.<sup>95</sup> Since both groups are typically represented by a State<sup>96</sup> that pays a price – politically or fiscally – if it is unable to internalise this effect, States are concerned by secondary effects regarding market access and will seek to negotiate.

Consider the situation in which State A (or a group of States) finds that the external effect imposed on its citizen by State B when excluding them from its attractive labour market<sup>97</sup> is greater than what it would

<sup>91</sup> 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 OUP 2003) 93 and 101–106. For an overview, see Charlotte Sieber-Gasser, 'Variationen der regionalen Personenfreizügigkeit: Die schrittweise Öffnung des Arbeitsmarktes' (2013) Jusletter.

<sup>92</sup> For post-NAFTA US FTAs see Demetrios G Papademetriou, 'The Shifting Expectations of Free Trade and Migration' (2004) 40 <[http://carnegieendowment.org/pdf/files/nafta\\_report\\_chaptertwo.pdf](http://carnegieendowment.org/pdf/files/nafta_report_chaptertwo.pdf)> accessed 23 February 2018.

<sup>93</sup> Nielson (n 91) 97.

<sup>94</sup> See e. g. Dunoff and Trachtman (n 12) 14.

<sup>95</sup> 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.

<sup>96</sup> Trachtman, *The Economic Structure of International Law* (n 12) 9.

<sup>97</sup> For the observation that the restriction of market-access causes an external effect, see *ibid.* 11.

be willing to pay State B to open its labour market. Consider that State B agrees on the price (which can be, say, a partial access to State A's market of goods and services). A treaty can then be established that transfers 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 State 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 of State B. Otherwise, provided that there is no outright coercion, irrational behaviour by one of the State parties or critical influence of minority interests in one of the States involved,<sup>98</sup> the two countries would not have concluded such a treaty. The overall sum of negative external effects is reduced. Part of the external effects have been internalised.

While the agents in question in the context of international immigration law are mainly States or supra- or International Organisations, the external effects they might want to internalise 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).

### **B. A Trend Towards Internalisation?**

Is there a trend towards internalisation in international migration law? Internalisation means that States and individuals have to take (at least some of) the external effects their behaviour regarding migration/the restriction of migration is causing into account. Internalisation can either be obtained by refraining from causing external effects them (or by getting compensation) if they are positive, or it can be obtained by refraining from causing external effects (or compensate others) if they are negative.

It seems that the increasing density of treaties regarding migration should contribute to such an internalisation.<sup>99</sup> Otherwise, States 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.<sup>100</sup> An increased internalisation of external effects is, therefore, what we should be observing as the result of a growing density of treaties on the issue.

Treaties on the free movement of persons are the most obvious example of an internalisation of external effects of migration governance. The external effect of excluding people from a labour- and service market is more or less entirely internalised. 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 – at least those among the contracting parties – are smaller than in the *status quo ante*.

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.<sup>101</sup> The so-called Guillotine-clause in the Free Movement of Persons Treaty between Switzerland and the EU<sup>102</sup> 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 (which 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.<sup>103</sup> The external effects of restricting access to the labour market are internalised 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

<sup>98</sup> Note that it can even be rational for a government to conclude a treaty that 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) 85 <[https://www.princeton.edu/~pcglobal/conferences/institutions/papers/dai\\_T500.pdf](https://www.princeton.edu/~pcglobal/conferences/institutions/papers/dai_T500.pdf)> accessed 16 April 2018. See also Posner and Sykes (n 18) 265; Trachtman, *The Economic Structure of International Law* (n 12) 148.

<sup>99</sup> Sykes (n 13) 768.

<sup>100</sup> Which 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 5) 255, 269; van Aaken (n 5) 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-organised interest-group: Dai (n 98) 85.

<sup>101</sup> Eytan Meyers, 'Multilateral Cooperation in International Labor Migration' (Center for Comparative Immigration Studies 2002) 13 <<https://escholarship.org/uc/item/4zv454f5>> accessed 16 April 2018.

<sup>102</sup> 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 (n 56).

<sup>103</sup> 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, 6156 and 6309 <<https://www.admin.ch/opc/de/federal-gazette/1999/6128.pdf>> accessed 16 April 2018.



