

The Role of International Law in Economic Migration

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1. Introduction

This article analyzes the economic and political ramifications of liberalization of national rules of migration through international legal agreements, and on the basis of this analysis develops proposals for new international legal rules in this field. Proposals for international law can only be sustained where the proposed law is expected to increase welfare, and where the distribution of the benefits and detriments of the proposed law is politically supportable.

Migration is a parameter of globalization, and it also has complex relationships of substitutability and complementarity with other parameters of globalization: movement of goods, services, information, money, and investment. Freeman examines the degree of international economic integration in labor, evaluating both quantities of movement of labor compared to movement of other factors, and price differentials in labor compared to price differentials in other factors. He finds that the labor market “is the least developed part of globalization.”¹

There are great welfare gains to be achieved by freeing-up international economic migration, just as there have been or are great gains available by freeing-up international trade in goods, services and money. It is estimated that a modest increase in industrial countries’ quotas on incoming temporary workers equal to 3% of their current work forces would result in increased world welfare of more than US\$150 billion a year.² This is greater than the projected benefits of a completed Doha Round of international trade negotiations.

If international policy makers were really interested in maximizing worldwide efficiency, they would spend little of their energies on a new trade round or on the international financial architecture. They would all be busy at work liberalizing immigration restrictions.³

The preoccupation of many governments with international trade in goods and services across national borders has resulted in an elaborate set of international rules on that commercially important subject. Less attention has been paid to the development of the rules governing the movement of human beings across national borders.⁴

¹ Freeman, Richard B., *People Flows in Globalization* 10 (Nat’l Bureau of Economic Research, Working Paper No. 12315, 2006), available at <http://www.nber.org/papers/w12315>.

² WORLD BANK INDEPENDENT EVALUATION GROUP, *ASSESSING WORLD BANK SUPPORT FOR TRADE, 1987-2004* (2006), available at http://www.worldbank.org/ieg/trade/docs/trade_evaluation.pdf

³ Rodrik, Dani, *Comments at a Conference on Immigration and the Welfare State* (June 23, 2001), available at <http://ksghome.harvard.edu/~drodrik/Comments%20on%20Immigration%20Conference.doc> .

⁴ *THE MOVEMENT OF PERSONS ACROSS BORDERS* (Sohn, Louis B. & Buergenthal, Thomas eds., 1992).

The welfare gains from liberalization of migration would be shared by developed and developing countries. But perhaps more importantly, migration can, if it is managed carefully, help to raise the living standards in poor countries. In order to achieve these gains, it is necessary to overcome obstacles to bargaining, and to assist political processes in realizing the magnitude of the potential gains. With so much welfare improvement to be gained, states will endeavor to overcome these obstacles to bargaining.

The role of international law is to provide mechanisms by which one state may reciprocally induce another to take its interests into account in decision-making. International legal commitments allow states, through the give and take of negotiations and through the exchange or pooling of authority implicit in international law, to achieve this state of affairs as closely as possible.

What are the changing social elements that would lead states to agree to reduce their authority in the field of migration?

- First, demographic change will result in increasing demand for certain types of labor in the developed world.⁵ The Pew Research Center has recently stated, as to the United States for example, that, based on current trends, “the population of the United States will rise to 438 million in 2050, from 296 million in 2005, and 82% of the increase will be due to immigrants arriving from 2005 to 2050 and their U.S.-born descendants”⁶
- Second, individuals in poor countries will continue to seek better standards of living in wealthier countries.
- Third, there are large economic surpluses to be captured from mobility. These surpluses arise from rather large wage differentials between developing and developed countries; labor mobility will allow individual workers, their employers, and eventually consumers to share these surpluses.

Pressure to emigrate from poor countries is increasing.⁷ Differences in wages, largely due to differences in productivity, drive the demand. “For example, in 1975 per capita GDPs in the high-income countries were on average 41 times higher than those in low-income countries, and 8 times higher than in

⁵ Fehr, Hans et al., *The Role of Immigration in Dealing with the Developed World's Demographic Transition* 26 (Nat'l Bureau of Economic Research, Working Paper No. 10512, 2004), available at <http://www.nber.org/papers/w10512> (arguing that immigration growth can only solve demographic problems in the developed world if it is concentrated in high-skilled workers from the developing world). See also Gordon, Robert J., *Exploding Productivity Growth: Context, Causes and Implications* (Brookings Institute, Brookings Papers on Economic Activity 2:2003, 2003), available at <http://faculty-web.at.northwestern.edu/economics/gordon/Productivity-Brookings.pdf> (arguing the importance of population growth for economic growth in the U.S. during the near future, and explaining the role of immigration in population growth).

⁶ Jeffrey Passel & D'Vera Cohn, *U.S. Population Projections 2005-2050* 1 (Pew Research Centre, 2008), available at <http://pewsocialtrends.org/pubs/703/population-projections-united-states>.

⁷ Ghosh, Bimal, *Towards a New International Regime for Orderly Movements of People*, in *MANAGING MIGRATION: TIME FOR A NEW INTERNATIONAL REGIME* 6, 10 (Ghosh, Bimal, ed., 2000).

middle-income countries. By 2000, high-income countries had per capita GDPs that were 66 times those in low-income countries and 14 times those in middle-income countries.”⁸

As developing countries have relatively young populations, and as the returns to migration are greater the earlier in one’s life that one migrates, it is appropriate to anticipate increased numbers of people in developing countries interested in emigration.⁹ Demography also operates on the “supply” side in this model: the supply of immigration opportunities would be expected to increase as developed country populations age.

Demand to migrate is not exclusively dependent on demography and economic circumstances. Demand to migrate is affected by conditions in departure countries, compared to conditions in destination countries. So, in addition to the critical factors of wages and productivity, poverty, human rights abuses, insecurity, disease, and other negative factors in the departure countries, combined with their opposites in the destination countries, increase demand for migration. “Despite the public announcements by policy-makers in numerous regional and international fora for a concerted use of aid, trade, and foreign investment to reduce emigration pressure in labour-abundant countries, there is little evidence that the strategy is being consistently applied or that it is making a real impact at the global level.”¹⁰

As these demand and supply factors change, there is no particular reason for the relevant law to remain static. “With respect to migration, national regulatory regimes and municipal law in general simply must accommodate the development of international markets for skilled and unskilled workers.”¹¹ The same perspective applies to the applicable international law.

As is well understood, there are enormous political barriers to liberalization of migration, especially in the wealthy countries. However, in other areas, too, there are often domestic political barriers to globally welfare-enhancing measures. This has certainly been the case of trade liberalization. States have responded with international legal rules that can mobilize additional constituencies, and precipitate new political coalitions. As Grossman and Helpman put it, at the conclusion of their leading work on the political economy of protectionism in trade,

A next step might be to assess the relative desirability of alternative international “rules of the game.” Such rules limit the policy choices open to national governments and change the nature of the strategic interactions between elected officials and their constituents. Our framework could be used to generate predictions about what domestic policies will emerge from the political

⁸ Martin, Philip, *Migration and Development: Toward Sustainable Solutions* 4 (International Labor Organization, Working Paper No. DP/153/2004, 2004) available at <http://www.ilo.org/public/english/bureau/inst/download/dp15304.pdf>.

⁹ *Supra* note 3 at 28.

¹⁰ *Supra* note 8 at 17.

¹¹ SASSEN, SASKIA, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996); see also Hollifield, James F., *Migration and the ‘New International Order: The Missing Regime, in MANAGING MIGRATION: TIME FOR A NEW INTERNATIONAL REGIME* 75, 87 (Ghosh, Bimal, ed., 2000).

process in different [international] institutional settings, and therefore to evaluate which rules give rise to preferred policy outcomes.¹²

2. The Welfare Economics of Migration

Under a trade-based model of welfare economics, given sufficiently wide disparities in wage rates across borders, global welfare would be increased by permitting greater movement of labor. Rodrik puts it as follows:

As every economist knows, the efficiency cost of any policy-imposed ("artificial") price wedge is proportional to the square of the wedge. Where international markets for commodities and financial assets are concerned, these price wedges rarely exceed a ratio of 2:1. Where labor services are concerned, however, wages of similarly qualified individuals in the advanced and low-income countries differ by a factor of 10 or more. So the gains from liberalizing labor movements across countries are enormous, and much larger than the likely benefits from further liberalization in the traditional areas of goods and capital.¹³

Empirical studies of factor mobility, and estimates prepared by Winters et al.¹⁴ and by the World Bank¹⁵, seem to confirm that there are very large potential returns from increased liberalization. These potential returns dwarf the returns from further trade liberalization. Barriers to both permanent and temporary movement of natural persons are still quite large, and many of these barriers lack a non-economic, or prudential, justification. Thus, there is a strong initial argument from allocative efficiency for liberalization of economic migration.

From the standpoint of destination states, immigrants may bring many benefits, including skills, knowledge, entrepreneurial spirit, and innovation. These benefits may assist in growth. There is little doubt that many likely destination states would gain from immigration of skilled workers. Trade in services by virtue of migration provides economies of scale, benefits of specialization, and stronger competition.

On the other hand, it is possible that destination states may under some circumstances lose from immigration of unskilled workers, while origin states may gain. Thus, while developing countries bemoan the brain drain, developed countries institute "quality-selective" immigration policies¹⁶ that seek to ensure that only brains are drained.

Economic theory suggests that, for destination states, an "optimal immigration policy would admit individuals whose skills are in shortest supply and whose tax contributions, net of the cost of public

¹² Grossman, Gene & Helpman, Elhanan, *Protection for Sale*, AMERICAN ECONOMIC REVIEW 84(4):833, 849 (1994).

¹³ *Supra* note 4.

¹⁴ Winters, Alan et al., *Negotiating the Liberalisation of the Temporary Movement of Natural Persons*, in 87 DISCUSSION PAPERS IN ECONOMICS (2002).

¹⁵ *Supra* note 3.

¹⁶ See Beine, Michel et al., *Brain Drain and Economic Growth: Theory and Evidence* (Institute for the Study of Labour, IZA Discussion Paper No. 819, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=434542#PaperDownload. Many developed countries favor visa applicants with academic degrees or specific professional skills.

services they receive, are as large as possible.”¹⁷ Yet it may not be a simple matter to determine relative scarcity or abundance. “A given type of worker may be scarce [in the U.S.] either because the U.S. supply of his skill type is low relative to the rest of the world, or because the U.S. demand for his skill type is high relative to the rest of the world, as with computer scientists and engineers.”¹⁸ So it is not strange, as Hanson explains, that in the U.S., both high-skilled software programmers and engineers employed by rapidly expanding technology industries, and also low-skilled workers in construction, food preparation, and cleaning services, are scarce.¹⁹

One of the critical issues that liberalization of migration will have to face is the fact that much of the desire to migrate is for migration from poor countries to advanced countries. Richard Freeman suggests that “[o]ne plausible explanation is that countries differ in technology. If an advanced economy uses more productive technology than a developing country, then returns to both labor and capital will be higher in the advanced economy and both factors will migrate there.”²⁰ Similarly, Martin et al. point out that if infrastructure has important effects on labor productivity, then migration may be stimulated by differences in infrastructure. They give the example of the Mexican shoe industry in the 1980s, where Mexican workers moved to Los Angeles to produce shoes for export to Mexico.²¹

The core question is whether increased migration would provide welfare benefits, to whom, and how much? Armed with detailed answers, informed by greater knowledge of the parameters that might affect the magnitude and distribution of benefits, it may be possible to determine whether these benefits are worthy of efforts toward realization, and what will be the best means of realization.

The large welfare gains mentioned above provide an important incentive for migration, whether legal or illegal. It is clear that the greatest beneficiaries of migration are the migrants themselves, often creating high-powered incentives for migration. In many cases, the alternative to legal migration will not be “no migration,” but will be illegal migration. In order to prevent illegal migration, powerful disincentives must be structured to overcome the powerful incentives to migrate. There are great costs to doing so, including especially risks to the migrants.

As a consequence, these welfare gains provide an incentive to structure legal and institutional mechanisms that can channel, facilitate, and regularize legal migration, and thereby reduce the incentives for illegal migration, and the costs of control of illegal migration. It is important to note, however, that experience shows that increased *legal* immigration can induce increased *illegal* immigration, depending on the particular context and structure. It appears that the overall effect of legal migration on illegal migration is ambivalent, and context-dependent.

¹⁷ Hanson, Gordon, *The Economic Logic of Illegal Immigration* 4 (Council on Foreign Relations, Council Special Report No. 26, 2007).

¹⁸ *Id.* at 14.

¹⁹ *Id.*

²⁰ *Supra* note 2 at 26-27. See also Markusen, James R., *Factor Movements and Commodity Trade as Complements*, JOURNAL OF INTERNATIONAL ECONOMICS 14(3-4):341-356 (1983) and Gierking, Shelby & Mutti, John, *Factor Rewards and the International Migration of Unskilled Labor: A Model with Capital Mobility*, JOURNAL OF INTERNATIONAL ECONOMICS 14:3-4 367, 380 (1983).

²¹ Martin, Philip et al., *Migration Outcomes of Guest Worker and Free Trade Regimes: The Case of Mexico-U.S. Migration*, in *MANAGING MIGRATION: TIME FOR A NEW INTERNATIONAL REGIME* 150 (Ghosh, Bimal, ed., 2000).

Thus, these unrealized large welfare gains are an institutional puzzle. It would be useful to solve this puzzle, and to develop a way to restructure legal and organizational mechanisms to allow these gains to be realized. This article is intended to advance that project, as an exercise in institutional imagination.

While it seems fairly clear that there are significant potential global gains to be achieved by liberalizing migration, it is also clear that these gains are not distributed evenly. Rather, as is the case with trade in goods or services, there will be winners and there will be losers. The problem for domestic and international politics, and for international institutions, is to establish a method of facilitating policy changes that are Pareto efficient in the sense that even those who might otherwise be losers are better off. The problem for international institutions is to assist in building domestic coalitions that will enable welfare-enhancing policy changes. These policy changes may require careful structuring of liberalization, or linkage of liberalization of emigration to other measures.

Sending States

Although the World Bank finds that increasing emigration of low-skilled workers would significantly reduce poverty in developing countries, those remaining behind (“TRB”) do not necessarily benefit from the emigration of their compatriots.²² First, emigration of high-skilled workers may reduce welfare in the sending country. Second, for the same types of reasons that, as discussed below, workers in the destination country are not necessarily hurt by immigration, workers in the home country are not necessarily helped by emigration. It is possible, however, that workers in the home country who otherwise compete with emigrants would experience a rise in wages. The World Bank simulation assumes an increasing proportion of skilled migrants, compared to unskilled migrants, to developed countries.²³ So, putting aside the ability of emigrants to escape poverty, what are the mechanisms that affect TRB in developing countries?

O’Rourke finds that wages rose in emigration countries during the late 19th and early 20th centuries, converging with countries of immigration, and that “emigration was an important source of living standard convergence for [emigration countries].”²⁴ Taylor and Williamson find that international real wage dispersion declined by 28% from 1870 to 1910, but that without the mass migrations of this period, wage dispersion would have increased by 7%.²⁵ Migration explains about 70% of living standards convergence during this period. O’Rourke concludes that “[e]migration was thus a major source of poverty relief in these economies, allowing living standards to grow far more rapidly than they would have in its absence.”²⁶

Emigration of low skilled workers can increase wages and reduce unemployment and underemployment of poor workers in the home country. Migration of low skilled workers has usually been beneficial to developing countries, contributing to poverty alleviation.²⁷ However, recent studies of

²² *Supra* note 3.

²³ *Supra* note 3.

²⁴ O’Rourke, Kevin H., *The Era of Free Migration: Lessons for Today* 7 (Institute for International Integration, IIS Discussion Paper No. 18, 2004).

²⁵ Taylor, Alan M. & Williamson, Jeffrey G., *Convergence in the Age of Mass Migration*, EUROPEAN REVIEW OF ECONOMIC HISTORY 1(1):27, 27 (1997).

²⁶ *Supra* note 24 at 9. See also, Williamson, Jeffrey G., *Winners and Losers Over Two Centuries of Globalization* (Nat’l Bureau of Economic Research, Working Paper No. 9161, 2002).

²⁷ *Supra* note 3 at 64.

Albania, Bangladesh, and Sri Lanka show no discernable wage improvements, despite large-scale emigration.²⁸

Where skilled labor flows from developing countries to developed countries, we can expect the destination country to benefit. On the other hand, the origin developing country may be harmed by the loss of skilled workers, reducing total output, reducing the tax base and reducing scale economies.²⁹ This is known as “brain drain.” “Depending on the length of the skilled workers’ absences, such a loss also could reduce an economy’s entrepreneurship, the ability to absorb new technologies, and various positive spillovers from skilled to other workers and to society in general.”³⁰

High-skilled migration has grown as a proportion of migration, in part due to selective immigration policies in countries such as the U.S., Singapore, Canada, and Australia. TRB may be hurt by the brain drain. Brain drain costs to TRB may include increased wage costs for employers and the consequent increased prices paid by consumers. High-skilled migration can be expected to affect different countries differently. Large developing countries with many skilled people, and the capacity to produce large numbers of skilled people, may not be harmed by high-skilled emigration, whereas smaller countries with fewer skilled people, and relatively smaller capacities to produce skilled people, may experience greater harm.³¹

Brain drain may reduce welfare of TRB, and growth in developing countries, when the emigrant was generating or would have generated positive externalities. For example, positive externalities from home country education programs may arise because the total return to education of workers may exceed the private return—in fact, one would assume that this is the reason for national investment in education. Furthermore, there may be economies of scale or scope that become unavailable after a certain level of emigration. Finally, emigration may reduce tax receipts; moreover, emigrants, if they remained, might have contributed more to their home country taxes than they received in public services.³²

The World Bank concludes that it is impossible reliably to estimate the benefit or cost to home countries of high-skilled emigration.³³ The literature on brain drain is almost exclusively theoretical, with the exception of a 2001 study that found a positive and significant correlation between migration

²⁸ Lucas, R.E.B., *International Migration to the High Income Countries: Some Consequences for Economic Development in the Sending Countries* (Annual Bank Conference on Development Economics, 2004).

