Dear colleagues, students:

This paper asks the following question: what is the optimal level of protection and enforcement of international law?

I try to answer this question, at least partly, through the lens of Calabresi & Melamed's property-liability-inalienability-rules framework.

To get the gist of this exercise, simply read the **Introduction (p. 1-4)**, **Section III (p. 11-14)** and the **Conclusion (p. 76-79)**.

The core of my analysis on optimal protection, i.e. should international law be protected under a liability rule, property rule or as inalienable, you find in **Section IV (p. 14-39)**.

The essence of my analysis on optimal enforcement, i.e. what sanctions should international law impose in case its rules of protection are broken (in particular: how can international law pretend to protect its entitlements as property, yet, offer only 1:1 retaliation as back-up enforcement?), is found in **Section VI (p. 55-70)**.

As the framework that I propose applies to all fields of international law, I hope that it offers something of interest to all of you.

I look forward to your comments.

Joost Pauwelyn.

OPTIMAL PROTECTION OF INTERNATIONAL LAW:

Navigating between 'European Absolutism' and 'American Voluntarism'

Joost Pauwelyn[1]

DRAFT

15 November, 2006

[1] Professor of Law, Duke University. I would like to thank Cesare Romano, Simon Schropp, Paul Stephan […] and the participants of workshops held at Tuebingen University (Germany), Chicago Law School, Duke Law School, Yale Law School [and …] for their comments on an earlier version of this article. All mistakes remain mine alone.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE TWO EXTREMES OF ‘EUROPEAN ABSOLUTISM’ AND ‘AMERICAN VOLUNTARISM’ 4

III. ALLOCATION, PROTECTION AND BACK-UP ENFORCEMENT OF ENTITLEMENTS 8

1. ALLOCATION OF ENTITLEMENTS 9
2. PROTECTION OF ENTITLEMENTS 10
3. BACK-UP ENFORCEMENT 12
4. A FRAMEWORK FOR THE PROTECTION OF INTERNATIONAL LAW ENTITLEMENTS 12

IV. HOW SHOULD INTERNATIONAL LAW ENTITLEMENTS BE PROTECTED? 14

1. THE ARGUMENT FOR A DEFAULT RULE OF PROPERTY PROTECTION 15
   1. *Contractual freedom and welfare maximization 15*
   2. *The absence of centralized enforcement 16*
   3. *The need for flexibility to attract participation and prevent exit 16*
   4. *Incomplete contracting 17*
   5. *Legitimacy concerns 18*
2. WHEN TO PROTECT ENTITLEMENTS AS INALIENABLE? 19
   1. *Significant externalities 20*
   2. *Moralisms 20*
   3. *Paternalism 21*
3. WHEN TO PROTECT ENTITLEMENTS UNDER A LIABILITY RULE? 21
   1. *Hold-out 21*
   2. *Free-load 22*
   3. *High transaction costs 23*
   4. *Additional reasons for liability protection in international law 25*
4. ARGUMENTS AGAINST LIABILITY PROTECTION IN INTERNATIONAL LAW 26
   1. *States may not internalize costs nor maximize welfare 27*
   2. *States are not unitary actors 29*
   3. *Absence of collective valuation 31*
   4. *The cost and possible errors of collective valuation 32*
   5. *International entitlements as unique goods 34*
   6. *Sovereign immunity 35*
   7. *The need to make credible commitments 35*
   8. *Inequalities between states 36*
5. A MATRIX TO DECIDE ON HOW TO PROTECT INTERNATIONAL LAW ENTITLEMENTS 37

V. HOW ARE INTERNATIONAL LAW ENTITLEMENTS CURRENTLY PROTECTED? 40

1. INTERNATIONAL LAW IS, IN PRINCIPLE, NOT INALIENABLE 40
2. INTERNATIONAL LAW IS, BY DEFAULT, PROTECTED BY A PROPERTY RULE, NOT A LIABILITY RULE 42
3. AN EVALUATION OF INALIENABILITY IN CURRENT INTERNATIONAL LAW 45
   1. *The need for a more objective analysis 45*
   2. *Collective obligations through the lens of moralisms, externalities and paternalism 47*
4. AN EVALUATION OF LIABILITY RULES IN CURRENT INTERNATIONAL LAW 49
   1. *Cross-border liability 49*
   2. *Liability rules in the GATT/WTO 50*
   3. *Investor protection under NAFTA and BITs 54*

VI. BACK-UP ENFORCEMENT IN INTERNATIONAL LAW............................ 55

1. THE PUZZLE OF PROPERTY PROTECTION BACKED-UP BY 'MERE' COMPENSATION AND PROPORTIONAL COUNTERMEASURES 56
   1. *Good reasons to limit countermeasures to 1:1 retaliation 59*
   2. *How 1:1 retaliation can achieve property protection: the "kicker" of community costs.......... 61*
   3. *Community costs in a property regime as opposed to a liability regime.................................. 65*
   4. *How 1:1 retaliation can achieve property protection: the hidden force of 1:1 retaliation itself67*
2. THE PUZZLE OF JUS COGENS AND COLLECTIVE OBLIGATIONS BENEFITING FROM THE WEAKEST FORM OF BACK-UP ENFORCEMENT 70
   1. *Default rules of back-up enforcement for community obligations... 71*
   2. *An assessment: Be careful what you wish for... 74*

VII. CONCLUSION 76

I. Introduction

International law scholarship has long been obsessed with trying to explain and predict *why* and *when* states comply with international law.[2] Is it because of pure self-interest[3], reputation[4] or domestic pressure groups and internalization[5], or perhaps explained by a sense of legal obligation or the legitimacy of the norm itself[6], or rather due to bureaucratic networks[7] or the personal psychology of political leaders[8]? This approach has consistently overlooked a logically preceding but no less important question: Assuming that the necessary incentives can be made available to induce states to comply, how strongly *should* international law entitlements be protected?

In domestic law, this question was addressed 35 years ago in a seminal *Harvard Law Review* article by Guido Calabresi and Douglas Melamed. Based on a model of individual freedom and welfare maximization – now standard assumptions of the law and economics school – Calabresi and Melamed provided a three-step scale of protection for domestic legal entitlements. In their view, a first group of entitlements is best protected as "inalienable" (not to be transferred at all, not even by mutual consent); a second group as "property" (which can be taken, but only with the consent of the entitlement's holder); a third group under a simple "liability" rule (the entitlement can be taken by anyone subject only to the obligation to pay full compensation for it). The idea of protecting entitlements under a mere liability rule, pursuant to a take-and-pay principle, subsequently developed in the broader theory of "efficient breach". This theory holds that when the net cost of compliance is higher than the net cost of breach, breach must be tolerated, even promoted, as it maximizes overall welfare. If, in this scenario, the victims of breach are fully compensated, breach is, moreover, said to be Pareto desirable: while the violating party increases its welfare, the victim is made whole.

The objective of this article is to apply the Calabresi and Melamed analysis, including the

---

[2] For a review of the literature on compliance, see Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in Handbook of International Relations 538 (Walter Carlsnaes et al. eds. 2002); ABRAM CHAYES AND ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); Law and Governance in Postnational Europe, Compliance beyond the Nation-State, Michael Zurn and Christian Joerges (eds.), 2005; Oona Hathawa, *Do Human Rights Treaties Make a Difference?* 111 YALE LAW JOURNAL 1935 (2002); and Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Human Rights Law* 54 DUKE LAW JOURNAL 621 (2004).

[3] JACK GOLDSMITH AND ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

[4] Andrew Guzman, *International Law: A Compliance Based Theory*, 90 CAL. L. REV. 1823 (2002).

[5] Harold Koh, *Why Do Nations Obey International Law?* 106 YALE JOURNAL 2599 (1997); Beth Simmons, International Law and State Behavior: Commitment and Compliance in International Monetary Affairs, 94 Am. Pol. Sci. Rev. 819 (2000); Claire R. Kelly, Enmeshment as a Theory of Compliance, 37 NYU Journal of International Law and Politics (2005) 303.

[6] Thomas Franck, The Power of Legitimacy Among Nations (1990).

[7] Anne Marie Slaughter, *A New World Order* (Princeton: Princeton University Press 2004); Manuel Castells, *The Rise of the Network Society* (Oxford: Blackwell Publishers Ltd. 1996).

[8] William Bradford, *In the Minds of Men: A Theory of Compliance with the Laws of War*, 36 ARIZONA STATE LAW JOURNAL 1243 (2004) at 1438 ("much of the variation in compliance is attributable to personality" of government leaders).

subsequent theory of efficient breach, not to entitlements derived from *domestic* law but to entitlements accorded under *international* law. In other words, if a treaty allocates an entitlement to free trade, non-discrimination or to be free from certain environmental harm or human rights abuse, what is the best way to protect this entitlement? Should it be made "inalienable" or protected only as "property" or, rather, should it benefit from the weaker form of "liability" protection? In addition, if the cost of compliance outweighs the cost of breach -- including the cost of fully compensating all victims -- should a country be permitted to violate international law on the ground that breach is then efficient, even Pareto desirable? Do these models, which originate in domestic law, find application in international law? Must they be adapted or do they even become completely inappropriate? Descriptively, how does international law currently protect entitlements? Does this current level of protection accord to the predictions under the Calabresi and Melamed model? Does it conform to the theory of efficient breach?

These are the questions addressed in this article. They worry as much about *over*-protection of international law as *under*-protection of international law. For a system long plagued by claims of irrelevance, such inquiry has understandably been somewhat of a taboo. Why worry about optimal, let alone over-protection, if international law is generally perceived as weak? In recent years, however, the conventional wisdom that international law is weak has been seriously contested. The creation in 1994 of the World Trade Organization (WTO) and its compulsory dispute settlement system is often referred to as a major advance in the legalization of international affairs.[9] In a recent book, Professors Robert Scott and Paul Stephan, referring to the establishment of international criminal tribunals, investment and intellectual property rights protection with compulsory arbitration, European economic and human rights integration and domestic civil litigation involving international law, go as far as concluding that

> [i]nternational law has become hard law, with its own Leviathan … The trend is clearly away from impotence. International law, because of the growth of formal enforcement, has become a real force with direct and material consequences for a wide range of actors.[10]

International law can, therefore, increasingly afford the luxury of asking itself: how strongly *should* entitlements be protected?[11] In the Kyoto Protocol, for example,

---

[9] JOHN JACKSON, THE WORLD TRADING SYSTEM, LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS, 110 (2d ed. 1997); Judith Goldstein, Miles Kahler, Robert Keohane & Anne-Marie Slaughter, *Introduction: Legalization and World Politics*, 54 INTERNATIONAL ORGANIZATION 385, at 389 (referring to a victory for trade 'legalists' over trade 'pragmatists'). For a discussion on the evolution of law and politics in the world trading system: Joost Pauwelyn, The Transformation of World Trade, 104 Michigan Law Review (2005) 1.

[10] Robert Scott and Paul Stephan, The Limits of Leviathan (2006), 11 and 14. Scott and Stephan, at p. 367, define "formal enforcement" as enforcement with private standing and a tribunal empowered to impose direct sanctions.

[11] See, in support, Andrew Guzman, *The Design of International Agreements* 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2005) 612 and Kal Raustiala, *Form and Substance in International Agreements* 99 AMERICAN JOURNAL OF INTERNATIONAL LAW (2005) 541. Even if one holds the view (further contested below in Section VI) that international law continues to be weak -- for example, because it lacks central enforcement – so that finer distinctions in normativity are irrelevant, the questions addressed in this article

reductions in harmful emissions were not protected by an outright prohibition to emit beyond a certain ceiling. Rather, the treaty introduced the hotly debated notion of tradeable emission rights allowing countries to pollute for as long as they "pay" for it by means of emission credits.[12] Equally, in the WTO a fierce debate is raging as to whether the treaty requires countries to bring their trade policies in line with WTO disciplines (specific performance under a property rule) or whether it permits, or even promotes, countries to "buy-off" their WTO obligations by paying compensation or suffering equivalent trade retaliation (efficient breach under a liability rule).[13] Even in the field of international refugee law, the idea of tradeable quotas was floated. To share the burden of refugees more equitably amongst potential host countries Peter Schuck has, for example, suggested to allocate country-specific refugee quotas and to create a market where states, who are unwilling or unable to host their share of refugees, can purchase credits from other states who do want to accept more refugees.[14] Similarly, the FAO Treaty on Plant Genetic Resources for Food and Agriculture currently protects the use of 64 major crops and forages and their genetic diversity not by handing out exclusive property rights but through a liability rule regime that provides open access to the covered plant resources subject to payment or benefit-sharing when, for example, a patented commercial product is developed using these resources.[15]

Let it also be clear what this article is *not* about. Although I will be using the two extremes of what I call "European absolutism" (all international entitlements should be inalienable) and "American voluntarism" (international entitlements are, at best,

---

at least raise an interesting thought experiment: Imagine, for a moment, that you do have all necessary instruments in hand to force states to comply with their international commitments (whatever these instruments may be): how far would you go, and what criteria would guide you?

[12] The system of tradeable allowances was originally proposed by the United States and objected to by many, especially in Europe. See Jonathan Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE LAW JOURNAL (1999) 677, at 712 and references in note 144. For a critique see Michael J. Sandel, Editorial, *It's Immoral To Buy the Right To Pollute*, N.Y. TIMES, Dec. 15, 1997, at A23 and Sins of Emission, *The Economist*, August 5-11, 2006, at 15 ("critics of offsetting argue that the ability to buy retrospective forgiveness for sins of emission is no substitute for not sinning in the first place").

[13] Contrast, in particular, Warren Schwartz and Alan Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 JOURNAL OF LEGAL STUDIES (2002) 179 (arguing that the WTO is a liability rule system that promotes efficient breach) to John Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?*, AJIL, 2004, 109 (arguing that the WTO imposes a property rule with an obligation to perform). Uncertainty as to the goal of WTO dispute settlement has, in turn, led to case law on the level of permitted trade sanctions in response to WTO breach that is in a state of disarray. One recent arbitration panel openly admitted this confusion as follows (US – Byrd Amendment, Arbitration under DSU Article 22.6, para. 6.4): "it is not completely clear what role is to be played by the suspension of obligations in the DSU and a large part of the conceptual debate that took place in these proceedings could have been avoided if a clear 'object and purpose' were identified".

[14] Peter H. Schuck, Refugee Burden-Sharing: A Modest Proposal, 22 Yale J. Int'l L. (1997) 243, 270-1. For a critique, see Benjamin Cook, Methods in Its Madness: The Endowment Effect in an Analysis of Regugee Burden-Sharing and Proposed Refugee Market, 19 Geo. Immigr. L.J. (2004) 333 and a response, see Peter Schuck, A Response to the Critics, 12 Harv. Hum. Rts. J. (1999) 385.

[15] See the International Treaty on Plant Genetic Resources for Food and Agriculture, concluded at the UN's Food and Agriculture Organization (FAO) in 2001 and in force since 29 June, 2004, available at http://www.fao.org/AG/cgrfa/itpgr.htm.

protected by a liability rule), this article is not about the age old question of whether international law is "law" or whether rules of international law are "legally binding". When negotiators design treaties and set the way in which entitlements – to be distinguished from rights -- are to be protected (inalienability, property rule or liability rule), they define and specify the scope, content and reach of the rights and obligations that states derive from the treaty. Protecting an entitlement under a liability rule does not make the treaty provision less important or less "law"/"legally binding"; it only defines how and how strongly the entitlement will be protected. As a result, to permit the taking of an entitlement under a liability rule (e.g., pollution under the Kyoto Protocol) is not the same as tolerating breach of a treaty obligation. Rather, the taking of the entitlement is perfectly legal and a breach is only committed in case the taker does not pay compensation for the entitlement (e.g., in case no emission credits can be put on the table). Conversely, the classification of an entitlement as inalienable does not make the rule in question more "law" or more "legally binding"; it only prevents states to transfer the entitlement, that is, to alter or contract out of the rule in question. Finally, in case an entitlement is protected by a property rule, to transfer the entitlement by mutual consent (i.e., to amend a treaty or modify it *inter se*) is not the same as breaching the treaty. In this case, breach occurs only when the entitlement is taken *without* consent. Efficient breach, on the other hand, does describe a particular type of *violation* of the law, namely one that increases welfare without making anyone worse off. The theory of efficient breach thereby questions the legally binding nature of the law. Yet, where a legal system permits or even promotes efficient breach (that is, it imposes a liability rule), by definition, efficient breach no longer constitutes a violation of the rules; rather, what would otherwise be considered as breach then becomes a simple taking of an entitlement *with* full compensation as required under liability protection.

Section 2 of this article defines the two extremes of what I call "European absolutism" and "American voluntarism". Section 3 explains the Calabresi and Melamed framework and redefines and expands it for application in international law. Within this framework, Section 4 asks the normative question of how international law entitlements ought to be protected. Section 5 tests these normative predictions against the current state of protection of international law entitlements. Finally, section 6 assesses the rules of back-up enforcement of international law, that is, how international law reacts in case the rules of protection are flouted. Section 7 concludes and summarizes the main findings of this article.

II. The Two Extremes of 'European absolutism' and 'American voluntarism'

On a scale of possible answers to the question of how strongly international law entitlements *should* be protected, one can think of two opposite extremes. Since I will use these two extremes as signposts or Weberian ideal-types within which I will situate and contrast my own propositions, they are defined more precisely in this section.

The first school of thought is what I will call European absolutism. This is an extreme version of the constitutional approach to international law which holds that, once

allocated, international entitlements cannot be modified or traded. Rather, they must be specifically performed unless, in the case of treaties, all treaty parties agree to re-allocate the entitlement. Put differently, on this view, all international entitlements should be inalienable. Hugo Grotius, for example, one of the (European) founders of international law, largely equated the new discipline with natural law and noted that, in his view, this "natural law is so immutable that even God himself could not change it".[16] The second school of thought, I will refer to as American voluntarism. This is an extreme version of the contractual approach to international law according to which the allocation of international entitlements is a mere pledge which states can renege on based on a simple cost-benefit analysis.[17] On this view, international entitlements are, at best, protected by a simple liability rule, a contract that can be broken with the payment of compensation.[18]

Although I fully realize that there are European voluntarists and American absolutists[19], as well as Europeans and Americans who fall somewhere in between[20], for ease of reference and, I admit, dramatic effect, my generalization identifies absolutism with Europe and voluntarism with the United States of America.[21]

The first group (absolutists) consists of traditional supporters of international law, haunted by the critique that "their" discipline has no teeth and is, therefore, largely irrelevant. In response, and somewhat paradoxically, this group portrays inalienability

---

[16] H. GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, article 1, ch. 1, X.5 ("[e]st autem jus naturale adeo immutabile, ut ne a deo quidem mutari queat").

[17] See, for example, Hans Morgenthau, Politics Among Nations, The Struggle for Power and Peace (1949) and John Mearsheimer, The Tragedy of Great Power Politics (2002), representing the so-called realist school which regards legal constraints beyond the nation-state as non-existent or at best very weak. As John Bolton, at the time of writing US ambassador to the UN, put it more bluntly: "International law is not law; it is a series of political and moral arrangements that stand or fall on their own merits, and anything else is simply theology and superstition masquerading as law" (John Bolton, *Is There Really "Law" in International Affairs?* 10 TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS (2000) 1, at 48).

[18] Trachtman, Joel P., "Building the WTO Cathedral" (February 17, 2006). Available at SSRN: http://ssrn.com/abstract=815844, at p. 21 (discussing remedies in general international law and concluding that "the goal seems to be to induce compliance when compliance is efficient, and breach when it is not") and Schwartz and Sykes, *supra* note 13, at 192 ("the WTO system contemplates departures from specified obligations when the costs of compliance exceed the associated benefits").

[19] John Jackson, for example, see *supra* note 13, tends more toward European absolutism than American voluntarism. Equally, Jacob Cogan, a US State Department official, starts his article (Noncompliance and the International Rule of Law, 31 Yale J. Int'l L. (2006) 189) with the following: "We treat noncompliance with disdain, and for good reason. After all, what does it mean to be a law if violation is permitted? And what does it mean to be a legal system if disobedience is tolerated").

[20] The present author, for example, has previously explored both European absolutism (see Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules – Towards a More Collective Approach*, 94 AJIL (2000) 621) as well as American voluntarism (see Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?* 14 EJIL (2003) 907).

[21] For a representative sample on the differences between Europe and America in their approach to international law, see ROBERT KAGAN, PARADISE AND POWER, AMERICA AND EUROPE IN THE NEW WORLD ORDER (2003); JEREMY RIFKIN, THE EUROPEAN DREAM, HOW EUROPE'S VISION OF THE FUTURE IS QUIETLY ECLIPSING THE AMERICAN DREAM (2004); Jed Rubenfeld, Unilateralism and Constitutionalism, 79 N.Y.U Law Review (2004) 1971 and Delahunty, Robert J., "The Battle of Mars and Venus: Why do American and European Attitudes Toward International Law Differ?" (April 2006). U of St. Thomas Legal Studies Research Paper No. 06-15 Available at SSRN: http://ssrn.com/abstract=899404.

and specific performance as the ideal or optimal level of protection of international entitlements. In the same spirit, this camp pursues *harder* international law as necessarily *better* international law and advocates the constitutionalization of international law as a source of supreme law that ties the hands of governments to protect themselves against political, economic and other forms of government failure.[22] Though crudely generalizing, I call this approach European absolutism, both because of how many European academics analyze and promote international law and because of how the law of the European Communities (EC) has been constructed: although EC treaties can be amended, individual member states cannot contract out of EC treaties *inter se* and EC law has direct effect and supremacy in domestic legal orders. In addition, under civil law (prevalent in most European countries) the fall-back remedy for breach is, equally, specific performance, not compensation[23], and the re-negotiation of contracts is generally discouraged.[24] Many developing countries have long sympathized with this approach as they tend to regard international law as an instrument to level global political imbalances. From that vantage point as well, protecting international entitlements as inalienable has often been advocated.[25]

A second group (voluntarists) consists of traditional critics of international law who question the ability of international law to influence the conduct of states. For this group, international law is a patchwork of pledges or, at best, contracts, that states engage in as self-interested, rational actors.[26] Given the absence of centralized enforcement and the requirements of state sovereignty and representative democracy, the argument goes, international entitlements cannot -- nor should they be -- fully protected in all cases.[27] Based on a cost-benefit analysis, this camp predicts that states will only comply with international law if the costs of its defection outweigh those of compliance. Along the same lines, the normative position of many within this second school of thought is that a state *should*, *a fortiori*, only comply with international law if, overall, it makes people better off.[28] Hence, on this view, when designing treaties or the system of international

[22] See, for example, E.-U. PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (1991).
[23] G.H. Treitel, Remedies for Breach of Contract, A Comparative Account, Clarendon, Oxford, 1988, 43-74 and noting, at p. 51, for example, that "German law starts with the principle that the creditor is entitled to a judgment for performance".
[24] Eric Brousseau, Did the common law biased [sic] the economics of contract … and may it change? in 6 Law and Economics in Civil Law Countries 79, 83-85 (Bruno Deffains and Thierry Kirat, eds., 2001).
[25] For a discussion, see Robert Hudec, Developing Countries in the GATT Legal System (1987).
[26] See, for example, Posner and Goldsmith, *supra* note 3 at p. 3: "Put briefly, our theory is that international law emerges from states acting rationally to maximize their interests, given their perception of the interests of other states and the distribution of state power" and at p. 9 rejecting arguments that "the preferences of individuals, and therefore state interests, can be influenced by international law and institutions".
[27] Or as John Bolton put it: "claims that 'international law' has binding and authoritative force ultimately ring either hollow or unacceptable to a free people" (John Bolton, *Is There Really "Law" in International Affairs?*, 10 TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS (2000) 1, at 9).
[28] See, for example, Alan M. Dershowitz, Why Terrorism Works (2002), arguing that the laws against torture should be subject to exception where the cost of compliance is too great. Equally, in the domestic law context, some have argued to extend liability rules so as to cover also constitutional rights. See Eugene Kontorovich, The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies, 91 Virginia Law Review (2005) 1135.

law more generally, states should be permitted, even advised, to take the entitlements of other states for as long as the compensation to be paid for such taking falls below the benefit derived from the taking.[29] Whilst European absolutists would regard such take-and-pay principle close to immoral[30], for American voluntarists, "efficient breach" improves overall welfare without making anyone worse off and ought, therefore, not only be permitted but actively promoted. From this perspective, full performance is, therefore, anything but optimal performance. Though, once again, crudely generalizing, I call this approach American voluntarism because of the United States' skepticism toward international law and its self-proclaimed strategy of "coalitions of the willing"[31], as well as based on the practical supremacy of US law over international law (most treaties signed by the United States are not self-executing[32] and, in any event, US federal law prevails over earlier international law[33]) and the pervading law and economics approach in the US legal academy. In addition, in the common law (and in contrast to civil law), the fall-back remedy for breach is, equally, expectation damages, not specific performance[34], and the renegotiation of contracts is encouraged (parties cannot ban future modifications).[35]

Put another way, European absolutism strongly believes in law and pre-commitment and, in pursuit of Kantian ideals, wants to dissect international law as much as possible from politics. In this vein, it regards international law as reflecting universal values to which domestic legal systems, prone to majoritarian abuse (witness the democratically elected

---

[29] See *supra* note 18. That efficient breach is more attractive to US, common law lawyers than it is to lawyers from the European, civil law tradition, see Aristides Hatzis, *Civil Law and Economic Reasoning: An Unlikely Pair*, Working paper dated February 6, 2005, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=661661.
[30] See, for example, Michael J. Sandel, Editorial, *It's Immoral To Buy the Right To Pollute*, N.Y. TIMES, Dec. 15, 1997, at A23 and Sins of Emission, *The Economist*, August 5-11, 2006, at 15 (noting that some environmentalists denounce the 'offsetting' of carbon emissions under the Kyoto Protocol as comparable to "the sale of indulgences by the Catholic church in the early 16th century, whereby people could, in effect, purchase forgiveness of past sins by handing over enough money").
[31] See, for example, *US Sees Coalitions of the Willing as Best Ally*, Financial Times, 5 January 2005 (quoting a senior US State Department official as follows: "We 'ad hoc' our way through coalitions of the willing. That's the future").
[32] See, for example, Bradley, Curtis A. (1999) 'Breard,' Our Dualist Constitution, and the Internationalist Conception. *Stanford Law Review* 51:529, at 531: "the U.S. approach to international law has been and continues to be fundamentally dualist"; at p. 540: "One condition frequently attached by U.S. treaty-makers is that the treaty in question not be self-executing … for example, U.S. treaty-makers have attached 'non-self-execution' declarations to their ratification of several human rights treaties" and Andrea Bianchi, "International Law and U.S. Courts: The Myth of Lohengrin Revisited," 15 Euro. J. Int'l L. 751 (2004).
[33] The later-in-time rule is often traced to *Taylor v. Morton*, 23 F. Cas. 784 (C.C.D. Mass. 1855) (No. 13, 749) (Curtis, J., on circuit), *aff'd on other grounds*, 67 U.S. (2 Black) 481 (1862).
[34] G.H. Treitel, Remedies for Breach of Contract, A Comparative Account, Clarendon, Oxford, 1988, at 63 ("In common law jurisdictions, the normal remedies for breach of contract are the action for an agreed sum … and the action for damages"). See also OLIVER WENDELL HOLMES, THE COMMON LAW 236 (Mark D. Howe ed., 1963) (1881) ("The only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised event does not come to pass").
[35] Alan Schwartz and Robert Scott, Contract Theory and the Limits of Contract Law, 113 Yale Law Journal (2003-4) 541, at 611: Parties are "not formally free to prevent themselves from modifying their contract in the future". See Restatement (Second) of Contracts & 311 cmt. a (1979)

Hitler) must be tied as a higher law.[36] Hence, for this school of taught, international law ought, ideally, to be sacredly protected and specifically performed. American voluntarism, in contrast, strongly believes in politics and flexibility and, in a more critical approach to law generally[37], subjects even its highest law, that is, the US constitution, to politics, deliberation and consent. As a result, optimal protection of international law involves a constant cost-benefit analysis and is anything but full performance. Professor Rubenfeld has recently described this divergence between European and American attitudes toward international law as grounded in profoundly different constitutional traditions.[38] In Europe he finds what he calls "international constitutionalism", in the United States, "democratic constitutionalism". For Rubenfeld, the latter, American approach "sees constitutional law as the foundational law a particular polity has given itself through a special act of popular lawmaking", a constitution based on "deliberation and consent" which ultimately remains subject to the flexibility of politics. In contrast, for Rubenfeld, the former, European approach "sees constitutional law not as an act of democratic self-governance but as a check or restraint on democracy deriving its authority from its expression of universal rights and principles that transcend national boundaries", a constitution based on "reflection and choice" whose commitments stand above politics and can therefore be readily internationalized.[39]

III. Allocation, protection and back-up enforcement of entitlements

Although domestic law analogies are never fully appropriate, this article subjects international law to a framework that is well-known in domestic US law, namely Calabresi and Melamed's 1972 distinction between inalienability, property rules and liability rules.[40] Although some scholars have previously referred to this model in

[36] See, for example, Martin Shapiro & Alec Stone Sweet, On Law, Politics, and Judicialization 203 (2002) ("European academic lawyers labour continuously to separate law from politics and, by extension, to distinguish what constitutional courts do from what political institutions do").
[37] On the different approaches to law generally in the US as compared to Europe, see Richard H. Pildes, "Conflicts Between American and European Views of Law: The Dark Side of Legalism," 44 Va. J. Int'l L. 145, 146-47 (2003).
[38] It is not the objective of this book to *explain why* Europe and the United States approach international law differently. Yet, where Jed Rubenfeld (*supra* note 21) refers to constitutional values, others refer to political interests (Kagan, *supra* note 21 and Delahunty, *supra* note 21). John Ikenberry refers to European attempts to make the dominant (US) power less threatening by "embedding that power in rules and institutions that channel and limit the ways that power is exercised" (John Ikenberry, "Strategic Reactions to American Preeminence: Great Power Politics in the Age of Unipolarity," National Intelligence Council Conference Report (July 28, 2003), available at http;//wwww.cia.gov/nic/confreports__stratreact.htm, p. 14; see also Stephen M. Walt, Taming American Power: The Global Response to U.S. Primacy 144-52 (2005).
[39] Rubenfeld, *supra* note 21, at 1971.
[40] Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARVARD LAW REVIEW (1972) 1089. Many law review articles further specifying the model have followed. See, for example, Madeline Morris, The Structure of Entitlements, 78 Cornell Law Review (1993) 822.

discrete fields of international law[41], this article is, to my knowledge, the first attempt to fully test the model to international law in general. What makes Calabresi and Melamed's model particularly interesting for international law is, firstly, that it offers a global matrix for legal entitlements, making abstraction of delineations deeply-engrained in domestic law such as private versus public law, contract versus tort, civil versus criminal law. As international law does not formally uphold any of these delineations[42], such a simplified, global model is more attractive. Secondly, the Calabresi and Melamed model uses the law and economics criteria of welfare maximization and rational action. Let it be clear from the start that when this literature (as well as the current article) uses the terms welfare maximization and efficiency, they are not limited to economic efficiency or monetary welfare. Instead, they refer to the maximization of an individual's or state's preferences, whatever these preferences may be (financial, moral, religious, geopolitical, etc.). Although the rational actor model has its limitations and, as we shall see below, needs to be adapted to fit international law, the model offers a fresh departure from the increasingly subjective, almost ideological debate between supporters and critics of international law. This debate is too often based on predisposed positions for or against international law rather than an objective analysis of facts and incentives. In that sense, even if the Calabresi and Melamed model suffers from its own limitations, magnified as they are in international law, the model can and does offer new insights.

