Contract, Treaty, and Sovereignty

Matthew Lister- Draft for conference at Penn Law

Note to conference participants: this is a *very* rough draft of a paper based on some ideas I have been toying with for some time. I appreciate your patience with the roughness of the presentation, the unfinished nature of some of the examples, and with the not-fully-worked out ideas. I will be extremely grateful for your thoughts and comments as I try to turn this into a more fully finished product.

Introduction

International economic law[1] has long had a legitimacy problem. Especially since the 1970's, with the developments coming out of the Tokyo round of GATT trade negotiations, increasing questions about whether this body was intruding into the rightful sovereignty of states became common. This criticism has increased in frequency and intensity since the 70's, growing along with the large number of bi-lateral investment treaties (BITS), NAFTA, and the start and development of the WTO. As international economic law has increasingly reached "beyond the border" and come to regulate areas of life that were long the sole concern of domestic governments, the need for greater legitimacy has grown. These worries about subverted state sovereignty and the illegitimacy of this body of law come not only from anti-cosmopolitan nationalists, but also, and increasingly, from those on the "left". For example, in the lead-up to US accession to the WTO, Ralph Nader charged that, if the US joined the WTO, "Decision-making power now in the hands of citizens and their elected representatives, including the Congress, would be seriously constrained by a bureaucracy and a dispute resolution body located in Geneva, Switzerland, that would operate in secret and without the guarantees of due process and citizen participation found in domestic legislative bodies and courts", and that, "if existing or proposed local and state standards can be chilled by a foreign country's formal accusation… that the standards are a non-tariff trade barrier, then the evolution of health and safety standards around the world will be stalled or degraded."[2]

---

[1] I shall use the term "international economic law" to cover that heterogeneous body of law relating to trade, investment, international business, and related areas. This is not, by any means, a natural kind, or even a clearly coherent social kind. There are many different types of law, law-making activity, and enforcement procedures covered under this heading, and no one thread running through all of them except that they relate to cross-border economic matters. Still, I think that it is a useful enough grouping to talk about in general terms. Most of the examples I will use relate to international trade regulation, as covered by the WTO agreement, and bi-lateral investment treaties or other similar agreements such as NAFTA. This body of law has, I think, important implications for human rights concerns, but is nonetheless conceptually distinct, and I shall discuss human rights issues only indirectly, if at all.

[2] Statement of Ralph Nader before the Senate Comm. on Foreign Relations hearing on The Uruguay Round of the General Agreement on Tariffs and Trade, June 14, 1994. Quoted from John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, Cambridge, 2006, p. 70.

Despite these worries, developments in international economic law have the potential to do significant amounts of good, increasing trade, furthering development, and increasing cooperation among the states of the world.[3] But, we are unlikely to achieve the goods that can be met through treaties in this area if states do not believe that they can do this without giving up important goods, including the ability to make decisions on issues of significant importance to their citizens. If we are to both gain the potential advantages of cooperation in this area and to protect the rightful sovereignty of societies, we must find a way to deal with this tension. It is here that a turn to insights gained from contract law can help us.

Contracts have the seemingly paradoxical ability to allow us to do more of what we want by binding ourselves to certain courses of action. Charles Fried presents the point nicely when he says,

> In order that I be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in which I may commit myself. It is necessary that I be able to make nonoptional a course of conduct that would otherwise be optional for me. By Doing this I can facilitate the projects of others, because I can make it possible for those others to count on my future conduct, and thus those others can pursue more intricate, more far –reaching projects.[4]

From a somewhat different perspective, we can see another important aspect of contracts, their ability to produce shared social welfare. As Robert Scott and Paul Stephen say, "The institution of voluntary commitment is the time-honored mechanism for achieving compliance with cooperative goals that benefit the collective interests of parties whose particular interest diverge."[5]

We see here how contracts can help individuals gain goods- increased autonomy or increased welfare- that they could not on their own. In what follows I will show how importing certain insights from contract law and theory to the evaluation of treaties in the international economic realm can help us gain similar advantages for international economic law. That is, I shall show who insights from contact law can help make international economic treaties sovereignty enhancing and better able to produce joint welfare, rather than sovereignty-compromising, as they currently often are. If this is the case, then this approach can help solve the legitimacy problem that international economic law faces, as well as making it more just and fair.

I shall proceed as follows. I will first give a brief account of the aspects of contracts, treaties, and sovereignty that are most salient and important for my analysis. I do not intend these accounts to provide anything like a theory of any of these subjects, but simply to highlight

---

[3] Some, of course, doubt that the promises of international economic law to further these ends is anything more than hollow, and perhaps are a mere façade for the furthering of the interest of already powerful and wealthy elites. I sometimes have sympathy with adequately qualified versions of these complaints, but think they are, at best, over-put, especially in light of economic growth and huge improvements in living standards in China and, to a very significant degree, Mexico for example. In this paper, however, I shall largely not address these issues.