²⁹ Sykes, Alan O., *The Welfare Economics of Immigration Law*, in *JUSTICE IN IMMIGRATION* 67 (Warren F. Schwartz, ed., 1995). See also, Bhagwati, Jagdish, & Rodriguez, Francisco, *Welfare Theoretical Analyses of the Brain Drain*, *JOURNAL OF DEVELOPMENT ECONOMICS* 2(3):195, 195 (1975) and Krugman, Paul, *Increasing Returns and Economic Geography*, *JOURNAL OF POLITICAL ECONOMY* 99(3):483, 483 (1971).

³⁰ Straubhaar, Thomas, *Why Do We Need a General Agreement on Movements of People (GAMP)?* in *MANAGING MIGRATION: TIME FOR A NEW INTERNATIONAL REGIME* 110 (Ghosh, Bimal, ed., 2000). See also Sykes, *id.*

³¹ BHAGWATI, JAGDISH, *IN DEFENSE OF GLOBALIZATION* 215 (2004).

³² *Supra* note 3 at 58 and 67.

³³ *Supra* note 3.

prospects and human capital formation.³⁴ There has been no systematic empirical assessment of the effects of brain drain on developing countries, largely due to a lack of harmonized international data.³⁵

There are a number of so-called “feedback effects” that can improve welfare in the origin state, including remittances and return migration with additional skills, contacts, and knowhow.³⁶

Perhaps the most significant source of positive feedback effects is remittances. Remittances may compensate poor home countries for losses incurred with the departure of workers.³⁷ “In small countries, remittances can account for a large share of GDP and foreign exchange. Even in a large country, remittances can greatly boost an economy.”³⁸

The United Nations International Fund for Agricultural Development’s 2007 report states that:

The driving force behind this phenomenon is an estimated 150 million migrants worldwide who sent more than US\$300 billion to their families in developing countries during 2006, typically US\$100, US\$200 or US\$300 at a time, through more than 1.5 billion separate financial transactions. These funds are used primarily to meet immediate family needs (consumption) but a significant portion is also available for savings, credit mobilization and other forms of investment. In other words, the world’s largest poverty alleviation programme could also become an effective grass roots economic development programme, particularly in the rural areas that present some of the greatest challenges to financial inclusion.³⁹

Home countries are increasingly acting to enhance the quantity and quality of remittances. Home countries may establish programs to encourage remittances for investment. For example, Mexico has established a matching funds program that matches remittances for certain types of investment projects. Where migrant communities develop abroad, it is also possible for organizations of migrants to band together to assist or invest at home.⁴⁰

Assuming remittance rates at current levels, the World Bank estimates according to its model that TRB would experience a net increase of 0.9% in their real incomes.⁴¹ Unger estimates that income grew

³⁴ *Supra* note 18 at 4.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Goldfarb, Robert et al., *Can Remittances Compensate for Manpower Outflows: The Case of Philippine Physicians*, JOURNAL OF DEVELOPMENT ECONOMICS 15(1-3):1-17 (1984).

³⁸ *Supra* note 2 at 22.

³⁹ INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT, *SENDING MONEY HOME: WORLDWIDE REMITTANCE FLOWS TO DEVELOPING COUNTRIES 2* (2007), available at <http://www.ifad.org/events/remittances/maps/brochure.pdf> (last visited March 19, 2008).

⁴⁰ Clubs of Mexican immigrants to the U.S. have formed to invest in their local communities at home. See Richard Lapper, *Migrant Villages Breathe Life Into the Old Country*, FINANCIAL TIMES, August 31, 2007.

⁴¹ *Supra* note 3 at 34.

more rapidly in Mexican towns experiencing greater emigration, and that income growth was associated with greater remittances.⁴²

Of course, remittances have other effects.

An IOM survey carried out in Guatemala . . . found that recipient households used 53 per cent of remittances to buy basic items such as food and clothing. A further 11 per cent was spent on education and health. As much as 36 per cent was directed to savings, economic purposes and for the purchase of assets, including housing.

Studies in CIS countries (Tajikistan, Moldova, Armenia) have found that the amount allocated for savings and investment is small. In Tajikistan (Olimova and Bosc, 2003), labour migration and remittances have not led to individual accumulation of wealth nor have they accelerated the pace of SME development. Nevertheless, as a survival strategy, labour migration has become a crucial stabilizing factor to offset the effects of economic crisis.⁴³

Indeed, it is possible that remittances may be used more for consumption than for investment⁴⁴, and may have little effect on growth. It may be that remittances from more skilled workers can take the form of growth-promoting investment. For example, highly skilled Indian emigrant technicians might make remittances as part of a venture capital project in India. Kapur and McHale conclude that the effects of remittances on poverty and development are still poorly understood.⁴⁵ However, Martin observes that

Most studies suggest that each \$1 in remittances generates a \$2 to \$3 increase in GDP, as recipients buy goods or invest in housing, education, or health care, improving the lives of non-migrants via the multiplier effects of remittance spending. Research suggests that the exit of men in the prime of their working lives initially leads to reduced output in local economies, but the arrival of remittances can lead to adjustments that maintain output. For example, migrant families can shift farming operations from crops to livestock, which require less labor, hire labor to produce crops, or rent crop land to other farmers, enabling them to achieve economies of scale.⁴⁶

As a response to the actuality or perception of harmful brain drain, it is certainly possible that home countries would determine to restrict or to tax certain types of emigration. Stark et al. (2005) find that developing countries would benefit from restrictions on migration.⁴⁷ Policy debates in the 1970s discussed whether a tax on emigration (known as a “Bhagwati tax”) could compensate the origin

⁴² Unger, Kurt, *Regional Economic Development and Mexican Out-Migration* (Nat'l Bureau of Economic Research, Working Paper No. 11432, 2005).

⁴³ ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE (OSCE), INTERNATIONAL LABOUR ORGANISATION & INTERNATIONAL ORGANIZATION ON MIGRATION, *HANDBOOK ON LABOR MIGRATION* 77 (2006).

⁴⁴ KAPUR, DEVESH & MCHALE, JOHN, *THE GLOBAL MIGRATION OF TALENT: WHAT DOES IT MEAN FOR DEVELOPING COUNTRIES?* 150 (2005).

⁴⁵ *Id.* at 161.

⁴⁶ *Supra* note 9 at 15.

⁴⁷ Stark et al. 2005.

developing countries for brain drain.⁴⁸ While direct restrictions violate human rights law and might prevent some efficient migration, a well-structured Bhagwati tax may provide a more subtle and appealing instrument.⁴⁹ (Wilson 2005)

While restrictions on emigration may violate human rights obligations, such restrictions have been seen in the past, for a variety of reasons, including to block transfer of technology or to maintain high land rents.⁵⁰ For example, Britain restricted emigration by skilled workers from 1719 to 1825.⁵¹ More recently, the former Soviet Union and its satellites restricted emigration in order to retain certain skilled workers, and presumably in order to prevent a rush for the exit in a failing state.

Perhaps a Bhagwati tax would be a superior tool, compared to restrictions on migration, or even compared to. For example, a Bhagwati tax might allow states to capture some of the benefits from their public education systems, preventing public education from becoming an undersupplied public good. One of the major criticisms of a Bhagwati tax has been the inability of the home country to enforce collections on migrants who reside in the destination country. This may be addressed through international agreements or other enforcement cooperation arrangements. While there are no direct precedents for cooperative arrangements of this type, there is no *a priori* reason why they could not be implemented. Furthermore, with the rising concern regarding international money laundering, financing of terrorism, and tax evasion, efforts such as the Financial Action Task Force could be adapted to foster cooperation in this field. International society has moved closer to international enforcement of private judgments,⁵² which are not necessarily more intrusive than a carefully delimited set of tax obligations.

Indeed, it would be possible to attain a similar effect to a Bhagwati tax simply by restructuring the obligation as a debt for money borrowed instead of a tax. A Bhagwati tax is not formally very different from an obligation to repay tuition or an exit fee that is enforced over time, instead of in a lump sum upon migration. Financing arrangements, provided either privately or publicly in the destination country, could provide a basis for collection. For example, countries concerned about brain drain might establish an obligation to repay the cost of public education upon emigration, and require the borrower/migrant to agree in advance to the enforceability of this debt in courts around the world. Although enforcement may still be costly, it would not be doctrinally exceptional.

Of course, any exit tax or Bhagwati tax would reduce incentives to migrate, except to the extent that the destination country accepted it as the basis for a credit or deduction against destination country

⁴⁸ *Supra* note 18 at 3.

⁴⁹ Wilson 2005.

⁵⁰ DOWTY, ALAN, *CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT* (1987).

⁵¹ O'Rourke, Kevin H. & Sinnott, Richard, *Migration Flows: Political Economy of Migration and the Empirical Challenges* 1 (Institute for International Integration Studies, IIS Discussion Paper No. 06, 2003).

⁵² The European Union governs the recognition and enforcement of civil and commercial judgments among its Member States by a regulation. *See* Council Regulation 44/2001 O.J. L 012, 1 (EC), available at <http://europa.eu.int/scadplus/leg/en/lvb/l33054.htm>. For a convention among OAS member states, *see* the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards, 18 I.L.M. 1224 (1979). *See also* the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, 24 I.L.M. 468 (1985).

taxes. Deductibility or creditability might be a basis for fiscal competition for migrants among destination countries. Insofar as the destination country recognizes the value of the contribution of the home country to the migrant's human capital, it may accept the principle that it should reduce its taxation in deference to the home country.

While this type of shared dual taxation arrangement would no doubt be quite complex, modern information processing technology might render it reasonably simple to administer. Many modern tax treaties contain arrangements for states to work out in advance the relative contribution to income of two states, in order to avoid double taxation based on allegations of transfer pricing. The task of determining the degree of contribution from human capital to the production of income may not be substantially greater.

Destination States

Destination states benefit from migration to the extent that the migration responds to relative scarcity and/or productivity gains, increasing the general productivity of the economy. By increasing the supply of labor, immigration increases the productivity of factors that are complementary to that labor. The increased income for destination country employers is termed the "immigration surplus." Smith and Edmonston develop a basic economic model using what they believe to be plausible assumptions, including constant returns to scale, to show that immigration produces net economic gains for domestic residents.⁵³ Immigration allows existing domestic workers to increase their specialization, producing goods more efficiently. On the consumption side, immigrants produce new goods and services and are paid less than the value of these goods and services, so domestic residents gain. Consumers thus benefit from reduced prices.

Furthermore, to the extent that immigrants contribute more in taxes than they receive in government services and transfer payments, immigrants may provide another benefit. The excess is a net fiscal transfer to non-immigrant taxpayers. It is easy to see that high-skilled immigrants are likely to pay more in taxes, and consume less in government services and transfer payments, than low-skilled immigrants.

However, destination countries may be harmed through three mechanisms. First, they may be harmed to the extent that certain groups of native or earlier immigrant workers are harmed, where the costs of adjustment exceed the productivity benefits. Second, they may be harmed through the fiscal mechanism, whereby immigrants receive more in public services and transfer payments than they contribute through taxes. As Hanson concludes, discussing the U.S. market, if "immigrants are a net fiscal drain, the total impact of immigration on the United States would be positive only if the immigration surplus exceeded the fiscal transfer made to immigrants." He continues, "For low-skilled immigration . . . this does not appear to be the case."⁵⁴ Third, the destination state will experience the costs of administering an immigration system.

Most research in this field has focused on the U.S. market, but the effects on other developed destination states are likely to be similar. There seems to be wide agreement that the U.S. as a whole, and other likely destination states, would benefit from increased immigration by highly skilled workers (even though competing domestic workers might be harmed). But immigration of less skilled workers, which

⁵³ SMITH, JAMES P. & EDMONSTON, BARRY, *THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC AND FISCAL EFFECTS OF IMMIGRATION* (1997).

⁵⁴ *Supra* note 19 at 21.

has been the recent trend, is more ambiguous. This may explain why many destination states, such as the U.S., Germany, Canada, or Singapore, provide more liberal access for high-skilled persons.

Smith and Edmonston argue that immigration is unlikely to have a very large effect on earnings or on gross domestic product per capita in the large and complex U.S. economy. They find savings, investment, and human capital of U.S. workers to be “far more critical.”⁵⁵

There has been a lively debate among economists with respect to the destination country effects of immigration to the U.S., and this debate has spilled over into the public arena.⁵⁶ Before reviewing this debate, it is important to state that the outcome of this debate is not the final word with respect to global welfare, or even U.S. immigration policy. That is, even if it is found that the U.S. is harmed by liberalized immigration, it may be that global welfare is increased, and therefore it would be efficient (albeit unappealing) to compensate the U.S. in order to induce the U.S. to accept liberalized immigration. Of course, the compensation could take the form of a measure that would have beneficial effects on the home states, such as liberalization of investment or of trade in high value-added services. In the General Agreement on Trade in Services (“G.A.T.S.”) negotiations at the W.T.O., Mode 4 liberalization of movement of natural persons was seen as both compensation for, and linked to, Mode 3 liberalization of commercial presence, which often is associated with investment.

Furthermore, even if the poorest workers in the U.S. are otherwise harmed by liberalized immigration, it may be that the U.S. as a whole is benefited by liberalized immigration. Again, under these circumstances, it might be efficient to compensate the harmed workers in order to induce them to accept liberalized immigration.

The above discussion shows that there are two critical concerns regarding destination country effects of immigration. First, certain natives of the destination country may experience reduced incomes due to price pressure on their wages. Second, immigrants may use publicly provided goods and services, including transfer payments, in excess of their contribution. Of course, immigrants may also enhance the welfare of natives in important dimensions. Immigrants may bring greater productivity and less expensive goods. Immigrants may also help to fund publicly provided goods and services.

While Longhi, Nijkamp and Poot, in their meta-analysis of studies of effects of migration on destination country wages, find that results differ across countries, they conclude that the effects of migration on wages are small: “one percentage point increase in the proportion of immigrants in the labor force lowers wages across the investigated studies by only 0.119 percent.”⁵⁷

Thus, applying the Longhi, Nijkamp, and Poot⁵⁸ findings to the World Bank simulation⁵⁹ (assuming a 3% increase in the stock of migrants) we would anticipate a 0.357% reduction in wages in the destination states. The World Bank simulation itself finds that in higher income countries, unskilled native wages decline by around 0.3%, while skilled native wages decline by 1.1%.⁶⁰ (Recall that the

⁵⁵ *Supra* note 56 at 6.

⁵⁶ Lowenstein, Roger, *The Immigration Equation*, THE NEW YORK TIMES, July 9, 2006.

⁵⁷ Longhi, S., Nijkamp, P. & Poot, J, *A Meta-Analytic Assessment of the Effect of Immigration on Wages*, JOURNAL OF ECONOMIC SURVEYS 19(3):451 (2005).

⁵⁸ *Id.*

⁵⁹ *Supra* note 3.

⁶⁰ *Supra* note 3 at 44.

World Bank simulation assumes a larger proportion of skilled migration than has occurred in the past.) On the other hand, more severe adverse consequences are felt by earlier migrants, whose wages decline by more than 10% for unskilled earlier migrants and 20% for skilled earlier migrants. These distinctions depend, of course, on the degree of substitutability between migrants and native workers.

Ottaviano and Peri find that “overall immigration generates a large positive effect on the average wages of U.S.-born workers.”⁶¹ Their analysis, using both estimation and simulation methods, examines closely the effects of skill complementarities and physical capital accumulation. They calculate that the average wage of native workers increased between 2% and 2.5% due to the inflow of foreign workers from 1990-2000, although the wages of native workers without a high school degree declined by 1%.

On the other hand, O’Rourke and Sinnott, examining the literature on effects on the unskilled, conclude broadly that “several studies, using various methodologies, have shown that in immigrant nations such as the US immigration had a significant negative impact on unskilled real wages.”⁶²

Given the diverse positions in this literature, the best conclusion that can be reached at this time is one of uncertainty as to whether and to what extent immigrants suppress the incomes of competing workers. However, several things are clear. First, under this literature it is by no means clear that the U.S., or any other destination country, is harmed *as a whole* by immigration. Second, the composition of the class of workers harmed will depend on the composition of the class of workers who immigrate, and immigrants (at least to the U.S.) have had a much higher proportion of unskilled persons than the native population.⁶³ Third, and of great practical importance, if immigration harms some group of native workers, the harm seems to vary directly with the magnitude of immigration. So, at least from the standpoint of immigrant-competing native workers, a stream is preferable to a flood. Fourth, the historical experience represented in this empirical literature is not necessarily indicative of future performance, especially under significantly changed policy. Finally, this literature does not address the possibility that the gains from immigration might be sufficient to compensate those harmed.

Temporary or Permanent Migration

Preference of temporary migration over permanent migration may arise from a concern to ensure that arrangements benefit developing countries. “If the movement is temporary, then we can be fairly confident that *both* the host and home country will gain. The benefits of permanent migration are less clear: the gains from remittances, networks, investment, etc. must be weighed against the possible costs of ‘brain drain.’”⁶⁴ Rodrik writes

To ensure that labor mobility produces benefits for developing nations it is imperative that the regime be designed in a way that generates incentives for return to home countries. While

⁶¹ Ottaviano, Gianmarco I.P. & Peri, Giovanni, *Rethinking the Gains from Immigration: Theory and Evidence from the U.S.* (Center for Economic Policy Research, CEPR Discussion Paper No. 5226, 2005).

⁶² *Supra* note 54 at 15

⁶³ Card, David, *Is the New Immigration Really So Bad?* 3 (Nat’l Bureau of Economics Research, Working Paper No. 11574, 2005).