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 maximises the aggregated preferences of individuals. The right to control someone's migration has in all likelihood generally 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.<sup>104</sup> 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.<sup>105</sup> They, therefore, do the most advanced job in internalising external effects of migration governance. Again, to minimise 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 internalising 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 or cruel, degrading or inhuman treatment in case of deportation or where the impossibility to migrate would separate individuals permanently from their families. Restricting or undoing migration would in these cases thus cause particularly strong negative external effects. At least those are internalised. Again, these are effects that are felt by individuals, rather than States.

The most interesting case in point to substantiate the hypothesis that treaties regarding migration tend to internalise the external effects of the regulation of migration, are non-standard agreements linked to readmission. The point can best be made by starting with standard readmission agreements. These have the objective 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 impose on receiving societies. This is why their basis for a common interest is limited. Negotiation or ratification or implementation frequently fails.<sup>106</sup> 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.<sup>107</sup> The linked issue allows the party who accepts the implementation of migration restriction to gain something in turn. It 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,<sup>108</sup> 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 sorts of agreements will often seem unbalanced with respect to the countries of origin.<sup>109</sup> 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 so because receiving countries have to transfer some property rights – meagre as they may be – for the simple aim of enforcing the property right over migration as it is legally already allocated to them – the right to restrict 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 rather than the interests of migrants or typical countries of origin. Since this asymmetry of interests is only superficially addressed by non-standard

<sup>104</sup> Schlegel, *Der Entscheid über Migration als Verfügungsrecht* (n 3) 167.

<sup>105</sup> 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 incentives and the information necessary to invest in the value of the property right. In a world without transaction costs, they could, therefore, generally obtain this property right. 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.

<sup>106</sup> See the examples given in Section 4.5 and 4.6.

<sup>107</sup> Panizzon, 'Readmission Agreements of EU Member States: A Case for Subsidiarity or Dualism?' (n 81) 121; Hatton (n 41) 368.

<sup>108</sup> Gordon (n 81) 1133; Hatton (n 41) 366; Meyers (n 101) 8.

<sup>109</sup> Lixi (n 2) 4; Cassarino (n 1) 28.

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,<sup>110</sup> and thereby some internalisation of the detrimental effects of the restriction of migration.

These agreements might therefore well be the beginning of a process of empowerment of countries of origin (or the symptom of their growing leverage).<sup>111</sup> The downside of this is that it is rarely the (potential) migrants who are compensated for the opportunities they have to sacrifice but their countries of origin. Such compensations for external effects that are mainly felt by citizens rather than States are, therefore, easier to accept for governments that do not risk to pay a political price for such agreements (governments that are little responsive to the demands of their citizens). It is also highly questionable whether the compensation that countries of origin receive, finds its way to the citizens that bear the negative external effect. The internalisation 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 contributes to bring down the volume of migration restriction closer to an overall optimum.<sup>112</sup>

If this trend is to continue, the prevention of migration will get more expensive. Less and less migration can be prevented if its added value (for those who benefit) outweighs its costs (for those who lose).

## VI. Conclusion

The property rights approach not only allows 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 highlight a trend towards internalisation of the external effects created by the initial allocation of property rights over migration. Interestingly, this trend 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 negative external effects) leads to treaties by which States agree to pay some sort of price in exchange for cooperation in migration governance. This leads to an increasing internalisation. 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 – at one time the agents that delineated property rights over migration and allocated practically all of them to themselves – have to transfer more and more of these valuable assets. Not just to contracting States and International Organisations, but even more so to individual migrants. The bundle of rights of (potential) migrants has become bolder over time 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 internalise the cost of preventing migration works selectively.<sup>113</sup> While highly qualified migrants from affluent 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 countries of origin. If the trend is to continue that migration governance relies more and more on the cooperation of countries of origin (or transit), it is also likely that the trend towards internalisation of the costs of the prevention of migration is to continue. This will enhance the costs of the restriction of migration and will, therefore, bring the volume of restriction closer to an optimal level. Moreover, in the long run, the agents (countries of origin) will likely have to share part of the compensation with even the most marginalised of the principals (potential migrants). One way of doing so is to press for legal paths for their international mobility.

<sup>110</sup> Hollifield (n 51) 235.

<sup>111</sup> Cassarino (n 1) 17.

<sup>112</sup> 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.

<sup>113</sup> 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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The author has no competing interests to declare.

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