1. Allocation of entitlements

According to Calabresi and Melamed, the first issue which must be faced by any legal system is what they call the problem of "entitlement".[43] At the domestic level, a state is presented with the conflicting interests of two or more people, or groups of people, and must decide which side to favor. Does it grant an entitlement to make noise or an entitlement to have silence; an entitlement to private property or an entitlement to communal property; an entitlement to bodily integrity or an entitlement to rape or murder? Equally, at the international level, rules of international law take sides in conflicts of interest between nations and, increasingly, between nations and individuals. Like domestic law, international treaties and custom allocate entitlements to pollute or to be free from pollution, entitlements to trade or to restrict trade, entitlements to non-intervention or to respect for human rights.

Crucially, however, whilst in domestic law such allocation of entitlements is easily

---

[41] See Wiener, *supra* note 12; Schwartz and Sykes, *supra* note 13; Trachtman, *supra* note 18 and Richard Morrison, Efficient Breach of International Agreements, 23 Denv. J. Int'l L. & Pol'y (1994) 183.

[42] The UN's International Law Commission (ILC) famously shelved a very controversial 1996 proposal (the 1996 Draft Articles on State Responsibility, Article 19, available at http://lcil.law.cam.ac.uk/ILCSR/articles_1996(e).doc) to divide all internationally wrongful acts in, on the one hand, international crimes ("breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime", Article 19.2) and, on the other hand, international delicts ("[a]ny internationally wrongful act which is not an international crime", Article 19.4). The final 2001 ILC Articles dropped the distinction between international crimes and international delicts but do attach special consequences to "serious breach by a State of an obligation arising under a peremptory norm of general international law" in Articles 40-41, discussed *infra* text at notes 235 and 236.

[43] Calabresi and Melamed, *supra* note 40 at 1090.

achieved through state or other majoritarian regulation, in international law it is far more problematic. Firstly, in the absence of a central law-maker, entitlements under international law are mostly allocated by consent. This raises the all-important question of attracting states to participate in a new rule or treaty, in particular when trying to tackle collective action problems such as global warming or nuclear proliferation. Without state consent to, for example, limit carbon emissions no state can be obliged to cut emissions. Since the consent rule also implies that states can, in principle, unilaterally withdraw from most of their commitments, preventing exit from treaties or other commitments is the second major problem in the allocation of international entitlements. Like the challenge of attracting participation, this risk of exit is not present in domestic legal systems. Indeed, within states, subjects cannot unilaterally exit from particular laws (other than through emigration and/or denouncing citizenship).

2. Protection of entitlements

The *allocation* of entitlements raises the first order of legal decisions or what, in international law, are often referred to as primary rules. Having made its initial choice, the next question is how to *protect* that choice. Framed in the domestic context, once an entitlement is set to, for example, silence, private property or bodily integrity, the state must next decide how and how strongly to protect this entitlement. In such second order decisions two questions must most commonly be answered.

First, can an individual sell or trade its entitlement? If not, the entitlement is said to be "inalienable". In most domestic legal systems, individuals cannot, for example, sell their kidneys or sell themselves into slavery even if they were willing to. Equally, minors cannot normally contract their entitlements away. This first type of entitlement is, in other words, immutable and non-transferable. It is, if you wish, written in stone unless and until it is altered by the legislator.

In case no such prohibition on transfer applies, the following, second question arises. For the entitlement to change hands must the holder of the entitlement agree or can anyone simply take the entitlement and compensate for it? If the former is true – no one can take the entitlement unless the holder sells it willingly – the entitlement is said to be protected by a "property rule". You do not have the right, for example, to take possession of my house even if you pay the going rate for it. You can only have my house if I agree to sell it to you. This second type of entitlement is, in other words, one that can be transferred, traded or exchanged, but only with mutual consent.

If the latter applies – the entitlement can be taken or destroyed for as long as compensation is paid – the entitlement is said to be protected by a "liability rule". The state can, for example, expropriate or take your land by eminent domain for as long as it pays you compensation. Equally, when an entitlement to clean air is protected by a pollution tax, I can unilaterally decide to pollute for as long as I pay the tax. This third type of entitlement is, in other words, one that can be bought-off or taken unilaterally subject only to a take-and-pay principle.

Applying these second order concepts of inalienability, property rules and liability rules to international law, the following basic questions arise:

(1) Can states freely transfer their entitlements under international law or should they at times be prohibited from doing so (making the entitlements inalienable)? If so, when, why and how should such inalienability be imposed?

(2) Can one state simply take or destroy the entitlement of another state, subject to compensation (liability rule or take-and-pay principle), or should certain entitlements only transfer if the holder willingly agrees (property rule or principle of mutual consent)? In other words, when, why and how should international law be protected by a property rule? And when, why and how should international law be protected by a mere liability rule?

There is no doubt, and Calabresi and Melamed openly admitted so[44], that entitlements can be protected by hybrid regimes, such as combinations of property and liability protection, and that all three rules of protection come in different degrees. The same is true for international law. The Kyoto Protocol, for example, first imposes a collectively set cap on emissions for each committed country, a cap which parties cannot change *inter se* (reminiscent of inalienability).[45] Subsequently, however, the Kyoto Protocol allows parties to pollute above their ceiling for as long as they "pay" for it, either by buying emission credits from someone else (consensual transfer suggestive of a property rule) [46] or by financing climate-friendly projects in developing countries under the so-called Clean Development Mechanism[47] (compensation in line with liability protection). Similarly, the protection of investor rights under NAFTA offers a mixture between liability and property protection. Expropriation of foreign investments for a public purpose is, for example, explicitly permitted and not regarded as breach for as long as full compensation is paid (liability protection). Unfair or discriminatory treatment of foreign investments, on the other hand, constitutes breach (under what would seem like a property rule). Yet, the remedy for such breach is explicitly limited to compensation (resembling liability protection). Equally, international entitlements can be made inalienable to different degrees. As discussed in Section V, peremptory norms of international law (*jus cogens*) are automatically binding on all states and super-inalienable as they cannot be transferred or contracted out from, not even by agreement of all states. Yet, also treaties of a legislative type which set out collective obligations (such as human rights conventions) have inalienable features, albeit to a lesser extent than *jus cogens*: Even if such obligations may only be binding on the parties who accepted them, they cannot be transferred or contracted out from *inter se* (that is, as between a sub-

---

[44] Calabresi and Melamed, *supra* note 40 at 1093 ("it should be clear that most entitlements to most goods are mixed. Taney's house may be protected by a property rule in situations where Marshall wishes to purchase it, by a liability rule where the government decides to take it by eminent domain, and by a rule of inalienability in situations where Taney is drunk or incompetent").
[45] Article 3, Kyoto Protocol.
[46] Article 6, Kyoto Protocol.
[47] Article 12, Kyoto Protocol.

set of treaty members). Like inalienable entitlements under domestic criminal law, such collective entitlements can only be transferred or re-allocated by the legislator himself.

3. Back-up enforcement

What Calabresi and Melamed overlooked, however, is that a legal system cannot rest once it has answered the second order question of how to protect entitlements. Indeed, a third and final question logically follows, namely: What happens if someone takes or destroys an entitlement *against* the rules? Put differently, how does the state respond when murder does occur, when you take my house *without* my agreement or when I pollute but refuse to pay the pollution tax? That Calabresi and Melamed did not ask this third order question of back-up enforcement is easily forgiven. In domestic law, the state has a monopoly on the use of coercive force and a variety of instruments in hand to compel its subjects to comply with the rules. Depending on how and how strongly it decided to protect entitlements, a state can seize my property when I refuse to pay taxes, it can fine you for occupying my house and incarcerate, or even execute, the murderer. Under international law, of course, the situation is different. In the absence of central enforcement, states cannot be jailed, let alone be executed. Moreover, when states refuse to pay compensation most of their property is protected by sovereign immunity. This means that in international law the third order question of what happens if entitlements are taken against the rules deserves attention. For many observers, it even becomes crucial.[48]

4. A framework for the protection of international law entitlements

In sum, rather than asking the tired question of whether international law is law or legally binding, the framework proposed in this article is three-pronged: (1) allocation: how does international law allocate entitlements?; (2) protection: how does international law protect entitlements; and (3) back-up enforcement: what happens if international rules of protection are disregarded? Crucially, within the second prong of protection, three broad possibilities arise: (1) make the entitlement inalienable, (2) protect it as property, making its transfer subject to mutual consent or (3) protect the entitlement under a mere liability rule or take-and-pay principle.

While focusing on the second order question of how international law protects entitlements (through inalienability, property rules or liability rules), a crucial point of this article is that, at the international level, any such attempt must be made in context. Firstly, we must take account of the *preceding* step of how international law allocates entitlements (essentially through voluntary assent which creates the dual problem of attracting participation and preventing exit). Secondly, we cannot loose sight of the *next* step of how international law responds, or can respond, when entitlements are taken against the rules (non-centralized back-up enforcement).

If international law is to further develop and to become more refined and sophisticated, it

[48] In Section VI below I will, however, describe how the protection of international entitlements does not stand or fall nor often primarily depends on coercive back-up enforcement.

must not merely attempt to create more rules (first order decisions), nor stare itself blind at the lack of centralized enforcement (third order decisions). It must incorporate the second order nuances of variable protection common in domestic law and justified *a fortiori* at the international level. Indeed, as further developed below, my claim is that at the international level there are *additional* reasons, not present (or not to the same degree) in domestic law, to stop short of making all entitlements inalienable, such as contractual freedom, the absence of centralized enforcement, attracting and retaining participation, incomplete contracting and legitimacy concerns.

By clinging to what they regard as the legal nirvana of immutable international law, European absolutists and other traditional supporters of international law overlook that even in domestic law most entitlements must *not* be sacredly respected. Even with the full force of centralized enforcement available, domestic law deliberately chooses to permit the contracting away of most entitlements (that is, those protected by a property rule). In addition, in a growing number of regulatory fields -- including, in particular, environmental protection -- domestic law goes as far as allowing the unilateral taking of entitlements subject only to compensation (thus protecting entitlements by a mere liability rule).[49] Most importantly, domestic legal systems permit such compensated takings not for lack of enforcement tools, but because they regard such lower levels of protection as more effective and efficient. In that sense, when setting the uniform target of inalienability, European absolutists try to be "more catholic than the pope". Their paradoxical over-ambition in the face of obvious weakness begs for criticism. By setting a standard that it cannot and, more importantly, *should not* always meet, international law would further undermine its already precarious credibility.[50] Indeed, as discussed later (Section VI.2), inalienability in international law risks leading to less, rather than more, compliance and enforcement.

In response to American voluntarists and other critics of international law, the nuanced framework proposed in this article demonstrates that the absence of an immutable and centrally enforced international law does not undermine international law's claim to normativity. Not because international law, in the absence of centralized enforcement, ought to lower its expectations, but because the normativity of international law, much like that of domestic law, comes in degrees. As in domestic law, in international law as well, it is often times more efficient and appropriate to protect entitlements by a property or liability rule rather than by strict inalienability. Moreover, as elaborated below,

---

[49] In the context of environmental protection, for example, Wiener writes that after thirty years of debate and experience, analysts agree that "incentive-based instruments such as taxes and tradeable allowances should generally be chosen over technology requirements and fixed emissions standards because the incentive-based instruments are typically far more cost-effective and innovation-generating than their alternatives". Moreover, "among the incentive instruments, the price-based tax and liability rule instruments – which set a price on emissions and let sources adjust the quantity they emit – will typically be superior to the quantity-based tradeable allowance and property rule instruments – which set the quantity of emissions and let the sources bargain over price". (Wiener, *supra* note 12, at 682). On the benefits of liability rules over property rules in terms of technological innovation for certain areas now covered by intellectual property rights, see Jerome Reichmann, *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation,* 53 VAND. L. REV. 1743 (2000).

[50] As Sophocles famously noted: 'What you cannot enforce, do not command' (Sophocles, Greek tragic dramatist (496 BC - 406 BC), see http://www.quotationspage.com/quote/2664.html).

sanctions and centralized enforcement are not the only -- nor probably the most important -- reasons why states, even individuals within states, comply with law. Their absence or relative weakness in the international context does not, therefore, render international law irrelevant, nor does it obviate further refinements between allocation, protection and back-up enforcement. On the contrary, as demonstrated below (Section VI.1), it is exactly the level of protection of international law entitlements (e.g. are they protected by a liability or a property rule) that sets and triggers the level of what I will call "community costs" which are, in turn, crucial to compliance with international law.

IV. How should international law entitlements be protected?

This section tackles the core normative question of how international entitlements *ought to be* protected under the second prong of this article's three-pronged framework (allocation, protection, back-up enforcement). It first explains why in domestic law, and *a fortiori* in international law, property protection is the optimal form of protection of entitlements unless special circumstances arise (Section IV.1). As a result, both what I called European absolutism (in favor of hard inalienability), and American voluntarism (in favor of simple liability protection), are undesirable extremes. Subsequently, I describe the circumstances in which deviation from the default rule of property protection may be advisable, first toward stronger protection of entitlements as inalienable (Section IV.2), second toward weaker protection of entitlements under a liability rule (Section IV.3). Yet, for both types of deviation from the default rule of property protection, I discuss a number of important *caveats*. The next section of this article (Section V) tests these normative predictions to the current state of protection of international law entitlements.

1. The argument for a default rule of property protection

Implied in the Calabresi and Melamed model is that property protection should be the default rule. In other words, once allocated, entitlements should be freely tradeable unless there are either (1) solid reasons to stop or prevent such trading by making the entitlement inalienable, or (2) good excuses to stimulate or force a beneficial transfer that would otherwise not occur (or at too high a prize) by protecting the entitlement under a mere liability rule. From a domestic law perspective, Paul Epstein, for example, has pointed out that "[t]he standard practice in virtually all legal systems assumes the dominance of property rules … everywhere and in every society property rules form the norm and liability rules the crucial exception".[51]

1. Contractual freedom and welfare maximization

The core reason for a default rule of property protection is individual freedom and the maximization of welfare that it should, in principle, bring about. The individual him- or herself, not the state or some other centralized power, is best-suited to value his or her needs and preferences (both financial and otherwise). As a result, letting individuals decide for themselves whether, and on what terms, to transfer entitlements leads to the maximization of individual as well as overall welfare. Put differently, to transfer an entitlement to the one who values it the most ensures the most efficient allocation of resources.

This basic *rationale* for contractual freedom and property protection is readily transposable to international law. Indeed, if anything, in the inter-state context, it applies with even greater force. Given the enormous political, economic and social diversity between states, and in the absence of a socially cohesive world community, states themselves, not international institutions or some form of world government, are, in principle, best-suited to value state preferences. To let states decide on when, and on what terms, to transfer their entitlements should, in principle, maximize inter-state welfare and ensure the most efficient allocation of resources.[52] If two states want to change an earlier treaty or agree to settle a dispute, even in a way that is inconsistent with an earlier treaty, why stop them (through inalienability)? Equally, if a state holder of an entitlement values its entitlement more than what a potential buyer is willing to offer for it (and no transfer occurs), why attempt to objectively value the entitlement and force a transfer (through liability protection)? In a national democracy state intervention either prohibiting transfer (inalienability) or forcing the transfer of individual entitlements

---

[51] Paul Epstein, A Clear View of *The Cathedral*: The Dominance of Property Rules, 106 Yale Law Journal 2091 (1996-1997), at 2092 and 2096. Alan Schwarz as well has argued in favor of specific performance as the default rule on the ground that information problems about valuation, enforcement, and so forth, are always present, Alan Schwartz, The Case for Specific Performance, 89 Yale Law Journal 271 (1979). See also Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. Legal Stud. 1 (1989) 13-4: "The efficient breach theory is in fundamental conflict with a basic premise of both the common law and other Western legal system, namely, that property (including contractual rights) is not be taken and given to another without the owner's consent. There are few exceptions to this principle. The major one is in public law [the government's power of eminent domain]".

[52] Below I question whether this process necessarily achieves maximization of intra-state welfare.

(liability) can be justified on majoritarian terms. In the international context, however, there is no global democracy and a huge diversity between states. Hence, centralized intervention is more difficult (though, of course, not impossible) to justify internationally than nationally. In sum, both in domestic and *a fortiori* in international law, principles of freedom and welfare maximization (to avoid the notion of state sovereignty) militate in favor of a default rule of property protection.

Four ancillary arguments support a default rule of property protection in the specific context of international law. As announced earlier, the second order decision of how to protect entitlements must, in the international context, take account of both the earlier and the subsequent steps of, respectively, allocation of entitlements (normally by consent only) and back-up enforcement (generally weak). All four of these ancillary arguments put the question of protection in this broader context. They relate to (1) the absence of centralized enforcement; (2) the need for flexibility to attract participation and prevent exit in a consent-based system; (3) incomplete contracting, especially in multilateral negotiations and (4) legitimacy concerns. All four of these arguments can also be seen as reasons why European absolutism (which favors making international law entitlements inalienable) is, in many cases, a step too far.

2. The absence of centralized enforcement

As compared to both inalienability and liability protection, protecting entitlements as property gives rise to the least amount of intervention. Since an entitlement protected by property rule can be freely traded between a willing buyer and a willing seller, property protection "lets each of the parties say how much the entitlement is worth to him, and gives the seller a veto if the buyer does not offer enough".[53] In other words, the transfer of entitlements is simply left to voluntary negotiations. Call it the market place of entitlements. No centralized power is required to either prohibit transfers (as in inalienability) or to objectively valuate entitlements that were unilaterally taken (as in liability protection). Since international law generally lacks centralized law-making and enforcement, the level of protection with the least amount of intervention is logically best-suited. Indeed, if we make an international entitlement inalienable, who will ensure that it is, in practice, not transferred or violated? Equally, when we let states unilaterally take entitlements or breach treaties for as long as they pay compensation, who will objectively determine the appropriate level of compensation and make sure that, afterwards, compensation is actually paid? Making what I will call "community obligations" inalienable without a system of community enforcement, and the paradoxical consequences that come with it, is further discussed in Section VI.2 below.

3. The need for flexibility to attract participation and prevent exit

Another argument that makes property protection particularly suitable to international law relates to the largely consensual nature of international law-making. Fixing entitlements as inalienable can make it harder for states to join the norm or treaty regime

---

[53] Calabresi and Melamed, *supra* note 40 at 1092.

in the first place: if a state knows that the new rule will be binding on it without the possibility for subsequent contracting out, it will think twice before signing on. Inalienability can, in this sense, exacerbate the problem of attracting participation. Even states that did contract into a regime of inalienability may, when found to be in violation, opt for leaving the regime altogether rather than strictly complying with it (the risk of exit).

International labor standards created under the auspices of the International Labor Organization (ILO) offer a good example of how treaties must balance universality and flexibility. To be effective, ILO standards should ideally be applied on a universal basis, that is, in all countries. Yet, to achieve universality, that is, to attract participation by all countries, ILO standards must offer flexibility to allow for the diverse cultural and historical backgrounds, legal systems and levels of economic development of ILO members. As a result, most ILO standards have been formulated in a manner that makes them flexible enough to be translated into national law and practice with due consideration of these differences. For example, standards on minimum wage do not require member states to set a specific minimum wage but to establish a system and the machinery to fix minimum wage rates appropriate to their economic development.[54] A similar trade-off between universality and inalienability, on the one hand, and flexibility to attract participation, on the other, can be found in the *Reservations to the Genocide Convention* case.[55] In that case, the International Court of Justice (ICJ) had to decide whether or not reservations to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide were permissible. A negative answer would have strengthened the convention as such and confirmed its inalienable features; a positive answer would have offered flexibility which, in turn, could attract more states into signing the convention in the first place. The ICJ leaned toward the latter option deciding that, even if some parties to the convention objected to a reservation, the reserving state "can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention".[56] Article 19 of the 1969 Vienna Convention on the Law of Treaties incorporated this principle.

4. Incomplete contracting

In addition, especially when multilaterally negotiated with high numbers of states, the requirement of consent by each and every player often leads to a common lowest denominator of vague rules and constructive ambiguity. To prevent re-negotiation or further refinement of such "incomplete contracts", that is, to make such entitlements inalienable, is hardly an optimal solution. This explains why many of today's core multilateral treaties – such as the UN Convention on the Law of the Sea or the Convention on Biological Diversity – are in many ways relatively broad framework

---

[54] INTERNATIONAL LABOUR OFFICE, RULES OF THE GAME, A BRIEF INTRODUCTION TO INTERNATIONAL LABOUR STANDARDS (2005), at 16.
[55] ICJ Reports (1951), 15.
[56] *Ibid.*, at 21, 24.

agreements that permit for further specification in regional or bilateral agreements.[57]

International norms are, moreover, prone to be "incomplete contracts" on more standard grounds as well.[58] When states draft treaties, especially in complex fields such as trade or environmental protection, negotiators are unlikely to discuss and fix rules for each and every situation that may arise in the future. Doing so would be too time-consuming and difficult (that is, involve transaction costs that are too high). Moreover, even if negotiators were willing to pay these costs, it is humanly impossible to foresee the future: international conditions may change (be it the world economy, political alliances or through natural disasters) and domestically as well, politicians are replaced and the preferences of their constituencies may alter. For all these reasons, state-negotiated norms, even more so than contracts between private operators, are most likely to be "incomplete contracts" that require flexibility. In other words, to protect entitlements thus allocated as inalienable may not be optimal.

5. Legitimacy concerns

A final argument in support of a default rule of property protection in the specific context of international law relates to the degree of legitimacy of international law itself. So far, this article has taken the legitimacy of international law for granted. For example, we have presumed that – through the consent rule -- international entitlements are allocated in a transparent and equitable way. In a domestic legal system where democratically elected law-makers allocate and shift entitlements this presumption is strong, indeed. In international law, however, the legitimacy of norms is sometimes questioned.

Firstly, legitimacy concerns have been raised because of who creates custom and negotiates treaties, namely predominantly the executive branch of government to the detriment of national parliaments, and very often including also state representatives who are not democratically responsible yet may have a definite influence on how international law is made and enforced.[59] Secondly, the legitimacy of international law has been

---

[57] See Article 311 of UNCLOS. For a discussion see RUDIGER WOLFRUM AND NELE MATZ, CONFLICTS IN INTERNATIONAL ENVIRONMENTAL LAW (2003).

[58] See GEORGE DOWNS AND DAVID ROCKE, OPTIMAL IMPERFECTION: DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS (1995); Schwartz and Sykes, *supra* note 13 and Henrik Horn, Giovanni Maggi and Robert W. Staiger, "The GATT/WTO as an Incomplete Contract", mimeo, 2006 (available at http://www.econ-law.se/HMS-5April2006.pdf).

[59] See, for example, J.H.H. Weiler & Iulia Motoc, *Taking Democracy Seriously: The Normative Challenges to the International Legal System, in* INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS (Stefan Griller ed., Eur.Cmty. Stud. Assoc. Aus. Publ'n Series Vol. 5, 2003) 67 ("You take the obedience claim of international law and couple it with the conflation of government and State which international law posits and you get nothing more than a monstrous empowerment of the executive branch at the expense of other political estates"); Curtis Bradley, International Delegations, the Structural Constitution, and Non-Self-Execution, 55 Stan. L. Rev. 1571 (2002-3) at 1558 ("transfers of authority by the United States to international institutions could be said to raise 'delegation concerns'. These concerns relate to democratic accountability, shifts in the balance of power between the federal branches, and erosion of the U.S. system of federalism") and Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH L. REV. 167 (1999) at 200 (arguing that ratification cannot cure the democratic difficulties in the treaty-making process).

questioned because of how difficult it is to change or adapt international law to new circumstances: once negotiated, signed and ratified, the consent rule and rules on the modification of custom, make it extremely difficult to optimally adjust the allocation of international entitlements.[60] Thirdly, critics have doubted the legitimacy of certain international norms on the ground that weak states have, for economic, political or other reasons, little choice but to join a treaty or treaty amendment making their formal consent an insufficient basis for those states to be legitimately held against the norms in question.[61]

This is not the place to evaluate whether or not there is a legitimacy deficit in international law. If at all present, this deficit would, in any event, vary across international norms and between states. What matters for present purposes is that where such deficit exists, it offers an additional reason to think twice before protecting entitlements as inalienable.[62]

2. When to protect entitlements as inalienable?

If reasons of contractual freedom, welfare maximization, lack of centralized enforcement, consensual decision-making, incomplete contracting and legitimacy, favor a default rule of property protection in international law -- or, put differently, militate *against* European absolutism -- under what circumstances should entitlements nonetheless be protected as inalienable? In other words, when should states be prevented from transferring entitlements or changing treaties or custom even *with* mutual consent?