[4] Charles Fried, *Contract as Promise*, Harvard, 1981, p. 18. As I shall note below, I think this point about the autonomy-expanding power of contracts is independent of Fried's moralized view of contract law, though arguing for this is not the main purpose of this paper.

[5] Robert E. Scott and Paul B. Stephan, *The Limits of Leviathan: Contract Theory and the Enforcement of International Law*, Cambridge, 2006, p. 60

some points I take to be particularly important or relevant for my account. While some points will be controversial, I hope that at least the majority of what I shall say in this section will at least be plausible, if not fully acceptable to everyone. Next, I shall show how these points about contracts, treaties, and sovereignty come together to show a way to make international economic treaties sovereignty-enhancing, thereby making international economic law in general more legitimate.[6] Finally, I shall illustrate my argument by looking at three examples, the dispute between the U.S. and the E.U. on the important of hormone treated beef; the dispute between the U.S. and Antigua over internet gambling, and the dispute between the U.S. and Mexico over access to the U.S. by Mexican truckers. Looking at these cases can help show how my approach to international economic law can make it more legitimate by making it sovereignty-enhancing.

Contracts

My interest in this section is not to sketch or propose anything like a theory of contracts, but rather to point out some aspects that seem to me important for seeing how international economic treaties may be made sovereignty-enhancing. I here follow Brian Bix in thinking that it is a mistake to look for a unified theory of contracts, as there are too many goals and too many uses of contracts to make them susceptible to a single theoretic approach.[7] My interest in contracts is not, then, in the "correct" theory of contract law, but in how they may help us achieve important goals which we could not achieve acting on our own. In particular, I am not interested in whether there is a distinctly moral obligation to "keep contracts"[8], or whether "efficient breach" is morally justifiable or not. Rather, my specific interest in contracts is related to the question of remedies.

Once again, my purpose is not to propose a theory of remedies, or to argue that any particular remedy is always or usually the most appropriate one. Here, I merely want to note, and insist, that if specific performance were the only possible remedy for a breach of contract, then contracts would be much less well suited to help us perform the tasks noted above, of increasing our autonomy in a way that is compatible with the autonomy of others, and of cooperating to produce shared welfare. It is not hard to see why this is so. If specific performance were the only possible remedy, then many contracts that we do enter into, given the possibility of alternative remedies, would be "too risky" to rationally enter into. Sometimes this risk would be economic- if the situation turned out the wrong way, we might be forced to take on losses that were highly disproportional to the potential benefit that was bargained for when making the contract. Sometimes the risk would be to our autonomy- we might be forced to perform some task which we would find personally offensive or degrading, which would violate

---

[6] This is only one aspect of the legitimacy of international law, or even of international economic law. I am not here attempting to give a full theory of legitimacy for even this one area of law, but simply showing one way in which legitimacy may be improved.

[7] Of course, one might object that this "pluralist" approach to contracts is itself a theory of contract law. I have no stake in that argument. For discussion of this point, see Brian H. Bix, *Contract Law: Rules, Theory, and Context*, Cambridge, 2012, pp. 147-62.

[8] This is Bix's term, which he prefers to "perform", as it seems less liable to beg the question on the issue here. See Bix, *Contract Law*, p. 141.

our other moral or legal commitments, or which would otherwise compromise strong values, despite the fact that our counterparty could be compensated either in ways other than our personal performance, such as through a money payment, or by performance by another person.[9]

Because it would very often be "too risky" to enter into a contract if specific performance were the only remedy available, we have a number of alternatives. I do not think we should expect any one remedy to be the appropriate choice for all types of contracts, and the fact that courts have crafted different remedies for different circumstances seems to support this conclusion. Insofar as the point of contract law is to promote autonomy and build social welfare, insisting on a remedy that would regularly run the risk of forcing people to act in autonomy and welfare destroying ways would be perverse indeed, and we can therefore have good reason to not insist on specific performance as the sole or primary remedy for breach.

Treaties

While it is likely difficult, if not impossible, to know exactly how many treaties are currently "in force", it is clear that the number is very high, and that there is great diversity among them in form, subject matter, and method (if any) of enforcement.[10] Given this great diversity, it seems to me to be a mistake to think that we should expect a unified theory of treaties, except perhaps at such an abstract level as to be of little use. Given this, I will focus on a sub-category or section of treaties, those covering international economic relations. There is still a large amount of diversity within this subsection, however, and so even here we should not expect a completely uniform account. (For example, this subsection of treaties include bi-lateral investment treaties, a groups where we should also expect diversity between treaties where both parties are highly develop states and ones where one party is highly developed while the other is developing; very large and complex multi-lateral treaties covering most of the countries of the world, such as the WTO agreement; regional free-trade agreements which share some features with the WTO agreement and some with BITs; old treaties of "Friendship, Commerce, and Navigation"; treaties relating to certain topics such as trade in civil aircraft or petroleum; and so on. This includes a large percentage of the total treaties in force, but excludes many important and well-known treaties, such as those covering human rights, international criminal law, international humanitarian law, and other similar subject. I expect that these treaties will have importantly