⁶⁴ Chaudhuri, Sumanta et al., *Moving People to Deliver Services: How Can the WTO Help?* 15 (World Bank, Policy Research Paper No. 3238, 2004).

remittances can be an important source of income support for poor families, they are generally unable to spark and sustain long-term economic development.⁶⁵

Of course, brain drain also presents risks in connection with temporary migration—it is simply reduced in magnitude, or perhaps the required recirculation brings enough benefits to counter any adverse effects. However, there must be circumstances where permanent migration would be more beneficial globally than temporary migration, so a policy challenge is whether there is a way to permit permanent migration, such that it confers net benefits on developing countries.

While few would argue with the goal of ensuring that migration arrangements redound to the benefit of the poor, a limitation to temporary migration may be too blunt an instrument to achieve the goal. Limitation of migration to temporary migration reduces the incentive to migrate, which can be understood as largely determined by the present value of the lifetime difference in expected income available in the home state versus that available in the destination state. Requirements of temporariness also artificially suppress the broader potential benefits of migration. Furthermore, the ratio of migration expense to migration benefits will be reduced under temporary migration. Indeed, it seems clear that the main effect of a requirement of temporariness is to moderate the effects of migration. If these effects are good, temporariness is bad; conversely, if these effects are bad, temporariness is good.

To be sure, a more refined instrument that can capture all of the benefits of migration of unrestricted duration, while protecting against brain drain, may require substantial development of international institutional arrangements, but the benefits of increased global welfare and increased freedom for individuals may justify the costs. Facilitation of remittances, the establishment of a Bhagwati tax, commitments of destination states to accept a specified number of less skilled immigrants, or naked transfers from destination states to home states, or some combination of the foregoing, may be used to ensure benefits to the poor. Temporary migration has many costs of its own, including administration, disruption of family and social life, and the naked deadweight loss of suppressing the efficient allocation of resources.

3. Political Economy of Migration

Politics is driven by more than just welfare, and it is certainly driven by the intra-national distributive aspects of welfare. That is, the politics of migration policy involves complex historical, social, patriotic, chauvinistic, and other factors, and experience has shown that it is too much to expect politicians consistently to play to the best interests or to the greater virtues of their constituents. Second, politics involves the examination not just of aggregate effects, but of effects on particular interest groups. Furthermore, political analysis requires examination of the relative intensity of the preferences and influence of these particular interest groups: their concern and clout.

Political economy analysis adds three important dimensions to our analysis.

- First, at the domestic level, how and to what extent are the distributive outcomes indicated by welfare economics transformed into political pressure in domestic politics? This is a question both of economic effects and of the mediation of economic effects

⁶⁵ Rodrik, Dani, *How to Make the Trade Regime Work for Development* (February, 2004), available at <http://ksghome.harvard.edu/~drodrik/How%20to%20Make%20Trade%20Work.pdf> at 3.

through political and social mechanisms. What additional parameters are important to political decision-making regarding migration?

- Second, at the international level, how do states fail to achieve welfare-enhancing agreements or transactions due to strategic problems or other market failures?
- Third, the prior two dimensions interact to present a cooperation problem in connection with international migration. In order for welfare-enhancing international agreements to be entered into, they must engage the domestic politics of member states. They require the assembly of domestic coalitions that have the political power to approve international agreements that will be acceptable to foreign counter-parties. In order to convince foreign counterparties to engage in reciprocal concessions, they require the assembly or contingent assembly of domestic coalitions that have the political power to induce continued compliance with the relevant agreement. Compliance coalitions may be supported, in part or in whole, by international legal commitments that include the threat of specific or diffuse, formal or informal, retaliation, or of other types of consequences. How is this cooperation problem different from that experienced in other areas, such as international trade in goods and services? What are the implications of these differences for legal structures?

It is worthwhile to compare the political economy of migration with the political economy of trade. The standard political economy account of protectionism in trade in goods is as follows. Domestic manufacturers for domestic consumption, perhaps supported by domestic labor, are interested in protection against imports in order to increase their profitability. Domestic manufacturers for domestic consumption are more concentrated, and therefore better organized and more powerful politically, than domestic consumers interested in cheap imports. Being better organized than consumers, domestic manufacturers for domestic consumption succeed in determining policy.⁶⁶

In contrast, one would assume generally that domestic manufacturers that compete with imports, domestic manufacturers seeking to export, domestic workers in complementary industries, and domestic consumers, would all welcome immigrants who are presumed to bring reduced labor costs. However, for some multinational corporations that already have the advantage of being able to access foreign labor markets at low prices, it may be more advantageous to locate labor intensive activities in cheap labor markets, which may not benefit from higher prevailing wages, minimum wages, collective bargaining, or costly safety standards. At the same time, these multinational corporations may wish to deprive their domestic competitors of cheap labor by promoting immigration restrictions.

It is also possible that some domestic employers may prefer illegal immigration to legal immigration, because of the bargaining power they may hold in relation to illegal immigrants. These employers may lobby against policies that would liberalize legal migration, while possibly opposing enforcement of restrictions on illegal immigration. Along with nativists, these employers may form a “Baptist-bootlegger” type coalition.

We might expect better-organized producer interests, combined with diffuse consumer interests, to be able to overcome less well-organized labor interests. Much would depend on the extent of labor organization. If labor interests were less well-organized, or otherwise weaker, under the standard political

⁶⁶ OLSON, MANCUR, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). See also WORLD TRADE ORGANIZATION, *WORLD TRADE REPORT* (2007).

economy simplification that government decision-makers are rational political support-maximizers, we would expect government policy to be favorable to immigration. Indeed, Freeman argues that “there is in general an expansionary bias in the politics of immigration in liberal democracies such that official policies tend to be more liberal than public opinion and annual intakes larger than is politically optimal.”⁶⁷

“Despite public indifference or opposition, and often in apparent disregard of rising unemployment rates, governments in the settler societies substantially increased immigration intakes [from 1975 to 1995].”⁶⁸ The “settler societies” include the U.S., Canada, and Australia. What caused these increased intakes? Presumably business interests influenced public policy where the voting public was either indifferent or opposed. In these societies, unions have not directly opposed immigration, and political parties have avoided intense political debate regarding immigration. The U.S. in the early 21st century may constitute a departure from this pattern, but even there, the debate often transcends party politics.

In order to liberalize outside of public view, informal or illegal immigration may be preferred to formal arrangements, including larger quotas or international legal commitments, which draw greater attention. So, while the bias may be liberal, it may also be suboptimal if informal immigration produces less welfare than formal immigration. Freeman concludes more broadly that “the concentrated benefits and diffuse costs of immigration mean that the interest group system around immigration issues is dominated by those groups supportive of larger intakes, and, by implication, the organized public is more favorable to immigration than the unorganized public.”⁶⁹

Interestingly, Freeman suggested in 1995 that this liberal dynamic is reinforced by an anti-populist norm in mainstream political parties, according to which politicians decline to exploit racial, ethnic or immigration-related fears in order to succeed.⁷⁰ This observation may no longer be valid today, and, of course, politicians do sometimes engage in demagoguery to exploit or precipitate these lesser sensibilities of their constituents. As discussed below, political, cultural, ethnic, religious, nationalist and other factors may play a role, whether legitimate or illegitimate, in the national politics of immigration. Ethnic groups may play a role in limiting migration from some areas, and promoting migration from other areas.

Destination State Market Power

Some destinations, such as the U.S., the European Union (“E.U.”), Canada, Australia, and other wealthy states, undoubtedly are attractive to immigrants. Part of this attraction arises from the wages that can be earned in these destinations, presumably due to high levels of productivity. This strong attraction gives rise to market power, in the sense that supply of immigration opportunities is limited, demand for immigration opportunities is high, and the governments of the destination countries have control of entry. Do these leading destination states use their market power to extract welfare gains from immigration? Consider the following possibilities.

- First, states with market power in this context may exert that power by accepting migrants and denying the home state of the migrants the ability to tax those migrants—

⁶⁷ Freeman, Gary P., *Modes of Immigration Politics in the Liberal Democratic States*, INTERNATIONAL MIGRATION REVIEW 29(4):881, 822 – 83 (1995).

⁶⁸ *Id.* at 887.

⁶⁹ *Id.* at 885.

⁷⁰ *Id.*

declining to implement a Bhagwati tax. By doing so, the destination state may impose a negative externality on the home state.⁷¹

- A second, related, way by which states with market power may exert their power is to accept only highly skilled immigrants—those who will make a positive contribution in terms of an immigration dividend and in terms of a fiscal contribution. Thus, we can interpret brain drain as a negative externality imposed by the destination state on the home state.
- Third, it is also possible that destination states could use their market power to impose discriminatory taxes or other burdens on immigrants, or to deny immigrants public benefits that are available to natives, causing immigrants to give up some of the surplus from migration that they might otherwise capture.⁷² Considering the U.S. relationship with Mexican or other illegal immigrants, it may be that denial of public services or public transfer payment benefits could be understood as an exercise of market power. Of course, illegal immigrants are more likely to suffer from this type of "discrimination." Under U.S. law, illegal immigrants are denied certain public benefits. So, could it be that a preference for illegal immigration can be explained by reference to the fact that illegal immigrants can more easily be subjected to discrimination?

These types of measures are likely to provide disincentives for migration, in a way that reduces global welfare. Indeed, it may be that a sufficient rationale for states to cooperate in this area is simply to increase volumes of migration, and thereby enhance global welfare. According to this rationale, states could agree to increase international migration, and thereby increase global welfare, provided that they were able to agree on the distribution of the gains.

Note, however, that the home state is not necessarily directly harmed by the destination state's exercise of market power. It does not feel the full welfare loss caused by the destination state exercise of market power, and so may not be motivated to negotiate to protect its emigrants. On the other hand, if home states sought more actively to tax their emigrants, they might understand refusal by destination states to enforce these taxes as harmful, and discrimination may reduce amounts available for remittances or to be used for investment upon return. Temporary migration arrangements may provide greater incentives for home states to protect their emigrants: under these arrangements, the goal of the home state is to have migrants send remittances and then return with capital, skills, and contacts.

To the extent that these types of policy externalities are recognized by the home state, it may have incentives to negotiate with the destination state over their reduction. Staiger explains a similar motivation in the trade context as follows:

Beginning from the inefficient trade policy choices made in the presence of this international cost-shifting, the purpose of international trade negotiations is then clear: to provide an avenue by which foreign exporters can have their interests represented in the trade protection choices of the national governments to whose markets these exporters seek access, and thereby to face those

⁷¹ The fact that the home state does not protest, and perhaps does not see this state of affairs as the imposition of a negative externality, is not necessarily determinative. Many externalities seem "natural" until they are identified and sought to be internalized.

⁷² Bucovetsky, Sam, *Efficient Migration and Income Tax Competition*, JOURNAL OF PUBLIC FINANCE THEORY 5(2):249 (2003).

governments with internationally appropriate incentives that lead them to choose internationally efficient levels of trade protection.⁷³

Note that this is a political representation argument. The goal in migration is also to induce destination states to choose internationally efficient levels of restriction on immigration. To paraphrase Staiger, it is to provide an avenue by which emigrants and those left behind in home states can have their interests represented in the immigration policy choices of the national governments to whose markets these emigrants seek access, and thereby to face those governments with internationally appropriate incentives that lead them to choose internationally efficient levels of immigration protection.

The Possibility of Cooperation

I have explained above that states may be able to increase global welfare, and share in this increase, if they can cooperate to liberalize migration. This type of cooperation problem has often been modeled, assuming among other things a certain structure of payoffs, using the prisoner's dilemma game. See Table 2a below. The central assumption is that (in a bilateral setting) the states could be better off if both acted cooperatively, but that each is individually better off if it defects while the other cooperates, and is worst off if it cooperates while the other defects. The dominant solution—the expected behavior—is defection by all states. However, by using international legal rules to change (make negative) the payoffs from defection, states are able to achieve the collectively optimal outcome of mutual cooperation.

In order to develop some simple schematics of the possible coalition dynamics in the political economy of the destination state⁷⁴ regarding migration, it is necessary to make a number of simplifying assumptions and to exclude much detail.

For simplicity's sake, I largely exclude from these schematics the more contextual, historical, social and political factors discussed in subsequent sections of this article. This does not mean that these factors are unimportant, but the purpose of these schematics is not to determine how states will necessarily behave, or what kind of international legal commitments they will necessarily establish. Rather, the purpose is to develop a rough approximation of the political dynamics that arise from the main welfare effects described above, in order to be able to suggest how international legal commitments may facilitate the achievement of these goals. By doing so, I hope to develop an idea of the broad parameters of possible international legal commitments in this area.

This strategy is predicated on a simplifying assumption that welfare considerations will be relatively strong and may, over time and in appropriate contexts, overcome some of the contextual, social, historical, and political factors. Furthermore, these factors do not necessarily always militate against liberalization. So, these schematics are simplifications. However, an international negotiation toward an agreement would necessarily involve states determining their positions based on all of the relevant factors, not only welfare.

There is a domestic coalition-building game, and a related international cooperation game: thus, migration policy is a two-level game. The interesting question here is whether governments may seek to

⁷³ Staiger, Robert W., *What Can Developing Countries Achieve in the WTO?*, JOURNAL OF ECONOMIC LITERATURE 44(2):428-442 (2006).

⁷⁴ I do not try to model the political economy of the home state, but this would be an important exercise in connection with attempts to evaluate the possibility that home states would enter into international migration agreements.

enter into international agreements in order to induce the formation of political coalitions in support of liberalization. I describe the domestic coalition-building problem, and show how it may drive an international coordination or cooperation game with game theory matrices. I show that, at least under certain hypothesized circumstances where, without international agreements, pro-liberalization forces would not be successful in inducing formal liberalization, international agreements may increase the possibility of formation of pro-liberalization coalitions.

Wealthy State – Wealthy State Migration

In connection with migration only between two wealthy states with similar proportions of skilled and unskilled labor, we can expect little harm to any class of workers, and modest benefits. The potential benefits would be modest because the differences in wages are small. There is little reason not to have international agreements to facilitate this type of migration, but there seems to be little incentive to establish new international law in this area because there is already substantial mobility. The strategic setting for migration between wealthy states can best be modeled as a coordination game.

Poor State – Wealthy State Migration Assuming Equal Productivity

However, let us consider the more difficult, and interesting, case of migration between poor states and wealthy states. Assume that domestic labor and foreign labor are asymmetric in skill level: labor in State A is largely high-skilled, while labor in State B is largely low-skilled. I base my assumptions about the positions of particular groups of workers on Heckscher-Ohlin theory. Under Heckscher-Ohlin theory, the real wages of skilled workers will be higher in low-skilled labor abundant countries than in high-skilled labor abundant countries. Under Heckscher-Ohlin, we would expect high-skilled workers to migrate from high-skill countries to low-skill countries, and we would expect high-skilled workers in low-skill countries to oppose immigration (at least by high-skilled workers). Conversely, low-skilled workers would migrate from low-skill countries to high-skill countries, and we would expect low-skilled workers in high-skill countries to oppose immigration (at least by low-skilled workers).⁷⁵

Under this assumed asymmetry, there are significant gains from liberalization: aggregate welfare in each of State A and State B can be increased by reciprocal liberalization. This is an important part of each government's utility function, and may help to induce the government to enter into international legal commitments to unlock this welfare increase. Table 1 below, supplemented by the textual description that follows, depicts the possible political coalitions first without reciprocity under international agreements, and second with reciprocity. In Table 1, I assume, importantly and perhaps counterfactually in the most important cases, that labor productivity is equal in State A and State B.

Table 1: Asymmetric Labor Markets with Equal Productivity

	Scarce Labor	Abundant Labor	Capital	Consumers
No Reciprocity	Strongly opposed to liberalization	Weakly in favor of liberalization	Strongly in favor of liberalization	Weakly in favor (dispersed)
Reciprocity	Strongly opposed to liberalization	Strongly in favor	Still strongly in favor but reciprocity may	Weakly in favor (dispersed)

⁷⁵ *Supra* note 54 at 7.

reduce returns due
to emigration

Scarce Labor Factor Opposes Liberalization. Given that these states have asymmetric labor markets, mobility (if made available without selectivity between classes of labor) benefits skilled labor in State A, and unskilled labor in State B, and conversely, harms unskilled labor in State A and skilled labor in State B.⁷⁶ Therefore, we would expect unskilled labor in State A to oppose liberalization, while skilled labor in State B opposes liberalization.

Capital Strongly Supports Liberalization. Capital is the main beneficiary of liberalization of immigration (except for the migrants themselves). Here, under asymmetry, there are substantial cross-country price differences, strengthening capital's support for liberalization.

Consumers Weakly Support Liberalization. Consumers would generally benefit in welfare terms from immigration. Here, under asymmetry, there are greater cross-country price differences, strengthening consumer support for liberalization. However, as in trade, consumers are assumed to be poorly organized to articulate this preference in destination country politics.

Abundant Labor Factor Weakly Supports Liberalization. Abundant labor benefits from liberalization by virtue of increased immigration of complementary types of workers. These complementary workers may increase the returns to the abundant types of workers. These are not powerful incentives to advocate liberalization.

Abundant Labor Seeks Mobility--Reciprocation. The abundant factor believes that it would benefit from its own international mobility, allowing its workers to emigrate to where they are scarce, in search of higher prices. This benefit gives plentiful labor an added incentive to seek foreign liberalization, as discussed above.

Thus, the added possibility of reciprocal foreign liberalization induces the formation of a coalition within each state among capital, the abundant labor factor, and consumers, to overcome the scarce labor factor's opposition to liberalization of immigration.

However, note that while capital supports liberalization of immigration at home, it is less likely to support increased emigration by virtue of liberalization of immigration abroad, at least with respect to scarce labor factors. So, we would expect to see some diversity of position within capital: some employers would benefit from increased immigration, while others would be harmed by increased emigration. Thus, *unselective reciprocal* liberalization may actually reduce capital's support. *Selective* reciprocal liberalization—by which the partner state liberalizes its immigration policy only with respect to factors abundant in the first state—would help to overcome this problem.