The starting point for any discussion on inalienability, be it in domestic or international law, is this: Anyone who believes in individual freedom, or the freedom of states to set their own destiny, ought to be weary of setting norms in stone, that is, of making entitlements inalienable. Once labeled as inalienable neither individuals (under domestic law) nor states (under international law) can transfer the entitlement. That is not to say that no entitlement ought to be inalienable, only that the criteria for inalienability need to be carefully scrutinized. As discussed below, this is, however, not the case in international law. For Calabresi and Melamed, in contrast, who address inalienability in domestic law, inalienability can be appropriate on three grounds: significant

---

[60] See, for example, Jed Rubenfeld, *supra* note 21 at 2007 ("Treaties are exceptions to ordinary lawmaking. Not only are they made outside the ordinary, democratic lawmaking process, but they can also claim to impose obligations on a country that the nation's legislature cannot thereafter amend or undo") and Cogan, *supra* note 19 at 197 (advocating what he calls operational noncompliance "in cases in which time is a factor or in situations in which consensus (as to reinterpretation or renegotiation) is unachievable – that is, in situations in which the international legal system, because of its decentralized lawmaking process, cannot accommodate current or developing conceptions of lawfulness").

[61] See Joseph Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 *ZaöRV* 547 (2004) at 557 ("Increasingly international regimes … are negotiated on a take-it-or-leave-it basis ... But for most States both the Take it is fictitious and the Leave it is even more. The consent given by these 'sovereign' states is not much different to the 'consent' that each of us gives, when we upgrade the operating system of our computer and blithely click the 'I Agree' button on the Microsoft Terms and Conditions").

[62] Some may go as far as using Marxist-type arguments against international law as a law that protects the strong and the status quo and hence ought not to be made inalienable.

externalities, moralisms and paternalism.[63]

1. Significant externalities

Under the Calabresi and Melamed model, inalienability may be called for in cases where the transfer of the entitlement would create such significant externalities -- that is, costs to third parties (as in pollution) -- that no buyer would be willing to pay for them. In that case, “setting up the machinery for collective valuation will be wasteful” and “[b]arring the sale [of, for example, land] to polluters will be the most efficient result because it is clear that avoiding pollution is cheaper than paying its costs – including the costs to [third parties]”.[64] Put differently, as the transfer cannot increase welfare, it is best to ban it.

Applied to international law, a first reason to make an entitlement inalienable is, therefore, that its transfer necessarily creates costs that exceed any possible benefit. If states agree, for example, not to use certain weapons, thereby allocating an entitlement to be free from the harm caused by these weapons, states could also ban any subsequent agreement that allows a country to use the weapon even if that country is willing to pay for it. The reason to do so could then be that the harm caused by the weapon necessarily exceeds any benefit to be gained by the weapon-using country. Put differently, where an activity would create such high degree of externalities – say, dropping a nuclear bomb or wide-scale, cross-border pollution – no one might be willing or able to pay for all the costs related to the transfer of the entitlement. Hence, it may be more efficient to ban the transfer in the first place.

2. Moralisms

A second reason for inalienability is based on so-called moralisms or values. In some cases “external costs do not lend themselves to collective measurement which is acceptably objective and nonarbitrary”.[65] In theory, one could value the external costs to other people in society related to me willingly selling myself into slavery and force the buyer to pay not just me, but also all third parties whose morals would be harmed by seeing me as a slave. Yet, because we feel that any monetization of, for example, freedom or a kidney is, by hypothesis, out of the question, most states decided to make the entitlement to be free from slavery, or to our kidneys, inalienable.

Applied to international law, a second reason to make an entitlement inalienable is, therefore, that the entitlement relates to a universal or quasi-universal moral value (such as the prohibition of slavery or apartheid) which makes any monetized transfer, by definition, impossible. International law could then allocate inalienable entitlements against, for example, slavery, genocide, aggression and crimes against humanity on the ground that states consider it inappropriate to monetize the values protected by these norms. In other words, where it is difficult, if not impossible, to put a price on an

---

[63] For a more detailed analysis of inalienability, see Susan Rose-Ackerman, Inalienability and the Theory of Property Rights, 85 Columbia Law Review (1985) 931.
[64] Calabresi and Melamed, *supra* note 40 at 1111.
[65] Calabresi and Melamed, *supra* note 40 at 1112.

entitlement (to, for example, freedom or the survival of an ethnic group), it makes sense to altogether ban the transfer of that entitlement.

3. Paternalism

A third reason to protect entitlements as inalienable is, according to Calabresi and Melamed, paternalism. They distinguish between self-paternalism and true paternalism. Self-paternalism explains why Ulysses tied himself to the mast, or why individuals pass a bill of rights or constitutional safeguards "so that they will be prevented from yielding to momentary temptations which they deem harmful to themselves".[66] The same logic applies when making invalid contracts entered into when drunk or under undue influence or coercion. True paternalism, in turn, explains why we prohibit a whole range of activities by minors.

Applied to international law, states may find reasons to tie their hands to the mast of a certain international norm so as to avoid future temptations to deviate from such norm, or limit contracting in situations of duress or coercion (self-paternalism). They may also consider it necessary to limit the transfer of entitlements held by states in situations of particular weakness (true paternalism).

3. When to protect entitlements under a liability rule?

With the earlier arguments in favor of property protection as the default rule – in particular, contractual freedom and welfare maximization -- why would we ever expect a legal system to move away from property protection or the free market exchange of entitlements? The answer, in short, is: To correct market failure. In the previous section, I discussed reasons to make entitlements inalienable (significant externalities, moralisms and paternalism). Inalienability favors the *holder* of an entitlement: Even if the holder *wants* to sell the entitlement, he or she is not permitted to do so. Inalienability *prevents* trading. At the other extreme of inalienability, one may also deviate from property protection by imposing a mere liability rule. Liability protection favors the *taker* of an entitlement: Even where the holder does *not* agree to transfer the entitlement, anyone can unilaterally take the entitlement on the sole condition that the holder gets compensated (take-and-pay principle). Rather than preventing trade, liability protection *stimulates* or even *forces* trade.

Yet, in international law, why should we ever permit a state to unilaterally take the entitlement of another state *without* that state's consent? At this stage, it is useful to revert to the reasons offered by Calabresi and Melamed for liability protection in domestic law. They offer three reasons to replace property by liability protection: hold-out, free-load and high transaction costs. The first two are also referred to as strategic behavior.

1. Hold-out

[66] Calabresi and Melamed, *supra* note 40 at 1113.

Even where the sale of entitlements is efficient (that is, the buyers value the entitlements higher than the sellers), certain sellers, or holders of the entitlement, may refuse to sell at the normal price in the hope of capturing more of the premium that the buyers are willing to pay. In other words, entitlement *holders* may engage in strategic behavior. Calabresi and Melamed use the example of eminent domain where owners of land may hold-out in order to get a higher price from the town authority wanting to build a park. Even though objectively the park is Pareto desirable (that is, the town's citizens value a park more than the land-owners value their land), with enough hold-outs, the park will not be built. Liability protection resolves this hold-out problem: "If society can remove from the market the valuation of each tract of land, decide the value collectively, and impose it, then the hold-out problem is gone".[67] In other words, under a liability rule or take-and-pay principle, the town can simply take the land and compensate its owners at an objectively determined value.

Under international law, it is easy to think of similar hold-out problems for which a liability rule may offer a solution. If, for example, the EC wants to renegotiate one of its tariff commitments in the WTO treaty and the EC is perfectly willing to pay each WTO member for this change, some WTO members may hold-out. That is, they may refuse to sign the amendment even though they are, objectively, offered full compensation (e.g., they get a lower tariff on some other product). Why so? Because in such renegotiation, WTO members – who, of course, realize that the proposed amendment is apparently important for the EC -- have an incentive to hide their true valuation so as to extract ever more compensation from the EC. With enough hold-outs, the price requested from the EC may simply kill the deal, even though objectively it should have materialized. In this situation, the market (*in casu* consensual re-negotiation of the WTO treaty) fails to establish what is Pareto desirable. Moving from a property rule (which requires consent from all sides) to a liability rule (where entitlements can be taken unilaterally as long as compensation is paid), can then offer a way out. Under such liability regime, or take-and-play principle, the EC could then simply increase its tariff but pay each WTO member for it, at an objectively set level. As discussed below, this is exactly the liability regime that Article XXVIII of GATT (tariff renegotiations) and Article XXI of GATS (renegotiation of specific commitments in services trade) provide for.

2. Free-load

Besides hold-out, Calabresi and Melamed offer the problem of free-load as a second reason to move from property to liability protection. While hold-out represents strategic behavior by sellers (or entitlement holders), free-load is strategic behavior by buyers (that is, potential takers of the entitlement). Going back to the example of eminent domain and the building of a park, although the town's citizens may each value the land at a price that makes the sale Pareto desirable, some citizens (i.e. potential buyers) may try to free-load. That is, they may claim that the park is only worth $50 to them or even nothing at all (instead of the true value to them of, say, $100). They would, of course, do so in the hope that other citizens will chip in more and buy the land with their money, even though

[67] Calabresi and Melamed, *supra* note 40 at 1107.

subsequently everyone would benefit from the park. With enough free-loaders unwilling to pay, the park may not materialize even though it is Pareto desirable. As with the hold-out problem, liability protection may then offer a way out: "if society can value collectively each individual citizen's desire to have a park and charge him a 'benefits' tax based upon it, the freeloader problem is gone. If the sum of the taxes is greater than the sum of the compensation awards, the park will result".[68] In other words, where the entitlement of citizens to their money is protected by mere liability, the town can simply take the citizens' money (that is, impose a tax) and compensate them with the creation of a park.

Moving now to international law, it is readily apparent that the largely consensual nature of international law-making -- that is, states *cannot* normally be forced into an international norm or scheme without their consent – should severely limit the way international law can deal with free-loaders. If a state decides to free-load, for example, on the commitments made by other countries to cut emissions under the Kyoto Protocol or to stop the trade in conflict diamonds, there is, in principle, nothing that international law can do to force these free-loaders to join the Kyoto Protocol or to participate in the Kimberly Scheme. In the absence of centralized power, no one can, for example, force the United States or China to impose an emissions tax. The only two things that existing Kyoto Protocol members can do is to either lure, or force, non-parties into joining with the use of, respectively, carrots or sticks.[69] The former process has been referred to by Wiener as the "beneficiary pays" principle (instead of the traditional "polluter pays" principle).[70] Given the consent rule and the general absence of rule-making or taxation by majoritarian decision, one would, therefore, predict that at least one of the traditional reasons offered in domestic law in favor of liability rules (namely, free-load) is hard to apply in international law.[71]

3. High transaction costs

---

[68] Calabresi and Melamed, *supra* note 40 at 1107.

[69] The use of sticks, or economic or other pressure, to force participation of free-riders in international regimes can be seen, for example, in the OECD's scheme against money-laundering, the so-called Financial Action Task Force (FATF). FATF issued a list of forty recommendations to fight money laundering and gave itself the mandate to monitor compliance with those recommendations (including the imposition of sanctions), even by states that did not join the scheme, see http://www.fatf-gafi.org. No surprise, therefore, that FATF can proudly state on its website that "[d]uring 1991 and 1992, the FATF expanded its membership from the original 16 to 28 members". Similarly, the Montreal Protocol on Substances that Deplete the Ozone Layer, in its Article 4.1, imposes an obligation on all parties to ban the import of controlled substances from any non-party. As of July 2006, Ratification of the Montreal Protocol increased from 29 at its entry into force to 189 as of July 2006 (see http://ozone.unep.org/Treaties_and_Ratification/2C_ratificationTable.asp). The Kimberley Scheme on Conflict Diamonds (Section III(c)) equally calls upon participants to "ensure that no shipment of rough diamonds is imported from or exported to a non-Participant".

[70] Wiener, *supra* note 12 at 750.

[71] This point was made earlier by Wiener, *supra* note 12 683 ("the presumption favoring environmental taxes depends on the assumptions that the regulator can compel polluters to comply by fiat and that the regulator can impose the instrument directly on polluters without an intermediate level of government in the way. But neither of these assumptions – coercive fiat or unitary regulation – is valid in the global legal context").

A third reason that Calabresi and Melamed offer to shift from property to liability protection is not strategic behavior by either seller (hold-out) or buyer (free-load) but high, or even prohibitive, transaction costs. The famous Coase Theorem tells us that, in the absence of transaction costs, parties will bargain to mutual advantage and renegotiate or transfer entitlements irrespective of how the legal system protects them.[72] In reality, of course, transaction costs do exist and often prevent efficient transfers. Calabresi and Melamed give the example of accidents and how it would be extremely expensive, if not prohibitive, to protect a victim's entitlement not to be accidentally injured as property. Indeed, in that case, anyone who engages in activities that may injure others would have to negotiate with all potential victims and buy the right, for example, "to knock off an arm or a leg".[73] Such requirement would preclude most activities that involve risk, even though these activities may, from an overall-welfare perspective, be worth having (ranging from driving cars to using certain machinery).

Much like hold-outs and free-loads, the problem of high transaction costs can be resolved through liability protection. As Calabresi and Melamed note, "perhaps the most common [reason], for employing a liability rule rather than a property rule to protect an entitlement is that market valuation of the entitlement is deemed inefficient, that is, it is either unavailable or too expensive compared to a collective valuation".[74] Hence, instead of forcing risk-takers to *ex ante* negotiate a deal with all potential victims, in domestic law, the entitlement of people to be free from accidental injury is protected *ex post* by a liability rule. As a result, the risk-taker can take the entitlement (i.e., cause an accident) but will then have to compensate the victim.

Should high or prohibitive transaction costs be a common reason to protect international entitlements under a liability rule? In one sense (low number of states), transaction costs under international law could be expected to be lower. As there are, after all, only 191 states and only so many neighboring countries for each state, it is, in many cases, possible to have *ex ante* negotiations with all potential victims. In contrast, when, for example, driving a car under domestic law the number of potential victims runs in the thousands, if not millions, and *ex ante* negotiations are virtually impossible. Under UNCLOS, for example, any state party who wants to change the rules (that is, "buy" certain entitlements from other members) will, indeed, need to negotiate with all other UNCLOS parties. Even if there are now 150 UNCLOS parties[75], such negotiations remain, in principle, feasible as compared to negotiating with thousands of potential victims every time you drive your car.

At the same time, other elements can make transaction costs in international negotiations much higher than in domestic law. As opposed to negotiations between individuals or unitary actors, negotiations between states are likely to be complex and time consuming.

---

[72] Ronald Coase, The Problem of Social Cost, 3 J. L & Econ 1 (1960).
[73] Calabresi and Melamed, *supra* note 40 at 1109.
[74] Calabresi and Melamed, *supra* note 40 at 1110.
[75] See Status of UNCLOS Ratification at http://www.un.org/Depts/los/reference_files/status2006.pdf.

As Putnam pointed out, state-to-state negotiations are two-level games.[76] At a first level of domestic politics, domestic constituencies and stakeholders must first formulate a position. At a second level of international politics, states must then agree amongst themselves. As these two levels constantly interact -- international negotiators may have to report back or ask authority from, for example, parliament – arriving at an agreed text takes time, energy and considerable expense. Even if the creation of multilateral institutions (such as the UN in New York, WTO in Geneva or UNESCO in Paris) may have replaced dispersed bilateral negotiations with more uniform negotiations in the same context and city, other developments may have neutralized these savings. First, most of the large multilateral organizations make decisions only by consensus. As a result, agreement is needed not just on a bilateral level but as between, for example, 150 players in the UNCLOS or the WTO. Second, the rise of representative democracy both domestically and at the international level has considerably expanded the number of stakeholders in international negotiations (be it individuals, NGOs, companies, professional organizations or other international organizations), thereby increasing overall transaction costs. On balance, one can therefore expect that Calabresi and Melamed's third reason for liability rules (high transaction costs) can find particular application in the international context.

4. Additional reasons for liability protection in international law

Besides Calabresi and Melamed's three reasons for liability rules in domestic law (hold-out, free-load and high transaction costs) there could at least be four additional reasons for international negotiators to adopt the take-and-pay principle. One possible incentive is that, as noted earlier, negotiators cannot foresee all situations nor predict what their compliance situation will be in the future. Because of these uncertainties they write so-called "incomplete contracts". This context could give them an additional reason to set up a liability rule device that permits breach whenever, for some reason or another, the cost of performance exceeds the damage caused by breach. Secondly, the above-described legitimacy concerns that have been expressed in respect of certain international rules may lead some to regard property protection as going too far. On that basis as well, states could then be permitted to take entitlements for as long as they compensate. In those circumstances, liability protection could, in other words, offer a democratic safety-valve: If based on new circumstances or changed preferences, a population changes its mind and democratically opposes a treaty obligation, under a liability rule, this opposition can be given effect, yet without harming others as liability protection implies full compensation of all victims. Thirdly, for those who believe that current international law is lopsided in favor of economic globalization and lags behind in environmental and social globalization[77], liability protection can offer an interesting tool. To avoid an even bigger divide, one could then argue that, for example, trade and investment agreements should only be protected by a liability rule. On this view, only once stronger rules

---

[76] Robert D. Putnam, "Diplomacy and domestic politics: the logic of two-level games," 42 Int'l Organizations 427, 434 (1988).

[77] See Gary Gereffi and Frederick Mayer, *Making Globalization Work*, February 2004 (paper on file with author) at 2, who refer to a "partially globalized world" and find a "global governance deficit of considerable magnitude".

materialize in the non-economic sector should stronger protection of trade and investment entitlements follow. Fourthly, as pointed out earlier, the flexibility implied in liability rules can be a way to attract participation to new commitments and prevent exit in a setting of largely consensual law-making.

4. Arguments against liability protection in international law

Given the above list of arguments in favor of liability protection, what stops international negotiators from setting up liability regimes? In other words, why prevent the apparently efficient and politically desirable outcome of the take-and-pay principle and insist on property protection as the default? More specifically, if a state takes another state's entitlement, fully compensates the victim and still gains, overall welfare increases at no one's expense: The violator is better off without any loss to the victim. So why should we ever set up property rules that categorically prevent such unilateral takings? Put differently, what is wrong with American voluntarism and its preference for liability rules and efficient breach?

As noted earlier, in domestic law, the core objection to liability rules is contractual freedom: If the entitlement does not change hands freely between a willing seller and a willing buyer, we must presume that such exchange does not increase welfare (i.e., the buyer does not value the entitlement more than the seller). As each individual or state is, in principle, in the best position to appreciate its preferences and to determine, for itself, the value it gives to entitlements, only where the market fails (i.e. when faced with strategic behavior or high transaction costs) should we force exchange, i.e. permit unilateral takings under a liability rule.[78]

A benefit closely linked to the consensual exchange of entitlements is stability. One need not even agree with David Hume that stability of possession is one of the dominant rules of society[79] or that breach of contract (even when compensated) violates Aristotelian virtues of promise-keeping and justice[80], to appreciate that liability rules may affect the security of transactions and societal stability at large.[81] Even if full compensation follows, the unilateral taking of entitlements disrupts the grievant's world.[82] In contracts

---

[78] As Eric Posner points out, "the simplest defense of specific performance [i.e. protecting contracts with a property rule] is that if parties are rational, they will design an optimal contract and courts should enforce their terms rather than giving the parties an option (expectation damages) when they did not bargain for it" (Eric Posner, Economic Analysis of Contract Law after Three Decades: Success or Failure (March 2002), U Chicago Law & Economics, Olin Working Paper No. 146. Available at SSRN: http://ssrn.com/abstract=304977, at 7, note 13).
[79] David Hume, A Treatise of Human Nature 484-516 (L.A. Selby-Bigge ed., OUP, 2nd edition, 1978) (1739-40).
[80] James Gordley, The Philosophical Origins of Modern Contract Law (1991, OUP), at 11 and 112. Or as Charles Fried put it succinctly: a "contract must be kept because a promise must be kept" (CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 17 (1981)).
[81] See, for an example, Charles Fried, Contract as Promise, 1981.
[82] As Coleman and Kraus put it: "It is surely odd to claim that an individual's right is protected when another individual is permitted to force a transfer at a price set by third parties. Isn't the very idea of a forced transfer contrary to the autonomy or liberty thought constitutive of rights?" (Jules Coleman and Jody Kraus, Rethinking the Theory of Legal Rights*,* 95 Yale L.J. 1335, 1338-9 (1986).

with multiple parties, such as multilateral treaties, it may upset a large number of parties and even incite third parties to engage in reciprocal breach (the risk of emulation).[83] Sociological studies have confirmed that people and businessmen highly value the principle that commitments are to be honored (sanctity of contract).[84] Paul Epstein, for example, has expressed the view that "[t]he choice between property rules and liability rules should normally be resolved in favor of the former to preserve the stability of possession and social expectations that are necessary for the growth of any complex social order".[85]

Moreover, and this is one of the core arguments of this article, in the international context, there are crucially important additional *caveats* against liability protection: (1) states may not internalize costs or maximize internal welfare; (2) states are not unitary actors meaning that both taking and selling international entitlements can leave individuals or companies within states worse-off; (3) where international law does not offer third-party dispute settlement, collective valuation is simply unavailable; (4) even where there is collective valuation, it can be costly and prone to errors; (5) international entitlements are often unique goods; (6) sovereign immunity may prevent the eventual collection of compensation; (7) the need to make credible commitments in international affairs; and (8) inequalities between states. All eight of these arguments can also be seen as reasons why American voluntarism (which favors the protection of international law entitlements through a simple liability rule) is, in most cases, a step too far.

1. States may not internalize costs nor maximize welfare

Unlike individuals or firms, states do not necessarily internalize all of the costs imposed on them.[86] To begin with, and quite obviously, politicians and bureaucrats making decisions on behalf of the state do not individually bear the costs of those decisions. When the US Congress decides to invade a country or the US President decides to impose safeguard duties on imported steel, the individual decision-makers do not pay the bill. Granted, the same is true when managers or board members make decisions on

---

[83] See, for example, Sungjoon Cho, The Nature of Remedies in International Trade Law, 65 University of Pittsburgh Law Review (2004) 763, at 808, explaining WTO remedies and the property rule inherent in it with reference to "growing norm-building that can ensure a stable and predictable operation of the system … WTO remedies not only address disputes but also prevent them" and regarding "WTO remedies as public goods for all Members beyond a mere instrument that settles and satisfies particular parties concerned in specific cases".

[84] Stewart Macaulay's famous study of relations among close-knit Wisconsin businessmen, for example, turned up two prominent contract norms. The first is that "commitments are to be honored in almost all situations". The second contract norm that Macaulay identified was that "one ought to produce a good product and stand behind it" (Stuart Macaulay, Non-Contractual Relations in Business, 28 Am. Soc. Rev. 555 (1963)). See also H.L.A. Hart, The Concept of Law 192-3 (1961), identifying the rule requiring the keeping of promises as part of a minimum natural law of a society. It has also been argued that a disposition to honor commitments enhances a person's chances of survival (Robert Frank, If *Homo Economicus* Could Choose His Own Utility Function, Would He Want One With a Conscience?, 77 Am. Econ. Rev. 593 (1987).

[85] Epstein, *supra* note 51 at p. 2120.

[86] See Eric Posner and Alan Sykes, *An Economic Analysis of State and Individual Responsibility under International Law*, February 2006, at 13, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885197.

behalf of a firm. Yet, whereas firms are generally assumed to be profit maximizers and will therefore in principle internalize the costs imposed on them, states fulfill functions other than profit-maximization such as providing public goods, upholding certain values or increasing geopolitical power. States do not respond to shareholders with profit in mind, they respond to voters with a range of financial and other preferences. As a result, states may not react to monetary incentives the way firms do.[87] Consequently, one state may take another state's entitlement even if it puts the first state in a financially *worse* position (the compensation to be paid for the entitlement exceeds the economic benefit of having the entitlement). Of course, if the taker-state thereby expresses the net preferences of its people the outcome (though financially costly) continues to maximize welfare, as welfare is not a purely economic question of cost and benefit, but the aggregate of an individual's, population's or state's preferences. If, for example, the US people value the liberation of a suppressed people more than it costs the US to liberate that people, US intervention can be said to maximize US welfare. If it does not, US decision-makers risk losing the next election.

At the same time, however, public choice theory demonstrates that states, including democratic ones, do *not* always act in the aggregate interest of the population.[88] In democratic states, public officials stand or fall not based on the bottom line of the country's budget, but as a result of political elections. Hence, they can be captured by special interests and make decisions that favor those interests but harm the country's overall welfare. Most trade restrictions, for example, amount to shooting oneself in the foot (consumer prices increase more than any increase in producer surplus). Yet, states commonly restrict trade so as to placate and confer special benefits to import competing companies. The situation in non-democratic states is worse: As dictators are not held accountable, their decisions– though maximizing the dictator's *individual* welfare – are not taken with the nation's overall welfare in mind.

If this is true – states (both democratic and dictatorial) act even if it reduces the overall welfare (broadly defined) of the country – the normative claim for liability rules and efficient breach is jeopardized. Liability rules and efficient breach are desirable only

---

[87] See Daryl J. Levinson, *Making Governments Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 CHI. L. REV. 345 (2000) (arguing that government officials may not regard the payment of a money judgment, which presents budgetary issues, with quite the same perspective as a private person who experiences possession and ownership more directly). In the context of making governments pay for expropriation or takings, see Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72, CAL. L. REV. 569 (1984) and Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30 (2003) (arguing that government actors who decide on what property to use for public purposes do not bear the costs of that decision, or receive the benefits). In contrast, see RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (arguing that the requirement of just compensation will force government to internalize the costs of taking private property and tend to ensure that it is not taken unless its value in government hands is higher).

[88] Robert Hudec goes a few steps further arguing that , in the context of WTO dispute settlement, governments "simply are not private litigants; they are governments – complex institutions known the world over for their inability to behave like rational beings" (Robert Hudec, *Transcending the Ostensible: Some Reflections on the Nature of Litigation between Governments*, 72 Minnesota Law Review 211 (1987)).

because they maximize welfare *without leaving anyone worse off*. They are, in other words, Pareto efficient. When states do not internalize the compensation costs of taking entitlements or breaching obligations, that is, when they act even if it puts the country in an overall worse position, the transfer or breach is no longer Pareto efficient and the *reason d'être* of liability rules and efficient breach evaporates. Iraq under Saddam Hussein may then invade Kuweit even if it harms overall Iraqi welfare. The United States may expropriate a Canadian investment even though the NAFTA compensation to be paid for it *outweighs* any US welfare gains. Equally, the European Union may then violate WTO rules even though the cost of retaliation is *higher* than the benefit of breach.

For dictators or elected officials who want to hold office such takings or transfers may be *politically* efficient. This explains why international negotiators may, as a descriptive matter, agree on liability rules or accept efficient breach regimes. Yet, as a normative matter, such transfers do not increase welfare (they are not Pareto efficient) and, therefore, not desirable.

In the context of the GATT/WTO, for example, Warren Schwartz and Alan Sykes argue that the WTO is a system that promotes efficient breach in a political sense, for the political actors who negotiated the treaty. They refer to "joint political welfare maximization"[89] where "the metric of welfare for each signatory to a trade agreement will not be money, but instead will be the political welfare (votes, campaign contributions, or graft, as the case may be) of its political officials".[90] Based on this *political* analogy to efficient breach, they explain why WTO back-up enforcement is limited to compensation and equivalent retaliation: "When the political burden of performance to a promisor exceeds the political detriment of nonperformance to the promisee(s) … nonperformance is jointly desirable".[91] Yet, they never argue that breach of WTO rules combined with compensation or suffering equivalent retaliation maximizes inter-state welfare or is Pareto desirable in any economic sense. In other words, Schwartz and Sykes use a political analogy to efficient breach in order to *explain* what they regard as the current level of protection of WTO entitlements, not to advocate that this current level of protection is *normatively desirable* as welfare maximizing. In sum, their argument is that the WTO *is* a liability rule regime (an assessment I disagree with below), not that it *should* be one.