[9] Specific performance is, of course, a more common remedy in civil law countries than in the common law system. However, there is some indication that specific performance is becoming less common, and is sought by parties increasingly rarely even in jurisdictions where it is theoretically more readily available. See Bix, *Contract Law*, pp. 99, 107. For a case which nicely illustrates how specific performance can needlessly require a party to face the option of a contempt charge (and fines) or violating other legal obligations, see the Dutch case of Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V., District Court at the Hague, 1982, 22 I.L.M. 66 (1983), in which Sensor Nederland, a Dutch company which was wholly owned (via a few steps) by a U.S. company, and thereby subject to U.S. export controls on sales of petroleum export equipment to the Soviet Union, was ordered to perform under the sales contract it had made for the equipment prior to the export controls being put in place, or to face significant fines. If the U.S. had not waived the penalties for violating the controls in this case, Sensor Nederland would have faced the choice of penalties from the U.S. and perhaps the loss of certain export rights, or significant penalties from the Dutch court, despite the fact that this seems to be the sort of case where monetary penalties would be both possible and appropriate.

[10] On this point, see Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, p. 42.

different normative structures than those that I will focus on, but I will not attempt to address this question at all.

I contend that the reasons why states enter into treaties, at least of the sort I am interested in here, are often very similar to the reasons why individuals enter into contracts. That is, doing so allows states to achieve goals[11] that they could not achieve on their own, and allows them to engage in welfare-enhancing forms of cooperation. Because these goals are similar, we may hope that some insights from contract law will apply to treaties as well.

I am, of course, not the first to notice the similarities between contract law and treaties. Robert Scott and Paul Stephan, for example, have written extensively on the similarities between treaties and contracts and what we might learn from this, but they focus heavily on the question of enforcement- how what we know about the enforcement of contracts can help us better understand and craft treaties.[12] My interest is not so much in enforcement, but in remedies. The two issues are related, and there are important parallels between my approach and that of Scott and Stephan, but as they hardly discuss remedies at all (even about contracts) there is yet important work to do here.

Another important difference between my comparison of treaties and contracts and that of Scott and Stephan is that they are primarily interested in the question of "optimal enforcement", where this is the level and method of enforcement of international law that will maximize social welfare.[13] Importantly, what is included in "welfare" is largely left undefined by Scott and Stephan, but whatever it is, its maximization is seen as the point of international law. While increasing welfare (however defined) is an important goal of international law, perhaps especially international economic law, I will hold that to understand the behavior of states in relation to treaty formation, we must look beyond a strictly consequentialist approach.

I will suggest that state have reason to craft remedies for violations or breaches of treaties that respect, as far as possible, their rightful sovereignty. This might not be equivalent to the remedies that maximize social welfare- certainly not always in any particular case, and perhaps not even over the long run or on average. But, we can see a parallel here with contracts. A party may choose to not provide specific performance, even when doing so would maximize social welfare, if doing so would compromise her autonomy in an unacceptable way. Of course, it is also the case that specific performance will itself often not maximize social welfare, though noting this just gives us one more reason to make sure that we have other remedies available.

However, a traditional approach to treaties has seen something very similar to specific performance as the primary, or even the exclusive, remedy. (In some cases compensation, in addition to the equivalent to specific performance, might be required, but the "performance" is

---

[11] There is, of course, some dispute about whether it makes sense to attribute goals or motives to corporate bodies such as states. While there are deep issues here, I will assume that we can make sense of such claims. I will not attempt to establish exactly how this it to be done, but will leave the issue to others and rely largely on common-sense understandings of such attributions here. I do not think that anything I say here will be deeply controversial on any understanding of corporate actorhood.

[12] See generally, Scott and Stephan, *The Limits of Leviathan: Contract Theory and the Enforcement of International Law*, Cambridge, 2006.

[13] Scott and Stephan, *The Limits of Leviathan*, p. 52

still necessary to meet a state's obligations under the treaty, as traditionally understood.) This rule is arguably implied by what many take to be the fundamental principle with regard to treaties, *pacta sunt servada*, or the idea that agreements must be fulfilled, where "fulfillment" means "performance".[14] This approach finds support in the world from important scholars of international economic law such as John Jackson, and arguably in the language of the WTO agreement itself. [15]

I shall argue, however, that in the case of international economic treaties, such a rule can lead to perverse results. In a way similar to how Scott and Stephan have noted that changes in the method of enforcement may lead to a change in the "activity level" of states in a particular area, either encouraging or discouraging agreements,[16] I will argue that allowing remedies under economic treaties other than the equivalent of specific performance may encourage a greater amount of cooperative and mutually beneficial treaty-making.