Under these circumstances, each state would generally have strong interests in liberalization by the other state, but would prefer—in terms of political contributions and votes from scarce labor at home—to avoid its own liberalization. This strategic setting may give rise to a prisoner's dilemma-type

⁷⁶ Hiscox (2002) suggests that highly skilled workers may already have greater mobility across sectors, and therefore may be less concerned about migration.

situation, in which each state is best off protecting while the other state liberalizes, but both states are better off if both liberalize than if both protect.

In this asymmetric setting, international legal rules could play a role in migration similar to that described above with respect to international legal rules in trade: international legal rules could be entered into by states in order to resolve the prisoner's dilemma, allowing states to reach greater welfare.

A reciprocal agreement to liberalize would create increased surplus, possibly allowing government to utilize this surplus to redistribute to those harmed (the scarce factor). Compensation arrangements within each state to compensate previously scarce labor for the loss of its market power may be necessary to induce agreement. If the gains accrue largely to capital, it may be appropriate to tax capital in order to acquire funds to provide adjustment assistance. If the gains accrue largely to migrants, which is likely, it may be useful to impose some type of charge or tax on migrants in order to capture a sufficient portion of the surplus to be able to provide adjustment assistance. If these domestic institutional arrangements could be made, a wider range of reciprocal commitments to liberalize would become feasible.

Following in Table 2(a) is a diagram of the prisoner's dilemma, as applied to this context. The equilibrium is inefficient, with each state defecting. In this set of assumed payoffs, if international legal rules can impose a cost greater than 1 (as illustrated in Table 2(b), for illustration, I use 1.5) on defectors (states that fail to liberalize as promised), then they will decide to liberalize instead. Note that this is an efficient outcome, as it maximizes aggregate payoffs to both states.

Table 2(a) A Migration Prisoner's Dilemma Game **without** International Legal Rules

		State <i>B</i>	
		Liberalize	Defect
State <i>A</i>	Liberalize	2,2	0,3
	Defect	3,0	1,1

(b) A Migration Prisoner's Dilemma Game **plus** International Legal Rules Imposing Penalties for Defection (no longer a Prisoner's Dilemma)

		State <i>B</i>	
		Liberalize	Defect
State <i>A</i>	Liberalize	2,2	0,1.5
	Defect	1.5,0	-.5,-.5

In Table 2(b), the dominant solution for each player is to liberalize: no matter what State *B* does, the best payoff for State *A* is to liberalize.

Poor State – Wealthy State Migration Assuming Unequal Productivity

There is some reason to believe that for popular destination states, there may not be great interest in migration to the typical sending states. This will often result from higher levels of productivity in the wealthy state. As suggested above⁷⁷, under some circumstances, both skilled and unskilled workers may flow toward the high-skilled state—the wealthy state.⁷⁸ “This is, of course, what happens in the real world, suggesting that richer countries do indeed enjoy superior technology to poor countries, and that endowments alone cannot explain differences in income, or for that matter trade patterns and factor flows.”⁷⁹ The following table suggests the possible domestic coalitions in the destination state under these circumstances.

Table 3: Asymmetric One-Way Flow: Unequal Productivity

	Scarce Labor	Abundant Labor	Capital	Consumers
No Reciprocity	Strongly opposed to liberalization	Weakly in favor of liberalization	Strongly in favor of liberalization	Weakly in favor (dispersed)
Reciprocity	Strongly opposed to liberalization	No change—no interest in emigration	Still in favor with enhanced benefits for investment	Weakly in favor (dispersed)
Reciprocity with side payment	Less opposed if side payment is used for adjustment or increase in export opportunities	More favorable if side payment is used for increase in export opportunities	Increased support if side payment provides increased investment or trade opportunities	May increase support if side payment is used to reduce taxes

Abundant Labor Does Not Support Reciprocity. Here, I assume that the skilled labor in the skilled labor abundant state is not interested in migrating to the unskilled labor abundant state, because the wages there are substantially lower due to differences in productivity. Therefore, it is not valuable to State A’s abundant skilled labor to secure liberalization by State B, so State A labor does not support liberalization by State A, and reciprocity within the migration field is not appealing.

Capital Supports Liberalization. As in the prior schematics, I assume that State A capital is not sufficiently powerful by itself to procure a policy of liberalization.

Bully Game. Therefore, the payoffs may be characterized as a “bully game,” in which State A’s dominant strategy will be to protect, as there is insufficient support for liberalization. State A will protect

⁷⁷ Trefler, Daniel, *International Factor Price Differences: Leontief was Right!*, JOURNAL OF POLITICAL ECONOMY 101: 961-987 (1993). See also Trefler, Daniel, *Immigrants and natives in general equilibrium trade models*, in *THE IMMIGRATION DEBATE: STUDIES ON THE ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION POLICY OPTIONS* 206—238 (Smith, J. P. & Edmonston, B. eds., 1998).

⁷⁸ *Supra* note 19 at 14

⁷⁹ See Markusen, *supra* note 22 at 9.

unless some other arrangements are made to induce a different policy by State A. As it is unlikely that State A unskilled labor would benefit from liberalization of immigration, the question is whether State A capital or State A skilled labor could be given increased incentives to support liberalization, in order to unlock an expected global welfare increase from liberalized migration. Liberalization by State B is unappealing to State A.

Side Payments or Linkage. Although a side payment might result in an efficient solution, it might be unappealing for State B to make financial compensation to State A. However, it is possible that if, for example, State B were willing to liberalize in relevant high value-added services sectors, under the GATS, (i) State A capital might find this opportunity valuable, and (ii) State A skilled labor might benefit from opportunities to be employed or otherwise to provide services in State B. A similar type of side payment or linkage could arise from investment liberalization in State B, providing opportunities for State A capital and State A skilled labor.

This provides an argument for linkage, by which two efficient policy changes that do not have sufficient political support to be effected alone, may both be viable under linkage. This is similar to what is believed to have happened *within* the trade field, where mercantilism balances mercantilism. In fact, now that wealthy states have few significant tariff barriers, at least on manufactured goods, while developing states still have substantial tariff barriers, the outlines of a next-generation “grand bargain” toward a virtuous cycle of efficiency may be identified: wealthy states allow greater immigration of skilled and unskilled workers, perhaps also agreeing to enforce a Bhagwati tax, while poor states reduce tariffs and barriers to investment and high value-added services.

Migration Fee or Bhagwati Tax. Another alternative type of “side payment” is to allow State A to achieve compensation by imposing a special fee or tax on immigrants.⁸⁰

[B]ecause most of the gains from immigration accrue to the immigrants rather than to the residents of destination countries . . . , there is little incentive for destination countries to ease immigration restrictions. The only way I can think of to increase the receptivity of destination countries to accept more immigrants would be to redistribute the benefits of immigration so that a greater share of the benefits flow to natives and a lower share of the benefits to immigrants. The “radically economic” policy here would be to use the price system to equilibrate the market for immigrants rather than to ration entry. An immigrant receiving country could charge admission fees or auction immigration visas or place special taxes on immigrants, and use those funds to redistribute the gains from immigration to existing citizens.⁸¹

Thus, the institutional capacity of home and destination states to jointly charge a migration fee might allow them to enjoy a greater portion of the surplus from migration. Of course, the problem with a migration fee alone is that it would not necessarily provide concentrated incentives for any particular political group to lobby for liberalization of immigration—it would enrich the state generally, but no particular group. So, the migration fee might be used to fund adjustment assistance in the destination state, and perhaps development assistance in the home state.

Poor State – Wealthy State with Threat of Offshoring or Illegal Immigration

⁸⁰ *Supra* note 2. See also Clarke, Harry R., *Entry Charges on Immigrants*, INTERNATIONAL MIGRATION REVIEW 28(2):338 (1994).

⁸¹ *Supra* note 2 at 33.

In the prior schematics, capital has been assumed to be weak, in part because it is not allied with labor, as it often is in the trade context. Yet (i) offshoring, or (ii) illegal immigration, may give capital a further source of power that is not necessarily dependent on government action.⁸² The threat to offshore, or to hire illegal immigrants, reduces the benefits of protection to scarce labor, thereby reducing its opposition to legal immigration. Indeed, simple liberalization of trade in goods or services plays a similar role. “That immigration and trade are substitute ways to obtain the same output suggests that changes in the number of immigrants will have less effect on native incomes in the presence of relatively free trade than they otherwise would.”⁸³ This is a critical point, as it suggests that resistance to immigration may be reduced as trade in goods and services is liberalized: the different facets of globalization reinforce one another. While this proposition depends on whether migration and trade are complements or substitutes, the threat value of offshoring might persist even where they are complements. Interestingly, globalization in one factor supports globalization in other factors, by reducing the returns to protection.

Table 4: Asymmetric One-Way Flow with Threat of Offshoring or Illegal Immigration

	Scarce Labor	Abundant Labor	Capital	Consumers
No Reciprocity	Weaker opposition	Weakly in favor of liberalization	Strongly in favor	Weakly in favor
Reciprocity	Weaker opposition	More strongly in favor	Still in favor, but reciprocity may reduce returns due to emigration	Weakly in favor

Thus, workers, and their unions, must recognize the alternatives available to them and their opponents as they decide what policy to support. Technological or institutional change that makes it possible to offshore jobs to developing countries with lower wages is analytically similar, assuming free trade in the products of this work, to a policy change relaxing restrictions on immigration. (Jain et al. 2006) For example, U.S. farmers are increasingly shifting production to Mexico in order to overcome barriers to immigration in the U.S.⁸⁴

This type of change would ordinarily benefit owners of firms and owners of complementary inputs, including complementary workers, while hurting those whose work it replaces. With declining trade protection, increasing liberalization of foreign investment, and technological advances, offshoring must be understood as a growing strategic alternative available to firms. It may be that in some contexts, support for relaxation of formal immigration controls is a superior alternative from the standpoint of unions, compared to the default alternative of allowing offshoring.

⁸² It may be dependent upon government inaction; that is, offshoring could be prohibited or otherwise deterred. In the 2004 presidential elections in the U.S., John Kerry, the Democratic nominee, referred to companies that offshored as “Benedict Arnold” companies.

⁸³ *Supra* note 56 at 147.

⁸⁴ See Julia Preston, *Short on Labor, Farmers in U.S. Shift to Mexico*, NEW YORK TIMES, September 5, 2007 at 1, col.1. Of course, Mexico benefits from free trade in goods under NAFTA, and transport costs are relatively low.

Furthermore, if illiberal formal migration policies will result in greater informal migration, with un-organized and vulnerable⁸⁵ illegal immigrants competing with organized labor in the destination country, then organized labor might find some attraction in managed formal migration.⁸⁶ Watts suggests that labor unions may form a coalition with employers in favor of legal immigration.

Thus, in an asymmetric context, offshoring or illegal immigration may reduce the value to domestic scarce labor of blocking formal liberalization of immigration. Under these circumstances, domestic labor may determine to support international legal commitments in order to promote immigration, as immigrants might join unions and would be subject to destination country cost structures, resulting in less competitive pressure than under the alternatives.

Other Factors Influencing Destination Country Politics

As we develop a political economy model of migration, it is useful to examine some of the historical experience, as a source of data regarding determinants of national policy beyond the economic welfare-based factors discussed above. Thus, in addition to the economic factors discussed above, we must recognize that cultural, ethnic, religious, nationalist and other factors may play a role, whether legitimate or illegitimate, in the national politics of immigration. Ethnic groups may play a role in limiting migration from some areas, and promoting migration from other areas. While the factors discussed here would add too much complexity for it to be practical to include them in the simple schematics developed above, they surely may affect policy in any particular state.⁸⁷ Furthermore, they suggest some of the concerns that may be raised in connection with proposals for legal agreements to liberalize migration, and some of the possible legal solutions to these concerns.

Given the possible divergence in the way the various parameters that influence policy may arise in different countries, we would expect some diversity in perspective across countries and across sectors. Different perspectives may arise because states have idiosyncratic approaches to policy-making, or because specific situational or historical factors in the experience of specific countries have a distinct effect on current policy.⁸⁸ However, Meyers finds “extraordinary” similarity among destination states in immigration policy for over a century.⁸⁹ He shows that immigration policy moved in broad synchronization for the major destination states from the 1770’s to the present. He argues that “the main reason for the similarities among the immigration control policies of the major receiving countries is the international interdependence between the socioeconomic and foreign policy factors that produce these

⁸⁵ Undocumented workers benefit from fewer labor rights protections than authorized workers or citizens. See Jonathan P. Hiatt, Testimony of Jonathan P. Hiatt, General Counsel, AFL-CIO, Before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law (May 24, 2007), available at http://www.aflcio.org/issues/civilrights/immigration/upload/Hiatt_Test.pdf.

⁸⁶ WATTS, J., *IMMIGRATION POLICY AND THE CHALLENGE OF GLOBALIZATION: UNIONS AND EMPLOYERS IN AN UNLIKELY ALLIANCE* (2002).

⁸⁷ Hollifield, James F., *Migration and the ‘New International Order: The Missing Regime in MANAGING MIGRATION: TIME FOR A NEW INTERNATIONAL REGIME* 92 (Ghosh, Bimal, ed., 2000) states that “economic arguments [in the migration context] tend to be overshadowed by political, cultural, and ideological arguments” Hollifield finds that migration policy is heavily influenced by national or founding myths, codified in citizenship and nationality laws.

⁸⁸ *Supra* note 2.

⁸⁹ Meyers (2004), p. 173

policies.”⁹⁰ On the other hand, he sees greater room for diversity of policy in connection with “structural factors” and preferences over permanent versus temporary migration. The structural factors include the economic structure of the country, the geopolitical position of the country, and the population density of the country.

Hatton and Williamson find that “[t]oday, country differences in anti-immigration opinion are driven by: the scale of immigration, which represents the labor market threat; the size of the welfare state, which represents the potential welfare burden; and the universal franchise, which assures that those concerns are reflected in tough immigration policies.”⁹¹ They argue that public opinion would be much more negative if immigration policies were more liberal. However, they also find that today’s median voter is no longer unskilled, accounting for the fact that immigration policies are not even tougher than they are. Note that the driving forces that Hatton and Williamson identify are essentially economic forces, as mediated by political processes.

Backlash

In the early 19th century, long distances, high transport costs and poverty at home formed natural barriers limiting emigration from poorer countries, or even emigration from wealthy countries by poorer individuals. As poverty and transportation costs decreased, more poor began to emigrate.

In the U.S., after the unprecedented immigration of the 19th century, there was a backlash that resulted in the head taxes, the Chinese exclusion acts, and other measures to restrict immigration.⁹² When the U.S. began to restrict access, it was in response to the concerns of the unskilled or semi-skilled urban working man median U.S. voter.⁹³ O’Rourke concludes that the “big political lesson from the period is . . . that immigration can be hard to sustain politically.” “Moreover, the basic factor leading to the 19th century anti-immigration backlash—the impact of immigration on wages—is present in today’s world as well.”⁹⁴ As suggested in section 2 above, there is a continuing debate regarding the empirical support for this proposition. Perhaps the most important point for purposes of this analysis is that the link between immigration and wage suppression has significant political traction, if not clear empirical support.

Freeman posits a political, as opposed to economic, rationale for cyclicity in political attitudes toward migration. The political cycle is caused by the growth of opposition over the life of a natural immigration cycle. Waves of immigrants give rise to political opposition after they have been present long enough to have substantial effects.⁹⁵ This political cycle may or may not be synchronous with the economic cycle.

Recession and Scapegoating

⁹⁰ *Id.* at 181.

⁹¹ Hatton, Timothy J. & Williamson, Jeffrey G. *A Dual Policy Paradox: Why Have Trade and Immigration Policies Always Differed in Labor-Scarce Economies?* 24 (Institute for the Study of Labour, IZA Discussion Paper No. 2146, 2006).

⁹² *Supra* note 27 at 15.

⁹³ *Supra* note 93.

⁹⁴ *Supra* note 27 at 17.

⁹⁵ *Supra* note 70 at 886.

Furthermore, by virtue of vulnerability to scapegoating in connection with wage declines, migration policy is likely to be cyclical, with greater openness during good times, and reduced openness during bad times.⁹⁶ Immigrants may be blamed for the effects of recessions that arise from other causes.

Meyers uses a comparative case study method examining the history of immigration policy in the U.S., Britain, Germany, and the Netherlands to evaluate a number of hypotheses regarding the cause of migration policy. He finds that, largely through an interest group causal channel, and partly through partisan politics, recessions cause a restrictive policy, while expansions cause liberalization.⁹⁷ For example, during the Great Depression of the 1930s, the U.S. moved to restrict immigration. Perhaps one reason for this phenomenon is that the coalition of employers would not be interested in further immigration in the midst of an economic recession, when labor is plentiful and cheap. Presumably, labor would be especially reluctant to allow entry of additional workers during a recession, and politicians would be especially sensitive to these concerns.

The Western European states have served as laboratories for temporary migration, which was heralded as providing the “allocational” benefits of migration without the “distributional” costs.⁹⁸ Prompted by recession in the 1970s, European public opinion was stimulated and European citizens organized, providing an effective counter to pro-immigration forces.

The observation (Meyers 2004) that recessions lead to restrictions may suggest either a safeguard mechanism or a sliding scale approach to liberalization commitments that states may make in the future. Note that this political cause is not dependent on an economic finding of causation by immigration either of recession or of wage reduction. It thus may (or may not) be consistent with a demagogic or mistaken view of the factual relation between immigration and recession.

Income Inequality

In connection with immigration policy in the U.S., Canada, Argentina, Australia and Brazil from 1850 to 1930, Timmer and Williamson show a significant relationship between income inequality and increasing barriers to immigration.⁹⁹ O’Rourke and Sinnott argue that “[t]he late 19th century experience indicates that absent international institutions which can restrain individual countries’ policies, globalization can undermine itself. Labour market integration undermined itself by increasing income inequality in the New World, which in turn led to immigration barriers.”¹⁰⁰ (Consistent with Heckscher-Ohlin theory, unskilled workers moved from Europe to the “new world” (where unskilled workers were

⁹⁶ Eytan Meyers, *International Migration Policy: A Theoretical and Comparative Analysis* (2004).