2. States are not unitary actors

Piercing the state-to-state welfare maximization model even further, it is readily apparent that even where state conduct does maximize the population's aggregate welfare it may still create individual losers within the state. This is because states are not unitary actors. Focusing, firstly, on states *taking* entitlements, the taking with full compensation may well increase the state's overall welfare. Yet, quite often, it leaves some individuals within the state worse off. Although quite unlikely, the US imposition of a safeguard on steel imports may increase overall US welfare even if one counts for the cost of

[89] Schwartz and Sykes, p. 180.
[90] Ibid., p. 184.
[91] Ibid., p. 184.

reciprocal trade retaliation against, say, US exports of oranges or textiles: The benefit to US steel producers could, somehow, outweigh the cost to US steel consumers (paying more for steel because of higher tariffs) combined with the cost to US oranges and textiles exporters (losing export markets due to the retaliation). Be this as it may, this constellation still reduces the individual welfare of both US steel consumers and US exporters of oranges and textiles. Unless the government were to re-distribute some of the gains away from US steel producers (through, for example, cash payments or tax credits), from the perspective of US steel consumers and US exporters of oranges and textiles, the transfer or breach is *not* maximizing welfare. Put differently, shift the unit of analysis from the state to individuals within the state and normatively speaking the transfer or breach is no longer Pareto efficient (steel consumers and exporters of oranges and textiles lose) and, therefore, no longer desirable.

Moving, secondly, to states who *hold* entitlements and see those entitlements taken by another state with full compensation, the transfer or compensation may well leave overall welfare in the victim state intact. Yet, quite often, it leaves some individuals within that state worse off. Even if Kuweit were somehow fully compensated for an Iraqi invasion, there is no guarantee that the compensation trickles through to those individuals or companies within Kuweit who were actually harmed. Even if compensation were correctly valuated and fully paid (problems discussed below), the question of equitable redistribution within the state remains. Equally, trade compensation paid by the US for the imposition of a safeguard on EC steel may well keep overall EC welfare intact: The gain to EC exporters of, for example, cheese (if this is where the US opens its market as trade compensation) may neutralize the losses to EC steel exporters (who export less because of the safeguard). However, even if this were so, this constellation does not compensate individual EC exporters of steel. As the original complainants in the dispute, EC steel producers remain uncompensated: More exports of cheese do not wipe out their losses. Unless the EC were to re-distribute some of the gains away from cheese exporters (through, for example, cash payments or tax credits), from the perspective of EC steel producers, the transfer or breach is *not* maximizing welfare. Put differently, shift the unit of analysis from the state to individuals within the state and normatively speaking the transfer or breach is no longer Pareto efficient (EC steel exporters lose) and, therefore, no longer desirable.

That states are not unitary actors and international law entitlements not uniformly operate in a state-to-state relationship is well-illustrated when applying liability rules or efficient breach to entitlements under human rights conventions. Imagine states A and B, both bound by a human rights treaty against torture and gender discrimination. Both have, as a result, entitlements not to see the other engage in torture or gender discrimination. Imagine now that state A wants to torture some of its prisoners or sees a need to discriminate against women and, therefore, decides to buy state B's entitlements to the contrary. To begin with, the decision by state A is unlikely to increase state A's overall welfare (confirming that states, in particular dictatorships, sometimes act against the aggregate welfare of their population). More importantly, even if the decision were somehow to increase overall welfare in state A, the torture or discrimination would surely leave individuals *within* state A worse off (those tortured or the women discriminated).

From their perspective, the transfer is *not* Pareto efficient. Consider then the situation of state B: Even if one could somehow calculate the harm done to state B by seeing individuals in state A tortured or discriminated, and fully compensate *state B* for it (an exercise I return to below), it goes without saying that this compensation does not help the actual victims of torture or discrimination in *state A*. How did we get to these absurd comparisons? Because human rights obligations are not so much state-to-state obligations but rather obligations held by state A against individuals *within* the jurisdiction of state A. In this constellation, a liability rule or theory of efficient breach where entitlements and compensation change hands *between* states is wholly inappropriate. The same is true for state entitlements as against individuals under international criminal law. Where human rights impose obligations on states as against their own people; international criminal law imposes obligations on individuals as against states and the world community so as to protect other individuals. To somehow permit Slobodan Milosovic or Saddam Hussein to "buy off" some of their criminal obligations by paying the state-holders of the related entitlements, not only flies in the face of the moralisms *rationale* for inalienability discussed earlier. It also overlooks the fact that the state-holders of the entitlement not to see Milosovic or Hussein engage in, for example, genocide or crimes against humanity are not the actual beneficiaries of the entitlement. If anything, the individual victims in the former Yugoslavia or Iraq ought to be paid, not the governments of, say, France or the United States.

In sum, the more one regards the ultimate beneficiary of entitlements to be individuals or operators within the state (such as individuals protected by human rights or companies protected by trade or investment law), the more difficult it becomes to apply state-to-state liability rules or efficient breach. If anything, one must then open the black box of the state and, if at all, consider compensation by states to individuals (as in human rights or investment law) or compensation by individuals to states or other individuals (as in criminal law). As pointed out earlier, however, most of these transfers (in particular, those regarding human rights and international criminal law) ought to be prohibited in the first place as the entitlements involved are optimally protected as inalienable (because of significant externalities, moralisms and/or paternalism).

3. Absence of collective valuation

The argument could be made that if one sticks to a *state-to-state* analysis of welfare maximization – irrespective of whether states act in the country's overall interest (section 1) or may leave individuals *within* states worse off (section 2) – liability rules and efficient breach can still be an optimal way to deal with strategic behavior or high transaction costs. After all, the objections in section 1 and 2 above apply not only against liability rules but also against consensual state-to-state transfers of entitlements under a property rule. There, as well, the consenting states involved may not maximize the country's overall welfare (section 1) or harm individuals or companies within the state (section 2). Yet, even if one makes abstraction of these two objections, important *caveats* against liability protection of international law entitlements remain.

As noted earlier, liability protection necessitates higher levels of intervention than

property protection. Although entitlements protected by a liability rule can be unilaterally taken (thereby limiting the amount of intervention required to protect them), once taken, the value of those entitlements must be objectively valuated by a third-party. This neutral *ex post* valuation to force an efficient exchange is a type and degree of intervention not required under a property regime. Under a property rule the valuation of entitlements is left to the parties themselves. A crucial requirement for liability protection is, therefore, the availability of a collective valuation mechanism.

Given the absence of centralized enforcement in international law – there is no international court or tribunal that states can automatically resort to for compensation in case their entitlements are taken – liability protection will in many cases be out of the question. Without a collective valuation system, liability protection risks, indeed, to amount to the law of the jungle: Yes, states could then take entitlements only if they pay for them, but without a court to set the value of the compensation and to make sure that compensation is actually paid, liability protection may well offer no protection at all. This also explains why one would expect liability protection in those regimes of international law that are most legalized, that is, which benefit from a strong dispute settlement mechanism and efficient back-up enforcement able to set and collect compensation.

4. The cost and possible errors of collective valuation

Even where international law does provide a mechanism for collective valuation, the cost and possible errors of collective valuation can provide powerful arguments against liability protection. Two types of costs can be distinguished[92]: First, the cost of setting up and running a court system that objectively values entitlements. Second, the errors made by such court system in assessing the true value of an entitlement to its holder.

Obviously, as in domestic law, setting up and running an international court or tribunal costs money: headquarters must be found and maintained; judges, staff and interpreters need appointed and paid; and the disputing parties themselves spend time and resources preparing and pleading their case. More importantly, however, in the international context, are possible errors of valuation by international courts or tribunals. Such errors risk that liability protection does not maximize welfare: *under*-compensation does not fully compensate the victim, thereby making the transfer Pareto undesirable and potentially overall inefficient; *over*-compensation pays the victim more than she is harmed and could be said to deter efficient breach.[93]

The risk of under-compensation is generally considered as most important. As Richard Craswell points out in the context of US law, "expectation damages as awarded in law

---

[92] See, Daniel Friedman, *The Efficient Breach Fallacy*, 18 J. Legal Stud. 1, 6-7 (1989) and Alan Schwartz, *The Case for Specific Performance*, 89 Yale L. J. 271 (1979).

[93] Eric Posner, for example, has taken the view that "expectation damages are … undesirable if courts have trouble determining the parties' valuations at the time of breach. The better remedy is specific performance, because the latter does not require the court to determine the promisee's valuation" (Posner, *supra* note 78 at 7).

often fall short of a truly compensatory measure due to the exclusion of such items as attorneys' fees, immeasurable subjective losses and 'unforeseeable damages'. Other rules excuse defendants from liability of expectation damages in cases of mistake or impracticability, or when clauses limiting the defendant's liability are upheld".[94] The limited evidence available in the international context confirms this tendency to under-value harm or compensation.[95] This is the case, for example, in arbitrations tasked to set the permissible level of trade retaliation in response to WTO breach.[96] The same conservative valuations are witnessed in investor-state arbitrations and before the International Court of Justice.[97] This tendency to put conservative estimates on harm is probably inspired by a high degree of deference by international courts to the sovereignty of states. Where the tribunal already intruded on this sovereignty by finding a violation, it is often naturally inclined to somewhat make-up for this intrusion by low-balling the compensation to be paid for the violation.

Correctly valuating the worth of an international entitlement can, indeed, be particularly hard. As opposed to individuals or unitary actors, harm caused to a state is most often composed of damage inflicted to a multitude of non-state actors. Moreover, breach may harm some actors in the victim state but benefit others. An illegal tariff on computers, for example, harms computer exporters but may benefit the consumers of computers in the same state (through lower computer prices at home). In addition, especially in the context

[94] Richard Craswell, Contract Remedies, Renegotiation and the Theory of Efficient Breach, 61 Southern California Law Review 629 (1987-88), at p. 637.

[95] See Petros Mavroidis, Remedies in the WTO legal system: Between a rock and a hard place, 11 EJIL (2000) 763, at 769 (referring to "the fallacy of full recovery" and stating that "courts normally have a tendency to downplay requested damages").

[96] In WTO arbitrations that determine the level of trade suspension which is "equivalent to the level of nullification or impairment" caused by WTO breach (DSU, Article 22.4), awards have, indeed, been rather conservative. In *US/Bananas* arbitrators refused to count US fertilizer and machinery exports to Latin America as well as US capital, management and packaging services offered in respect of Latin American banana exports to the EC (arguing that it was for those Latin American countries to claim these harms). In *Hormones*, the arbitrators noted: "we need to guard against claims of lost opportunities where the causal link with the inconsistent hormone ban is less than apparent" (para. 41) and rejected harm with "too remote" or "too speculative" a causal link (para. 77). In *1916 Act* the arbitrators insisted on "credible, factual, and verifiable information" (para. 5.54) and stressed that "this prudent approach … is appropriate" (para. 5.57). As a result, they rejected to count any settlement under the 1916 Act that was not disclosed (para. 5.63). Since under US law most (if not all) settlements are bound by confidentiality rules, no settlements are currently covered. The same arbitrators refused to count the "chilling effect" of merely having legislation in place (even if it is not actually applied) for being "too speculative, and too remote" (para. 5.69), noting dryly that "a quantification of the chilling effect is not possible" (para. 5.72). While accepting final damages amounts and fines in judgments under the 1916 Act, the arbitrators also refused to count litigation costs (para. 5.76).

[97] See, for example, Serge Lazareff, Assessing Damages – Are Arbitrators Good at it? Should they be assisted by experts? Should they be entitled to decide *ex aequo et bono*? – Some War Stories, 6 Journal of World Investment & Trade (2005) 17 ("Assessing damages is the *parent pauvre* of arbitration, the neglected aspect. It is almost, in the context of arbitration, the midnight clause of a contract, and it is very distressing to read in so many awards that '*the Tribunal, having at its disposal all the elements of the case, orders A to pay B US$ 140 million*'; finished" and Debra Steger, Dispute Settlement under the NAFTA, 2006 manuscript, available with author, at 8 ("the tribunals established [under NAFTA Chapter 11] to date (with two or three notable exceptions) have been relatively conservative in their findings and awards of damages").

of multilateral treaties, breach may harm not one but a multitude of other states, as is the case, for example, with treaties addressing global commons or disarmament. Errors are, obviously, more likely when valuing and adding up this composite harm caused to non-state actors and/or several states as compared to setting, for example, the damage done to one individual involved in a car accident or one company victim of contract breach.

5. International entitlements as unique goods

Correct valuation of an entitlement becomes even more difficult if the entitlement has subjective value to its holder. Non-compensation of this subjective value may well be what prevented the consensual transfer of the entitlement in the first place.[98] In international law this problem of so-called "unique goods" can be particularly acute. Indeed, many international law entitlements relate to unique goods.[99] As opposed to fungible goods (such as money, wheat or cars) which are commonly traded, unique goods are not often traded and have high levels of subjective value, making third-party valuation extremely difficult.[100] How should we value, for example, intrusion in a country's airspace? What is the value of a country's agricultural exports if agriculture is said to fulfill not only economic but also environmental, life-style and social functions? What is the value of cultural identity, GMO-free supermarkets or a pristine environment in a poor developed country as opposed to a rich country?[101] Given the enormous economic, social and cultural diversity between states, the value of a particular entitlement is likely to vary widely between states. Any attempt at collective valuation, in particular when such is done exclusively by foreign judges, may therefore include serious errors of under- or over-valuation. We can expect this to be the case especially where unique goods are involved.[102]

---

[98] Once again, if the tribunal's valuation does *not* take account of this subjective component (i.e., in case of under-compensation), the forced exchange under liability protection is not efficient, at least not in Pareto terms: even if the exchange were to increase overall welfare, it makes one of the parties worse off, namely the victim who is not fully compensated.

[99] In support, see Sykes and Schwartz, *supra* note 40 at 187 ("the harm done to political officials by a breach of promise in the WTO is no doubt difficult to measure precisely, and when damages are hard to calculate, that fact is usually thought to be a heavy thumb on the scale of favoring a property rule over a liability rule").

[100] Kronman argues that the common law efficiently reserves specific performance for disputes involving valuation problems such as those involving unique goods, Anthony Kronman, Specific Performance, 45 Univ. Chic. L. Rev. 351 (1978).

[101] In this context, Jide Nzelibe (*The Credibility Imperative: The Political Dynamics of Retaliation in the WTO's Dispute Resolution Mechanism* 6 THEORETICAL INQUIRIES IN LAW (2005) 215 at p. 244), argues that continued uncertainty as to a country's costs of breach and retaliation may actually contribute to compliance. He uses uncertainty as an argument against efficient breach or liability protection: "the efficient breach approach seems inappropriate when applied to the WTO context because it can eliminate or substantially undermine the uncertainty that is inherent in trade disputes and negotiations, rendering retaliation ineffective as an enforcement mechanism … uncertainty about each state's retaliation costs increases the chance that retaliation will be an effective deterrent".

[102] The first and core hypothesis in the positive model of optimal international law enforcement of Professors Scott and Stephan – whose main distinction is between formal and informal enforcement (see *supra* note 10) -- makes a similar point related to valuation or verifiability (*ibid.*, at 255): "States and other actors will rely on informal mechanisms for international law enforcement whenever applying the rules requires information that cannot be verified by an independent observer except at a high cost and where effective and verifiable proxies for that information are not readily available to an independent observer".

6. Sovereign immunity

Even if an international tribunal correctly valuates all possible harm to each and every victim, the ultimate risk of non-payment remains as recovery against states is limited by principles of sovereign immunity. Even if a company could, therefore, be awarded full damages for expropriation of a foreign operation under a bilateral investment treaty, or an individual be granted full compensation under a human rights convention, actual collection of the money may stumble against the wall of sovereign immunity. If so, we can obviously no longer talk of victim compensation or efficient breach and liability rules are wholly inappropriate.

7. The need to make credible commitments

Closely related to the stability argument discussed earlier, if transactions and the possession of entitlements are not secure (as risks being the case under liability protection) making credible commitments becomes more difficult. Yet, one of the core functions of international law and institutions, operating as they do without central enforcement, is to enable credible commitment.[103] To resolve international problems, in particular to transcend so-called prisoner's dilemmas and collective action situations, states will only commit themselves and cooperate in case other states do the same and make their commitments credible. A commitment protected only by the take-and-pay principle of a liability rule may not be credible enough. As a result, no deal may be made, fewer states may participate or fewer commitments may be are entered into.

As interactions between states are repeat games on a variety of topics, frequent unilateral buy-outs by a state, even if compensated, can also make future commitments of that state (in the same or in a different context) less credible. With past experiences of buy-outs, why would you believe this time that a government will keep its promise? Faced with commitments that are not credible enough, states, like individuals in private contracts, may be able to secure future performance by means of clumsy security devices such as bonds and hostages but only at the expense of high transaction costs.[104]

Moreover, recall that international relations are two-level games. Hence, states sometimes make international law not only as a commitment against other states, but also as a commitment toward their own domestic constituencies. One reason why countries commit, for example, to trade liberalization or human rights and international protections for minority groups is often to lock-in domestic reform or to tie their hands, and the hands of future governments, to resist against present and future domestic pressure groups. If these pressure groups know that the commitment can simply be bought-off,

---

[103] See Guzman, *supra* note 4; Andrew Guzman, Reputation and International Law, 34 Ga. J. Int'l & Comp. L. 379 and Kal Raustiala, Refining the Limits of International Law, 34 Ga. J. Int'l & Comp. L. (2005).
[104] See Anthony T. Kronman, Contract Law and the State of Nature, 1 J. L. Econ. & Org. 5 (1985). Also Friedman, *supra* note 51 at p. 7: "If a party in need of contracting with another cannot rely on the contract to guarantee performance, then he may turn to other more costly and less efficient means (for example, becoming a self-supplier or vertically integrating with his supplier) to gain greater assurance that he will get what he seeks".

governments may not be able to resist. Liability protection, therefore, threatens credible commitment both as against other states and domestic players. Put differently, the welfare gains of liability protection may be outweighed by welfare losses due to a lack of credible commitment either internationally or at home.

8. Inequalities between states

A final consideration to keep in mind when considering liability rules for international law, are the huge inequalities between states. States such as the United States are immeasurably richer and politically more powerful than states such as Burkina Faso or Bangladesh. In domestic contract law terms, a treaty between the United States and Bangladesh is like a contract between Microsoft and an individual living under the poverty line. This raises two distinct problems.

First, as pointed out repeatedly in the domestic law context[105], the take-and-pay principle of liability rules is in danger when there is a risk of non-payment. At this juncture, we are not addressing the general problem of sovereign immunity or what to do in case a state refuses to pay compensation. Rather, certain states may simply be so poor that they do not have the money or other resources to pay for their breach.[106] This can lead to breach by poor countries without compensation and, therefore, welfare losses. On that ground, Richard Posner, for example, has argued that compensation was not a feasible alternative to retaliatory sanctions in early legal systems: with their very limited wealth, wrongdoers simply could not compensate their victims.[107] Similarly, but this time from a victim's perspective, in the WTO context, for example, victims of breach (especially developing countries) may not have enough trade with the violating WTO member to actually be able to exercise the retaliation rights they obtained.[108] If so, breach cannot technically be set-off or rebalanced and any reference to efficient breach is wholly inappropriate.

---

[105] See, for example, Ellickson, Order without Law, 1991, at p. 212: "For a variety of reasons, a grievant may see an entitlement to compensatory relief as inadequate. First, when the malefactor lacks the assets to make good on the debt, an award of informal damages is all but meaningless".

[106] An interesting provision in an earlier draft of the 2001 ILC Articles on State Responsibility provided the following limitation on a state's obligation of reparation: "In no case shall reparation result in depriving the population of a State of its own means of subsistence" (Article 42.3 of the 1996 Draft Articles on State Responsibility, available at http://lcil.law.cam.ac.uk/ILCSR/articles_1996(e).doc). This limitation, which may of course prevent compensation and with it endanger liability rules, was not withheld in the final 2001 ILC Articles.

[107] Richard Poser, A Theory of Primitive Society, with Special Reference to Law, 23 Journal of Law and Economics (1980) 1-53.

[108] In *Canada - Export Credits*, for example, the relatively small size of the Brazilian market actually worked against Brazil as a complainant. It was used as an argument to *lower* Brazil's rights to trade retaliation. The arbitrators looked at the overall level of trade between Canada and Brazil (Canada's export to Brazil were, according to Canada, US$591 million, according to Brazil, US$927 million) and found as follows (para. 3.42): "This disparity between the level of the proposed countermeasures [US$ 3.36 billion] and the total value of Brazil's imports of goods from Canada [between 0.5 and 1 US$ billion] is so large that, in our view, it is not fitting by way of response to the case at hand". The arbitrators finally awarded a little under US$250,000. Hence, instead of feeling pity for Brazil (and its low levels of imports from Canada), the arbitrators used this factor against Brazil. This is like saying that since the victim of a crime is poor or does not have the strength to retaliate, we must reduce the penalty on the wrongdoer.

Secondly, and perhaps more importantly, liability protection in a context where some parties are extremely rich and strong while others are dead-poor and without influence, creates the risk that the take-and-pay principle works only for the rich and powerful. In other words, liability rules in the WTO context, for example, could grant the EC and the United States a democratic safety valve and permit them to breach and pay their way out if welfare maximization so directs. Poor developing countries, in contrast, may not always have this option either because they cannot pay for their takings or breach, or because a taking or breach risks the trigger of hidden reprisals. The same could happen to smaller developed countries. Where the United States may not easily be stopped from discriminating or expropriating foreign investments, notwithstanding the NAFTA obligation to pay compensation for it, the chilling effect on Canada (either through the US government or through the pressure of foreign investors more generally) may be substantial and prevent Canada from action even where it would maximize welfare. Now, if the poor or relatively weak cannot, or do not dare, to breach even where such breach would maximize welfare, welfare losses occur and it is hard to speak of a truly operational, let alone equitable, liability rule.

5. A matrix to decide on how to protect international law entitlements

It was not the goal of this section, nor is it the goal of this article, to decide on how to protect specific international law entitlements. Rather, this section provides one simple rule and a complicated matrix within which negotiators must make this decision for themselves. The simple rule is that, by default, entitlements under international law ought to be protected by a property rule. This prescription goes against both the extreme of European absolutism (favoring inalienability) and the extreme of American voluntarism (favoring liability protection). A default rule of property protection is justified by principles of contractual freedom and welfare maximization and further supported in the international context by (1) the absence of centralized enforcement; (2) the need for flexibility to attract participation and prevent exit in a consent-based system; (3) incomplete contracting, especially in multilateral negotiations and (4) legitimacy concerns. All four of these arguments are reasons why European absolutism goes too far. Nonetheless, I have offered three arguments to move from property protection to inalienability: (1) externalities, (2) moralisms and (3) paternalism.

Conversely, on the other extreme of the scale of protection, this section elaborated the three standard arguments to move from property to liability protection: (1) hold-out, (2) free-load (difficult to apply in the consent-based system of international law) and (3) high transaction costs. In a partial overlap with the reasons against inalienability, it also summed up a number of additional arguments that could make liability protection attractive in the international context: incomplete contracting, a democratic safety valve to deal with (real or perceived) legitimacy concerns, a way to address imbalances between economic and other forms of globalization, and flexibility to attract participation and prevent exit.

Subsequently, however, I offered a list of crucial arguments that are likely to make

liability protection of international law entitlements inappropriate or, at least, undesirable (even from a welfare maximization perspective), in particular: (1) states do not necessarily internalize costs nor do they necessarily maximize internal welfare; (2) states are not unitary actors; (3) the absence of collective valuation; (4) the costs and errors of collective valuation; (5) international entitlements as unique goods; (6) sovereign immunity; (7) the need to make credible commitments; and (8) inequalities between states. All eight of these arguments are reasons why American voluntarism goes too far. In any event, before treaty negotiators impose a liability rule, they must carefully weigh the totality of these valuation and compensation costs against any gains that may be made in, for example, transaction costs.[109]

Table 1 below summarizes the proposed matrix. Obviously, the outcome under this matrix depends on the particular treaty or commitment in question. For example, if universal values are at stake, inalienability may be called for (moralisms). If, on the other hand, fungible goods are involved, liability protection becomes more attractive (as errors in collective valuation are less likely). Equally, any assessment under this matrix is likely to vary depending on the state or negotiator making the assessment. For example, liability protection may not be attractive to developing countries which do not have the resources to invoke the take-and-pay principle, or seek strong pre-commitment as against domestic pressure groups. As a result of conflicting demands for how to protect an international commitment mixed systems may, therefore, emerge.

---

[109] As Friedman, *supra* note 51 at p. 2, notes "the efficient breach rule, while designed to reduce transaction costs, fares poorly precisely because of the expensive transactions that it in fact generates". As was noted in the context of domestic contract law, "parties must balance the benefits from credible commitments against the benefits of flexibility in adjusting to realized states of the world" (Robert Scott and Paul Stephan, Self-enforcing international agreements and the limits of coercion, Wisconsin Law Review (2004) 551, at p. 615, note 174).

<u>Table 1</u>: A Matrix to decide on how to protect international law entitlements

Arguments *for* INALIENABILITY	**Arguments *for* PROPERTY PROTECTION**	**Arguments *for* LIABILITY PROTECTION**
1. SIGNIFICANT EXTERNALITIES (transfer is necessarily inefficient)	CONTRACTUAL FREEDOM & WELFARE MAXIMIZATION	1. HOLD-OUT (strategic behavior by holders of entitlements: they refuse to sell)
2. MORALISM (entitlement cannot be monetized)	ABSENCE OF CENTRALIZED POWER (lack of collective valuation mechanism; no centralized enforcement)	2. FREE-LOAD (strategic behavior by potential buyers of entitlements: they free-ride on others) * Note: difficult to apply given the consent-based nature of international law
3. PATERNALISM (self-paternalism; true paternalism)		3. HIGH TRANSACTION COSTS (making forced transfer with objective valuation more efficient)
	*Attract participation & prevent exit in a consent-based system * Incomplete contracts * Legitimacy concerns & democratic safety valve * Balance globalization	
Arguments *against* INALIENABILITY		**Arguments *against* LIABILITY PROTECTION**
<u>See</u> the arguments in favor of property protection *<u>See also</u>* the paradox of inalienability in international law discussed in Section VI.2 (strongest protection is paired with weakest back-up enforcement)		* states may not internalize costs or maximize welfare * states are not unitary actors * absence of collective valuation * costs and errors in collective valuation * international entitlements as unique goods * sovereign immunity * the need to make credible commitments * inequalities between states

V. How are international law entitlements currently protected?

This section tests the normative predictions developed in the previous section. It looks at whether this article's framework of variable protection of entitlements -- based on inalienability, property rules and liability rules -- finds application in the formal standards of protection set out in current general international law. The Articles on State Responsibility adopted by the UN's International Law Commission in 2001 (ILC Articles) are used as reflective of this general international law.[110] A limited number of specialized treaty regimes are also tested. As a descriptive matter, or a question of how the law currently is (*lex lata*), both European absolutism and American voluntarism are wrong. International law entitlements are not sacredly protected as inalienable, nor simply protected by a mere liability rule. As predicted, international law is, by default, protected by a property rule. Only in limited circumstances are entitlements made inalienable or protected by liability rules.

1. International law is, in principle, not inalienable

In contrast to the demands of European absolutism, most entitlements under current international law can be transferred, or contracted out from, at will and are, therefore, *not* inalienable. What follows are the default rules of protection of international law entitlements.