This is increasingly relevant in relation to economic treaties of various sorts, as these have, to an ever greater degree, come to not just regulate the "external" affairs of state, or traditional matters such as national treatment and most-favored-nation status, but to also reach "beyond the border", and into areas of regulation that once would have been seen to be of clearly domestic concern. Examples here include environmental regulation, health and safety standards, employment regulation, licensing, agricultural policy, regulation of public morals, cultural policy, and so on[17]. These are areas of regulation that we might think are rightfully within the sovereign prerogative of a state, at least within the bounds set by human rights norms. The worries we may have about this intrusion into plausible areas of state sovereignty become more pronounced when those who make the decisions about such regulations are tribunals or arbitration panels who have minimal, if any, responsiveness to democratic or otherwise descent,

---

[14] At one point Hans Kelsen though that this norm, in international law, might plausibly be thought to be the *grundnorm* for all of law. While Kelsen later modified his view, he continued to hold that this was a norm "of special importance." See Kelsen, *The Pure Theory of Law*, University of California Press, 1967, pp. 214-217, 323-24. Kelsen's later view was that the *grundnorm* of international law (and perhaps of all law) is that "the individual [here a state] ought to behave in such a manner as the others usually behave (believing that the others ought to behave that way)". Kelsen, *The Pure Theory of Law*, p. 216. I make no pretenses to being about to fully understand Kelsen's view, and he discusses commercial or economic law, whether domestic or international, hardly at all, but I see no reason why this later view on the *grundnorm* of international law should be incompatible with the approach I develop here. For discussion of the role played by this idea in the civil and canon law traditions, see Bix, *Contract Law*, p. 115.

[15] See the discussion in Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, pp. 149, 168. WTO Charter, Art. XVI(4) requires members to "ensure the conformity of its laws, regulations, and administrative procedures" with the obligations set out in the agreements, and the Dispute Settlement Understanding holds that the obligation imposed on "offending" states is "to secure the withdrawal of the measures concerned if these are found to be inconsistent" with WTO obligations. DSU Art. 22(1). Countervailing measure are meant to be temporary and not a replacement for compliance with obligations. DSU Art. 22(2). This runs strongly in opposition to the position I shall propose. (I may add that, when I first started thinking of this idea, at a Salzburg Seminar session on protectionism several years ago, and suggested it to David Unterhalter, then chairman of the WTO Appellate Body, he rejected it out of hand as being incompatible with the understanding of settlements under the WTO agreement. I agree that my proposal is a significant change, but think that's no reason to reject it.)

[16] Scott and Stephan, *The Limits of Leviathan*, p. 18

[17] [examples of disputes in each of these areas to be added]

responsive decision-makers.[18] My goal is to find a way to use a wider variety of treaty remedies to ensure that economic treaties are sovereignty-enhancing for states in a way that is similar to how contracts may be autonomy-enhancing for individuals, while still encouraging mutually beneficial cooperative activity. Doing this, I contend, will strengthen, and not undermine the legitimacy of international law. However, before looking at some examples, I will say a few words about the notion of sovereignty that I consider relevant for this project.

Sovereignty

Traditional notions of sovereignty, often traced, somewhat dubiously, to the Treaty of Westphalia, treat sovereignty as essentially unified, and as granting essentially unlimited authority to act within the a state to the sovereign, without the interference of other states.[19] These claims have generally, and rightly, been rejected.[20] But, this is no reason to reject a suitably modified notion of sovereignty, one that accepts moral and legal constraints on state action in certain areas, while holding that states ought to have a high degree of autonomy in setting their internal policies and in charting their own paths in the world.[21] In this sense, sovereignty for states plays a role that is similar in many ways to that played by autonomy for individuals in liberal theories of justice. [Note- I might add a brief discussion here of Kant on autonomy to flesh out the idea I have in mind.] This notion of autonomy is inherent, for example, in Rawls's idea of international society as made up of democratic and descent peoples.[22]

One consequence of this notion of sovereignty is that many parts of international law will be legitimate only if they are freely consented to by the relevant states. There is a parallel here with more traditional notions of sovereignty, which see it as the basis for the idea that international law depends, in general, on state consent, and in the idea of the "equality of

---

[18] These concerns about intrusions into the rightful sovereignty of a state are of course most strongly felt when the state is a democratic one, and the domestic decisions interfered with are the result of a legitimate democratic process. I take this to be the paradigm case for us to consider. However, roughly following Rawls, I think that we may extend this analysis, at least to some degree, to non-democratic states who at least mostly respect human rights and are to some sufficient degree responsive to the interests of their citizens. To defend this position would, however, take me too far away from my main interest in this paper. See Rawls, *The Law of Peoples* Harvard, 1999, pp. 62-78. For my take on relevant issues, see Lister, "There is no Human Right to Democracy. But may we Promote it Anyway?", 48.2 STAN. J. INT'L L, 257 (2012).

[19] The first clear formulation of this idea seems to be from Jean Bodin. See Bodin, *On Sovereignty* (from *The Six Books of the Republic*), Cambridge University Press, 1992. In the English speaking world important versions of this idea are found in Hobbes, *Leviathan*, XVII 13-15, XVIII, and in John Austin, *The Providence of Jurisprudence Determined*. All three authors accept that, while the sovereign may be a collective individual, the power of sovereignty cannot be divided, and that the sovereign is legally unlimited in his authority to act within a state.