⁹⁷ *Id.*

⁹⁸ *Supra* note 70 at 891 (citing Straubhaar 1992)

⁹⁹ Timmer, Ashley & Williamson, Jeffrey G., *Immigration Policy Prior to the Thirties: Labor Markets, Policy Interactions and Globalization Backlash*, POPULATION AND DEVELOPMENT REVIEW 24(4):739-771 (1998).

¹⁰⁰ O’Rourke, Kevin and Sinnott, Richard, *What Determines Attitudes Towards Protection? Some Cross-Country Evidence*, in *BROOKINGS TRADE FORUM 2001* 16 (Susan M. Collins & Dani Rodrik eds., 2001)

relatively scarce), reducing wages of unskilled workers in the new world. “It was this fact above all else which prompted immigration restrictions in the decades leading up to the Great War.”¹⁰¹

This research suggests that in order for liberalization to be sustainable, it should be combined with mechanisms that reduce or stabilize income inequality. It would be innovative for international legal rules to provide for this type of mechanism directly, but a variety of adjustment or aid mechanisms could serve this purpose.

National History and Foundational Experience

Freeman links divergent immigration politics to particular immigration histories, dividing destination states into three main subsets, each with distinct modes of immigration politics: (i) English-speaking settler societies, including Australia, Canada, New Zealand, and the U.S., (ii) Western European states including Germany, France, Britain, Switzerland, the Netherlands, Sweden, and Belgium, and (iii) Southern European states, including Portugal, Spain, Italy and Greece.¹⁰²

Meyers suggests that “English speaking settler societies” tend to favor large-scale permanent migration, while “ethnic societies” (European societies) tend to prefer temporary migration. For the English-speaking settler societies, immigration is part of their foundational periods and “folklore.” In these countries, however, polling data does not support larger intakes of immigration, but only maintenance or reduction of immigrant numbers.¹⁰³

The Western European states mentioned above are distinguished, according to Freeman¹⁰⁴, by the fact that their modern experience of mass immigration occurred after they were already fully developed states, and after the Second World War. This migration was “narrowly economic,” and for some states was a result of their colonial history. When migrants were welcomed or recruited, it was as a necessary measure to meet post-war labor needs. “The politics of immigration in these states today is haunted by the mistakes, failures, and unforeseen consequences of the guestworker era and by the social conflicts associated with the new ethnic minorities created during that time.”¹⁰⁵ These states are much less positive toward immigration (although it should be noted that these states have all subscribed to broadly free migration within the context of, and among the states of, the E.U.).

Ethnicity, Nationalism, and Chauvinism

As we consider the political economy of migration, it is not possible to ignore the non-economic politics of immigration. Heterogeneous societies are more likely to accept dissimilar immigrants than homogeneous societies, such as Japan. While Meyers finds that migration policy is largely determined by the state of the economy, he also finds, *inter alia*, that large-scale immigration of ethnically, culturally, or racially dissimilar people may result in greater resistance to immigration.

This could be explained in terms of racism, ethnocentrism, or irredentism, although Meyers suggests a less unattractive possible rationale in terms of maintaining existing bloc political power. For example, the German and Irish waves of immigration to the U.S. in the middle of the 19th century

¹⁰¹ *Id.* at 29.

¹⁰² *Supra* note 70.

¹⁰³ *Supra* note 70 at 887.

¹⁰⁴ *Supra* note 70 at 889.

¹⁰⁵ *Supra* note 70 at 890.

provoked anti-immigrant sentiment in part due to concerns about the values of Catholicism and their consistency with individual freedom, and in part due to concerns regarding European radicalism.¹⁰⁶ Another benevolent explanation may be that there are benefits to broad agreement on governance and on the types of public goods that will be provided; increased diversity could result in less efficient production of public goods.

During the late 20th century, the U.S. and other destination countries began to eliminate ethnic discrimination, which had served as a proxy for economic discrimination. Hatton and Williamson conclude that “immigration policy is much tougher now than a century ago simply because there are far more potential immigrants from poor countries to keep out.”¹⁰⁷

O’Rourke and Sinnott examine international survey evidence, and find that non-economic factors such as patriotism and chauvinism (the sense that locals are “better” than immigrants) play a major role in determining attitudes of voters, while economic factors remain important, with individual views reflecting individual skill levels in a manner consistent with Heckscher-Ohlin theory.¹⁰⁸

While in a number of Western democratic countries, right wing parties have adopted chauvinistic positions, and have attracted substantial support at times, they have generally not been able to convert their positions to policy. Examples include Le Pen’s National Front party in France, Fortuyn’s eponymous party in the Netherlands, and Haider’s Freedom Party in Austria. Freeman foretells that “their general failure is more the result of their extreme positions than an indicator that the alarms they raise about immigration fail to touch profound chords within mass publics.”¹⁰⁹ Indeed, in the 2008 U.S. election cycle, opposition to immigration has achieved a great deal of political salience. Xenophobia of the right, and sometimes of the left, is not fully explained by economic factors.

In the trade context, we have seen demagogues of both the left and of the right attack the loss of local autonomy or the loss of local jobs due to adherence to W.T.O. rules, with scant attention to the value of the reciprocal benefits and jobs gained.¹¹⁰ These same demagogues, especially those of the right, attack immigrants and immigration with even greater vitriol. Any move toward greater international legal commitments in the migration context must have an active public education and public relations component in order to counter these arguments. One critical question, in migration as in trade, is whether global welfare could be improved by a global research and education effort that would lay out the facts regarding migration more clearly and honestly.

Of course, in addition to the more general factors adduced above, government decisions on where to seek liberalization and where to liberalize would depend on several country-specific factors. On the immigration liberalization side, these factors would include relative scarcity of workers in the relevant areas, elasticity of demand for workers in the relevant areas, and resulting likely effects on wages and employment, as well as political clout of the affected workers, importance of wages to domestic employers in the relevant sector, and political clout of the affected employers.¹¹¹

¹⁰⁶ Meyers 2006, pp. 29-30

¹⁰⁷ *Supra* note 93 at 9.

¹⁰⁸ *Supra* note 100.

¹⁰⁹ *Supra* note 70 at 885.

¹¹⁰ See PATRICK BUCHANAN, *STATE OF EMERGENCY: THE THIRD WORLD INVASION AND THE CONQUEST OF AMERICA* (2006).

¹¹¹ See *supra* note 70 and Joppke, C., *Why Liberal States Accept Unwanted Immigration*,

Meyers seeks to explain how governments decide on the number of immigrants they will accept, whether to differentiate between various ethnic groups, and whether to favor permanent immigration over migrant workers. We might add to these three dependent variables—(i) number of immigrants (size), (ii) ethnic selectivity (ethnic composition), and (iii) permanence versus temporariness—the additional dependent variable of (iv) skill level (skill composition). Meyers (2004) finds that in practice the size and ethnic composition variables have been closely linked because most migrants have been dissimilar in an ethnic sense, and most countries applied more liberal policies with respect to those who are ethnically similar.

As suggested above, it is also important to distinguish between high-skilled migration and low-skilled migration. Freeman suggests that skilled labor recruitment schemes are proliferating across rich democracies, and only provoke modest conflict. “The recruitment of the highly-skilled [in certain societies] has been successfully sold as a cost-free policy that produces substantial, if diffuse, benefits for the society in a global economy privileging technology and creativity.”¹¹²

Of course, government decisions on where to liberalize would depend on several factors. These factors would include relative scarcity or abundance of workers in particular categories, elasticity of demand for workers in these categories, likely effects on wages and employment, relative political clout of the affected workers, importance of wages to domestic employers in the relevant sector, and political clout of the affected employers.¹¹³ With respect to domestic employers, it is important to recognize that not all businesses can appropriately be fully included in this category. Some multinational corporations that themselves are able to arbitrage among labor markets may benefit from labor market segmentation, and may prefer barriers to immigration in order to deny their domestic competitors access to cheaper labor.

Home Country Politics

On the home country side, governments would consider their tax base, the local effects on domestic wages and employment, the local welfare and growth effects of departing workers, the magnitude of potential remittances, political clout of the potential emigrants, and political clout of domestic employers. Emigration of skilled labor may have a negative effect on per capita income in the sending state under increasing returns to scale.¹¹⁴ Home states may also lose positive externalities from human capital.

Furthermore, home state capital might oppose, or at least be ambivalent with respect to, international negotiations to seek liberalization of immigration abroad, as increased emigration from the home state might reduce returns to capital in the home state. Home state capital would presumably prefer selective reciprocity, where foreign states liberalize with respect to immigration of labor sectors that are abundant in the home state.

There is an analogous problem in trade negotiations: exporting state consumers may be hurt by liberalization commitments abroad, and importing state consumers may be hurt by reductions of export

WORLD POLITICS 50(2):266-293 (1998).

¹¹² *Supra* note 70 at 238.

¹¹³ *Supra* note 70 at 29 and Joppke, *supra* note 110 at 266.

¹¹⁴ Krugman, Paul. *Increasing Returns and Economic Geography*, JOURNAL OF POLITICAL ECONOMY 99(3):483, 483 (1971).

subsidies abroad. However, in the trade context, this consumer perspective is rarely articulated with force. A similar concern felt by capital might be expressed with more force.

As the greatest benefits of migration accrue to the migrants themselves, no political economy account of international migration would be complete without evaluating the impact of migrants. However, migrants in this political sense are truly between societies: before they migrate, they are not a part of the destination state political community, while their hope for migration will, if realized, at least partially or temporarily remove them from the home state political community.

On the other hand, once they have migrated to the destination state, immigrants might not support additional migration. First, there is some evidence that the group of destination state workers hurt most by additional migration is recent immigrants. Second, recent immigrants generally have no financial interest in additional immigration, although they may be interested in family reunion type immigration. Third, recent immigrants may not be politically active, and may not have voting rights, in their new country.

This political “dual outsider” situation of migrants may go a long way toward explaining why we see few moves to liberalize migration: those who would benefit the most are not full members of either the home or the destination state political community. In all, the greater political influence of migrants would appear to occur when they are *potential* migrants, prior to their actual departure. This group may also have some influence on the sending state after their departure, through remittances, diaspora politics, or other mechanisms.

While few states any longer control emigration, due in part to the influence of human rights concerns, the home state has a choice whether to seek liberalization commitments by destination states, or not. This is a source of indirect control. In fact, where the default rule is restriction in the destination state, we might say that destination states seem to cooperate with home states in refraining from liberalization of immigration. So, for example, Indonesia could theoretically determine to seek commitments by the U.S. to liberalize immigration to the U.S. of unskilled and semi-skilled labor, while at the same time refraining from requesting the U.S. to reduce restrictions on immigration from Indonesia of software engineers, or medical doctors. The result is substantively similar to a restriction on emigration.

In connection with trade in goods, it is relatively unusual to engage in tariff harmonization—thus in connection with goods, we do not see narrow reciprocity of commitments within a single sector. Similarly, in services, we see little explicit harmonization of liberalization. So, in connection with migration, we might expect to see exchanges of diverse commitments. For example, the E.U. might liberalize in connection with immigration of nurses, in exchange for the Philippines liberalizing in connection with immigration of architects. This type of flexibility, or specificity, would allow governments to appease stronger political constituencies, and to tailor commitments to maximize local political support.

But examined from the standpoint of the home state, as opposed to the potential migrants within the home state, and putting aside for a moment remittances, potential benefits upon return, and a possible “Bhagwati tax,” there is little for the home state to gain from emigration of skilled workers, and the possibility of loss. There are possibly greater gains from emigration of unskilled workers. However, it is highly unlikely that a wealthy country unskilled worker would migrate to a poor country. In contrast to the situation with trade in goods, where trade is bilateral, and all states stand to gain on both the import and the export side, in migration as it stands today, benefits are not bilateral, in part because migration is

generally not substantially bi-directional. That is, as Hatton points out, migration of the most important type is not a “two-way street.”¹¹⁵

On the other hand, migration between similar economies may be much more of a two-way street, and may involve the operation of comparative advantage. This suggests that bilateral or plurilateral agreements regarding migration, among similar countries, may be more likely than agreements between different countries.

The fact that home states do not generally benefit from emigration of skilled workers may help to explain why we do not see international legal commitments to liberalize in the migration context: putting aside remittances and returns, sending states have little interest in liberalization by destination states. In fact, just the opposite: sending states should be glad to see restrictions on immigration in the destination states, at least as to skilled migration. But these types of restrictions are inconsistent with global welfare, and are inconsistent with the welfare of migrants.

How could sending states be given a stake in emigration, in order to induce them to seek welfare-enhancing liberalization commitments by destination states?¹¹⁶ One answer is by facilitating the imposition of a Bhagwati tax, or by enhancing the role of remittances or return. In addition, perhaps sending states would be interested in commitments to admit unskilled workers along with the skilled workers. Perhaps by inducing destination states to decline to distinguish between skilled and unskilled workers, or to make commitments to admit a specified number of unskilled workers, home states could see their welfare enhanced by liberalization commitments.

4. The Legal Response

Of course, it is not possible in this academic work to elaborate a complete and acceptable set of institutions and rules for international migration. So the description here of a possible basis for a multilateral agreement is not intended to pre-empt the question of the form of agreement or agreements that will arise in the future—it is merely intended to posit a checklist of considerations and a possible sample of the types of provisions that might be considered for inclusion in an international agreement on migration.

As we begin to consider the possibility of international legal rules of labor migration, we must first consider the alternatives.

The first question is that raised above: what economic and political benefits do legal commitments produce? Thus, states may choose to engage in no institutionalization at all: continue to allow individual states to determine their immigration policy unilaterally, without legal restriction. We generally have today a regime of rough give and take, with states exercising power constrained by a degree of informal reciprocity. This does not mean that there is no cooperation—it merely means that there is no longer-term legalized and institutionalized cooperation.

¹¹⁵ Hatton, Timothy J., *Should We Have a WTO for International Migration?* ECONOMIC POLICY 22(50): 339-383 (2007).

¹¹⁶ In connection with negotiations for the Doha Round of W.T.O. trade negotiations, the Indian Minister of Commerce, Kamal Nath, insisted that the U.S. should provide a greater number of H1-B visas: should provide greater liberalization as a destination state for migrants.

Indeed, outside of the E.U. and forced migration contexts, international law and organizations have so far had little influence over migration policy. According to Meyers, “[t]he limited influence of international organizations and regimes is caused by the high political costs of immigration, the difficulty of distributing the benefits of immigration, and the almost unlimited supply of labor that has exempted the receiving countries from the need to cooperate with the countries of origin or with other receiving countries.”¹¹⁷

We must ask whether this type of reservation of complete national autonomy, perhaps with some degree of informal reciprocity, is efficient, or whether some legal restrictions would be useful to states in order to achieve a more efficient strategic equilibrium. Recall that some of the schematics developed in section 3 above suggest the possible utility of reciprocity, but do not require formal legal commitments for reciprocity. Note that even a regime of informal reciprocity is an institution in the institutional economics sense, and is a “regime” in the international politics regime theory sense. Formal law, and formal organizations, are not necessarily required to achieve a different strategic equilibrium, but they are an important means by which states may self-consciously revise institutional dynamics.

States may reach an agreement to achieve an efficient equilibrium, but what might this agreement look like? One possibility, among many, would be simply to allow free migration. However, simple permission for free migration might result in losses to states that invest in human capital, and to states that provide high levels of social welfare transfers. A move to free migration might result in public goods problems and congestion problems, and ultimately cause these states to move to otherwise inefficient levels of investment in human capital and social welfare.

We know that a move to immediate complete liberalization, besides being politically impossible, may raise problems of excessive migration and congestion, and may put undue pressure on social welfare programs. We also know that for some states liberalized immigration may be harmful, so a move to immediate and unmitigated liberalized immigration alone would not satisfy the Pareto criterion as applied to that state. Furthermore, a simple move to free migration would lose the benefits of gradualism, and the benefits of customization to particular national circumstances. It appears more likely that states would select a more nuanced arrangement. Therefore, any new system would by necessity include different rules for different states, allowing customization, or scheduling, of commitments. These customized commitments would be produced through negotiation, which would include a process of evaluation by each state of its position, presumably based on an analysis of its own circumstances and welfare.

Each state is likely to have divergent domestic politics in relation to migration. Therefore, it is highly unlikely that a one-size-fits-all approach to migration liberalization would fit all states—or would even be consistent with maximizing global welfare. Furthermore, different states will find it appropriate to liberalize at different rates. Therefore, request-offer-type negotiations, in which states make a request of another state to liberalize in a specific sector in a specific way, and the requested state makes an offer conditional on appropriate reciprocity, would seem attractive. This is the method used in services negotiations at the W.T.O. in the Doha Round, and it has frequently been used in goods negotiations as well.

As described above, there are circumstances where a state’s best option, considering migration alone, may be simply to protect its labor markets. This may be the case even where liberalization would enhance *global* welfare. Perhaps under these circumstances, destination states would find it useful to

¹¹⁷ 2000, p. 1266

exchange liberalization commitments in migration for liberalization commitments in other sectors by home states. These might include liberalization by home states in services, investment, or goods sectors, or it could involve other concessions.

To the extent that anti-migrant demagoguery in destination states combines with anti-import mercantilism in sending states, these erroneous economic perspectives may be harnessed to counteract one another.

Economists and developing countries have criticized the “grand bargain” that concluded the Uruguay Round, on the ground that developing states took on obligations, especially in connection with intellectual property rights, that actually conferred detriments on them. Some economists have grown nostalgic for the original GATT years, when negotiations were largely concerned with tariff reduction. This is because from the trade economics perspective, both the importing and the exporting state were made better off by tariff reduction, so policy-makers could not err. Where all of the possible concessions are welfare-improving, bargaining may be expected to result in benign outcomes. While the field of migration does not offer the same kind of “error-proof” negotiations, *worldwide* welfare is only likely to be diminished by migration that is either (i) in error, or (ii) excessively motivated by public welfare programs. Therefore, economists should encourage negotiations toward liberalization of migration.