First, states have the right to amend treaties by agreement between the parties.[111] Therefore, as between a willing seller and a willing buyer, treaty entitlements can be transferred and are *not* inalienable. Second, states are equally free to contract out of customary international law (in particular the general law of treaties and state responsibility) when crafting new treaties.[112] As *lex specialis* such specific treaty provisions then prevail over the general, fall-back rules of custom which are, therefore, derogable or supplementary, rather than inalienable. Third, besides renegotiating the treaty itself or contracting out of custom, states also have the right to settle specific disputes that arise under a treaty or custom. Crucially, such settlements must not necessarily be consistent with the original treaty or custom. As part of a settlement, the

[110] Those ILC articles are generally considered to reflect customary international law and/or general principles of law. Even where particular ILC articles or provisions would not reflect custom or general principles of law, in any event, they express the wisdom and opinion of a highly qualified and diverse group of international lawyers and, on that ground, are a source of international law in the sense of Article 38.1(c) of the ICJ Statute (referring to "teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law").

[111] Article 39 of the Vienna Convention on the Law of Treaties (VCLT): "A treaty may be amended by agreement between the parties".

[112] See, for example, Article 5 of the VCLT which applies the VCLT (largely considered to reflect customary international law) to treaties adopted within an international organization "without prejudice to any relevant rules of the organization". See also Article 55 of the ILC Articles stating that the ILC Articles do not apply "where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law".

victim of breach can validly consent to the full or partial continuation of what constituted the breach[113] and/or waive its right to invoke responsibility.[114] In sum, international law entitlements are *not* written in stone. States can change the rules, consent to breach or waive their rights.[115]

A first type of international law entitlement that is, however, inalienable is that protected by what are called peremptory norms of general international law or *jus cogens*. The Vienna Convention on the Law of Treaties defines these norms as those "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". Oft cited examples are the prohibitions of slavery, genocide, aggression and crimes against humanity.[116] As is the case for inalienable entitlements in domestic law -- such as the prohibition to sell one's kidney – contracting out of *jus cogens* is prohibited and any treaty that conflicts with *jus cogens* is void.[117] Crucially, in one sense *jus cogens* is even more inalienable than any domestic law entitlement. Although, in domestic law, most entitlements under, for example, criminal or constitutional law cannot be transferred as between individuals and are, as a result, inalienable, they can always be re-allocated by the legislator or constitutional assembly itself. *Jus cogens*, on the other hand, is super-inalienable: States cannot contract out of it in their bilateral relationships; in addition, even if all states were to consent, they cannot even change *jus cogens* (unless such consent could be seen as terminating the *jus cogens* nature of the norm itself).[118] In other words, states are not only prevented from transferring *jus cogens* entitlements; they cannot even re-allocate *jus cogens* entitlements by legislative action.

In addition to *jus cogens*, there is a second type of international law entitlement with

---

[113] Article 20 of the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001 (ILC Articles): "Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent".

[114] Article 45 of the ILC Articles: "The responsibility of a State may not be invoked if: (a) The injured State has validly waived the claim …".

[115] This is why, in this author's view, WTO members can settle disputes in deviation from the WTO treaty for as long as they do not thereby affect third party rights. The direction in DSU Art. 3.5 that all solutions to matters formally raised under the DSU "shall be consistent with [WTO] agreements" is there to protect third parties. It does not prevent the two disputing parties from changing, adapting or dis-applying a particular rule as it applies to the dispute at hand *for as long as third party rights remain unaffected*. Under the Vienna Convention (Article 30), such settlement prevails over the WTO rule as the norm later in time; under the ILC Articles, the settlement amounts to consent precluding wrongfulness (under Art. 20) or, at the least, a waiver of dispute settlement rights (under Art. 45).

[116] At some point, *jus cogens* (or at least part thereof) was even referred to using the domestic law analogy of 'crimes' of state (ILC Draft Articles of 1996, Article 19, contrasting crimes of state with mere delicts, see *supra* note 42).

[117] Article 53 of the VCLT: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law". In addition, Article 64 provides: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates".

[118] Given the consent to change it, the norm could then be said to no longer be a norm "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". Obviously, this would only confirm the circular nature of *jus cogens* as it could then not be contracted out from unless everyone agrees to do so.

inalienable features, namely: treaties of a legislative type that set out so-called collective obligations (such as human rights or labor conventions and certain environmental treaties). Unlike *jus cogens*, entitlements under those treaties *can* be re-allocated by consent of all the parties to the treaty. Treaties, even those of a legislative type (including the UN Charter) can, of course, be amended. However, given the high and increasing number of parties involved in many of today's regional and multilateral conventions, in practice, even here re-allocation by what one could call legislative action has proven extremely difficult. More importantly, like *jus cogens*, once entitlements under collective obligations are allocated by the multilateral treaty, they cannot normally be transferred or modified *inter se* as between two or a sub-set of the parties to the treaty. Bilateral contracting out is, in other words, not permitted (a feature of inalienability). I elaborate further on the difference between collective and bilateral obligations in the next section.

2. International law is, by default, protected by a property rule, not a liability rule

If European absolutism is exaggerated, so is American voluntarism. Indeed, contrary to the claims of American voluntarism, when it comes to the second order question of how and how strongly international law is currently protected (to be distinguished from the third order question of back-up enforcement in case the rules of protection are flouted, discussed below in Section VI), international law represents more than mere pledges. According to the principle of *pacta sunt servanda*, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith".[119] In addition, international law entitlements are, by default, protected by the relatively strong regime of property protection, not the weaker regime of mere liability. Put differently, as much as no one can take my house without my agreement, an entitlement under international law cannot be unilaterally taken without the agreement of its holder. Crucially, in both cases, this protection remains even if the taker fully compensates the holder, that is, even if the taker pays me the going price for my house or fully compensates the state for its entitlement to, for example, open trade or clean air. In sum, unless there is mutual agreement, international law cannot be "bought out".

More specifically, as regards past violations, or the retrospective protection of entitlements in those cases where breach has already ceased, the fall-back principle in international law is restitution, *not* compensation.[120] This obligation of restitution – defined as an obligation to "re-establish the situation which existed before the wrongful act was committed"[121] -- is only absolved in case, and to the extent that, restitution is either (1) "materially impossible"; or (2) "involves a burden out of all proportion to the benefit deriving from restitution instead of compensation".[122] Put differently, where state

[119] Article 26 of the VCLT.
[120] Article 35 of the ILC Articles.
[121] Ibid.
[122] Ibid. In an earlier ILC draft, a further limit (not withheld in the final 2001 Articles) was mentioned, namely restitution in kind is not obligatory in case it would "seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind" (Article 43(d) of the 1996 Draft Articles on State Responsibility, available at

A confiscates the embassy of state B in violation of the rules on diplomatic immunity[123], it does not suffice for state A to pay full compensation. Unless such is "materially impossible" or involves a burden for state A "out of all proportion" to the benefit for state B, state A *must* hand the embassy back to state B. In this sense, international law requires specific performance, *not* expectation damages. Efficient breach -- or deterring compliance whenever its costs outweigh the benefits -- is, therefore, *not* the goal of international law. On the contrary, most efficient breaches will not even be tolerated since restitution that involves a burden with *any* degree of proportion to its benefits remains mandated. Only if such burden is out of *all* proportion can the taker of an entitlement rest with mere compensation.

Crucially, as concerns the future or prospective protection of entitlements in those cases where breach continues, the fall-back principle is, equally, cessation of the breach and a continued duty of performance. In other words, the obligation is specific performance; compensation does not suffice.[124] Apart from consent or waiver by the victim of the breach -- possibilities mentioned earlier in support of the proposition that international law is *not* inalienable – there are, under general international law, no exceptions to this obligation of cessation or specific performance.[125] Put differently, while tolerance for certain forms of efficient breach could be read in the "burden out of all proportion" language for the obligation of restitution, as regards continuing violations, efficient breach is neither the stated goal, nor ever an excuse for violation. Unless otherwise stipulated, states cannot, therefore, buy their way out of future performance. They *must* perform their obligations.[126]

In sum, making abstraction of *jus cogens*, unless otherwise specified in a specific treaty regime, international law is protected by a property rule, not a liability rule.

---

http://lcil.law.cam.ac.uk/ILCSR/articles_1996(e).doc). A Resolution on Obligations *Erga Omnes* in International Law, adopted in 2005 by the Institute of International Law (available at http://www.idi-iil.org/idiF/resolutionsF/2005_kra_01_fr.pdf) is even stricter in its demand for restitution providing (in Article 2(b)) that "restitution should be effected unless materially impossible". No other excuse is provided for.

[123] Article 22 of the Vienna Convention on Diplomatic Relations: "1. The premises of the mission shall be inviolable … 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution".

[124] Article 29 of the ILC Articles: "The legal consequences of an internationally wrongful act … do not affect the continued duty of the responsible State to perform the obligation breached". Article 30(b) states more explicitly: "The State responsible for the internationally wrongful act is under an obligation … to cease that act, if it is continuing". In addition, Article 30(b) even obliges the wrongdoing state "to offer appropriate assurances and guarantees of non-repetion, if the circumstances so require".

[125] This strong presumption in favor of keeping treaties intact, and obliging performance with them, is found also in Article 49.3 of the ILC Articles (even where countermeasures to induce compliance with an obligation are permitted, "[c]ountermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question") and in international case law (where courts and tribunals have been extremely reluctant to find the invalidity or termination of treaties, see, for example, Alan Boyle, *The Gabcikovo-Nagymaros Case: New Law in Old Bottles* (1997) 8 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL Law 13).

[126] Articles 54-64 of the VCLT (on termination and suspension of the operation of treaties) and Articles 20-27 of the ILC Articles (circumstances precluding wrongfulness) provide limited exceptions in this respect, but have nothing to do with efficient breach or permitting compensation instead of performance.

As hinted at earlier, one precision must be added as regards treaties of a legislative type such as human rights and labor conventions or certain environmental treaties. Like bilateral agreements, multilateral treaties are, by default, protected by a property rule.[127] However, in such multilateral context the question arises whether two parties to the treaty may agree to modify the treaty only as between themselves (*inter se*), that is, whether one state can agree to transfer its entitlement to, for example, clean air or free trade, to another state without the consent of the remaining parties to the treaty? If so, the obligations in question are of a bilateral or reciprocal nature, comparable to a contract. In other situations, however, entitlements under the multilateral treaty cannot be separated into bundles of bilateral obligations but are held collectively by all parties.[128] Such entitlements derive from what is referred to as collective or *erga omnes partes* obligations, comparable to a statute or legislative act.[129] In respect of such collective obligations, international law has limited the possibility for *inter se* transfers or contracting out. This, in effect, strengthens the protection of entitlements under certain multilateral treaties as it makes it more difficult to change them or to give them away. In that sense, the protection becomes inalienable.

According to the Vienna Convention on the Law of Treaties, *inter se* modifications of a multilateral treaty are only permitted if either (1) the multilateral treaty provides for such possibility, or (2) the treaty does not prohibit the *inter se* modification, and the modification neither "affect[s] the enjoyment by the other parties of their rights under the [multilateral] treaty or the performance of their obligations", nor "relate[s] to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the [multilateral] treaty as a whole". In other words, as collective or *erga omnes partes* entitlements are effectively held by *all* the parties to the treaty (such as entitlements under most human rights or environmental agreements), they can, in principle, only be transferred or modified by agreement of *all* of its holders, not bilaterally as between two states only.[130] In contrast, reciprocal or bilateral entitlements -- even those set out in a multilateral treaty, such as the convention on diplomatic relations or most trade agreements – can be transferred or contracted away *inter se* unless such is either (1) prohibited in the treaty or (2) relates to a provision "derogation from which is

---

[127] The VCLT and ILC Articles apply to both bilateral and multilateral treaties.

[128] Also referred to in Article 48.1(a) of the ILC Articles as obligations "established for the protection of a collective interest of the group" of states party to the treaty (or, for that matter, bound by the custom).

[129] On the difference between collective and bilateral obligations, see Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature*? EJIL (2003) 907-951.

[130] Bringing the obligation close to *jus cogens* status, Article 311 of the UN Convention on the Law of the Sea (UNCLOS) goes even further and provides that "States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 [declaring the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, including its resources, to be the "common heritage of mankind"] and that they shall not be party to any agreement in derogation thereof". The difference with *jus cogens* is, of course, that Article 311 only applies to UNCLOS parties whilst *jus cogens* by definition applies to all states. See also the 1997 UNESCO Universal Declaration on the Human Genome and Human Rights, whose Article 1 declares the following: "The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity".

incompatible with the effective execution of the object and purpose of the treaty as a whole".

In sum, bilateral entitlements are protected by a property rule; collective entitlements are, in principle, inalienable unless all the parties to the multilateral treaty agree to re-allocate them.

3. An evaluation of inalienability in current international law

That international entitlements are not uniformly protected as inalienable meets our prediction. It is, after all, not that surprising except for those who stick to Grotius' definition of international law as natural law which "is so immutable that even God himself could not change it". What is more surprising, and contradicts this article's framework, are the criteria (or absence thereof) for elevation to *jus cogens* status and the resulting lack of a clear list of *jus cogens* norms.[131] The same is true in respect of collective obligations or treaties of a legislative type.

1. The need for a more objective analysis

Promoting a norm to *jus cogens* (thereby making it super-inalienable) or to collective obligation status (thereby prohibiting *inter se* transfers) is a serious decision, with important freedom restricting and back-up enforcement consequences (the former were discussed in Section IV, the latter are dealt with below in Section VI.2). When it comes to the super-inalienable feature of *jus cogens* entitlements – the fact that they cannot be re-allocated at all, not even by consent of *all* states (something unknown in domestic law) – one could even question whether the contractual freedom of states is not restricted too much.[132] Yet, in international law, little thought is given as to the specific reasons why, and the circumstances of when, such decision ought to be made.[133] Indeed, when it comes to *jus cogens*, current international law offers no criteria at all, other than the tautology that *jus cogens* norms must be "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted".[134] Equally, as far as collective obligations are concerned, all we know *lex lata* is that they

---

[131] For the very first explicit recognition of a norm as *jus cogens* by the International Court of Justice, see *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, 3 February 2006, available at www.icj-cij.org, at para. 64 (noting that the character of *jus cogens* "is assuredly the case with regard to the prohibition of genocide").

[132] This is not to say that states should be able to agree to re-introduce, for example, slavery. Only to say that if states want to codify or refine *jus cogens* they ought to have the right to do so. This may be a largely academic question as in practice who could stop an agreement by *all* states to alter *jus cogens*? Indeed, such agreement could then be seen as the end of the *jus cogens* status of the norm itself. See *supra* note 118.

[133] As noted recently by Dinah Shelton: "Although it may be appropriate today to recognize fundamental norms deriving from an international public order, the extensive assertions of peremptory norms made by some writers and international tribunals, without presenting any evidence to support the claimed superior status of the norms under consideration, pose risks for the international legal order and the credibility of the authors and tribunals". (Normative Hierarchy in International Law, 100 AJIL 291, at 292).

[134] See *supra* note 117.

are "established for the protection of a collective interest of the group"[135] and "must transcend the sphere of bilateral relations of the states parties".[136] The ILC Commentary gives some examples of collective obligations -- "they might concern … the environment or security of a region (e.g. a regional nuclear free zone treaty or a regional system for the protection of human rights)"[137] – but explicitly states that this list is only illustrative and that "'[i]t will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes".[138] In the absence of further criteria and, worse, a decision-maker with the power to decide which norm gets classified where[139] there is no accepted list of *jus cogens* or collective obligations. As a result, in many cases, states do not even know which rules are at the pinnacle of legal protection. To make a domestic law analogy, this would be like announcing the creation of a criminal justice system without defining what conduct is criminal in the first place.[140]

Current decisions on inalienability seem predominantly subjective and based almost exclusively on the importance given by major stakeholders to the norm or treaty in question. It is generally agreed, for example, that norms are elevated to *jus cogens* status based on the important moral or ethical values that they protect.[141] Equally, when it comes to identifying collective obligations, it has become a badge of honor for a treaty to qualify, and almost a defeat or relegation for the values pursued when a treaty is found to set out "merely" bilateral or reciprocal obligations.[142]

---

[135] See *supra* note 128.
[136] ILC Commentary, at 297.
[137] ILC Commentary, at 320-1.
[138] ILC Commentary, at 297.
[139] The ICJ has only recently decided in explicit terms that the prohibition of genocide is, indeed, *jus cogens*. See *supra* note 131. Although treaties could, in principle, decide that the obligations set out are either bilateral or collective in nature, very few do so. For an exception, see Article 311 of UNCLOS, *supra* note 130.
[140] As Sheldon notes, at p. 292, "[*jus cogens*] is a concept that lacks both an agreed content and consensus in state practice" and, at p. 299, "the concept of *jus cogens* has received widespread support, without any agreement or clarity about its source, content or impact".
[141] Alfred Verdross, who introduced the notion of *jus cogens* in a 1937 article, refers to general principles of morality or public policy "common to the juridical orders of all civilized nations" (Verdross, Forbidden Treaties in International Law, 31 AJIL 571 (1937) at 572). In a later article, Verdross went as far as stating that "all rules of general international law created for a humanitarian purpose" constitute *jus cogens* (Verdross, Jus Dispositivum and Jus Cogens in International Law, 60 AJIL 55 (1966) at 59). See also Prosper Weil, *Towards Relative Normativity in International Law* 77 AJIL 413 (1983) footnote 29 ("Such terms as 'legal conscience of states', 'awakening of conscience', 'universal conscience', 'common good of mankind' recur like a leitmotiv on practically every page of the International Law Commission's work on the theories of *jus cogens* and international crimes") and Jonathan Charney, Universal International Law, 87 AJIL 529 (1993) at 193 (jus cogens "is distinguished from ordinary international law because it is based on natural law propositions applicable to all legal systems, all persons, or the system of international law"). The 2005 Resolution on Obligations *Erga Omnes* in International Law of the Institute of International Law (*supra* note 122) explains the status of *jus cogens* with reference to "fundamental values of the international community" (Second preambular paragraph).
[142] In respect of WTO obligations, see Chios Charmody, WTO Obligations as Collective, EJIL (2006) 419 and Sungjoon Cho, The Nature of Remedies in International Trade Law, 65 University of Pittsburgh Law Review (2004) 763. In a similar vein, a 2005 Resolution on Obligations *Erga Omnes* in International Law of the Institute of International Law (*supra* note 122), defines collective or *erga omnes partes* obligations "in view of their common values and concern for compliance" (Article 1(b)).

What the Calabresi and Melamed framework adds then is a more objective assessment of when to make entitlements inalienable. Although the model may add relatively little for the question of when to qualify norms as *jus cogens* – most, if not all, of *jus cogens* entitlements can be explained based on the moralisms ground for inalienability -- even there it offers an alternative and arguably more objective justification for promoting a norm to *jus cogens*: Where it is difficult, if not impossible, to put a price on an entitlement (to, for example, freedom or the survival of an ethnic group), transfer cannot increase welfare. As a result, it makes sense to altogether ban it, i.e., to make the entitlement inalienable. From this perspective, international law rightly bans slavery, genocide, aggression and crimes against humanity as *jus cogens* since it is impossible, even inappropriate, to monetize the value of the entitlements protected by these norms.[143]

2. Collective obligations through the lens of moralisms, externalities and paternalism

When it comes to selecting the second type of inalienable entitlements, namely collective obligations – an exercise with great practical importance[144] but discussed far less than *jus cogens* -- the Calabresi and Melamed model offers deeper insights. Applying the three specific reasons to make entitlements inalienable (moralisms, significant externalities and paternalism), moralisms, or the problem of monetizing certain entitlements, can explain why most human rights conventions set out collective obligations which cannot be transferred *inter se*. As noted earlier, significant externalities could justify the label of collective obligation for disarmament and certain environmental obligations. Where an activity creates such high degree of externalities – say, dropping a nuclear bomb or wide-scale, cross-border pollution – no one might be willing or able to pay for all the costs related to the transfer of the entitlement. Hence, it may be more efficient to ban the transfer in the first place. Paternalism (of the minor-adult sort) may, in turn, justify making collective obligations where occupied territories or failed states are involved, both being actors operating from a position of weakness. The Fourth Geneva Convention, for example, prohibits protected persons and occupied territories to renounce or transfer any of the rights granted to them in the convention.[145]

---

[143] Yet, see the original argument against slavery by Adam Smith, offered in the 18th century at a time when slavery and slave trade was still perfectly legal: "the work done by freemen comes cheaper in the end than that performed by slaves" (quoted in NIALL FERGUSON, EMPIRE, 2004, at 96).

[144] Distinguishing collective from bilateral obligations is not only important for the permissibility of *inter se* modifications but also for the question of standing and the permissibility of *inter se* suspension as a form of countermeasure for a breach of other obligations or bilateral settlements of disputes that deviate from the multilateral treaty. See Pauwelyn, *supra* note 20 at 8-9.

[145] Article 7 of the Fourth Geneva Convention provides that protected persons, who include those in occupied territories, "may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention". Article 47 reiterates and expands upon this injunction: "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, *nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power,* nor by any annexation by the latter of the whole or part of the occupied territory" (emphasis added).

Crucially, pursuant to the model developed in this article, whether an entitlement is protected as inalienable, property or under a liability rule does not say anything about the subjective importance of the treaty or the objectives that it pursues. Instead, what counts under the model is the maximization of welfare (broadly defined).

Let us take the example of global warming. Few today dispute that this is an important issue and raises global concerns which transcend the individual interests of states. Following the ILC definition of collective obligations, one could, therefore, be tempted to label emission entitlements as collective obligations which, in the words of the ILC, pursue "a collective interest of the group"[146] and, on that ground, decide to make these entitlements inalienable. However, inalienability simply because of the importance of the cause or the collectivity of the interests concerned may not be the best or most efficient way to deal with global warming. And this is, after all, what the treaty wants to do: Combat global warming at, one would presume, the lowest cost. Indeed, notwithstanding the importance of the goal pursued, property protection may be better. This is exactly what the Kyoto Protocol does. The core advantage of permitting Kyoto parties to trade emission credits (under a property system) is economic efficiency. Where emissions automatically affect all countries (as in global warming) and abatement costs vary between countries and industries, a system of tradeable quantity limits will obtain a given level of abatement at the lowest possible cost. As Wiener explains, in such system "[e]ach source abates up to the point that its marginal costs of abatement equals the market price for an allowance to cover the next unit of emissions. High-cost abaters undertake less abatement and buy more allowances; low-cost abaters undertake more abatement and sell allowances".[147] In sum, polluting combined with buying emission allowances from someone who can abate more cheaply than you can, maximizes welfare without increasing overall levels of emissions.[148]

Equally, advocates of making WTO entitlements inalienable (as in collective obligations) ought to think twice. That liberalized trade is an important objective which can boost economies worldwide and lift millions out of poverty is not a sufficient reason to prevent WTO members from *inter se* transfers. As with global warming, protecting entitlements as property, instead of inalienability, does not somehow degrade the objective pursued. If welfare maximization (broadly defined) is the goal, it may be better to permit countries to contract out of WTO obligations for as long as they do not affect third party rights (such as the most-favored-nation principle). Such consensual re-introduction of trade restrictions, between a willing buyer and a willing seller (for whatever reason, be it human rights, cultural diversity or to combat conflict diamonds) must be presumed to maximize welfare and to be Pareto efficient, especially if third parties are kept unharmed. If, in contrast, all WTO entitlements were written in stone and could only be altered with the consent of *all* WTO members (an event that is increasingly unlikely with 150 WTO members and counting), a serious loss in contractual freedom to address wide diversities between WTO members would result. Such loss would not only reduce the policy space of WTO members but also prevent welfare maximization. After all, unlike human rights

[146] See *supra* note 128.
[147] Wiener, *supra* note 12 at 697.
[148] For a critique, see *supra* notes 12 and 30.

entitlements, trade entitlements can be monetized and there is no issue of moralisms. Trade is an instrument that creates welfare which, in turn, permits the pursuit of other values. Trade is not an end in itself. To put a price on it (as is regularly done for investments in NAFTA and BITs) is, in other words, possible and appropriate. Only where transfer of WTO entitlements would create externalities that are so grave as to prevent an increase in welfare (any benefit to be derived by the buyer could not possibly cover the overall cost) ought inalienability be considered. In addition, some countries may want to invoke self-paternalism -- that is, the need to tie their own hands to resist future temptations of protectionism – to argue for inalienability of certain WTO entitlements. Yet, any possible gains from such inalienability must be carefully weighed against the losses in contractual freedom and welfare maximization.

4. An evaluation of liability rules in current international law

As predicted in Section IV, in the international context, property protection is the rule, liability protection the exception. As with *jus cogens* and collective obligations (inalienability) discussed earlier, more thought must be given, however, as to precisely when and why to introduce liability rules. The framework proposed in this article offers several reasons to move from property to liability protection, in particular hold-out and high transaction costs. As noted earlier, given the consent-based system of international law, resolving free-load through liability rules is, however, more difficult: without the consent of the free-riders, international law cannot normally impose liability rules such as taxation or an obligation to pay compensation. As importantly, whenever treaty negotiators consider a liability rule they must take account of the eight *caveats* set out earlier against such rule, in particular, the effect on non-state entities, problems related to collective valuation, the need to make credible commitments and inequalities between states.

Examples of current liability rules in international law are cross-border liability and can be found in the GATT/WTO, NAFTA Chapter 11 and bilateral investment treaties (BITs). The Kyoto Protocol also has features of liability protection. Although its core mechanism – consensual trades of emission credits – amounts to property protection, to some extent Kyoto parties can also unilaterally exceed their ceiling (without buying emission credits from someone else) by financing climate-friendly projects in developing countries under the so-called Clean Development Mechanism or planting forests which are subsequently discounted as so-called sinks.[149] Such unilateral pollute-but-pay option amounts to liability protection. It is made feasible through strict multilateral scrutiny by Kyoto organs and thereby addresses the core problems of collective valuation and back-up enforcement.

1. Cross-border liability

The closest analogy to liability protection based on high transaction costs – remember Calabresi and Melamed's example of car accidents -- is liability for cross-border

[149] Article 12, Kyoto Protocol.

environmental damage. As much as domestic law does not ban cars because they may cause injury, international law does not prohibit all activities that may cause cross-border damage. Yet, international law does impose "a general duty on the part of a state to protect other states from injurious acts by individuals within its jurisdiction".[150] Along these lines, since 1970 the UN's International Law Commission (ILC) is examining further rules on what it calls "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law".[151] States may, therefore, have an entitlement to be free from certain injury. However, other states can take this entitlement, *without* prior agreement, for as long as they pay compensation to the injured party.[152] As in domestic law, the reason to thus permit states to unilaterally take entitlements is that, otherwise, states would need to negotiate compensation agreements *ex ante* with each and every possible victim, before they engage in any risky activity. Such requirement would impose high, if not prohibitive, transaction costs. Put differently, to impose property protection in this type of situation could prevent too many risky but overall desirable activities.[153]

2. Liability rules in the GATT/WTO

For whatever reason (including purely protectionist pressures), WTO members have the right to unilaterally re-introduce tariffs on imported goods or certain restrictions on trade in services on condition that they pay compensation or suffer equivalent suspensions of concessions by other affected WTO members. Although WTO members must first attempt to reach agreement on such proposed changes (a requirement of property protection), in the event no agreement is found, the WTO member requesting the change can enact it unilaterally (that is, unilaterally take entitlements from other members) subject only to a collectively-set compensation, namely "compensatory adjustments" set by arbitration[154] or the suspension by other members of "substantially equivalent" concessions or benefits.[155] A similar liability rule applies where a WTO member is faced

---

[150] ALEXANDRE KISS AND DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW (3rd edition, 2003), p. 184, referring to the famous *Trail Smelter* arbitration (3 U.N. RIAA 1938, 1965).
[151] See Alan Boyle, *Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited*, in ALAN BOYLE AND DAVID FREESTONE (EDS.), INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT, PAST ACHIEVEMENTS AND FUTURE CHALLENGES (1999).
[152] See, for example, the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, in PATRICIA BIRNIE AND ALAN BOYLE, BASIC DOCUMENTS IN INTERNATIONAL LAW AND THE ENVIRONMENT (1995), p. 132. Many environmental treaties do, however, also require advance notification and consultation, risk assessments and the enactment of precautionary measures. See Kiss and Shelton, *supra* note 150 at 188-223.
[153] Note, however, that in certain respects this liability rule is supplemented with obligations to prevent harm and to require prior authorization and consultations. See, for example, the ILC's Draft Articles on *Prevention of Transboundary Harm from Hazardous Activities* (adopted by the ILC in 2001, Report of the ILC on the work of its 53th session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. V.E.1*). Although the ILC articles apply to "activities not prohibited by international law" (Article 1), states have an obligation "to take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof" (Article 3), to "require prior authorization" (Article 6) and to "enter into consultations" (Article 9).
[154] GATS Article XXI:3(a).
[155] GATT Article XXVIII:3(a)) and GATS Article XXI:4(b).

with a sudden surge in imports resulting from GATT liberalization commitments and is given the right to impose a so-called safeguard.[156]

Each of these liability rules – tariff renegotiations under GATT, change in specific commitments under GATS and safeguards – can be explained within the framework proposed in this article. Forcing WTO members to obtain the agreement of all 149 other WTO members before they can increase tariffs or modify their specific commitments under GATS (as would be the case under property protection), risks hold-outs and implies high, if not prohibitive, transaction costs. In addition, the WTO treaty is a standard example of incomplete contracting.[157] Trade negotiators cannot foresee all possible situations, nor can they predict future economic and political developments, both at home and internationally. As a result, they wanted the flexibility of a liability rule. In the increasingly contentious field of trade regulation, liability protection may also offer a welcome democratic safety-valve.