[20] For a useful early attack on Austin's notion of sovereignty, applicable in large degree to Bodin and Hobbes as well, see Henry Sidgwick, *The Elements of Politics, 2nd ed.*, Macmillan and Col, 1897, pp. 651-8. Various notions of sovereignty are teased out and shown to not depend on each other by Stanley I. Benn in his paper, "The Uses of Sovereignty", in Quinton, ed., *Political Philosophy*, Oxford University Press, 1967, pp. 67-82.

[21] For an instructive argument suggesting this conclusion (though not framed in quite this way), see Anna Stilz, *Liberal Loyalty: Freedom, Obligation, and the State*.

[22] See Rawls, *The Law of Peoples*, pp. 42-3, and Lister "Sovereignty" in Mandle and Reidy, eds., *The Rawls Lexicon*, Blackwell, forthcoming.

nations"- the idea that each society, regardless of its size or power, has equal standing in international law and decision-making.[23]

We can, however, reject the idea that sovereign proves states with unfettered authority to act internally (and to make war in the pursuit of state interest) without rejecting it whole-sale. When we see this, we must note that we are left with important question about which decisions ought, rightfully, be left to states to decision on their own. This is not a rejection of sovereignty (or, as Jackson seems to suggest, a reduction of it to the question of how to achieve "good governance"[24]) but rather, an attempt to understand its proper scope. Once we see this, we understand that consent retains an important, if not unlimited, role in legitimating international law and institutions,[25] and that those who think consent plays no important role here either have an unduly narrow view of international law, or are confused about its role in relation to sovereignty.[26] The areas over which states ought to have sovereignty, and so where legal actions against the state ought to depend on the consent of the state, are contested, but I will here contend that at least most of the areas covered by international economic law fall into this category.

We may also here see the continuing importance of the idea of the equality of nations (or states- this notion has no essential connection with the idea of a "nation" as that term is often used in political philosophy.) Within the area of rightful sovereignty for a state, the mere fact that a majority of other states think that an action is appropriate is no ground for forcing a dissenter to go along, any more than the fact that, say, the majority of my neighbors prefer a certain life-style is grounds for forcing me to comply. Of course, states may voluntarily enter into organizations or agreements where majority or weighted majority vote controls, but this itself is no objection to the correct idea of the equality of nations. Rather, this takes us to our next point. In a way that is similar to how individuals may commit themselves to certain course of action by forming contracts, without this meaning that the notion of autonomy was somehow mistaken or illusory, states may bind themselves by entering into treaties, without this showing that the notion of sovereignty is illusory.[27]

Just as an individual may limit her autonomy in some ways by making an agreement, a state may limit its sovereignty- its freedom to act in an area where it may rightfully act- so as to achieve some important good, such as increased welfare or a wider total range of options in

---

[23] For discussion on this point, see Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, p. 58

[24] Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, p. 72

[25] On this point, see Lister, "The Legitimating Role of Consent in International Law", *Chicago Journal of International Law*, Vol. 11, No.2, 2011, and, for a slightly different take, Thomas Christiano, "The Legitimacy of International Institutions", in *The Routledge Companion to the Philosophy of Law*.

[26] Alan Buchanan, in his book, *Justice, Legitimacy, and Self-Determination* seems to me to be guilty of the first charge, and John Jackson of the second. [to be expanded a bit and explained.]

[27] The claim I attack here is suggested by Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, p. 71. On Bodin's notion of sovereignty, the sovereign may not bind himself, for if he did, he would no longer be sovereign. This seems to me to show the mistaken nature of Bodin's account, rather than that the very notion of sovereignty is rendered incoherent by the idea of a binding treaty, as Jackson seems to think. [cite to Bodin.]

which to act. Just as the ability to bind one's self in this way may be autonomy-enhancing for an individual, so may the ability to enter into treaties be sovereignty-enhancing for states. However, whether a particular agreement is autonomy-enhancing for individuals or sovereignty-enhancing for states will depend, at least in part, on the types of remedies that are available.[28] This is important in that, if remedies are not carefully crafted, many agreements that could be beneficial- autonomy or sovereignty enhancing or welfare promoting- will not be entered into, making all parties worse off than they otherwise would be. Additionally, a poor fit between agreements and remedies can lead to a lessening of legitimacy for the agreements that are actually made, especially when less powerful actors or those with fewer resources accept an agreement out of necessity, but then feel aggrieved when there is a dispute over the agreement which requires them to take steps that do not seem to be fair.