Governments might welcome assistance, in the form of international legal restrictions, in resisting the temptation to restrict immigration, where restriction is not consistent with public welfare. International legal commitments play a similar role in the trade context. Ideally, these commitments would contain economically nuanced safeguards that would allow states to renege on their commitments to the extent that the commitments seem actually to be causing recession, accentuating the adverse effects of recession, or causing other economic disruption.

As described above, whether the international migration setting is described as a coordination game, a prisoner’s dilemma, or another strategic model, it may be useful for states to cooperate through international law, in order to communicate regarding selection of an equilibrium strategy in the case of a coordination game, and in order to change the payoffs in the case of a prisoner’s dilemma, and therefore support welfare-improving behavior.

International Public Goods and International Regimes

One basis for international regimes is to produce global public goods. Hollifield states that until recently there was little demand for international regimes in the area of migration policy.¹¹⁸ Low demand for institutionalization is synonymous with a transaction costs and transaction benefits structure in which unilateral action and reaction, without institutional modification, results in a stable (but not necessarily efficient) strategic equilibrium. Where, for example, the value to states of migration is small, we would expect them to expend no resources to establish institutions to regulate migration. However, it is clear that the potential global welfare improvements are very substantial, so that the main question is not whether there is value in liberalization, but how the enhanced welfare will be distributed.

Often the rise of international law has been associated with technological or social change that has resulted in the emergence of international public goods that can be achieved through cooperation. Is liberalization of migration a public good? It is a public good if one state’s use of it does not diminish its

¹¹⁸ See Hollifield, *supra* note 12 at 90.

availability to other states (consumption is non-rivalrous) and if it is not possible to exclude states from its benefits (it is non-excludible).

There is at least some argument that liberalized migration benefits all states due to direct and indirect effects on the general enhancement of global welfare, as well as growth effects. This is similar to the argument that free trade constitutes a global public good.¹¹⁹ The indirect effects of this enhancement would seem to be non-excludible, so in this sense, we may view liberalized migration as a global public good. The implications of this understanding are that this public good may be under-supplied—its supply is a collective action problem. Therefore, some institutional mechanism for cooperation may be indicated.

In addition, if we understand human capital as a global public good, it also is likely to be undersupplied.¹²⁰ As outlined above, another way of describing this problem is to generalize that each state wishes to attract or retain skilled workers, while each state wishes to exclude or expel unskilled workers. This conflict coexists with the collective goods problems relating to free migration. This collective action problem could be addressed by allowing states to appropriate the benefits of their investments in human capital through migration restrictions, through a Bhagwati tax, or through other mechanisms.

So, for example, if The Philippines has an absolute advantage in nursing care, while the U.S. has an absolute disadvantage, it may be appropriate to ensure that nurses from The Philippines may migrate to the U.S. In order to induce The Philippines to make appropriate human capital investments, this regime should ensure that remittances, Bhagwati taxes or compensatory payments compensate The Philippines for its investment.

By allowing states to capture the value of these types of created advantage in the production of human capital, human capital is converted from a public good to a private good from the perspective of the state. This is not an endorsement of limitations on emigration, but the point is that states will invest efficiently in human capital—and will invest more—if the public goods problem is resolved.

Migration can be understood as a global problem, and as a collective action problem, in a third way. In order to regulate the flows of workers effectively, with low costs in economic terms and in ethical, human rights, and communitarian terms, destination states need the cooperation of sending states in order to make appropriate arrangements for recruitment, remittances, and return, and in order to inhibit illegal migration.

The development dimension of migration may add yet a fourth public goods aspect. To the extent that migration is seen as a means to reduce poverty, and as a means to stabilize unstable governments, these results may be public goods. The willingness of destination states to accept migrants in order to promote welfare of people in sending states may be understood as a collective action problem that may be resolved through institutionalization.

Thus, both free migration and human capital enhancements may be understood as global public goods, with possibly somewhat inconsistent solutions. In order to resolve this set of problems, it may be appropriate to seek a solution in which each state agrees to allow a measure of free migration with respect to both unskilled and skilled workers, while reaping the benefits of its human capital enhancement

¹¹⁹ *PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION* (Kaul, Inge et al., eds., 2003).

¹²⁰ See Straubhaar, *supra* note 33 at 128.

programs. Of course, to the extent that states have comparative or absolute advantages, it would seem appropriate to allow them to utilize these advantages.

Bilateralism and Regionalism

States may choose to engage in bilateral institutionalization: states may enter into bilateral agreements to liberalize their immigration policies. A number of states have entered into bilateral migration agreements, but these generally do not involve formal commitments to liberalize. Importantly, states have developed webs of bilateral treaty arrangements in connection with foreign investment, and international taxation. There have been efforts to multilateralize foreign investment treaty regimes, without success to date. Bilateral arrangements of course raise important issues of discrimination vis-à-vis other states: of most-favored nation non-discriminatory (“MFN”) treatment. However, it is possible to establish MFN rules that link treatment under separate agreements. Bilateral foreign investment treaties often contain MFN obligations that effectively link treatment under one treaty to obligations under another, multilateralizing the best treatment a particular state has conceded. Again, would entry into a broader form of agreement confer greater benefits?

Bilateral equilibria may be unsatisfactory for several reasons.

A second option is regional or other plurilateral arrangements. Some groups of states have already entered into regional or other plurilateral arrangements for immigration. So, of course, one important question is why some states have chosen bilateral or regional agreements, and why they have considered bilateral or regional arrangements to be more desirable than multilateral arrangements. It is possible that, due to greater economic homogeneity and lower travel costs, regional migration is more likely to be the subject of agreement *first*¹²¹, but it is entirely possible that multilateral arrangements for migration would also be desirable.

Bilateral and regional agreements may serve as pathfinders for multilateral agreements, or they can serve as substitutes for multilateral agreements. In trade, this set of alternatives has been dubbed the “building blocks” versus “stumbling blocks” question, assuming that global welfare is maximized by, and global society is heading towards, multilateral agreement. So, to the extent that liberalization of migration is understood as a deeper form of integration than trade in goods or services, it may be that sub-multilateral integration would be appropriate according to a variable geometry perspective. Some states may be more interested or more prepared for this type of integration than others, and the variable geometry perspective would suggest that the faster states need not wait for the slower ones, and that the slower ones need not be required to accelerate.

Multilateral institutionalization is a response to the question of MFN treatment raised above. It also provides a broader forum for engaging in negotiations, and perhaps for complex multi-party barter that increases the scope of possible agreement.

Multilateralism and MFN

States would wish to consider the utility of an unconditional MFN principle in international migration law. In the migration context, the comparative advantage principle suggests that individuals

¹²¹ Nielson, Julia, *Labour Mobility in Regional Trade Agreements in MOVING PEOPLE TO DELIVER SERVICES* 93, 94 (Carzaniga, Antonia and Matto, Aaditya eds., 2003).

willing to work at the lowest price (all other things being equal) should migrate. Comparative advantage would be diminished if, in the E.U. context for example, a Greek worker were to move to France to accept a job where an otherwise equivalent Egyptian worker would have taken the job at a lower wage rate. The MFN principle is broadly consistent with comparative advantage. Thus, an MFN principle contributes to the *global* gains from migration. There already exist regional and bilateral migration arrangements that may conflict with comparative advantage in this way.

In addition to promoting welfare, an MFN principle, in migration as in trade, would also avoid political implications of discrimination, wherein in the example above, Egypt becomes jealous of Greece's access to the French market.

With increasing competition for migrant access to wealthy markets, developing countries may find themselves competing with one another for access. They may wish to negotiate together in a multilateral setting in order to avoid a collective action problem in bargaining. The possible negotiation of treatment superior to other comparable states may be modeled in strategic terms as a prisoner's dilemma among sending states, in which sending states undermine their collective interest. If they are able to join together to form a cartel, based on the MFN principle, they may be able to extract superior liberalization commitments from destination states.¹²² In particular, they may be able to countervail the market power of destination states described in part 3 by forming a kind of "cartel" of home states—they may thus be able to reduce the use of market power by destination states.

On the other hand, with increasing competition to attract skilled workers, destination states may find themselves racing to the bottom in terms of their taxation or other aspects of their treatment of skilled workers. "The similarities in labour demand across receiving countries, as well as the emerging competition for labour from sending countries, may support a multilateral approach or at least co-ordinated policies among receiving countries."¹²³

In addition, there are economies of scale that may make a multilateral agreement less costly in terms of diplomatic and administrative resources than a series of bilateral agreements. It is also possible that there would be economies of scale in connection with international institutional arrangements, such as secretariat operations or dispute settlement. Of course, it is possible to have a hybrid multilateral-bilateral agreement: a multilateral framework agreement under which states agree to specific bilateral arrangements. Furthermore, it may be that a multilateral agreement would facilitate multilateral surveillance and enforcement action that would result in greater possibilities for compliance.

As noted above, an MFN rule could provide incentives to "free ride." Especially given the possibility that states would negotiate arrangements to share migration fees between home and destination states bilaterally, it may be that uniformity of migration fees under an MFN principle would be inconsistent with welfare maximization. Some kind of conditional MFN, or system of bilateral relations, could be superior to a rule of unconditional MFN. In this connection, under a rule of conditional MFN, migrants might be eligible to migrate on an equal basis, except that pairs of states would establish different migration fees, and different allocations, depending on each state's particular circumstances.

It is likely that states would wish to negotiate some exceptions to an MFN obligation. One type of exception might relate to arrangements for mutual recognition of professional qualifications. Another

¹²² See Andrew Guzman, *Explaining the Popularity of Bilateral Investment Treaties: Why LDCs Sign Treaties that Hurt Them*, 38 VA. J. INT'L L. 639 (1998).

¹²³ OECD, 2004, p. 27

type of exception might permit entry into free trade areas or customs unions that include labor mobility components: If, for example, Australia and New Zealand, in pursuit of a broad program of economic integration, agree to free movement of labor between them, this should not require them to accept free movement of labor with every other country of the world.

One of the main reasons for a global trade organization (i.e., the W.T.O.) is the economic and political need in the trade context for non-discrimination in the MFN sense: each state requires a promise that it will be accorded trade concessions equal to those accorded to each other state. As more bilateral and regional arrangements are entered into, states may seek a rule of MFN in order to protect the relative value of concessions achieved. An MFN rule also ensures negotiators against having their work “undercut” by subsequent superior concessions to other states, allowing them to avoid adverse political consequences. Both of these motivations appear to be applicable in the migration context, although there are cultural, regional, or other reasons why departures from MFN might be more acceptable in connection with migration than in connection with trade in goods or services.

Of course, there are important distinctions. In the goods context, assuming fungible goods, MFN in the application of tariffs would be expected to have a significant effect on market penetration, and on terms of trade. In the migration context, we often think in terms of quotas, rather than tariffs, although it is possible to impose a tariff equivalent through discriminatory fees or taxes.

However, the home state is not likely to have the same mercantilist perspective, wishing to increase outbound migration, as in trade in goods. Thus, it may be less concerned about departures from MFN in connection with migration than it is in connection with trade in goods. On the other hand, citizens hoping to migrate may criticize their governments for failing to obtain equal treatment with other home states.

While, as noted above, MFN does not require a multilateral agreement, it is easier to negotiate and to seek reciprocal commitments within a multilateral negotiation that leads to a multilateral agreement. This was one of the benefits that led the U.S. and the U.K. to seek a multilateral trade agreement in the 1940’s, resulting in the G.A.T.T. Multilateral negotiations are concerted negotiations, and reduce the possibility of “free riding.” An MFN rule of negotiations does result in the possibility that some states would attempt to free ride on negotiations by other states, declining to make concessions themselves. However, at least within the G.A.T.T./W.T.O. system, this problem has generally been addressed through concerted negotiations, with careful examination of each state’s concessions. In connection with the G.A.T.S., at least in the original 1994 agreement, states preserved a right to decline MFN treatment to certain other states in order to retain a means to deter free-riding.

One way of evaluating the choice between sub-multilateral liberalization of migration, and multilateral liberalization, is under the global cost-benefit analysis approach described by Jacob Viner in connection with goods as “trade creation” versus “trade diversion.” This analysis asks to what extent establishment of sub-multilateral liberalization increases global welfare through liberalization of sub-multilateral migration, while diminishing global welfare by diverting migration from its most efficient destinations. In the years since 1950, economists have critiqued and extended the static Vinerian analysis in a number of ways.

Economists have also importantly added to Viner's "static" analysis by consideration of what Bhagwati has called the "dynamic" time-path issue.¹²⁴ This dynamic question includes the question of the relationship between the growth of regional trade integration and the growth of multilateral trade integration: whether regional integration agreements are building blocks or stumbling blocks on the path to global economic integration.¹²⁵ It would be possible to establish a multilateral agreement that would regulate sub-multilateral integration in order to prevent welfare-reducing arrangements.

Thus, as in the case of goods and services trade, there may be some need to allow sub-multilateral integration as a departure from MFN requirements. The E.U. is an example of such integration. Of course, the E.U. is inconsistent with the MFN requirements of G.A.T.T. and G.A.T.S., and is thought to qualify for relevant exceptions. So, it would be consistent to provide similar exceptions in a multilateral agreement on migration. There would be similar normative arguments regarding the utility of an exception from the MFN principle, in terms of trade creation and trade diversion, and in terms of building blocks versus stumbling blocks.

Linkage

It is not appropriate to consider migration negotiations as stand-alone negotiations, isolated from other international issues. Linkage, as a political fact, is pervasive. States bargaining with one another in the international relations market use whatever tools are at hand: security matters are linked to trade, finance is linked to environmental protection, membership in regional organizations is linked to human rights. This is a natural, and a presumptively efficient, phenomenon. In these contexts, states find themselves in a barter economy, trying to make deals by seeking to identify "bilateral coincidences of wants." Until the days of greater use of techniques such as internationally tradeable pollution permits, or more direct monetization of jurisdiction, barter will continue. In barter economies, the greater the breadth of subject matters available, the greater the possibilities for making a deal.

T.R.I.P.S. is an archetypical, and advanced, case history of linkage. We may view T.R.I.P.S. as a possible precedent for migration. In fact, Mode 4 of G.A.T.S. already demonstrates the degree of natural linkage between migration and trade in services. The question is whether political, legal, and/or institutional linkage would allow states to make and to enforce welfare-improving agreements.

Of course, it is by no means clear that the W.T.O. should address international migration law issues. However, broader organizations may offer economies of scale and scope. On the other hand, broader organizations could reduce the domain of inter-organizational competition. Moreover, it does not necessarily matter whether functions are separated in function-specific international organizations, or are integrated within a single organization, such as the United Nations, or perhaps the W.T.O. Within a single organization, the critical question will be how these different concerns or functions are integrated. We live in a world of path dependence: given that the W.T.O. exists, with a highly articulated set of institutional and legal capacities and tools, there may be actions, such as adding functional responsibility to the WTO, that make sense that would not make sense were the starting point different.

It is possible that negotiations in the W.T.O. context may provide an advantage over negotiations in a separate multilateral migration agreement, the International Organization for Migration, the International Labor Organization, or another functional context: the greater possibility of linked package

¹²⁴ Bhagwati, Jagdish, *Regionalism and Multilateralism: An Overview, in NEW DIMENSIONS IN REGIONAL INTEGRATION* (Jaime de Melo & Arvind Panagariya eds., 1993).

¹²⁵ BHAGWATI, JAGDISH, *THE WORLD TRADING SYSTEM AT RISK* (1991).

deals. While institutional linkages may be made between discrete functional organizations, under some circumstances doing so within a single organization may enhance administration and legitimacy.¹²⁶ The WTO already contains much scope for package deals: for side payments. “With all side payments prohibited, there is no assurance that collective action will be taken in the most productive way.”¹²⁷ However, it is worth noting that the WTO system, with its effective requirements of unanimity for amendment, results in greater requirements for “package deals” than a system that relies on majority voting for new “legislative” rules.

Martin et al. suggest that because destination countries require the cooperation of home countries in ensuring that temporary migrants return home, some means of enforcing commitments (on the part of the home country) are needed. They suggest that the destination country provide “special trade rights, investment and other preferred treatments”¹²⁸ as a device to secure compliance through threats of withdrawal. Similarly, these types of benefits could be linked to efforts to assist in preventing unauthorized immigration.

Martin et al. argue that “the emigration countries that benefit from freer trade and investment should be expected to help immigration countries manage migration, especially the unwanted or unauthorized migration that freer trade is expected eventually to reduce. Given the resistance to free trade in many aging industrial democracies worried about unwanted immigration, it seems naive to suggest that migration can continue to be excluded from trade negotiations.”¹²⁹ Furthermore, restrictions on imports of goods produced in developing countries, such as agricultural products and textiles, “reduces employment in emigration countries and increases employment for migrant workers in industrial countries.”¹³⁰

Of course, other linkages and compliance mechanisms could be considered, and linkages and compliance mechanisms could be formal or informal.

An Emigration Fee, a Bhagwati Tax, an Immigration Fee, or an Auction

As discussed above, a Bhagwati tax may be useful to redress certain distributive problems that arise in connection with immigration, to the extent that the brain drain may confer harm on the home state. This is especially valuable where the home state is a developing country. It seems that increased migration would put increasing pressure on states to coordinate in setting tax rates and in collection of tax. Otherwise, they may find themselves in an uncooperative competition, in which they lose the ability to tax mobile resources. It is increased mobility, as may result from liberalization of migration, which provides market power to the mobile factor.

Bucovetsky evaluates the strategic characteristics of a context in which high skilled workers initially resident in a low productivity home state wish to migrate to a particular high productivity

¹²⁶ See Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, 42 VA. J. INT’L L. 933 (2003); and Michael P. Ryan, *The Function-Specific and Linkage-Bargain Diplomacy of International Intellectual Property Lawmaking*, 19 U. PA. J. INT’L ECON. L. 535 (1998).

¹²⁷ BUCHANAN, JAMES M & TULLOCK, GORDON, *THE CALCULUS OF CONSENT* 153 (1962).