Yet, to label the re-introduction of tariffs, services restrictions or safeguards combined, each time, with equivalent suspensions of concessions by other WTO members as efficient breach goes too far.[158] First of all, the reintroduction of trade restrictions in each of those cases is explicitly permitted. Hence, one cannot talk of breach. Second, and more importantly, even if one calls it breach, it is not efficient as no damages for past or future harm must be offered. At best, the *status quo ante* is reached: In response to one party reverting to an earlier, pre-negotiation tariff, the other party can do the same. In none of these situations can one speak of expectation damages that fully compensate the victim, a crucial condition for breach to be efficient. Indeed, unless the country is large enough (and can therefore improve its terms of trade with higher tariffs), retaliation by the original victim of the breach normally causes additional harm to the victim, rather than compensates it. Moreover, as noted earlier, when piercing the state veil, a higher tariff on, for example, steel even combined with compensation or retaliation in some other sector (say, oranges or textiles) does not compensate the losses of steel exporters. From their perspective, the situation is not Pareto efficient.

Although some controversy remains on the issue[159], all WTO commitments other than

---

[156] In a first instance, WTO members are asked to work out a deal "to maintain a substantially equivalent level of concessions and other obligations" (Article 8.1 of the Safeguards (SG) Agreement). Such deal may include an "adequate means of trade compensation for the adverse effects of the measure [i.e., the safeguard] on their trade". Yet, if no deal can be reached, the safeguard can, nonetheless, be unilaterally imposed, but affected WTO members have the right to suspend "the application of substantially equivalent concessions or other obligations under GATT 1994" (SG Article 8.2). If the safeguard responds to an absolute increase in imports and conforms to the provisions in the SG Agreement, however, such equivalent suspension can only be exercised three years after the safeguard was first imposed (SG Article 8.3).

[157] See Horn et al., *supra* note 58.

[158] But see Schwartz and Sykes, *supra* note 13.

[159] In support of the DSU as a liability regime, see Schwartz and Sykes, *supra* note 13; Robert Lawrence, Crimes and Punishments? Retaliation under the WTO (2003) and David Palmeter & Stanimir Alexandrov, 'Inducing compliance' with WTO dispute settlement, in The Political Economy of International Trade Law, Essays in Honour of Robert Hudec (eds. Daniel Kennedy & James Southwick), 646. In support of the DSU as a property regime, see Jackson, *supra* note 13; Nzelibe, *supra* note 101 and Trachtman, *supra* note 18.

tariffs, specific commitments in trade in services and safeguards -- in particular those that are not set out in country-specific schedules of concessions and newer ones such as those on health measures and technical barriers to trade -- are protected by a property rule. This proves that levels of protection need not be uniform across a treaty regime: some commitments may be better protected as property (such as treaty provisions equally applicable to all WTO members), others under a liability rule (such as member-specific commitments set out in schedules that differ for each WTO member). The specific re-negotiation schemes that permit the unilateral taking of entitlements only apply for tariffs, specific services commitments and import surges due to GATT commitments. In the absence of such explicit contracting-out, for other WTO commitments, the default rule of property protection under general international law applies. This property rule is (at least implicitly) confirmed in the WTO's dispute settlement provisions (DSU).[160] WTO arbitrators, in turn, confirmed that the objective of trade retaliation is to induce performance, not to compensate or rebalance the scales.[161] As one recent arbitration panel put it: "we do not read anything in the DSU or in the [Subsidies] Agreement which would create a right not to comply with DSB recommendations and rulings".[162] Crucially, not a single WTO member, not even the United States, has ever argued that compensation or retaliation can fully replace performance as an equally available option, the way proponents of an overall WTO liability scheme suggest.[163] For those WTO

---

[160] See DSU Articles 3, 21 and 22 as elaborated in Jackson, *supra* note 13 (Article 3.7: "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent"; Article 21.1: "Prompt compliance … is essential"; Article 22.1: "Compensation and the suspension of concessions … are temporary measures … neither … is preferred to full implementation"; Article 22.8: "The suspension of concessions … shall be temporary and shall only be applied until such time as the measure found to be inconsistent … has been removed … or a mutually satisfactory solution is reached"). In support: Peter Van den Bossche, The Law and Policy of the WTO (CUP, 2005), at 220 ("The DSU leaves no doubt that compensation and/or the suspension of concessions or other obligations are *not* alternative remedies … *instead of* complying with the recommendations and rulings", emphasis in original) and Mavroidis, *supra* note 95 at 800 (even with compensation or suspensions in place "the WTO member author of the illegal act continues the illegality and has not fulfilled its international obligations").

[161] See, for example, *EC – Bananas* and *EC – Hormones*.

[162] *Canada – Export Credits*, para. 3.104.

[163] In a GAO Report to the Committee on Ways and Means, it is said that "The United States maintains that it has the right not to comply with WTO rulings" (UNITED STATES GENERAL ACCOUNTING OFFICE, *Report to the Chairman, Committee on Ways and Means, House of Representatives*, WORLD TRADE ORGANIZATION: ISSUES IN DISPUTE SETTLEMENT at 16 (August 2000)). Yet, this statement is made in the context of whether WTO rulings have direct effect in the domestic US legal system. It is clear that WTO rulings cannot be enforced in US courts and that, under domestic US law, the US has, indeed, no obligation to comply with WTO rulings. See USTR Press Release, *State Sovereignty and Trade Agreements: The Facts*, April 14, 2005, at http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file870_7578.pdf: "WTO, NAFTA and other trade agreements do not in any way preempt or invalidate federal, state, or local laws that may be inconsistent with those agreements. This is because, while the United States has committed itself to adhere to the rules set out in the WTO and the NAFTA agreements, those rules do not automatically override any domestic laws"). The same is true in the EC (*Portugal v. Council*, C-149/96, 23 November 1999). The question addressed in this article, however, is whether the United States has an obligation under international law (not US domestic law) to comply with WTO rulings. The answer is yes, subject to the *temporary* alternatives of compensation and trade retaliation. As the same GAO report points out (at p. 15): "Under WTO dispute settlement rules, compliance is the preferred way of responding to an adverse WTO ruling. However, a member may decide not to comply and either offer equivalent

commitments, WTO members are, in other words, obliged to comply with WTO rules or obtain the consent of relevant WTO members to deviate from those rules. They cannot unilaterally take these entitlements, pay compensation for them, and thereby end the matter.[164]

This insistence on property protection, dormant in the original GATT[165] but more explicitly confirmed in the WTO, can, once again, be explained under the matrix proposed in this article. Given the increased complexity of trade rules, WTO members had to weigh the advantages of flexibility offered by a liability rule, against the need for credible commitment and stability which is better served under a property rule. The number of GATT/WTO members has also increased exponentially, from 23 in 1947 to 150 in 2006, making full compensation of potentially 149 other parties increasingly difficult both financially and politically. In addition, with developing countries now constituting the large majority of WTO members, the problems related to liability protection in the presence of huge imbalances of power between players became more acute. More complicated trade commitments also increases the cost and possible errors of collective valuation as is required under liability protection.[166] Finally, as trade commitments evolved from purely state-to-state affairs to rules whose main beneficiaries are seen as private business and traders[167], compensation and retaliation as equal alternatives to performance became politically less palatable. For example, more exports for US machinery producers (thanks to a compensatory tariff reduction by the EC) do not compensate US farmers kept out of the EC market by a WTO-inconsistent ban on GMOs. Equally, US orange and textiles producers (targeted by EC retaliation in response to a WTO-inconsistent tariff on steel imports) are unwilling to pay for benefits that protection may offer to US steel producers. As many of these factors apply also to tariff

---

compensation or face foreign retaliation. These options, which are considered under the dispute settlement rules to be *temporary*, were designed to protect sovereignty" (emphasis added).

[164] Tellingly, a dispute remains on the agenda of each and every session of the Dispute Settlement Body for surveillance even after retaliation has been approved and this "until the issue is resolved" (DSU Article 21.6).

[165] See GATT Article XXIII:2 which sets up the GATT's dispute settlement process with as a last resort suspension of concessions by the victim as "appropriate in the circumstances". Although it does not explicitly say so, suspension in Article XXIII:2 reads more like a last resort remedy or sanction to induce performance, rather than a simple replacement or payment for the taking of entitlements. For example, unlike Articles XXVIII (tariff renegotiations) and XIX (safeguards), Article XXIII:2 limits suspension to cases where "circumstances are serious enough" and subjects suspension in response to breach to collective approval. Article XXIII:2 also immediately adds that in response to suspension, a wrongdoer "shall be free, not later than sixty days after such action is taken, to give written notice … of its intention to withdraw" from the GATT. In other words, suspension is hardly put up as a normal event or instrument to enable, let alone, promote efficient breach. As explained below (Section VI.1), the fact that suspension needed to be proportional (although in GATT, the requirement was somewhat broader, namely "appropriate in the circumstances"), does not automatically mean that the system is a liability rule. Proportional countermeasures can be appropriate back-up enforcement for a property rule.

[166] Scott and Stephan, for example, argue against compensation awards, which are inherent in liability schemes, for international commitments that are non-verifiable, that is, whose control requires information that cannot be proven to a third party at a reasonable cost (definition at p. 376). In their view, "[t]he evidence suggests that an attempt to extend formal enforcement to nonverifiable contract terms – such as the obligation to adjust terms in good faith – is likely to impair the efficacy of those informal means of enforcement that rely on reciprocity norms (p. 176-7).

[167] See Panel Report on *US - Section 301*.

renegotiations, modification of GATS specific commitments and safeguards, they can also explain why, in practice, GATT/WTO liability rules have not often been invoked and decreasingly so over time.[168] In exceptional situations, however, they continue to offer welcome safety valves and flexibility.

3. Investor protection under NAFTA and BITs

Another example of liability protection under current international law is investor protection under NAFTA Chapter 11 and most bilateral investment treaties (BITs). When it comes to expropriation the entitlement is clearly protected by a liability rule: non-discriminatory expropriations for a public purpose are not even breach of treaty for as long as full compensation is paid.[169] Other entitlements have similar, though less outspoken, liability features: a violation of national treatment or fair and equitable treatment, for example, does violate the treaty, but the remedy for it is explicitly limited to compensation, not restitution or specific performance.[170] As a result, states cannot be forced to, for example, withdraw a discriminatory environmental statute or award a contract to an unfairly treated foreign investor. The only remedy that investors can expect is, instead, compensation. NAFTA governments can, in other words, unilaterally take an investor's entitlement for as long as they pay compensation for it.

The liability scheme thus imposed can be explained within the framework of this article. It was made possible largely because NAFTA Chapter 11 includes a compulsory investor-state dispute settlement system which offers collective valuation. As the entitlement protected centers on physical investments of money in a foreign country, that is, goods that are relatively fungible (rather than unique), the cost of errors in collective valuation are likely to be lower. Importantly, the problem of collecting and distributing compensation was also dealt with. Investors have private standing and therefore directly receive money compensation. In other words, even when piercing the state veil, unilateral takings with full compensation are likely to be Pareto efficient as the actual investor-victim gets compensated directly. Moreover, the system is supported by efficient back-up enforcement, namely domestic courts which have an obligation to recognize and enforce NAFTA Chapter 11 awards. A similar mechanism is at work for investor-state arbitration awards under the World Bank's ICSID Convention.[171]

---

[168] Although the shift from GATT to WTO witnessed an increase in the number of reservations to renegotiate tariff concessions pursuant to GATT art. XXVIII:5, this increase in reservations or potential exit options, did not result in more actual renegotiations taking place. On the contrary, during the period 1995-9 the lowest number of tariff renegotiations actually took place (8 as opposed to, for example, 56 between 1980-9). See ANWARUL HODA, TARIFF NEGOTIATIONS AND RENEGOTIATIONS UNDER THE GATT AND THE WTO, PROCEDURES AND PRACTICES 89 (2001) at 88 and 107. Similarly, since its creation in 1995, GATS Article XXI (re-negotiation of specific commitments in trade in services) has so far never been invoked.

[169] NAFTA Article 1110.

[170] NAFTA Article 1134.1: "Where a Tribunal makes a final award against a Party, the Tribunal may award only: (a) monetary damages, and any applicable interest; or (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages, and any applicable interest, in lieu of restitution".

[171] ICSID tribunals are unlikely to award specific performance and, instead, remain focused on compensation. To that extent, they offer liability, not property, protection. Yet, such liability protection

VI. Back-up enforcement in international law

As pointed out in Section III, how and how strongly entitlements are protected -- as either inalienable or by a property rule or a liability rule -- must be distinguished from what the system does in case the rules of protection are not respected (back-up enforcement). Earlier, I referred to this distinction as one between second and third order questions. I also pointed out that whilst in domestic law back-up enforcement is a given (there are police, bailiffs and prisons) in international law (which generally lacks central enforcement) the third order question of back-up enforcement becomes a crucial part of the equation. As a result, even though this article focuses on the second order question of how international law ought to protect entitlements, as noted earlier, any such inquiry must be made in the context of the third step of back-up enforcement.

Logically, one would expect that higher levels of protection will also be backed-up with higher or stronger remedies in case that level is not met. Put differently, the more ambitious the goal, the more forceful the instruments to achieve that goal. This is exactly what we see in domestic law. Where entitlements are (highly) protected as inalienable (such as in criminal law) back-up enforcement takes the form of imprisonment, sometimes even the death penalty. The next level of protection by property rule is, in turn, backed up with fines coupled, if necessary, to imprisonment. Both go well beyond mere compensation and add what Calabresi and Melamed have called a "kicker" which, in the example of property rules, "represents society's need to keep all property rules from being changed at will into liability rules".[172] Finally, in case someone takes an entitlement protected by a liability rule without paying compensation, the holder of the entitlement can ask a court to objectively value the required level of compensation and, subsequently, enforce payment, if necessary with the help of bailiffs.

In international law, however, the situation is strikingly different, as we are faced with what is, at first sight, a double paradox. First, although international law, by default, ambitiously protects entitlements as property, back-up enforcement in case this rule of protection is not respected corresponds rather to what we would expect under a liability rule (compensation and proportional countermeasures). In other words, though more strongly protected as property, back-up enforcement in international law appears to be weaker. At first sight at least, international law does not seem to have Calabresi and Melamed's "kicker" (Section VI.1). Second, and ultimately more worrisome, those entitlements that international law protects most strongly as inalienable (*jus cogens* and collective obligations) benefit paradoxically from the weakest form of back-up enforcement (Section VI.2). This paradox has led, and continues to lead, to demands for

---

was made possible because of a strong dispute settlement mechanism including, specifically, automatic enforcement before domestic courts of any money awards. See Article 54.1 of the ICSID Convention: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State" (underlining added).

[172] Calabresi and Melamed, p. 1126.

more effective alternatives to enforce *jus cogens* and collective obligations away from the state-to-state model.

1. The puzzle of property protection backed-up by 'mere' compensation and proportional countermeasures

As described earlier in Section V, whilst many entitlements in domestic law are protected by a mere liability rule, international entitlements are, by default, protected by a property rule. This rule requires, in principle, restitution and performance instead of only compensation. Given the inherent weakness of international law (in particular, the lack of centralized power) this may come as a surprise. In the face of weakness, is international law trying to be "more catholic than the pope"? In Section IV, I explained this apparent puzzle of an inherently weak system strongly protecting entitlements as property: It is largely *because of* – not despite -- the weaknesses of international law that international entitlements are, by default, protected as property. More particularly, it is because of the absence and/or costs of a collective valuation mechanism and the problems of collection and distribution of compensation (both of which result from the lack of centralized power) that a liability rule under current international law is unlikely to work. These weaknesses of international law do *not stop*, or *prevent it*, from the relatively high level of property protection. Rather it is those weaknesses that partly *explain* the default rule of property protection.

Moving to the next step of back-up enforcement, a new puzzle arises. Though highly protected as property, in the event the rules of property protection are flouted, international law offers only the type of back-up enforcement we would expect for liability protection. Indeed, in case the taker of an international entitlement protected as property fails to meet its obligation of restitution and/or specific performance (that is, cessation of ongoing breach), the back-up is merely (1) reparation for harm caused.[173] If the wrongdoer refuses to pay reparation, and to separately induce specific performance, the remedy of last resort is simply (2) *proportional* countermeasures[174], that is, countermeasures "commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question".[175] In case of material breach of treaty, one may add (3) suspension or termination of the treaty by the victim as against the wrongdoing state.[176] However, at least under the default rules of general international law, genuine sanctions or punishment either in the form of fines or punitive

[173] ILC Articles, Article 36.1: "The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution". More generally, Article 31.1 provides: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".

[174] ILC Articles, Article 49: "An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two", in particular, to induce cessation of the breach and payment of reparation.

[175] ILC Article 51. See also ILC Article 37.3, in respect of the remedy of "satisfaction" (available insofar as breach "cannot be made good by restitution or compensation" and which can take the form of "an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality"): "Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State".

[176] Article 60 of the VCLT.

(even disproportional) countermeasures are prohibited.[177]

In contrast, in domestic law, fines and/or punishment are exactly what we expect as back-up enforcement for property rules. To deter non-consensual takings of entitlements (such as my property entitlement to my house), fines are then set so as to exceed the expected gain from breach multiplied by the inverse of the probability of a fine being effectively imposed: If, for instance, the probability of detection and punishment is one out of five, the optimal fine is set at the expected gain multiplied by five.[178] For others, the optimal fine equals not the expected *gain* but the *harm* caused by breach multiplied by the inverse of the probability of being caught.[179] In general international law, however, no such calculation is made as fines and punishment are by definition prohibited and only reparation and proportional countermeasures are allowed in response to breach. In sum, international law sets for itself a level of protection that is *higher* than that for many domestic law norms (property versus liability protection). Yet, the instruments to achieve that higher level of protection (ultimately, reparation and proportional countermeasures) are *weaker* than those available in domestic law.

How can one explain this puzzle?

European absolutists are likely to bow their heads to this puzzle and, in the same breath, argue for stronger back-up enforcement in international law, such as punitive sanctions.[180] Critics of international law, in contrast, including what I called American voluntarists, are likely to point at current weak back-up enforcement to argue that, notwithstanding the stated goal of property protection, international entitlements are

---

[177] The Commentary to ILC Article 51, at p. 344, notes: "a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49". In respect of compensation, the Commentary to ILC Article 36, at p. 245-6, notes: "Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character". As concerns satisfaction, the Commentary to ILC Article 37, at p. 268, states: "satisfaction is not intended to be punitive in character, nor does it include punitive damages". On punitive damages in international law, see N. Jørgensen, A Reappraisal of Punitive Damages in International Law., *B.Y.I.L.*, vol. 68 (1997), p. 247; S. Wittich, Awe of the Gods and Fear of the Priests: Punitive Damages in the Law of State Responsibility., *Austrian Review of International and European Law*, vol. 3 (1998), p. 31. Equally, based on DSU Article 22.4 (requiring "equivalence" between trade suspensions and the harm caused by the original breach), WTO arbitrators under DSU Article 22.6 have consistently rejected punitive suspensions (see, for example, *US – 1916 Act*, para. 5.22).

[178] See, for example, L.A. Bebchuk and L. Kaplow, Optimal Sanctions and Differences in Individuals' Likelihood of Avoiding Detection, 13 International Review of Law and Economics 217 (1993) and Wouter Wils, Optimal Antitrust Fines: Theory and Practice, 29 World Competition Law and Economics Review (2006) 183, at 190-1.

[179] Gary Becker, Crime and Punishment: An Economic Approach, 76 Journal of Political Economy 169 (1968) and W.M. Landes, Optimal Sanctions for Antitrust Violations, 50 University of Chicago Law Review 652 (1983).

[180] See, for example, Mavroidis, *supra* note 95 (at 811, arguing that "for legal security to be served, *institutional* rather than individual grounds must be agreed and inserted in the contract that will guarantee respect at all times" and at 812 discussing punitive damages in the WTO). See also Benjamin Brimayer, Bananas, Beef and Compliance in the WTO: The inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower nations, *Minnesota Journal of Global Trade* (2001) 10.

actually protected by a mere liability rule. On this view, as breach only results in compensation and proportional countermeasures, how can one claim that states must perform their commitments even if the cost of compliance outweighs the cost of defection? Put differently, with such weak back-up enforcement, how can one contest that international law permits efficient breach? From this perspective, the stated goal of property protection is, at best, overshooting: In the hope that more states will *actually* comply, international law raised the bar in its official *expectation* of how strictly states *ought to* comply. Knowing far too well that states cannot be forced into restitution or specific performance (there is no international police), international law would then be imposing its high level of protection in the hope that states will at least be inclined to pay reparation. This would be like imposing a speed limit of 40 MPH hoping that, since there is no real penalty linked to speeding anyhow, drivers will at least slow down to 60 MPH. At worst, the stated goal of property protection is, for outright critics of international law, completely irrelevant: As states are purely self-interested and, therefore, perform their commitments only for instrumental reasons, the only thing that counts is back-up enforcement. On this view, if breach is ultimately met only with compensation and proportional countermeasures, the second order question of how entitlements are protected (and with it the bulk of this article) is irrelevant.

In the context of WTO law, for example, Joel Trachtman agrees that formally WTO entitlements are protected by a property rule, but submits that

> a legal realist, and a legal economist, would ask not what the formal law specifies, but what it does in response to breach. *Ubi ius ibi remedium*. Here, the law in action clearly does not operate as a property rule. States that violate WTO law are not subject to enforceable specific performance-type remedies, nor do they experience any penalty for their violation beyond the potential authorization of withdrawal of equivalent concessions ... So, as a matter of fact and practice, if not as a matter of legal doctrine, the WTO legal system is best characterized as employing a liability rule, rather than a property rule.[181]

Going one step further, Professors Schwartz and Sykes point at weak back-up enforcement (equivalent suspension of concessions) to argue, deductively, that even formally WTO entitlements are not protected by a property rule. If WTO members had preferred specific performance, their argument goes, they would have provided for sanctions that were more than equivalent to the harm caused. Since they did not do so, according to Schwartz and Sykes, WTO entitlements are formally and in practice protected by a mere liability rule.[182]

---

[181] Trachtman, *supra* note 18, at p. 23. See also at p. 21: "Indeed, if the goal were simply to induce compliance through the actions of government operatives, then penalties calculated to induce action by these operatives would be appropriate. But the goal is not necessarily to induce compliance in all cases. Rather, the goal seems to be to induce compliance when compliance is efficient, and breach when it is not".

T[182] Sykes and Schwartz, supra note 40 at 191 ("If WTO members really wanted to make compliance with dispute resolution findings mandatory, they would have imposed some greater penalty for noncompliance to induce it") and Alan Sykes, The Remedy for Breach of Obligations under the WTO Dispute Settlement Understanding: Damages or Specific Performance? In New Directions in International Economic Law:

An alternative and better explanation for the puzzle at hand is, however, available. First, there are good reasons why international law avoids punitive sanctions (sub-section 1 below). Second, even with the relatively weak back-up enforcement of compensation and proportional countermeasures in hand (hereafter referred to as 1:1 retaliation), the stated goal of property protection can and usually is met, in particular through the "kicker" of community costs (sub-sections 2 and 3), and the hidden force of 1:1 retaliation (sub-section 4). As a result, current instruments of back-up enforcement in international law are, generally speaking, optimal and do not undermine the default goal of property protection, let alone the usefulness of distinguishing levels of protection from back-up enforcement.

1. Good reasons to limit countermeasures to 1:1 retaliation

That international law (as compared to domestic law) prohibits punitive sanctions (i.e., offers a relatively weak instrument of back-up enforcement, namely 1:1 retaliation) is easily explained: first, because of the consensual nature of international law and its status of a largely incomplete contract; second, because of the lack of centralized control over breach; third, due to power imbalances between states.

Firstly, states, including the most powerful ones, are hesitant to enter a regime with strict remedies and tough punishments. Knowing that they may end up not only as complainants but also as defendants, states want to maintain some wiggle room.[183] Such flexibility may be sought after as an exit option to openly violate the agreement in case, for example, political or economic circumstances change or, more likely, so as not to be hammered for good faith implementation which turns out to constitute breach.[184] As noted earlier, treaties are incomplete contracts that cannot foresee all situations. They are also increasingly vague, especially when multilaterally negotiated, so that states acting in good faith may subsequently be found to violate the agreement. As a result, if international law were to impose a back-up enforcement mechanism that is too forceful, it might either deter participation in what is essentially a consent-based system or, for those who did join but now face harsh penalties, may lead to exit from the treaty.[185] As David

---

Essays in Honour of John H. Jackson 349 (Marco Bronckers & Reinhard Quick, eds 2000). See also David J. Bederman, Counterintuiting Countermeasures, 96 AJIL 817, 818 (2002).

[183] GEORGE DOWNS AND DAVID ROCKE, OPTIMAL IMPERFECTION: DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS (1995). As Robert Hudec noted in the context of the GATT/WTO: "The optimum legal system is not simply the strongest legal system. It is the legal system that will be most helpful in enforcing one's trade agreement rights as complainant, while at the same time preserving the desired degree of freedom to deal with adverse legal rulings against one's own behavior" (Robert Hudec, Broadening the Scope of Remedies in WTO Dispute Settlement, in FRIEDL WEISS & JOCHEM WIERS, eds., IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES, (Cameron May Publishers 2000) pages 345-376, at 350).

[184] As one WTO arbitrator noted: "In WTO dispute settlement cases, it is probably true that most defending parties argue in good faith that they believed the measures at issue were in conformity with the relevant provisions of the WTO Agreement" (Arbitration under Article 22.6 of the DSU, *Canada – Export Credits*, para. 399).

[185] As Anne-Marie Slaughter noted: "Forcing a situation in which a losing litigant is automatically forced to comply with the panel judgment … is bound to make some States law-breakers".