Using Ideas from Contract Law to Ensure the Sovereignty-Enhancing Nature of Treaties

It is my claim that many of these problems can be overcome or reduced if we understand international economic treaties more like we do contracts, and attempt to craft remedies for a "breach" of a treaty that is in some ways similar to that of breach of contract. This would require a fairly significant shift in how we think of treaties, at least in relation to international economic law. At least on one interpretation, it would mean rejecting *pacta sunt servada* as the basic norm governing treaties,[29] and it would, for example, involve a major shift in how dispute resolution in the WTO works, at least officially.[30]

Oliver Wendell Holmes famously argued that the obligation imposed by a contract was not to perform, simplicitor, but rather to perform or to pay damages.[31] Either course of action would fulfill one's legal duty.[32] This has not been the rule or the approach in international law. For example, as noted before, under WTO rules, as currently understood, a state may not fulfill its obligations, if found to be in violation, by accepting certain countervailing duties. These duties are meant to encourage the "offending" state to bring its actions into accordance with its obligations, and until a state does so, it is seen as in violation of its obligations.[33]

Holmes' formulation is often associated with the idea of "efficient breach"- the idea that breach of contract and payment of damages is justified when doing so would produce greater overall welfare than would fulfilling the contract. Though this a likely scenario for Holmes's formulation to apply, it is not the only possible one. For example, one may decide to breach and

---

[28] Of course, this is not the sole consideration. As Scott and Stephan show, enforcement mechanisms are also very important, among other considerations.

[29] This would be so if we do not consider paying damages as "keeping" one's agreement. It is not obvious to me that we should think this, but the converse also does not seem obvious to me.

[30] As we shall see below, the shift might well be seen to be less significant in practice, though even here, there would be important differences.

[31] Holmes, "The Path of Law", in Oberdiek and Kavanagh, *Arguing about Law*, pp.___

[32] Of course, someone might insist that this just shows that, even if Holmes is right, that legal and moral duties come apart here. I am not particularly sympathetic to this line of thought, but also do not think it is central to my concerns in this paper, and so will not spend significant time on it.

[33] DSU Art. 22(2)

pay damages for reasons other than economic gain. The cases that I will be most interested in will fall into this later pattern, though cases on a closer analogy with efficient breach are also possible. We might characterize the sort of cases that I am most interested in as the "sovereignty preserving" equivalent of efficient breach. In these cases, a state holds that it would compromise important aspects of its internal sovereignty if it were to "perform" under the treaty. In such cases, I contend, the state in question ought to have the option of "paying damages", in some suitably determined way, and to be seen to have thereby fulfilled its obligations under the treaty, just as one who pays damages after a breach of contract has fulfilled her legal obligations.[34] Cases closer to paradigmatic "efficient breach" are also possible on my account, perhaps particularly in the sorts of situations discussed by so-called "strategic trade theory".[35] These cases, however, seem somewhat more problematic to me than either standard efficient breach in contract or the "sovereignty preserving" version discussed above, in that there may be more chance of undermining the trade system as a whole in these situations. If so, special care must be used to craft remedies for such cases.

My approach can also help with another important issue that has developed in multi-lateral treaties such as the WTO agreement, the issue of treaty rigidity. This is an issue that is especially likely to arise in multi-lateral treaties with many members and where super-majority or consensus voting rules make changes to the treaty difficult to achieve.[36] There is a difficult situation here, related to the "equality of nations" aspect of sovereignty. States have good reason to worry about joining treaties which cannot be changed except with great difficulty, even in the face of changed circumstances, but there is also no universally accepted voting rule that would make change easier to accomplish. Smaller states are unlikely to accept voting that is weighted on population or economic factors, as it would allow them to be dominated by larger or more powerful states, and larger and more powerful states are unlikely to accept simple majority voting, as this could lead to a small minority of the world's population or economic power dictating to the rest. The predictable result is a stalemate. This both makes changing exiting institutions difficult, and gives a strong disincentive to forming new institutions, even when doing so would be predictably beneficial.

My approach can help mitigate this problem, even if it cannot solve it. (There may be no complete solution.) By offering greater flexibility to states in meeting the obligations imposed by international institutions, the cost of entering such institutions may be made more acceptable.

---

[34] As Bix notes, a significant worry about the Holmes formula is that, at least in a typical American contract cases, damages can rarely be expected to make the non-breaching party whole. See Bix, *Contract Law*, p. 116. While this need not be a legal problem, it suggests that paying damages may not fulfill all of one's moral duties, though the question seems to me to be a difficult one. However, this worry seems less pronounced to me in the case of treaties than in contracts, in that states are arguably better situated to expect, and negotiate around, these costs, and to be repeat-players, who sometimes come out ahead, sometimes behind, but who can expect balance in the end.

[35] See Paul Krugman, "Introduction: New Thinking about Trade Policy" in Krugman, ed., *Strategic Trade Policy and the New International Economics*, MIT Press, 1986, pp. 1-22 for a brief over-view of strategic trade theory. [Brief description to be added]

[36] See Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, p. 47 for useful discussion of this point.

Conversely, by making the cost of existing institutions more explicit, this approach may also help encourage increased cooperation for making needed modifications to existing institutions.