¹²⁸ *Supra* note 23 at 156.

¹²⁹ *Supra* note 23 at 157-58.

¹³⁰ *Supra* note 23 at 158.

destination state.¹³¹ The voters in that destination state would be motivated to improve their own position by capturing rents from the immigrants. Bucovetsky assumes that immigrants have above-average incomes in the destination state. Therefore, in order to capture rents from the immigrants without discriminating explicitly, the destination state will increase the progressivity of its income tax system. This outcome assumes that the home state and destination state are unable to cooperate with one another.

If countries were to seek to cooperate, one equilibrium solution might involve an agreement to share the tax base. While there are many ways in which to share the tax base, countries might find some guidance in the literature on formula apportionment in connection with corporate income tax. Formula apportionment ordinarily divides the tax base among tax jurisdictions by reference to a formula referring to the proportion of sales, payroll, and assets within each jurisdiction. These components would not be relevant in apportioning the tax base relating to a migrant, but other components might be relevant. One is years of education. Another might be years of experience. A third might be relative productivity in the two taxing states.

In order to prevent welfare losses to home states, it may be appropriate, as discussed above, to allow home states to impose some kind of fee, perhaps an education fee, in order to enable them to recapture the value of public education in connection with emigrants. Such fees must be calculated in a reasonable amount and should not be charged upon emigration, but should be paid over time after emigration. Alternatively, if the fees were charged in full upon emigration, it would be appropriate to ensure that reasonable financing arrangements were available to emigrants.

One way to ensure the reasonableness of financing arrangements is to ensure that the obligation is enforceable in destination states. The more secure that arrangements for collection are, the more available and cheaper the financing will be. Destination states might accept a commitment to assist in the enforcement of payment of this charge. This type of issue might be addressed as a matter of private international law, relating to enforcement of obligations and, eventually, judgments.

An alternative structure might involve taxation.

[S]ince young persons with limited capital who could gain greatly from immigration might be unable to fund themselves, they would be better served by paying an extra amount from future income taxes, in the same manner that Australia allows young persons to borrow for higher education and then repay with additions to future income taxes.¹³²

Ideally, from the standpoint of the migrant, the tax charge would be eligible for a credit, or at least a deduction, under the host country tax system. If it were eligible for a credit, the host country would in effect be ceding tax jurisdiction, or tax base, to the home country, to the extent of the tax charge. It is also possible to establish a credit even if the home country charge is not structured or characterized as a tax. Of course, a credit or deduction for education charges is just one way to “apportion” the tax base relating to migrants.

A hybrid structure, such as the following, could be devised:

- an ex post facto schools charge, based on quantity and quality of schooling,
- arising upon emigration, and held in abeyance upon and during return,

¹³¹ *Supra* note 75.

¹³² *Supra* note 2 at 33.

- to be paid in installments over an extended period of time,
- enforceable by the authorities in the host state, and
- eligible for a deduction (or credit) in the tax system of the host state.

A different structure, perhaps more attractive from an economic standpoint, would involve an auction of immigration rights, as discussed in the following section.

Above, I have discussed home state taxation. However, destination states may determine that the efficient means to regulate *entry* is through an immigration fee or a discriminatory tax structure. The purpose may be to exercise market power in order to share the surplus that would otherwise fall largely to the migrants, or it may be to compensate the destination state for negative externalities that it may experience. An immigration fee might be especially appropriate in relation to unskilled labor. Destination states should not be permitted to discriminate against or among immigrants in connection with income taxation. Income taxation should otherwise be subject to a rule of national treatment and MFN. This would “funnel” all protection and externality internalization into the migration fee.

One way to analyze the difference between a quota or quality requirement, on the one hand, and a fee, on the other hand, is to make an analogy to the difference between a quota and a tariff on trade in goods. Under an immigration fee, immigration would be permitted, but the host state would charge fees, or taxes, that would establish a barrier to entry.

States may view it as useful to replace the current system of quotas with a system of tariff-like taxes, emulating the move that took place in the Uruguay Round to “tariffy” agricultural protection. Tariffication would have some welfare benefits in the sense that, under uncertainty as to the efficient quantity of migration, a tariff-type charge would allow market mechanisms to adjust, while a quota would not automatically adjust. Tariffication also provides some benefits in terms of transparency, predictability, and tractability in negotiations.

This structure could be combined with a home state exit fee structure as discussed above, with joint enforcement. Under this combined mechanism, the home state and the host state would calculate and negotiate an aggregate charge to migrants, and then negotiate, presumably on the basis of some set of apportionment principles, a division of this charge.

Thus, the same system of charges would (i) permit the home state to internalize a portion of the benefits from allowing their high-skilled workers to migrate, and (ii) allow the host state to impose a charge on unskilled immigrants that would either compensate the host state for the costs it incurs in relation to their entry, or deter their entry. The magnitude of these fees, and their apportionment between home and destination states, could be subject to negotiation. One role for international law in this setting would be to establish principles for apportionment, and perhaps an independent mechanism for apportionment.

In order to remove disincentives to emigrate, origin states would ordinarily be required to defer to destination states in connection with income taxation on destination state-source income. States generally do this already through their national tax systems and through bilateral income tax treaties, either through an exclusion of foreign source income or through a credit for foreign taxes paid on foreign source income. A credit system provided by the home state maintains a disincentive to migration where the destination state tax rate is lower than the origin state tax rate, as the emigrant will be required to pay the difference. Furthermore, this type of credit system might suppress fiscal competition, insofar as migrants would be subject to a minimum tax equal to their home state’s tax, regardless of their residence.

Another way to set the migration fee, which would be even more sensitive to market conditions, may be to hold an auction.¹³³ From time to time, different commentators have suggested auction structures for entry visas: “[S]ince immigration quotas are often subject to excess demand, there are strong reasons for supposing that, from the viewpoint of existing residents, the right to migrate is a valuable scarce resource which should, optimally, be sold.”¹³⁴ Collie finds that “when immigration occurs with auctioned immigration visas, it is a Pareto-improvement” when the wage difference between the two countries is substantial. “At the optimal level of immigration, the wage in the host country is at least twice the wage in the source country, and the cost of the immigration visa is equal to more than half the earnings of the immigrant workers.”¹³⁵

Under the mechanism described above, the auction would in effect be conducted by the home state and host state jointly, or at least it would allow the migrant to pay a single charge.

Finally, it is possible that states would engage in a competition to attract highly skilled or other desirable workers, and it is also possible that they would seek to induce migration by workers whose training has been heavily subsidized by their home states. In order to avoid the kinds of public goods problems described above, and in order to avoid inefficient regulatory competition, it may be appropriate to coordinate with respect to taxation.

The Structure of Negotiations and Commitments

Despite the demonstrated difficulty in determining the welfare consequences of immigration, on both the host and home state sides, states will continue to make policy in this area on the basis of the analytical resources available to them. Not to decide is to decide, and it is just as ignorant to assume that no international legal commitments in this field are feasible or desirable as it is to assume that a comprehensive agreement is feasible and desirable. Moreover, even under uncertainty, given the context of the generally beneficial effects of liberalization, the principle of conservatism would not counsel against but for liberalization.

At least as a starting point, it appears that a positive list approach provides sufficient flexibility and transparency for states to use it as a basis on which to commence negotiations. The negotiations that led to the G.A.T.S. in 1994 were conducted on a “positive list” basis. That is, each member state prepared a positive list of sectors in which it would liberalize, rather than undertaking a comprehensive commitment to liberalize, and then negotiating to establish exceptions (a “negative list” approach). While the distinction may not seem significant—it may seem akin to the question of whether a glass is half full or half empty—there is wide agreement among negotiators and commentators that the bureaucratic dynamic of a positive list approach has less of a bias towards liberalization. However, the positive list approach has been used so far in services negotiations at the W.T.O., and has been the dominant approach, in effect, to reduction of tariffs. Since the 1940s, states in the G.A.T.T. and W.T.O. have

¹³³ Simon, Julian, *The Price of Citizenship--Auctioning Immigration Visas Helps Foreigners and Americans Alike*, POLICY REVIEW 39:71-72 (1987).

¹³⁴ See Clarke, *supra* note 83 at [pincite].

¹³⁵ Collie, David R., *Auctioning Immigration Visas* 11 (Cardiff Business School, Cardiff Business School Working Paper No. E2007/25, 2007), available at http://www.cardiff.ac.uk/carbs/econ/workingpapers/papers/E2007_25.pdf (last visited November 3, 2007).

debated whether to have “across-the-board” tariff reductions, with exceptions, or to simply negotiate on a product-by-product basis, and have most often used product-by-product negotiations.

A positive list approach seems to provide more power and possibility to lobbying against liberalization in particular sectors: stronger lobbies may achieve their goals more readily with a positive list approach. On the other hand, a positive list approach facilitates gradualism and an opportunity to increase liberalization after experience, and information, is gained. The positive list approach could be combined with the migration fee discussed above.

In order to facilitate negotiations and differentiation of commitments based on particular sectors or skills, it will be important to have some degree of harmonization, or at least understanding, regarding classification of different types of skills. The International Standard Classification of Occupations (“I.S.C.O.”), maintained by the International Labor Organization (“I.L.O.”), is already available, and both serves as a model for national classifications, and facilitates communications among countries and analysts. The I.L.O. describes the I.S.C.O. as follows:

The International Standard Classification of Occupations is a tool for organising jobs into a clearly defined set of groups according to the tasks and duties undertaken in the job. It is intended both for statistical users and for client oriented users. The main client oriented applications are in the recruitment of workers through employment offices, in the management of short or long term migration of workers between countries as well as in the development of vocational training programmes and guidance.¹³⁶

The I.S.C.O. operates at several levels of specificity. It will be up to states to determine at what level of specificity to allow and make commitments. In the W.T.O. legal system, there have already been a number of disputes regarding classification, including in connection with the distinction between data processing machines and telecoms equipment, the question of whether an exclusion of “sporting” also excluded gambling services, and the question of what constitutes salted chicken. We would expect similar types of issues to arise in connection with migration, under a positive list approach that results in differential liberalization.

Individual migrants may wish to remain in a destination state temporarily, indefinitely, or permanently. Of course, they would prefer to have a choice. From an economic standpoint, despite arguments that home states may avoid brain drain through regimes of temporary migration, individual choice would seem to be most congruent with efficiency. Another way of saying this is that, if there is an externality produced by migration, the best way to address it, if it is worthwhile to do so, is likely to be with an instrument that measures and redresses the externality, rather than by imposing arbitrary constraints on a type of activity that sometimes gives rise to the externality. Artificial limitations might reduce the possibility of efficient migration. So, limitations to temporariness seem like a second-best technique for protecting home states from brain drain, compared to the type of migration fee discussed above.

While the better approach would seem to be to allow migrants to remain permanently, for host state political purposes, it may be useful to provide the possibility in any international migration agreement for term limits applicable to migration. Any limits would be taken into account in discounting the amount of a migration fee.

¹³⁶ ILO Website, <http://www.ilo.org/public/english/bureau/stat/isco/index.htm> (last visited September 10, 2007).

Adjustment

Adjustment costs in the migration context arise in connection with a political or altruistic response to shocks to labor markets. And indeed, if the unskilled or semi-skilled jobs in developed countries immediately became open to workers from poor countries, the incumbent workers might find themselves under severe wage pressure, at least in the short term. This would be both cruel and politically infeasible. So an adjustment mechanism must accompany substantial liberalization.

Experience in the U.S. and elsewhere seems to indicate that destination countries with more flexible labor markets will experience reduced adjustment costs. Furthermore, countries with sophisticated financial markets will also experience reduced adjustment costs.

Migration is similar in adjustment terms to importation of labor intensive goods. Both raise global welfare, but may threaten home country workers who compete with the imported goods or the imported workers. In connection with trade in goods, G.A.T.T. and now the W.T.O. have served to phase in the effects of liberalization, and have been complemented by various schemes for adjustment.

The simplest adjustment mechanism is gradualism. G.A.T.T., which began its life as a framework agreement, has been successful in allowing states to negotiate liberalization selectively and gradually. G.A.T.S. is similarly a framework agreement awaiting the negotiation of more stringent commitments. As discussed above, it seems likely that any new international agreement relating to migration would be in the form of a framework agreement, and would entail a degree of experimentation and adjustment over successive “rounds” of negotiation and commitment.

In addition to negotiation over time, another form of gradualism entails the use of pre-negotiated transition periods. These have the advantage of being locked-in legally, and therefore being somewhat more predictable than relying on future negotiations. These have recently been used in connection with the accession of new countries to the E.U.

A second alternative, often combined with a degree of gradualism, is adjustment assistance in the form of transfer payments, outplacement or training. Assuming that the relevant liberalization was indeed global welfare improving, there is by definition sufficient surplus to compensate the displaced workers, subject to certain limitations. The first limitation is that compensation is often only pecuniary, and does not restore the non-pecuniary losses occasioned by displacement. Second, significant transaction costs may be associated with compensation. Third, for a variety of political and social reasons, compensation may not occur, or may be insufficient to address losses.

Although a true global “embedded liberalism” approach would provide for cross-national compensation payments, it is difficult to justify these types of payments in formal political settings. However, in informal and less transparent ways, such payments do take place. A global embedded liberalism would extend to poor countries and would allow them, as well as wealthier countries, to attenuate the risks and costs of liberalism to which their citizens are exposed. The transfers could occur on a global basis, and would seem to require global institutions to overcome collective action problems in order to make them effectively.

Finally, let us emphasize the connection between liberalization and redistribution based on the cosmopolitan nature of poverty. In many instances, liberalization gives rise to substantial political costs. These costs may be paid through selective protectionism: dissenting interests may be ‘paid off’ through protection against competition. This is despite the fact that it might enhance global social welfare to

simply pay direct compensation. However, direct compensation is more readily criticized, and allows costs to fall fully on local taxpayers. On the other hand, protection often raises costs only to presumably less politically powerful consumers, and also diminishes the welfare of foreign persons, whose interests are not directly taken into account in the domestic political system. The point is that domestic redistribution is critical to efficient liberalization, just as international redistribution is necessary to poverty relief more generally.

While many wealthier states have domestic institutions capable of facilitating redistribution, we lack global institutions capable of facilitating international redistribution. That is, redistribution may be impeded, or at least rendered inefficient, by the lack of appropriate institutions to allow individuals or states to engage in redistribution with confidence and efficiency. Institutional development can assist in overcoming collective action problems in connection with individual decisions to engage in redistribution.

Arrangements to share the tax base with respect to migrants, allowing home developing countries to at least avoid conferring uncompensated benefits on wealthier states, would be a step toward this type of redistribution.

Recession and Safeguards

As discussed above, recession is a leading cause of scapegoating and rejection of immigration. Yet there are other circumstances that may make decisions to admit immigrants, or decisions to accept commitments to admit immigrants, regrettable.

While states have liberalized trade in goods significantly since the establishment of the G.A.T.T. in 1947, states have determined that it is desirable to maintain the right to impose “contingent protection” in order to reverse their liberalization under certain circumstances. Obviously, if the right to engage in contingent protection is not constrained enough—if it is too easy to rightfully apply safeguards—then the concessions made by states in international trade negotiations would have little value.

So the international trade law system is finely balanced between enforcement of liberalization commitments and permission to derogate from liberalization commitments.

It might be argued that the permission to derogate from liberalization commitments under appropriate circumstances may play a role in inducing greater liberalization commitments. That is, negotiators may be willing to make greater liberalization commitments under conditions of uncertainty regarding the effects of liberalization, where they know that they can derogate from these commitments in the event that they turn out to be unexpectedly burdensome. It might further be argued that at least the safeguards mechanism represents a kind of international law facility for “efficient breach.” That is, it allows states to determine to back away from their commitments, if they are willing to provide compensation (under certain circumstances).

The main argument for safeguards is that a domestic industry needs a period of protection to shield it from a surge in imports, and that after a period of protection the domestic industry will be able to compete globally. Horn and Mavroidis have argued in the trade in goods context that safeguards measures may serve an efficient temporizing function, by allowing more gradual and therefore (under

specific and limited circumstances) less costly reallocation of resources, especially labor.¹³⁷ However, economists are broadly distrustful of the ability of governments to sort between valid claims along these lines, and invalid claims that will result in a chronic need for protection.

As discussed above, there are significant tendencies to scapegoat immigrants in order to deflect criticism of the host government for economic setbacks. These tendencies should be restricted and fought with public relations efforts. Provisions requiring member governments to refrain from engaging in these tactics, and to fairly and fully report to their populaces on an annual basis the effects of their immigration liberalization on the domestic economy as a whole and on particular segments of the economy, may serve to restrict demagoguery. The type of immigration fee proposed above should be carefully explained to citizens, so that they understand that this fee is intended to, and does, ensure that (i) immigrants do not burden the domestic public welfare system, and (ii) those domestic workers who are displaced due to immigration will receive appropriate adjustment assistance so that they are not harmed. Member states should contribute to a global public relations effort to promote understanding of the benefits of migration, especially focused on the destination states.

Immigration flows may respond to a number of causal factors, and may be difficult to predict. However, most liberalization commitments that we would expect, at least in early years of a multilateral system, would be numerically limited. So, there would be only a limited rationale for a safeguards-type mechanism to allow contingent protection against inflows. There still may be some rationale, as states may make commitments with the expectation that they would not be used in full, or would not be used quickly. Alternatively, states may have trouble predicting the effects on domestic employment markets, or they may have trouble predicting jobs growth. So, there may be some basis for a safeguards system that would allow contingent withdrawal of concessions on the part of destination states. If a compensation system were thought useful, it might take the form of withdrawal by sending states of immigration concessions, or it might be cross-sectoral in goods or services. An alternative would be financial compensation.

One of the problems with a safeguards mechanism would be identifying causation of injury. If the predicate for contingent protection is that increased immigration causes economic dislocation, it may be necessary to prove both causation and injury. Neither of these legal tests has been without problems in the goods sector, and of course there has been a running empirical debate in the U.S. regarding the econometric analysis of the impact of increased flows of immigrants on the welfare of domestic workers.