Palmeter points out in response to claims that current WTO remedies are too weak (no retroactive damages and even prospectively only equivalent retaliation): "It is important to understand … that the remedy that exists in the WTO is the remedy that Member governments found they were willing to accept as successful claimants – no doubt because they were unwilling to commit themselves to providing more as unsuccessful defendants".[186]

Along similar lines, Scott and Stephan refer to sociological studies[187] to demonstrate that formal enforcement and material sanctions may crowd out or diminish the effectiveness of informal incentives that motivate compliance, in particular, the instinct to reciprocate.[188] In domestic law, neither the front-end concern of attracting participation nor the back-end concern of avoiding exit play a role: a domestic legislator rules by fiat and citizens cannot exit from specific rules (other than through emigration and/or denouncing citizenship). This makes it much easier, and more appropriate, for domestic law to have strict back-up enforcement as compared to international law.

Secondly, limiting countermeasures to 1:1 retaliation in a decentralized legal system introduces a stabilizing constraint and minimizes the overall cost of breach and deterrence. Domestic legal systems went through a similar process. Francesco Parisi, for example, describes how in ancient law remedies evolved from discretionary retaliation (that is, unregulated retaliation imposing punishment much more severe than the harm done, i.e., sevenfold retaliation[189]) to a system of proportional retaliation or the Biblical *lex talionis* ('an eye for an eye'[190], setting a limit of 1:1 as the maximum penalty for a crime).[191] Even though in a system of sevenfold-retaliation no rational breach would be expected, the reality was that involuntary disturbance of the original peaceful equilibrium did occur and, if misperceived by at least one group, triggered very costly feuds. In the following passage the analogy to international law is readily made:

> In the absence of fixed rules [i.e. 1:1 retaliation], the magnitude of the victim's retaliation was often exacerbated by the victim's partisan bias, leading clans to overestimate the gravity of their harm and to retaliate in excess of the original

---

[186] David Palmeter, *The WTO Dispute Settlement System in the Next Ten Years*, Presentation at Columbia University Conference on The WTO at 10: Governance, Dispute Settlement and Developing Countries, April 7, 2006, available at http://www.sipa.columbia.edu/wto/pdfs/PalmeterWorkingPaper.pdf.

[187] In particular, Stuart Macaulay, Non-Contractual Relations in Business, 28 Am. Soc. Rev. 555 (1963). Macaulay's subjects reported that legal sanctions were not only unnecessary but might well have undesirable effects, as the invocation of legal enforcement might be seen as a betrayal of trust or an instinct to engage in sharp practice.

[188] Scott and Stephan, *supra* note 10 at p. 35, 44. On that basis, they suggest, at p. 37, that "the hardening of … obligations through formal, third-party enforcement may deny states the opportunity to demonstrate that they have the capacity and desire to cooperate, and in effect restricts cooperation to those subjects where independent observers can verify the conditions for cooperation and sanction defections. In this way, formal enforcement can impede rather than promote valuable cooperation".

[189] See Gen. 4:15, 4:23-4 and Prov. 6:13.

[190] See Exod. 21:23-4 and Leu 24:17-22.

[191] Francesco Parisi, The Genesis of Liability in Ancient Law, 3 American Law and Economics Review (2001) 82. See also Elisabeth Zoller, Unilateral Peacetime Remedies: An Analysis of Countermeasures (1984) at 14 (observing that "in primitive societies, reciprocity is the central principle of life").

> loss. In turn, the clan suffering an excessive retaliation often felt entitled to respond with the infliction of new harm to the other party. This regime of retaliatory threats risked degenerating into spirals of escalating violence.[192]

Proportional countermeasures in international law can, therefore, be seen as a coordination mechanism to reduce the risk of escalating violence and retaliation, a system of predictable and non-discretionary retaliation that promotes stability and overall efficiency.[193] As Robert Axelrod has argued, in environments characterized by the absence of hierarchy, tit-for-tat (or more precisely nine-tenths of a tit for a tat) is the best strategy for inducing cooperation among egotistical actors.[194] Interestingly, as is largely the case in current international law[195], this 1:1 limit in ancient law was generally applicable and independent of the level of social undesirability of the crime and the probability of detection of the wrongdoer.[196]

Thirdly, the imbalance of power between states offers an additional reason to opt for proportional instead of punitive countermeasures. When it comes to back-up enforcement, weaker states are, indeed, in a particularly difficult predicament. On the one hand, they want stronger remedies and treaties with real teeth, if not, powerful states may not comply. On the other hand, weak states have historically faced 'gunboat diplomacy' and over-enforcement by powerful states. As a result, they are the first ones to benefit from limits on the legality of countermeasures and the requirement that countermeasures be proportional. In that sense, the law on countermeasures is as much about limiting excessive self-help and leveling the playing field between hugely unequal players, as it is about effectively inducing compliance. As Schwartz and Sykes pointed out in the context of the WTO, the introduction of automatically and collectively authorized retaliation in the new WTO dispute settlement system was in response "not so much to the undercompliance with substantive obligations that arises absent these sanctions, but to the danger of excessive unilateral sanctions that exists in the absence of centralized oversight regarding the magnitude of sanctions".[197]

2. How 1:1 retaliation can achieve property protection: the "kicker" of community costs

Explaining why international law limits countermeasures to 1:1 retaliation is one thing

---

[192] Parisi, *supra* note 191 at p. 87.
[193] See Edith Hamilton, The Greek Way, 1930, New York: W.W. Norton. See also *Case Concerning the Air Services Agreement of 27 March 1946 between the United States of America and France*, 18 Report of International Arbitral Awards 417, at 445, para. 91: "It goes without saying that recourse to counter-measures involves the great risk of giving rise, in turn, to a further reaction, thereby causing an escalation which will lead to a worsening of the conflict. Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other Party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute".
[194] Robert Axelrod, The Evolution of Cooperation 136-9 (1984).
[195] But see the special rules for *jus cogens*, discussed *infra* text at note 236, and also ILC Article 51 which permits "taking into account the gravity of the internationally wrongful act and the rights in question".
[196] Parisi, *supra* note 191 at p. 85.
[197] Schwartz and Sykes, *supra* note 13 at p. 204.

and relatively easy. It does not contradict American voluntarism, nor proponents of the idea that international entitlements are in practice (Trachtman), or even formally (Sykes), protected by a mere liability rule. Quite another thing is to demonstrate that mere compensation and proportional countermeasures are actually sufficient as back-up enforcement for a property rule. If this article can demonstrate this latter point, my claim in favor of a default rule of property protection for international entitlements stands not only as a formal or prescriptive matter (second order question) but also as a matter of law in action (third order question), even in current international law.

Two strands of arguments support the idea that proportional countermeasures or 1:1 retaliation can be sufficient to back-up a property rule. Firstly, and most importantly, states have incentives to perform their commitments besides direct sanctions or 1:1 retaliation, in particular reputation costs, fear of emulation and community pressure (hereafter referred to collectively as community costs). As one popular source put it, "[t]here are three basic flavors of incentive: economic, social, and moral. Very often a single incentive scheme will include all three varieties".[198] Secondly, and discussed in sub-section 4, even 1:1 retaliation itself is more forceful than one would think at first sight. As an empirical matter, we know that international cooperation is ubiquitous and that most international law is complied with most of the time.[199] In the WTO, for example, after 10 years of operation and more than 350 disputes, in only a handful of cases did violators fail to perform and each of those cases pitted the US against the EC (not a small developing country against a powerful nation that could be unmoved by the threat of mere tit-for-tat retaliation). Knowing that back-up enforcement is limited to compensation and proportional countermeasures and, in the WTO, does not even include damages but only equivalent retaliation, how can this remarkable success rate be explained?[200] With all the talk of efficient breach, how come that so few of them materialized?[201]

To begin with, 1:1 retaliation or direct sanctions are not the only costs of breach. Even if one assumes that states care only about their own interests and comply with international law for purely instrumental reasons, breach, in various degrees, also triggers reputation

---

[198] STEVEN LEVITT AND STEPHEN DUBNER, FREAKONOMICS, A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING (2005), at 21.

[199] Louis Henkin, How Nations Behave: Law and Foreign Policy (1979) 47; Robert Keohane, International Relations and International Law: Two Optics, 38 Harvard International Law Journal (1997) 487 ("Governments make a very large number of legal agreements, and, on the whole, their compliance with these agreements seems quite high. Yet what this level of compliance implies about the causal impact of commitments remains a mystery"); and Detlev Vagts, The United States and Its Treaties: Observance and Breach, 95 AJIL 313 (2001) at 313 (arguing that "the U.S. record [regarding treaty observance] has not been as negative as some have feared but that anxieties have been needlessly fueled in recent years by the reckless language of both officials and scholars").

[200] One study, for example, concludes that the level of compliance with subsidy rules under the WTO agreement is higher than the level of compliance with German domestic rules on subsidization. See Michael Zurn and Jurgen Neyer, Conclusions – The Conditions of Compliance, in Law and Governance in Postnational Europe, *supra* note 2, at 183.

[201] See the sparse invocation of GATT/WTO liability mechanisms discussed *supra* note 168.

costs, fear of emulation and community pressure.[202] International affairs are a repeat game, in a variety of fields. Given the limited number of states, the impossibility of anonymity and the durability of state identities, reputation is a factor that matters.[203] As Andrew Guzman explains, "[a] reputation for compliance with international law is valuable because it allows states to make more credible promises to other states. This allows the state to extract greater concessions when it negotiates an international agreement".[204] As a result, reputation encourages states to comply with international law, even where direct sanctions alone may not provide a sufficient incentive. Reputation can, in other words, explain why 1:1 retaliation can and does achieve property protection. Fear of emulation, that is, realization that if I breach my obligation now, you may be less inclined to perform your obligations in the future, can play a similar role. In this context, Scott and Stephan refer to moralistic reciprocity or reciprocal fairness, linked to broader community pressure, as a potent additional means of self-enforcement besides retaliatory threats and reputational sanctions.[205] Moreover, community pressure need not come from the outside or other states alone. An unequivocal, public condemnation of a state can mobilize domestic actors in that state to put pressure on the state to comply (be it consumers or domestic industries suffering from WTO breach or NGOs advocating human rights in case of human rights violations).

This is not to say that reputation or community costs alone are sufficient or that they will always trigger significant or the same costs. Indeed, states can have multiple reputations (say, one in the field of trade, another for environmental compliance) and multiple reputational concerns (sometimes creating a reputation of toughness, including through violating the law, may be beneficial). Reputation may also attach more to regimes or governments than states, and as regimes change with some frequency, reputation costs may at times be perceived as less important.[206] What reputation, fear of emulation and community pressure (herein referred to in combination as "community costs") do achieve, however, is that they act at the margin, like all influences on state behavior, and may in many cases explain why even the most powerful states comply with international law even where the threat of proportional countermeasures means nothing to them. For example, reputation, fear of emulation and the desire to uphold the WTO as an institution

---

[202] Andrew Guzman, *International Law: A Compliance Based Theory*, 90 CAL. L. REV. 1823 (2002). See also George Norman & Joel P. Trachtman, The Customary International Law Game, *99 Am. J. Int'l L. 541 (2005);* Edward T. Swaine, Rational Custom, *52 Duke L.J. 599 (2002)* and long before that: Robert O. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy (1984)

[203] Scott and Stephan, book, p. 121.

[204] Andrew Guzman, Reputation and International Law, 34 Ga. J. Int'l & Comp. L. 379, at 383.

[205] Scott and Stephan, article, p. 565 and book, p. 154. They invoke, in particular, an empirical study by Ernst Fehr and Klaus Schmidt (A Theory of Fairness, Competition and Cooperation, 114 Q. J. Econ. 817 (1999)) that develops a theory of inequity aversion, combining features of both altruism and envy. Scott and Stephan distinguish simple reciprocity from moralistic reciprocity, at p. 155: "In the simple form of reciprocity, punishment for defection takes the form of withdrawal of future cooperation (e.g., if you cheat, I will not deal with you anymore). Moralistic reciprocity refers to more elaborate forms of punishment, including social ostracism, reduced status, fewer friends and fewer mating opportunities. Evolutionary theorists argue that simple reciprocity cannot support large scale human cooperation … But moralistic reciprocity offers a more plausible basis for establishing large scale patterns of cooperation because it provides many more ways that cooperators can punish defectors".

[206] Scott and Stephan, *supra* note 10 at p. 121.

which serves US interests, largely explains why the United States implemented adverse WTO rulings obtained against it by developing countries such as Brazil and Venezuela (*US – Gasoline*) or, even more so, Costa Rica (*US – Underwear*).[207] As Robert Hudec explains in the context of GATT: "The ultimate 'remedy' which made the GATT dispute settlement procedure as successful as it was [was] the force of community pressure. Community pressure is something that can be generated without an elaborate structure of remedial procedures".[208]

Finally, if one is willing to go beyond purely instrumental reasons for why states comply with international law (an assumption we have stuck to so far), empirical evidence on individual behavior may further explain why states comply notwithstanding weak back-up enforcement.[209] Such other research includes, for example, that of Tom Tyler whose psychological studies suggest that people comply with law because of procedural justice and ideas of fairness, that is, based on social relationships and ethical judgments, rather than purely instrumental reasons (e.g. the threat of sanctions or punishment).[210] If correct in the international context, compliance with international law would then at least partly be self-regulatory and Tyler's noninstrumental explanations could explain why states comply with international law even where the sanction for breach is "only" 1:1 retaliation. It is, indeed, not too speculative to imagine that when, for example, US President George W. Bush considers foreign policy, he not only acts pursuant to a rational cost-benefit analysis, but is driven also by ideas (such as freedom) and moral principles (including religion). Following a different track, in an empirical study of neighborly relations between cattlemen in Shasta County, California, Robert Ellickson demonstrates that people frequently resolve their disputes in cooperative fashion without paying any attention to the laws that apply to those disputes.[211] Ellickson criticizes what he calls the legal centralism of law and economics theory which, like Thomas Hobbes, seems to deny the possibility that controllers other than the state or some centralized Leviathan could generate or protect entitlements.[212] If correct in the international

---

[207] See Schwartz and Sykes, *supra* note 13 at p. 196-7; Trachtman, *supra* note 18 at p. 18 ("Reputation may help to explain why we observe widespread compliance with WTO law despite existing prospective-only remedies that would seem, considered alone, to provide incentives for breach"); Shannon K. Mitchell, GATT, Dispute Settlement and Cooperation: A Note, 9 Economics and Politics 97 (1997), Dan Kovenock & Marie Thursby, GATT, Dispute Settlement and Cooperation, 4 Economics and Politics 151 (1992).
[208] Hudec, *supra* note 183 at 376.
[209] If proponents of a pure rational choice approach to international law are allowed to apply to states rational actor models usually applied to individuals, we must be ready also to learn from other behavorial and sociological research on individual action and consider application of it to state action.
[210] Tom Tyler, Why People Obey the Law (2006). See also Colin Diver, A Theory of Regulatory Enforcement, 28 Public Policy (1980)257, at 297 ("Businesses obey regulations for a host of reasons, moral or intellectual commitment to underlying regulatory objectives, belief in the fairness of the procedures that produced the regulations, pressure from peers, competitors, customers, or employees, conformity with a law-abiding self-image – in addition to fear of detection and punishment. It is a common place that no regulatory command will succeed without substantial voluntary compliance").
[211] Robert Ellickson, Order Without Law, How Neighbors Settle Disputes (1991).
[212] Ellickson, p. 138-9. Ellickson points, for example, to the fact that a few virtuous leaders at the highest level of social control create incentives for cooperative activity that cascade down. Such a critical mass of self-disciplined elders may, in his view, be as good a controller as Hobbes' Leviathan. This may explain why in international law, cooperative behavior by mayor players such as the United States can be an important stimulus for cooperation.

context, what Ellickson refers to as "decentralized social forces" (including notice, gossip and the threat of force) contribute importantly to social order and may explain why, notwithstanding "mere" 1:1 retaliation, high levels of property protection are and can be achieved.

3. Community costs in a property regime as opposed to a liability regime

Granted, community costs may induce compliance with both property and liability protection: under a liability rule, reputation may induce states to pay full compensation; under a property rule, reputation may convince states to perform their commitment. Yet, even if formal back-up enforcement under both regimes may be the same -- as is apparently the case in international law, where the default property rule is backed-up with "mere" compensation and 1:1 retaliation – the informal factor of community costs operates very differently. Under a property rule, community costs are, in essence, the "kicker" that achieves property protection.

Under a liability rule, the payment of compensation or suffering of 1:1 retaliation, as the case may be, is the end of the story and stops all community costs (as where a NAFTA party expropriates property but pays full compensation for it). Indeed, as the state has then fully complied with its obligations under the liability rule, by paying compensation the state becomes a law-abider. Under a liability rule, compensation is merely the "price" for doing what is permitted and, with its payment, all community costs stop. Under a property rule, however, the payment of compensation or suffering of 1:1 retaliation (in, for example, WTO dispute settlement), even where it is the only formal back-up, is nothing but a temporary solution and not the end of the story. As the ultimate goal is and remains performance (or consensual re-negotiation of the commitment), the clock of community costs keeps ticking.[213] Under a property rule, rather than the "price" for doing what is permitted, compensation and 1:1 retaliation is a "sanction" for doing what is forbidden.[214] As Daniel Friedman pointed out in the domestic law context, the similarity in the end result -- domestically, a money award; internationally, compensation and/or 1:1 retaliation – should not blur the fundamental distinction between the two situations: Under a liability rule (Friedman mentions eminent domain in public law; we could mention expropriation under NAFTA or tariff renegotiations and safeguards in the WTO), the appropriation is lawful and permissible and the remedy of compensation is a perfect substitute for the right. Under a property rule, in contrast (Friedman mentions the

[213] In the WTO context, for example, even after retaliation has been approved, the question of non-implementation by the original wrongdoer remains on the agenda of each and every session of the WTO's Dispute Settlement Body (DSB), "until the issue is resolved" (DSU, Article 21.6, see *supra* note 164). In other words, at each and every session of the DSB the wrongdoer is put on the spot and reminded by all other WTO members that performance is still lacking. This creates community costs even after retaliation has been approved.

[214] See R. Cooter, Pirces and Sanctions, 84 Columbia Law Review (1984) 1523 and J.C. Coffee, Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It 101 Yale Law Journal (1992) 1875. That trade retaliation under the DSU is currently seen as a sanction rather than simply rebalancing the scales or compensation, see Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 94 AJIL (2001), 792.

case in which conduct is wrongful but the remedy of the innocent party is limited to damages; we could mention a WTO-inconsistent trade restriction triggering 1:1 retaliation under the DSU), the appropriation is not lawful, nor permissible and the remedy of compensation and/or retaliation is to vindicate the right, not to replace it. [215]

This fundamental distinction, notwithstanding the similarity in back-up enforcement, means that in a property regime, even after compensation and 1:1 retaliation, community costs keep running. This is not the case under a liability rule. Community costs are, therefore, the "kicker" that ensures property protection. In Calabresi and Melamed's words, community costs are what "keep[s] all property rules from being changed at will into liability rules".

Crucially, to trigger community costs, what matters is the existence of an obligation in the eyes of other states (say, other WTO members when it comes to a US breach) rather than a sense of legal obligation felt by the breaching state itself (*in casu*, the United States).[216] Put differently, if community costs are the "kicker" that back-up property protection in international law, activation of this kicker turns on a clear community sense of there being an obligation of performance (rather than mere compensation).[217] As a result, and this is an important point, the second order question of setting an agreed level of protection of entitlements is crucial, even in the less developed system of international law. Unlike what American voluntarists may claim, the triple distinction introduced in this article – allocation, protection and back-up enforcement – does, therefore, matter as it is the agreed level of protection that sets the trigger for, and determines the degree of, community costs.

In the WTO context, for example, this highlights the importance of the debate over whether WTO entitlements are protected as property or liability. If WTO members merely start *believing* that WTO entitlements are protected by a simple liability rule, this will reduce or may even take away the "kicker" of community costs, and with it the cost of breach. The debate on whether to introduce monetary compensation for WTO breach offers a good illustration.[218] If the WTO would mandate such compensation (especially as a replacement of, instead of in addition to, retaliation), it is crucially important to specify that this compensation is there to make up for damage (and possibly to induce compliance), not to replace actual performance. If not, compensation risks being regarded by the trade community as a substitute for compliance and the payment of

---

[215] Friedman, *supra* note 51 at p. 1 and 15-6. Using the example of nuisance, Friedman submits that the defendant had no right beforehand to pollute, although, ex post facto, the court confined the remedy to damages. Crucially, however, the limitation on the remedy does not amount to a license to commit a tort.

[216] See Guzman, *supra* note 4 at 1.

[217] In support, Trachtman, *supra* note 18 at p. 37: "Reputational sanctions might still apply where a state fails to comply with the rules that can be understood as property rights, whereas if a rule is *understood* as a liability rule perhaps no reputational sanction would attach".

[218] For such proposal, see Communication by Ecuador, TN/DS/W9, at 6 ("compliance should be given more encouragement and, for this purpose, compensation could be an extremely useful tool"); Communication by the Group of Least Developing Countries, TN/DS/W/17, at 4 ("a strong case for monetary compensation can be made. This remedy is important for developing and least developed countries, and for any economy that suffers for the time that an offending measure remains in place"); and Marco Bronckers and Naboth van den Broek, Financial Compensation in the WTO, 8 JIEL (2005) 101.

compensation may stop community costs.[219] This, in turn, would seriously weaken back-up enforcement (no more "kicker' of community costs) and could paradoxically mean that an additional instrument of back-up enforcement (monetary compensation) leads to less, rather than more, compliance. Eventually, this may undermine the property regime in the first place and replace it by a liability rule.[220]

Although examining a completely unrelated field, this is exactly what happened in a study of day-care centers in Israel.[221] Apparently, the mere rule that kids were supposed to be picked up at 4 p.m. did not prevent some parents from being late. To address this problem, the decision was made to fine any parent arriving late $3 per child for each incident. Now, what happened? Instead of down, the number of late pickups went up. How can this be explained? Not only was the fine too small but, more importantly, it substituted an economic incentive (the $3 penalty) for a moral/community incentive (the guilt and community pressure that parents were supposed to feel when they came late). As risks being the case in the WTO, monetary compensation, in effect, changed a property regime (kids must be picked up at 4 p.m.) into a liability regime ($3 gets you off the hook).

Conversely, in NAFTA, where (unlike in the WTO) breach does not trigger an obligation of specific performance, the level of protection is determined not only by the formal remedy provided (mere compensation, reminiscent of liability protection) but also by the overall perception of how "bad" it is to breach NAFTA in the first place. If NAFTA parties, investors and society at large trigger community costs for breach alone, these community costs, combined with the formal remedy of compensation, may provide strong incentives to comply with NAFTA even where a purely economic cost benefit analysis would call for breach (the benefits of, say, discriminating the foreign investor outweigh the compensation to be paid). In the end, based largely on community perceptions, as much as WTO protection could shift from property to liability, NAFTA protection could, thereby, shift from liability to property.

4. How 1:1 retaliation can achieve property protection: the hidden force of 1:1 retaliation itself

A second strand of arguments for why compensation and proportional countermeasures can achieve property protection relates to the fact that 1:1 retaliation itself is more

[219] For reactions along those lines see India's response to an EC proposal promoting compensation in the WTO: "In fact if the EC's proposal on making trade compensation more realistic is accepted, it could serve as an inducement for the losing party not to comply promptly with the DSB decision. If the EC agree that the key objective of the dispute settlement mechanism is to secure withdrawal of WTO inconsistent measures, how does the proposal for making trade compensation more realistic encourage this objective?" (Communication from India, Document TN/DS/W5, 7 May 2002) and Chile's position expressed at a meeting of the DSB, WT/DSB/M/6, at 7 ("Chile was not particularly attracted to the proposals on compensation, as there was the tendency to see it as a substitute for compliance").
[220] This is not to say that compensation in the WTO context is necessarily a bad idea, only to point out that it is important to put it in context. As in general international law, it may be better to combine compensation with retaliation as the two instruments serve distinct roles, the former an inducement for the wrongdoer to comply, the latter making up for damage caused to the victim.
[221] Uri Gneezy and Aldo Rustichini, *A Fine is a Price*, 29 JOURNAL OF LEGAL STUDIES (2000) 1-17.

forceful than one may think at first sight. It is crucially important to realize that retaliation in international law (with the notable exception of the WTO) is a remedy *in addition to* compensation and (in all cases, including the WTO) destined primarily to punish the wrongdoer, not to compensate the victim. When I take your eye in response to you taking my eye, I do not get my eye back nor am I compensated in any way for previously losing my eye. In WTO law, however, the oft-repeated argument that trade retaliation is shooting oneself in the foot and therefore inappropriate as a remedy[222] overlooks this basic point: As much as me taking out your eye is costly for me as a victim, it is quite natural that higher tariffs as a form of retaliation can be costly also for the victim of WTO breach.[223]

In addition to focused on causing pain to the wrongdoer (not compensation to the victim), 1:1 retaliation is linked to the *loss* suffered by the victim, not the *benefit* derived by the wrongdoer. In other words, countermeasures must be proportional to the damage caused, not to the gain obtained from breach. Unlike disgorgement (which takes away benefits from the violator), and like compensation, retaliation is linked to harm. In the WTO, for example, the level of trade retaliation is not set with reference to the gains made by the violator. Rather, retaliation must be equivalent to the nullification and impairment caused to the victim of the breach.[224] Now, as Parisi points out, "[u]nder usual circumstances, the wrongdoer derives a benefit that is less than the harm suffered by the victim".[225] If, for example, you take out my eye, I will most likely suffer more from losing my eye than you gain from taking it out. As a result, the pain I cause to you with 1:1 retaliation (calibrated as it is on *my* earlier *pain* of losing my eye) is likely to outweigh the benefit or gain that you obtained from originally taking my eye. Coming back to the WTO example, the expected benefits of a WTO-inconsistent trade restriction (if there are any benefits at all) are likely to be smaller than the harm caused to foreign trading nations, especially if more than one country (and potentially 149 other nations) are affected and must be compensated. In that scenario, the threat of 1:1 retaliation can be sufficient to deter breach.

Besides the fact that retaliation in international law comes in addition to compensation and is focused on causing pain to the wrongdoer but calibrated on the harm done to the victim, also the nature or type of 1:1 retaliation may explain why it is, most often, sufficient to deter breach or to induce compliance.[226] Unlike the Biblical *lex talionis* ("an

---

[222] See Charnovitz *supra* note 214 who, on that and other grounds, suggests to replace trade retaliation with other types of sanctions.

[223] Recall, however, that unlike general international law WTO remedies do not include compensation for harm caused and offer only retaliation. This may explain why from the early GATT days there has been confusion as to the goal of trade retaliation, namely: is it compensatory or awarded to induce compliance, or both?

[224] DSU Article 22.4. But note the case law on "appropriate countermeasures" under the WTO's subsidies agreement (Article 4.10). There, arbitrators have set the level of trade sanctions in response to so-called prohibited subsidies at an amount equal to the subsidy originally handed out. Thus, rather than focusing on the harm caused by the subsidy to other WTO members, arbitrators have centered on the benefit or gain bestowed on the subsidized industry in the wrongdoing country.

[225] Parisi, *supra* note 191 at p. 104.