Illustrations and Examples

I will now turn to three examples of fairly recent and prominent disputes in international economic law to show how my approach may be applied in these situations. By looking at these examples, we can see both how this approach can help promote sovereignty while maintaining international obligations, and also get some idea of how remedies might be crafted differently in particular cases. The cases I will consider will include disputes between two highly developed countries or associations, and between a highly developed country (the US) and a less developed country (Antigua in one case and Mexico in the other.) The cases I will consider are the disputes between the U.S. and Canada and the E.U. over hormone treated beef; the dispute between the U.S. and Antigua over internet gambling, and the dispute between the U.S. and Mexico over access to the U.S. by Mexican truckers.

[Please note that this section is still being heavily worked on and the following is barely a sketch. I apologize for this.]

E.U.- U.S./Canada Beef Hormone Dispute

[Brief history of the E.U.-U.S. beef hormone dispute to be added.] This dispute touches on food safety and agricultural policy, two areas traditionally and plausibly thought to be subject to state control, and which societies might reasonably disagree. The fact that the WTO Dispute Resolution Body and Appellate Body found that the E.U. had not supplied sufficient scientific evidence to justify its ban of hormone treated beef under the Agreement on the Application of Sanitary and Phytosanitary Measures does not change this point. Here we have a tribunal with limited, at best, democratic accountability dictating to a society which level of health precautions it must take. If the WTO agreement requires the E.U. to admit in food products that it does not consider safe, then it will clearly be sovereignty-reducing, and thereby give incentives to the E.U. and its member-states to not engage in such agreements in the future. But, if the U.S. and Canada cannot depend on the Dispute Settlement Body of the WTO to secure its rights under the agreement, then these countries, too, would have reasons to be skeptical of such agreements. Here carefully crafted remedies which would compensate the U.S. and Canada for their loss of expected benefits under the treaty while still allowing the E.U. the ability to set its own health and safety standards would provide for a sovereignty-enhancing alternative. [Discussion of appropriate remedies- the most likely seem to me to be the authorization of off-setting duties on EU agricultural products.]

U.S.-Mexico Trucking Dispute

As part of the NAFTA agreement, the U.S. had an obligation to allow Mexican trucks to deliver goods from Mexico to the US and return goods From the US to Mexico. However, this program was delayed for nearly 15 years on the grounds that, according to the U.S., Mexican trucks did not meet US safety standards. Mexico, in retaliation, imposed countervailing duties on U.S. goods. Highway and automobile safety is plausibly an area where states should have a high degree of autonomy in setting their own standards, not least because different societies may reasonably differ on the costs and benefits of different measures and what level of risk they are willing to take on. For the sake of argument I will here assume that, in this case, the US was motivated by actual safety concerns and the inability of Mexican trucks to meet generally applicable standards that were set higher in the US than in Mexico, and not merely engaging in pro-US trucking protectionist measures. Given this, The US could reasonably feel that it would be unacceptable to be required to allow trucks that it did not believe to be safe to drive in the US or to lower its safety standards for truck. [Discussion of this history of the dispute.] In this case, Mexico imposed countervailing duties on US goods in retaliation. However, more appropriate remedies could have been crafted, such as a comparable exclusion of US trucks from Mexico until the dispute was settled, or requiring the US to pay an amount into a fund to be used to improve and verify safety standards of Mexican trucks until the appropriate standard was reached. Once the standard was reached, further exclusion of Mexican trucks would not be justified under this approach.

U.S-Antigua Internet Gambling

This case provides one of the most interesting possible applications of my approach. [History and description of the US-Antigua dispute to be added]. Rules relating to "public morality" are plausibly within the rightful sovereignty of a state, and again represent an area where different societies may reasonably disagree. To tell a state that it must accept activities that it considers to be socially harmful is plausibly to make a deep intrusion into the state's ability to engage in self-government. In this case, the WTO Dispute Settlement Body and the Appellate Body held, not implausibly, that, from the perspective of the WTO agreement, there was no difference between the domestic gambling services allowed by the US and the internet gambling services provided by Antigua, and so the US was in violation of its obligations under the WTO agreement by blocking internet gambling operations form Antigua.[37] Antigua was therefore authorized to put in place countervailing duties on the US. However, the great difference in size between the US and Antigua made traditional countervailing duties impossible to employ. Even if Antiguans stopped importing any goods from the US, the US would hardly notice and the Antiguans would merely be made worse off. Therefore, the Appellate body of the WTO took the unusual step of allowing "cross-modal" remedies, allowing Antigua to avoid its obligations under intellectual property laws in relation to the US, and to produce and sale copies of protected materials.

[37] I should add that I think this reasoning is quite persuasive, but also think that these sorts of decisions are most properly made via the democratic process within a country.

As in all such cases, the Dispute Settlement Body officially sees these measures to not be "damages" that the US may decide to pay if it decides to keep in place its ban on internet gambling, but rather an inducement to encourage the US to take steps that it has an obligation to meet. Such an understanding has two problems. First, it will require more on-going supervision from the Dispute Settlement Body than is desirable, so as to make sure that the "inducement" is proper and not being abused. If the award to Antigua were instead seen as damages analogous to those in contract law for breach, then it would be reasonable to put the obligation to show that they are no longer necessary, if that were to be the case, on the US. Secondly, this interpretation suggests that a state may not rightfully decide, via the democratic process, what its public morals legislation should be, but rather that such decisions may be decided by unaccountable tribunals. Such a rule is likely to make increased cooperation less likely rather than more likely, as states rightfully think they cannot engage in this sort of cooperation without risking important goods. My alternative approach, which sees the rights granted to Antigua to circumvent intellectual property rules otherwise required by the TRIPS agreement as damages, both recognizes the rights of a state such as the US to set their own rules in these areas, and makes transparent that certain choices will have costs that the state will have to decide to accept or not. My approach, therefore, is sovereignty-preserving and does not threaten future cooperation, at least to the degree that is done by the current WTO system.

Some Possible Objections

[Once again, this section is very sketchy at this point- a mere penciling of some worries about my approach and some gestures at replies. I will be very grateful for suggestions here.]

In this section I consider three possible objections to my approach, first, that it is not significantly different from current practice, secondly, that this approach would reduce the stability and predictability we seek from international economic treaties, and finally that the approach would undermine international economic law more generally by encouraging parties to not comply, thereby reducing valuable cooperation.

The first question one might have about my approach is whether it is a significant change from current practice at all, or whether it is merely a relabeling of what actually happens in the WTO at this time. After all, many of the most well-known trade disputes have gone on for years. In the US/Canada –EU beef hormones dispute, for example, countervailing duties have been in place for more than 10 years. Why think that my approach is, therefore, importantly different in substance than what we have now?

There is something importantly right in this objection, in that a large part of my approach is to change how we think about or conceptualize our obligations under international economic law rather than to suggest very different penalties than have been put in place by the WTO DSB. However, I contend that even this reconceptualization can be significant, insofar as it helps us better understand the normative structure of international economic law. First, it helps us see

that countervailing duties or the withdrawal of protections are not, in these cases, punishment, but rather costs that a party must pay. Under my approach, when the DSB allows countervailing duties, this is not meant as a punishment for the "offending" state, but as a way to make the costs of the choice transparent, in a way that is similar to the order to pay damages in a contract dispute. The strict liability nature of damages in contract suggests that damages are best seen as costs and not punishment,[38] and something similar, I contend, should be seen in the case of "damages" applied in disputes over international economic treaties. In such cases a society may more carefully decide which is values more- preventing internet gambling or having additional protection on intellectual property, for example- and evaluate its choices in light of their costs. Insofar as decisions of tribunals are seen as imposing an obligation, and not merely a cost, on a society, this sort of evaluation is not open. It is my contention that, by making this structure more transparent and clear, societies will be able to better evaluate their choices and to be better reconciled to the costs and benefits that come from international cooperation.

The second objection builds on the idea that one of the important goals of international economic law is to promote stability and predictability in the international economic realm, and worries that an approach such as mine, which might be seen as allowing states, at least in some situations, to "buy their way" out of the obligations imposed by treaties, will greatly reduce this stability and predictability.[39] If my proposal did greatly increase instability and unpredictability in the international trade system, it would be a significant reason to oppose it. However, I do not think this is a serious worry. First, as noted above, the practical results of my approach may not vary to a high degree from current practice. Secondly, by conceptualizing countervailing duties and other penalties as damages, we can increase the transparency of the system and work to develop more standardized systems of damages, perhaps drawing on the experience of contract law in various countries. We do not normally think that allowing damages other than specific performance greatly reduces the stability and predictability of the domestic economy, and I see no reason to think it would do so for the international economy. If anything, the more explicit importation of lessons learned from domestic contract law may well help promote stability and predictability, in particular by increasing transparency.

Finally, we might worry that my approach will reduce the over-all amount of international cooperation by encouraging parties to "breach", thereby undermining international economic law. We might think that this approach is likely to make "breach" (and then payment of damages) higher than the traditional approach, and that this will make joining treaties less useful, perhaps leading to a downward spiral. This worry cannot be ruled out a priori, and must be taken seriously. However, I think that there is reason to think it is not the most likely outcome, even if "breach" is somewhat higher under my approach than under the traditional approach. This is so because we may reasonably expect the over-all level of international economic cooperation under treaties to go up under my approach, even if there is somewhat more "breach" under any particular treaty. This result would follow if the sovereignty-enhancing

[38] On this point, see Bix, *Contract Law*, pp. 142-3.

[39] This objection is pressed by Jackson, who suggests that it is also the opinion of many working in the WTO dispute settlement body. See Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, p. 168.

aspect of my approach encourages states to enter into economic treaties that otherwise would have found too risky under the traditional approach. If this is so, then the total amount of beneficial cooperation will increase, even if under each treaty there is somewhat more "breach" than in the past.

Conclusion

[to be added]