[226] That states may breach but subsequently step in line in response to 1:1 retaliation can partly be explained by the fact that people, and therefore presumably governments, consistently tend to overestimate

eye for an eye"), countermeasures in international law must not be of the same type as the original breach. Rather, the core limit is quantitative, not qualitative. In the WTO, for example, the victim of a WTO-inconsistent tariff on steel must not retaliate with an equivalent tariff on steel. Rather, the victim can suspend any trade concession of an equivalent value, be it tariffs on cars, oranges or textiles. This leeway as to the type of product or sector in which to retaliate has led to very effective retaliation, for example, by the EC against US industries that were crucial in the Bush administration's 2004 re-election campaign. By thus mobilizing domestic US industries (*in casu*, Florida orange growers and North Carolina textile producers) against a WTO-inconsistent US steel tariff, 1:1 retaliation by the EC has, at least in political terms, proven to be more than a simple tit-for-tat. Combined with the already existing opposition against the steel tariff by US consumers of steel (e.g. the US car industry) the proposed EC retaliation, amongst other elements, led to the withdrawal of the tariff.[227] A similar process occurred in the *US - Foreign Sales Corporations* dispute. As Mark Movsesian remarks, without intruding directly on domestic institutions, "the genius of the retaliation remedy lies in its ability to use the domestic political process to achieve the public interest. By setting one collection of interest groups against another, the retaliation remedy encourages the adoption of free trade policies that benefit a nation's consumers as a whole".[228]

Finally, although I have referred to countermeasures under general international law as 1:1 retaliation, there is some leeway to go above strict equivalence. First, proportionality is defined as a level "commensurate" with the injury suffered, instead of strict equivalence.[229] In case law, there has, indeed, been a tendency to accept countermeasures even though they exceeded exact equivalence for as long as they were not clearly disproportionate.[230] Second, recall that proportionality permits "taking into

the probability of good things happening to them. See N.D. Weinstein, Optimistic Biases About Personal Risks (1989) 246 Science 1232 and R.B Korobkin and T.S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, (2000) 88 California Law Review 1051, at 1091-5. Decision-makers are therefore likely to overestimate, for example, the gains to be obtained from a WTO-inconsistent tariff. Once imposed, however, those gains may turn out to be lower and although the *ex ante* expectation of gain may have exceeded the threat of 1:1 retaliation, *ex post* realization of gains may no longer do so. Hence, the tariff is withdrawn.

[227] See David Sanger, *A Blink From the Bush Administration*, New York Times, 5 December 2003.

[228] Mark Movsesian, Enforcement of WTO Rulings: An Interest Group Analysis, 32 Hofstra Law Review (2003) 1, at 4-5. Schwartz and Sykes, *supra* note 13 at p. 194, similarly refer to domestic costs of violation as a crucial engine that drives compliance with WTO law. Hudec, *supra* note 183 at 23, in turn, warns that "[m]ore-than-equivalent retaliation would probably undermine the effort to enlist support for compliance within the target country. It would be perceived by the target country audience as taking unfair advantage of the violation …".

[229] Recall, however, that in the WTO, DSU Article 22.4 does require "equivalence". At the same time, in respect of prohibited subsidies (Subsidies Agreement, Article 4.10), "appropriate countermeasures" are allowed which, in a footnote, is further specified as follows: "This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies … are prohibited". Also the original GATT Article XXIII:2 on trade suspensions refers to suspension "appropriate in the circumstances", see *supra* note 165.

[230] See, for example, *Naulilaa (Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa), UNRIAA*, vol. II, p. 1013 (1928), at p. 1028 ("one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them") and *Air Services*, *supra* note 193, at p. 444, para. 83 (in that case there was no exact equivalence between France's refusal to allow a change of gauge in London on flights from the west coast of the United States and the

account the gravity of the internationally wrongful act and the rights in question". Hence, if the breach is particularly serious and/or the right protected particularly important, retaliation for a level higher than harm caused can be acceptable.[231] Both of these elements -- proportional not equivalent; permission to take account of the gravity of breach and of rights -- may further explain why proportional countermeasures can appropriately back-up a property rule. Importantly, these elements also offer an entry way for international law to tailor back-up enforcement more precisely to the particular level of protection sought by each norm, as is casually done in domestic law.[232] One such example is the Kyoto Protocol where parties who exceed their emissions ceiling at the end of the implementation period will see the short-fall carried over to the next period. On top of that, and clearly as a form of punishment, an additional 30% can be added.[233] Yet, whenever treaty negotiators consider punitive remedies, they must take account of the reasons set out earlier (in sub-section 1) for why countermeasures in international law are normally limited to 1:1 retaliation (in particular, the need to attract participation and prevent exit in a consent-based system). In addition, negotiators must count for the community costs (discussed in sub-sections 2 and 3) when assessing whether punitive remedies are genuinely needed to achieve compliance.

2. The puzzle of jus cogens and collective obligations benefiting from the weakest form of back-up enforcement

In the previous section, I set out a first paradox of back-up enforcement in international law: Though more strongly protected as property, back-up enforcement in international law appears to be weaker ("mere" compensation and proportional countermeasures). I subsequently explained this apparent paradox: first, there are good reasons for international law to avoid punitive sanctions; second, and crucially important, the "kicker" of non-legal remedies, in particular community costs, combined with the hidden force of 1:1 retaliation itself, can, and usually does, achieve the stated goal of property protection. As a result, the instruments of compensation and proportional

---

United States' countermeasure which suspended Air France flights to Los Angeles altogether. The Tribunal nonetheless held the United States measures to be in conformity with the principle of proportionality because they "do not appear to be clearly disproportionate when compared to those taken by France").

[231] For example, in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (I.C.J. Reports 1997*, p. 7, at p. 56, paras. 85, 87, citing *Territorial Jurisdiction of the International Commission of the River Oder, 1929, P.C.I.J., Series A, No. 23*, p. 27) the Court took into account the quality or character of the rights in question as a matter of principle and (like the Tribunal in the *Air Services* case, *supra* note 230) did not assess the question of proportionality only in quantitative terms.

[232] Such tailoring, including a permission to go beyond mere equivalence, can already be seen in, for example, the case law on trade suspension under the WTO Subsidies Agreement. In *Canada – Export Credits*, for example, Canada openly stated that it would not comply in respect of contracted but not yet delivered aircraft. On that ground, the arbitrators (in para. 3.121) decided to adjust the level upwards with 20%, i.e. "by an amount which we deem reasonably meaningful to cause Canada to reconsider its current position to maintain the subsidy at issue in breach of its obligations".

[233] Decision 24/CP.7 on Procedures and mechanisms relating to compliance under the Kyoto Protocol, FCCC/CP/2001/13/Add.3, Section XV.5(a): "Where the enforcement branch has determined that the emissions of a Party have exceeded its assigned amount … it shall declare that that party is not in compliance … and shall apply the following consequences: (a) Deduction from the Party's assigned amount for the second commitment period of a number of tones equal to 1.3 times the amount in tones of excess emissions".

countermeasures are, generally speaking, optimal and do not undermine the default goal of property protection, let alone the usefulness of distinguishing levels of protection from back-up enforcement.

In addition, and more worrisome, a second paradox arises in respect of those entitlements which I described earlier as most strongly protected in international law, namely entitlements collectively held by the international community as a whole (*jus cogens*) or an entire group of states (collective obligations), referred to hereafter in combination as community obligations. This second paradox can be summarized as follows: Although *more strongly* protected as either super-inalienable (*jus cogens*) or prohibiting *inter se* transfers or contracting out (collective obligations), back-up enforcement of community obligations risks being *weaker* than that available under the default norm of property protection. As a result, rather than more, we risk seeing less compliance with these hierarchical super-norms. Let me explain why this is so.

1. Default rules of back-up enforcement for community obligations

As is the case for other international entitlements, back-up enforcement for community obligations remains essentially limited to (1) reparation and (2) proportional countermeasures. As the ILC Commentary notes, "[t]here has been … no development of penal consequences for States of breaches of these fundamental norms. For example, the award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms".[234] At the same time, when it comes to "serious breach" of *jus cogens* -- defined as "gross or systematic failure" to comply with *jus cogens*[235] -- states do have an obligation to "cooperate to bring to an end through lawful means" any such breach and not to "recognize as lawful a situation created by a serious breach", nor to "render aid or assistance in maintaining that situation".[236] However, other than the UN Security Council acting to maintain international peace and security, and enforcement regimes set up under specific treaties (such as the International Criminal Court, regional human rights treaties and the Kyoto Protocol), there is no collective enforcement or punishment mechanism in international law. Even collective enforcement by the UN Security Council is seriously hampered as it is frequently paralyzed by the veto of one of the five permanent members. Indeed, this is especially the case when the Security Council is faced with *jus cogens* questions such as an alleged genocide or gross human rights violations (witness the reluctance of Russia in

---

[234] ILC Commentaries, p. 279.

[235] Article 40.2 of the ILC Articles.

[236] Article 41 of the ILC Articles. As noted earlier, *supra* note 42, the earlier 1996 ILC Draft Articles introduced a distinction between international crimes and international delicts. Although the final 2001 text dropped this distinction, the special consequences attached to international crimes were similar to those set out in Article 41 of the final, 2001 articles. In addition, however, the 1996 text (Article 52) dis-activated some of the excuses otherwise permitted not to offer restitution in kind (including the "burden out of all proportion" justification in what is now Article 35, see *supra* text at note 122) or not to pay compensation (see *supra* note 122) when it came to international crimes. Interestingly, such disactivation was not maintained in the final text of what is now Article 41.

the Kosovo crisis or the reluctance of China in the Darfur crisis).[237]

Moreover, it is not just that community obligations are, notwithstanding their higher goal, backed-up by more or less the *same* instruments as entitlements protected as property. The situation is worse than that. There is a genuine risk that back-up enforcement for *jus cogens* and collective obligations turns out to be *weaker* than the general rule.

First, given the inalienable nature of *jus cogens* obligations, states responding to breach (including those specifically injured, say, the state victim of aggression) cannot engage in reciprocal suspension of the obligation concerned, either as a countermeasure[238] or in the form of treaty suspension or termination.[239] Where a victim of WTO breach can impose reciprocal trade sanctions, a victim of aggression is *not* allowed to reciprocally invade the original wrongdoer. Without such threat of reciprocity, the cost of defection obviously decreases. Moreover, even if reciprocal suspension were permitted, for most violations of *jus cogens* it would not offer much of an incentive to end the violation: Few states would feel compelled to stop, for example, genocide because another state threatens to commit genocide on its own population. Equally, as collective obligations (say, those related to human rights or global commons) are held collectively by all parties to the treaty, their bilateral, state-to-state suspension would not only affect the wrongdoer but all other parties to the treaty. Because of these third party effects, the reciprocal suspension of collective obligations is, by default, prohibited.[240]

Second, even though all states (or all states party to the legislative-type treaty) have a right to invoke responsibility for breach of community obligations[241], the very nature of these obligations often means that no state in particular will actually invoke this right and

---

[237] At the 2005 UN World Summit, the UN General Assembly did, however, make the following commitments: "The international community, through the United Nations … has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council … on a case-by-case basis … should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity" (UN General Assembly Resolution, A/Res/60/1, 24 October 2005, para. 139).

[238] Article 50 of the ILC Articles, listing obligations that cannot be affected by countermeasures, including obligations for the protection of fundamental human rights and obligations under peremptory norms of general international law.

[239] Article 60.3 of the VCLT, dis-applying treaty suspension or termination in response to material breach in the case of "provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties".

[240] Article 49 of the ILC Articles stresses that countermeasures may only be taken "against a State which is responsible for an internationally wrongful act", not against third parties. Moreover, the bilateral suspension of collective obligations would also violate the *pacta tertiis* rule (Article 34 VCLT and, for *inter se* suspensions of multilateral treaties, Article 41.1(b)(i) VCLT, discussed *supra* text at note 129).

[241] Article 48.1 of the ILC Articles: "Any State other than an injured State is entitled to invoke the responsibility of another State … if: (a) The obligation breached is owed to a group of States including that States, and is established for the protection of a collective interest of the group; or (b) The obligation breached is owed to the international community as a whole".

challenge the wrongdoer. This is because violations of *jus cogens* (say, genocide) or collective obligations (say, those related to global commons such as the ozone layer or the high seas) may not affect any other state in particular. Sometimes they do not materially affect other states at all (as is the case when a government abuses the human rights of its own population). This creates a collective action problem where more often than not states are unwilling to bear the cost (both economic and political) of enforcing an obligation that does not individually and/or materially affect them. In this sense, the difference between a common or public good and a good that does not belong to anyone (i.e., between the 'common heritage of mankind' and *res nullius*) is small. In both cases, no one may effectively protect the good.

Third, even if a state, not specifically affected, were willing to take up the role of policeman in the collective interest, it can only request cessation and reparation.[242] It is generally accepted[243] (with notable exceptions, however[244]) that under current international law, such policing nation -- unless it is specifically injured (say, itself the victim of aggression) -- does *not* have the right to take individual countermeasures. In other words, it cannot resort to the ultimate and most important back-up enforcement instrument available for standard breaches of international law. Knowing that for some violations no single state will be individually injured (as in human rights violations), this, in effect, means that the back-up enforcement of countermeasures is, for certain community obligations, not available *at all*. The reason for this prohibition goes back to the power inequalities between states and the fear of smaller states that the most powerful

---

[242] Article 48.2 of the ILC Articles, with the limitation that reparation can only be requested "in the interest of the injured State or of the beneficiaries of the obligation breached".

[243] Article 54 of the ILC Articles: "This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached", underlining added. The reference to lawful measures is generally understood as excluding countermeasures which, by definition, are unlawful but excused. In the ILC Commentary to Article 54 (p. 355, para. 6), state practice is reviewed and the following conclusion is made: "the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest". Similarly, after an exhaustive review of state practice, another author concludes: "a close examination of the cases … in which states seemed to be acting in the name of collective interests cannot determinatively lead to the conclusion that there is an established customary or other rule of international law permitting resort to such measures" (ELENI KATSELLI, COUNTERMEASURES, THE NON-INJURED STATE AND THE IDEA OF INTERNATIONAL COMMUNITY, 2005, at 277, DPhil thesis on file with the author). According to Katselli, "states have been hesitant to resort to countermeasures whenever not individually injured because they believed that they had an obligation to refrain from doing so … states not only have been reluctant to clearly spell out that they were acting on the basis of a right under international law, but they also stated that doing so would be in violation of international law" (ibid., p. 226).

[244] See CHRISTIAN TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW (2005), 250 (finding, after an exhaustive survey of state practice that "it seems justified to conclude that present-day international law recognizes a right of all States, irrespective of individual injury, to take countermeasures in response to large-scale or systematic breaches of obligations *erga omnes*"). More narrowly, a 2005 Resolution on Obligations *Erga Omnes* in International Law of the Institute of International Law (*supra* note 122) provides in Article 5(c): "Should a widely acknowledged grave breach of an *erga omnes* obligation occur, all the States to which the obligation is owed … are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specifically affected by the breach".

nations will engage in excessive forms of self-help, in this case, even where they are not individually affected.[245] Weaker states must, therefore, balance the benefits of more effective enforcement of community obligations, against the risk that the most powerful nations become the ideological policemen of the world in the guise of individually enforcing obligations in the collective interest.

2. An assessment: Be careful what you wish for

As Bruno Simma (now ICJ judge) noted, community obligations in a system without community enforcement are doomed to remain in "the world of the 'ought' rather than that of the 'is'".[246] Even though more states have the right to do something about breach of community obligations, in practice, fewer states (if any at all) may actually take the initiative. Moreover, those who are willing to act are deprived of the standard instruments of last resort namely both (1) reciprocal suspension of the obligation breached and (2) individual countermeasures (unless the state is individually injured by the breach). In this sense, community obligations risk experiencing the worst of both worlds: They lack an effective community-based enforcement mechanism (be it under general international law or specific treaty regimes) and, on top of that, are deprived from the normal back-up of individual enforcement, be it reciprocal suspension or countermeasures.[247]

In some respects, and quite paradoxically, the *actual* protection of international entitlements is, therefore, inversely related to how strongly international law *aims* or *pretends* to be protecting the entitlement. This largely explains why we sometimes see less, rather than more, compliance with those norms of international law that are most strongly protected. Perversely, promotion to this higher status may therefore reduce instead of increase actual levels of compliance.[248] As a result, stakeholders in regimes

---

[245] A similar reluctance to collectively enforce *jus cogens* can be found in the VCLT. Articles 65 and 66 thereof grant jurisdiction to the ICJ to examine disputes on the validity of a treaty on *jus cogens* grounds. Given that all states are harmed by breach of *jus cogens* one would think that all states can invoke this procedure. Yet, the wording of Articles 65 and 66 is such that most commentators conclude that only parties to the treaty in question may invoke its invalidity on the ground that it violates *jus cogens* (Andreas Paulus, Jus Cogens *in a Time of Hegemony and Fragmentation – An Attempt at a Re-appraisal*, 74 NORDIC JOURNAL OF INTERNATIONAL LAW (2005) 297, at 305 and references in footnote 23).

[246] Bruno Simma, *Does the UN Charter Provide an Adequate Legal Basis for the Individual or Collective Responses to Violations of Obligations* erga omnes*?* In THE FUTURE OF INTERNATIONAL LAW ENFORCEMENT, NEW SCENARIOS – NEW LAW? (ed. Jost Delbruck), 1993, 125. Or as Ian Brownlie put it more bluntly in respect of *jus cogens*: "the vehicle does not often leave the garage" (Ian Brownlie, *Discussion Statement*, in A. CASSESSE AND J. WEILER (EDS.), CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING (1988) 110.

[247] Philip Allott speaks of a fundamental tension between contemporary international society and contemporary international law: "The tension is between what has been the intrinsically *bilateral* character of international legal accountability and an incipient international *social* responsibility" (PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD (1990) 333).

[248] Promotion to the status of collective or *erga omnes partes* obligation could, thereby, achieve the opposite of what the Institute of International Law has in mind when defining such obligations, namely "in view of their common values *and concern for compliance*" (2005 Resolution on Obligations *Erga Omnes* in International Law, *supra* note 122, Article 1(b), emphasis added). Rather than more, less compliance could follow.

such as trade or environmental protection who are normally anxious to elevate "their" norms to the status of community obligations in an effort to transcend the debasing tit-for-tat horse-trading between states[249], must realize what they are asking for. Taking reciprocity away from a treaty regime without replacing it with a sufficiently solid community may actually weaken rather than strengthen the effectiveness of the treaty. Put differently, it is wrong to presume that promotion to *jus cogens* or collective obligation automatically leads to better protection and enforcement. On the contrary, quite the opposite may be true.[250]

As discussed in respect of the fall-back rule of property protection, notwithstanding these problems related to the state-to-state enforcement of community obligations, what I called community costs may still create sufficient incentives for states to comply. At the same time, the paradox of community obligations without community enforcement has led to growing demands for alternatives away from state-to-state enforcement. Such alternatives are (1) to match community obligations with a sufficiently robust community enforcement system (as was done in the Kyoto Protocol[251]); (2) to give direct standing to affected private parties (as, for example, in the European Court of Human Rights); or (3) to enable international proceedings directly against individual criminals (as, for example, in the International Criminal Court). In addition, there is some evidence that (4) domestic courts are increasingly willing to enforce or give direct effect to certain community obligations, especially *jus cogens*, even where for other norms they refuse to do so. Such bifurcation between types of international norms can be seen both in the recent US Supreme Court opinion in *Sosa v. Alvarez-Machain* (giving effect to some international law under the Alien Tort Statute, but not to other[252]), as well as in the courts of the European Union (denying direct effect to WTO rules[253], but giving direct effect to most other international law, including scrutiny of UN Security Council resolutions under norms of *jus cogens*[254]).

---

[249] In respect of trade see, for example, Sungjoon Cho, *The WTO's Gemeinschaft*, 56 ALA. L. REV. 483 (2004) and Chios Carmody, *WTO Obligations as Collective*, 17 EJIL (2006) 419. For the environment, see Michael J. Sandel, Editorial, *It's Immoral To Buy the Right To Pollute*, N.Y. TIMES, Dec. 15, 1997, at A23.
[250] See Bruno Simma, International Crimes: Injury and Countermeasures: Comments on Part 2 of the ILC Work on State Responsibility, in International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility 283, 315 (Joseph Weiler et al. eds., 1989) ("it is a reason for concern that these new conceptions [of community interest] are being grafted upon international law without support through, and any attempt at, adequate institution-building").
[251] See *supra* note 233.
[252] 539 U.S. Supreme Court (2003) No. 03-339 finding that "federal courts should not recognize claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the 18th-century paradigms familiar when [the Alien Torts Statute] was enacted" in 1789, namely "offenses against ambassadors, violation of safe conduct, and piracy".
[253] PIET EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION, LEGAL AND CONSTITUTIONAL FOUNDATIONS, 302 ff., Oxford: 2004.
[254] *Kadi v. Council of the European Union*, 21 September 2005, Case T-315/01 (under appeal).

VII. Conclusion

The core message of this article is that optimal protection of international law implies variable protection of international law. Given the expansion and hardening of international law – expansion, to cover fields formerly reserved to domestic law-making; hardening, to include formal enforcement and tribunals with compulsory jurisdiction -- international law has reached a degree of maturity that gives it the luxury, indeed, the obligation, of variable protection. Gone are the days where international law was largely a derivative of natural law, centered on war and peace and diplomatic relations between sovereign princes. In recent decades, international law has come to address the full panoply of concerns of the regulatory state, ranging from individual human rights to the domestic regulation of commerce and the environment.[255] Faced with similar expansion and diversity, no single domestic legal system requires absolute protection, or imposes the same sanctions, for all legal commitments. Constitutions are normally written in stone, while contracts can simply be renegotiated. Where certain statutory obligations can be bought-off, others, such as those under criminal law, cannot be transferred as between private individuals. Theft is sanctioned more heavily than breach of contract, and remedies for constitutional violation are more forceful than those for statutory breach. Far from a concession to weakness, variable protection of international law is the logical result of its success and further refinement. Rather than undermining international law, variable protection takes the normativity of international law seriously and calibrates it to achieve maximum welfare and effectiveness at the lowest cost to contractual freedom and legitimacy.[256]

The specific model developed in this article distinguishes between (1) the allocation of entitlements, (2) the protection of entitlements and (3) back-up enforcement. Within this framework, I have focused on step 2, namely: how strongly should international entitlements be *protected*, and distinguished between inalienability (no *inter se* transfers), property rules (transfers only by mutual consent) and liability rules (unilateral takings are permissible subject to compensation).

The main claim resulting from this analysis is that, by default, international law ought to be protected by a property rule. As in domestic law, to let states transfer their entitlements by mutual consent gives effect to the contractual freedom of states (not to use the word sovereignty). Assuming that states – not international institutions or judges -- are best placed to value a state's entitlement, property protection should also maximize inter-state welfare. For those reasons, what I called European absolutism (favoring uniform inalienability) and American voluntarism (favoring uniform liability protection, even efficient breach) are undesirable. Moreover, as demonstrated, they are also descriptively mistaken as current rules of general international law do, indeed, impose

---

[255] See Joseph Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 *ZaöRV* 547 (2004).

[256] As Ernest Young notes: "The point is to take international law seriously as law, by subjecting it to the same sorts of institutional give and take that have characterized our domestic legal arrangements throughout our history" (Ernest Young, *Institutional Settlement in a Globalizing Judicial System*, 54 Duke Law Journal 1143, at 1259).

property protection: With limited exceptions, international law entitlements can be altered or transferred *inter se* (they are not inalienable) and their goal is restitution or specific performance, not compensation or efficient breach (as in a liability regime).

Although it may, at first sight, be surprising to see an inherently weak system, such as international law, strongly protect its entitlements as property, this apparent puzzle can easily be explained: It is largely because of – not despite -- the weaknesses of international law that international entitlements are, by default, protected as property. More particularly, it is because of the absence and/or costs of a collective valuation mechanism and the problems of collection and distribution of compensation (both of which result from the lack of centralized power) that a liability rule under current international law is unlikely to work. These weaknesses of international law do not stop, or prevent it, from the relatively high level of property protection. Rather it is those weaknesses that explain the default rule of property protection.

The model developed in this article also demonstrated, however, that any decision on how strongly to *protect* an entitlement (step 2) must take account of the consent-based *allocation* of entitlements (step 1). In particular, inalienability may not be optimal to attract widely diverse states to participate in treaty regimes nor to prevent them from exiting such regimes. The consent-based allocation of entitlements also explains why the standard reason of free-load to shift from property to liability protection does not normally work in international law (treaties cannot be imposed on states without their consent). Finally, the consent-based allocation of entitlements justifies limits on back-up enforcement (weaker back-up enforcement may enable participation and prevent exit) and explains why 1:1 retaliation is the default rule for countermeasures in international law.

Equally, the decision on how strongly to *protect* an entitlement (step 2) must take account of the peculiar *back-up enforcement* of international law (step 3). In particular, the lack of centralized enforcement may militate against both inalienability (which requires strong community enforcement to prevent transfers) and liability protection (which necessitates an effective collective valuation system to assess liability).

At the same time, I demonstrated how the generally weak back-up enforcement of international law – compensation and 1:1 retaliation – does not undermine the default rule of property protection, nor the importance of setting variable levels of protection. On the contrary, in addition to the legal remedy of 1:1 retaliation, what drives compliance is what I called community costs (reputation, fear of emulation and community pressure) and it is exactly the perception of how strongly entitlements are *protected* that triggers and determines the level of those costs. Community costs are, in other words, the "kicker" that back-up property protection in international law. As a result, the default rule of property protection is not only a rule on the books but also the norm of international law in action.

With the default rule of property protection in mind, the model of variable protection developed in this article also demonstrated that the further refinement and development

of international law may increasingly justify inalienability as well as liability rules. Especially the increasing availability of international courts and tribunals (as in the field of human rights and international criminal law) as well as multilateral oversight (as under the Kyoto Protocol) may justify and enable, respectively, inalienability and liability protection. That said, the current criteria for *jus cogens* and collective obligations -- both having inalienable features -- would benefit from a more objective analysis. Such analysis should center on externalities, moralisms and paternalism as grounds for inalienability, rather than what is now an inherently subjective assessment of the values or importance of the norms or treaty concerned. Defining collective obligations – from which *inter se* modifications or transfers are prohibited – should not be linked to the importance or value of the treaty. On the contrary, as illustrated in emissions trading under the Kyoto Protocol, property protection can be more effective as well as maximize welfare even where it addresses core objectives such as combating global warming. Indeed, when it comes to back-up enforcement, "promoting" a norm to collective obligation status (as some WTO commentators have advocated) may well reduce, rather than increase, overall levels of compliance especially when such promotion to community obligation is not matched with a system of community enforcement.

An equally careful analysis is required before protecting treaties under a mere liability rule (or take-and-pay principle). The standard reasons to move from property to liability protection in international law are hold-out and high transaction costs. Yet, even there, as states may not internalize costs nor maximize overall state welfare, liability protection may leave some entities worse of and, therefore, not be Pareto desirable. This risk is particularly grave where entitlements affect non-state actors (as is the case for human rights treaties and, to some extent, WTO obligations). Since states are not unitary acts, even where overall state welfare increases or is left intact, private parties within the state may suffer. As in NAFTA, it may then be necessary to give direct standing to private parties, victim of, for example, expropriation, before moving to a liability scheme. In addition, liability rules should only be considered where a collective valuation mechanism is available to assess the value of entitlements that states could then unilaterally take from each other. Without collective valuation, and a system to force states to actually pay compensation to victims, a liability rule risks turning into the law of jungle. Moreover, liability rules are more appropriate where entitlements relate to fungible goods (such as investment or trade) rather than unique goods, that is, goods that are more difficult to valuate because of subjective elements. Finally, before installing a liability regime any gains that can be made in transaction costs or flexibility must be weighed against the losses of making credible commitment more difficult and potentially exacerbating inequalities between states. Indeed, where the take-and-pay principle works for the rich and powerful but not for the poor or relatively weak, it is unlikely to maximize welfare, nor would it be equitable.

The purpose of this article was not to offer fixed rules or solutions on how particular norms of international law ought to be protected. Rather, the article offers a baseline (the default rule of property protection) and a matrix of considerations (leading to either inalienability or liability protection) that can guide diplomats, treaty negotiators, judges and other stakeholders when framing and implementing international law. The outcome

under this matrix is likely to be different depending on who or which state makes it and will vary across international organizations, treaties and norms. It can even diverge as between norms in the same treaty. Yet, what counts is that law-makers and law-enforcers take the need and appropriateness of varying levels of protection seriously, reach agreement and articulate how and how strongly a particular norm or treaty must be protected and adapt back-up enforcement accordingly. It is these types of refinements that will guarantee the effectiveness and legitimacy of international law and, with it, its long term survival.