Although the possibility cannot be considered in detail within the context of this work, it may be appropriate to include in an international agreement regarding labor mobility some arrangements to assist in dealing with surges in the demand to migrate. States may have difficulty predicting the demand to migrate, so a completely different kind of safeguard system from the type used in connection with trade in goods may be appropriate in connection with migration.

This “reverse safeguard” would provide for *increased* commitments to accept immigrants under circumstances such as famine, civil war, or economic crisis. This type of safeguard would have a completely different function from safeguards now in place with respect to trade in goods, and would really be an extension of the concept of forced migration or refugee management. In order to work well

¹³⁷ Horn, Henrik & Mavroidis, Petros C., *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia: What Should be Required of a Safeguard Investigation?* in *THE WTO CASE LAW OF 2001* (H. Horn & P.C. Mavroidis eds., 2003).

to relieve misery in sending states, these would be required to be coordinated contingent commitments, in which many destination states agree to “share the pain” of increased immigration.

Restrictions on Emigration

A national welfarist (as opposed to a global welfarist) analysis might support some restrictions on emigration, in order to avoid the possibility of reduction of origin state welfare by emigration of high-skilled workers. The only significant threat to developing countries from liberalized migration would seem to arise from the possibility of brain drain. However, the possibility of reduction of welfare depends on a number of factors, and may not be very great, and it may be difficult for governments to determine in advance which types and amounts of emigration will be welfare-reducing. After all, in order to determine the welfare impacts of emigration, governments would be required *ex ante* to ascertain the needs of their own labor markets, the possibility for return, the possibility for remittances, etc.

On the other hand, human rights considerations argue in favor of full rights to emigrate. Furthermore, full rights to emigrate may promote beneficial regulatory or even fiscal competition. Finally, the right to emigrate may already be protected by international human rights law. So, while it appears appropriate to ensure that an agreement on migration protect a broad right to emigrate, it is also important to consider the concerns that developing countries may have as to possible welfare losses. Under the common skilled labor-scarce home country and skilled labor-abundant destination country pattern, the home country may lose from emigration of skilled workers, while the host country per se (i.e., excluding the migrants themselves) does not capture much of the gain. Rather, the gain stays in the migrants’ pockets. As suggested above, one possible solution is to require compensation to those who lose, in this case, those remaining behind, from those who gain: the migrants.

National Treatment, Domestic Regulation, Family Rights, and Welfare Programs

National treatment compares the treatment of foreigners with the treatment of host country nationals, and is intended in the trade in goods context to protect from defection through discrimination the value of other liberalization commitments. In the migration context, human rights values would also be served by a rule against discrimination.

Consider the issue of national treatment *after* admission: inside the border. If a right of national treatment prior to admission were established, it would simply effect a broad liberalization of immigration. National treatment is intended in trade agreements to protect the value of trade concessions by ensuring that the playing field between national and domestic is otherwise level.

The important thing to keep in mind with respect to national treatment in migration, as in trade in goods, is that ordinarily domestic persons are entitled to extensive access to their home labor markets, while foreign persons start off with only constrained access. So, national treatment obligations in trade agreements, and in migration agreements, begin by assuming important and enduring barriers. These barriers are addressed in tariff negotiations in connection with goods, and would be addressed in positive list-based negotiations in connection with migration.

While, as the World Bank points out, minimum wage laws and social insurance schemes set a floor on the price of labor, this does not mean that there is not scope for competition above the floor, or utility in establishing rules of non-discrimination.¹³⁸ Non-discrimination by virtue of governmental

¹³⁸ *Supra* note 3 at 74.

measures would be an appropriate rule; it is not certain that private discrimination needs to be addressed in connection with an economic migration treaty, as opposed to a human rights treaty.

Although Hatton argues that permanent immigrants are generally accorded national treatment, this leaves out many ways in which immigrants are at least temporarily denied the same rights as nationals, including rights to vote and access to certain transfer programs.¹³⁹ Furthermore, Hatton envisions a regime in which states do not make commitments to accept immigrants; experience with trade agreements demonstrates that under a regime where states make such commitments, but later wish to renege, denial of national treatment would be a primary avenue for defection.

National treatment obligations would require careful structuring and exceptions. For example, immigrants may be excluded from certain national security-oriented jobs, or may only be permitted to vote after an extensive transition period. But the basic idea of a national treatment provision, as in the trade context, would be to limit protectionism—to limit defection from liberalization commitments through differential treatment that makes migration less attractive but does not have a bona fide prudential or other justifiable purpose.

It is well understood, both in the E.U. context and in the G.A.T.S. context, that both discriminatory and even non-discriminatory regulation and licensing of professions or trades may serve as a barrier to trade in services and movement of workers. Yet these regulatory and licensing regimes serve important prudential purposes, and so they can neither be disregarded nor dismantled. Requirements of proportionality can serve to ensure that these regulatory rules are not used to establish barriers to migration. Regimes of harmonization and recognition can serve to ensure the achievement of prudential purposes while minimizing the concomitant impediment to free movement.¹⁴⁰

The E.U. and G.A.T.S. contain instruments to discipline domestic regulation, through tests of discrimination and proportionality, through requirements or facilitation of recognition, or through harmonization. These types of instruments may be adapted to use in the migration context, with varying degrees of discipline. Of course, in an initial multilateral agreement on migration, something more along the lines of the G.A.T.S. facility for future agreements would be appropriate, rather than a detailed work program toward complete integration, as in the E.U.

The important thing in this context is to erect structures that will cause domestic regulators to take into account the effects that their regulations have on foreign persons, and to seek to ameliorate those effects without losing the prudential benefits expected from the regulation.

Denial of access to members of a migrant's close family may serve as a substantial deterrent to migration. There does not appear to be a specific customary or conventional international law right to family unity, or family reunification. However, a number of human rights instruments contain component rights that may form the basis for an argument of unity or reunification under particular circumstances. While, for example, Article 9 of the Convention on the Rights of the Child provides that States Parties shall ensure that a child shall not be separated from his or her parents against their will, it does not

¹³⁹ *Supra* note 114 at 364.

¹⁴⁰ See Trachtman, Joel P., *Lessons for the GATS from Existing WTO Rules on Domestic Regulation*, in *DOMESTIC REGULATION AND SERVICE TRADE LIBERALIZATION* (Aaditya Mattoo & Pierre Sauvé, eds., 2003) and Trachtman, Joel P., *Embedding Mutual Recognition at the WTO*, *JOURNAL OF EUROPEAN PUBLIC POLICY* 14(5):780 (2007).

specifically forbid states to decline to admit the children of immigrants. For economic migrants, who presumably have a choice to emigrate or not, a host country policy of adult workers only would not appear to violate the obligation of Article 9.

And so, it would seem appropriate for any agreement on international migration to address this issue. Accompanying family members should be provided access to appropriate public services, including educational services. Furthermore, it may be appropriate to provide relevant language or other destination state cultural training to migrants and their families. While these are costly, they may be covered through a migration fee.¹⁴¹

One of the possible sources of inefficiency, and potential injury to the destination state, is excess utilization by immigrants of public services. And of course, this type of utilization raises political concerns as well. Qualitative restrictions may address these concerns, by establishing criteria for admission associated with non-use or modest use of relevant public services. Migration fees can be structured to respond to the same concerns. On the other hand, broad denial of access to public services would deter immigration.

Trebilcock proposes using an insurance arrangement to provide for coverage, while ensuring that the destination state does not bear the cost.¹⁴² This proposal may be compared to the immigration fees discussed above, and serves some of the same purposes. He proposes that migrants, or their employers, be required to obtain private insurance to cover possible drawings on non-contributory social programs during a specified period after entry. The programs addressed would include welfare payments and public non-contributory pensions. Trebilcock would not deny immigrants coverage under public education and healthcare. Trebilcock is attracted to this structure because it would develop a private insurance market that would assess and price the risk to the social insurance system posed by particular immigrants. In a sense, this insurance-based structure covers some of the same concerns that might be addressed through a migration fee, although it is administered by a private party. The assumption is that the private insurance market would evaluate and price these potential costs more accurately than government planners.

This private insurance requirement is certainly worthy of consideration as a “less trade restrictive alternative” to skill, age, or other criteria designed as proxies for non-use or delayed use of social welfare programs. This type of insurance would also provide some experience that could be used to determine whether the risk to the destination state fisc is great enough to require a regulatory response.

As a matter of equal respect for individuals and perhaps human rights, it seems desirable to ensure that equally situated persons are treated similarly. Trebilcock’s private insurance proposal ensures equality of access to social welfare programs, after entry and mandatory arrangement for private coverage. It is therefore consistent with these concerns. Long-term denial of access to social welfare programs, and short term denial of access to public education and public health programs, seem inconsistent with these concerns.

Along similar lines, individual workers will be artificially deterred from migration if they lose their home country social security-type or health benefits, or if they are ineligible to participate in destination country social security or health programs, or if their work in either the destination or home

¹⁴¹ See Clarke, *supra* note 83.

¹⁴² Trebilcock, Michael J., *The Law and Economics of Immigration Policy*, AMERICAN LAW AND ECONOMICS REVIEW 5(2):271-317 (2003).

country is ineligible to qualify them for benefits. Again, it would make sense to funnel all protection or internalization of externalities into a single migration fee, and to provide a continuous system of social security and health benefits. The E.U. has developed appropriate systems for providing continuous coverage, and for sharing costs, between home and destination states. These may serve as a model, although they require a high degree of coordination and administrative capacity.

Citizenship

States have been reluctant and slow to grant citizenship to immigrants. However, difficulty in achieving citizenship may be seen by potential immigrants as a disincentive to migration. One potential solution is to negotiate a uniform, or a scheduled non-uniform, maximum period of residence prior to eligibility for citizenship. At some points, states must recognize, with Max Frisch, that they have imported not just workers, but men and women who deserve the same treatment as native-born men and women. States may impose criteria, such as civic knowledge, language ability, or others, but these criteria should be required to be reasonable, transparent, and fairly applied. W.T.O. disciplines on government procurement, certification, and licensing provide examples. On the other hand, a maximum period prior to citizenship may induce states to limit the stays of immigrants in order to prevent them from attaining the right to citizenship, so this type of structure must be evaluated carefully in terms of its interaction with other policies.

With citizenship, and sometimes residence, come responsibilities. It would seem unfair to allow immigrants to acquire a full set of rights without contributing in terms of national service or military service, if native born citizens are required to make these types of contributions. If the immigrant has already performed these types of services, the relevant home state sharing in any migration fee should be reduced accordingly, and the destination fee sharing increased. This would provide a rough way to establish a “level playing field” and avoid double requirements for service.

Public Policy Exceptions

Immigration raises critical issues from a national security standpoint.¹⁴³ Each state will reserve the right to qualify its commitments by reference to national security concerns. Within the W.T.O. agreements, this type of exception, contained for example in Article XXI of G.A.T.T., has been included.¹⁴⁴ While there have been circumstances in which states have questioned a purported use of this exception, such as the case of the U.S. Helms-Burton law, it has generally not been used for substantial defection from liberalization commitments.

¹⁴³ Fisher, David et al., *Migration and Security in International Law*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS 2* (T. Alexander Aleinikoff and Vincent Chetail, eds., 2003).

¹⁴⁴ Article XXI of G.A.T.T. has not been applied in W.T.O. dispute settlement. *See* Unpublished Report of the Panel, *U.S.—Trade Measures Affecting Nicaragua*, 1986 WL 363154 K/6053 (October 13, 1986) (unadopted). For scholarly commentary, *see, e.g.* Schloemann, Hannes & Ohlhoff, Stephan, *Constitutionalization and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM.J.INT’L L. 424-451 (1999). *See also* Article XIV of G.A.T.S. (providing exceptions for actions that the acting state considers necessary for the protection of its essential security interests, where such actions are taken during a state of war or other emergency in international relations).

Obviously, states will wish to exclude individuals who may present a threat of epidemic. There would seem to be less risk of protectionist use of health exceptions in the context of migration than there is in the context of sanitary and phytosanitary measures relating to agricultural products. Consequently, there would appear to be less need for strict disciplines on national health measures used as a basis to exclude immigrants. Reference to World Health Organization standards may be appropriate in this area. The W.T.O. Agreement on Sanitary and Phytosanitary Measures may be a useful reference as states determine how to address this issue.

There is an ethical and political argument for allowing groups of individuals to protect a certain political culture by excluding individuals who do not accept that political culture. Arguments of this nature can easily shade into irredentism or worse. On the other hand, there may be strong historical and security arguments for maintaining an existing ethnic balance. This is the type of “high politics” with which international economic law has in the past been loath to interfere. And it is easy to see how an influx of members of a minority ethnic group could upset delicate balances.¹⁴⁵ However, in a world of increased multilateral liberalization of migration, ethnic exceptions may seem more and more suspect.

5. Possible Organizational Structures

Should the International Labour Organization have been the fourth Bretton Woods institution, alongside the I.M.F., the World Bank and the G.A.T.T.? After World War I, France, Italy, Japan and Poland argued unsuccessfully that the I.L.O. should regulate migration.¹⁴⁶ But after the tightening of immigration restrictions in the interwar period, migration was not addressed at Bretton Woods.

In order for an assignment of authority to an international organization to be justified, states must first wish to regulate the relevant subject matter under international law. Once it is decided to regulate a subject matter under international law, an organization may be useful in order to serve as a secretariat for, to manage, to enforce, to develop, and otherwise to service, a multilateral agreement on migration. The E.U. and W.T.O., respectively, provide examples of the types of roles that an organization might play in connection with migration. The major roles include facilitation of negotiations, research, technical assistance, preparation of new treaty rules, preparation of new rules other than by treaty, surveillance, dispute settlement, and punishment. And of course, at least three important multilateral organizations already address migration, in at least some dimensions: the I.O.M., the I.L.O., and the W.T.O.

So the questions addressed in this section are (i) assuming that international law would be useful in the field of international economic migration, would an international organization be useful, compared to the alternatives, (ii) what organizational features and governance arrangements would be appropriate for an organization dealing with international economic migration, (iii) would the I.O.M., I.L.O., or W.T.O. serve usefully as the international organization principally charged with responsibility for international economic migration, and (iv) how should different organizations addressing varying facets of international economic migration coordinate their activities?

Not all international law requires an organization. Much, if not most, international law lacks a secretariat, dispute settlement, and other organizational functions. While some type of international law may be useful in the field of economic migration, it is not necessarily clear what, if any, organizational components are suitable. Nor is it clear what relationship international migration law should have with other international law, or with existing international organizations.

¹⁴⁵ *Supra* note 8 at 17.

¹⁴⁶ JAMES, HAROLD, *THE END OF GLOBALIZATION: LESSONS FROM THE GREAT DEPRESSION* (2001).

One theoretical justification for international organizations is to reduce the transaction costs of international cooperation. This is the Coasean story of the market versus the firm, with the international organization playing the role of firm.¹⁴⁷ In the Coasean theory of the firm, the reason for firms (in our case, organizations) is dependent on transaction cost reduction. The best way to think about this model is in terms of cost-benefit analysis. There are gains to be achieved from cooperation. Where the net gains from cooperation exceed the transaction costs of cooperation, we would expect to observe cooperation. States would be expected to seek to maximize their net benefits from cooperation by utilizing the institutional structure, from case-by-case cooperation to organizationally-structured cooperation (analogous to the continuum between the market and the firm), that maximizes the transaction benefits, net of transaction costs.

In connection with international cooperation in the context of migration, transaction costs arise from two main channels. First, transaction costs are occasioned by the cost of establishing mechanisms to avoid strategic behavior. If an organization can reduce these costs, by, for example, supplying information, certifying information, or changing the structure of retaliation and the payoff from defection, then the organization may be justified. A second channel of transaction costs is the complexity of identifying, evaluating, and negotiating a Pareto improving transaction.

It is not possible to determine with any certainty whether an international organization would have greater net transaction benefits, compared to those resulting from a simple treaty, without a specific organization formed around the treaty. In important dimensions, the question of which would have greater net benefits is dependent on the question of the structure of the international organization.

However, given the complexity of a likely migration treaty, with many opportunities for uncertainty and defection, it is certainly possible that an organization may provide certain useful services. In particular, we might examine the possibility of strategic behavior. To the extent that the strategic context in which states find themselves maps into a prisoner's dilemma, or another strategic model that could be resolved efficiently by a change in the payoffs, an international organization might be useful. It would allow states to cooperate where cooperation is beneficial, and where it otherwise would not be possible.

Let us pursue the example of a prisoner's dilemma. Recall that the dominant strategy for any state in the prisoner's dilemma is defection. The only way to avoid the Nash equilibrium of defection by all parties is to change the payoffs. An international legal rule that entails some kind of informal or formal punishment, or other negative consequences of defection, can change the payoffs so as to change the game from a prisoner's dilemma to a coordination game, with a much greater likelihood of compliance. Organizations can serve to engage in surveillance, communication, and adjudication, in order to implement rules that change payoffs.

Williamson, extending the Coasean theory of the firm, focuses on asset specificity as a basis for problems of opportunism and, in turn, as a basis for integration within a firm.¹⁴⁸ This type of problem arises after economic relations are entered, and arises from the fact that one party makes an investment in transaction-specific assets. The classic and apparently apocryphal example of Fisher Body and General Motors is used to illustrate the utility of vertical integration to safeguard the party required to make the asset specific investment from opportunistic behavior on the part of the other party. In this example, an

¹⁴⁷ Trachtman 1996

¹⁴⁸ WILLIAMSON, OLIVER E., *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985).

asset specific investment is one that can only realize its full value in the context of continued relations with another party.

Williamson claims that "it is the condition of asset specificity that distinguishes the competitive and governance contracting models. Contract as competition works well where asset specificity is negligible. This being a widespread condition, application of the competitive model is correspondingly broad. Not all investments, however, are highly redeployable."¹⁴⁹

What makes a particular transaction in international migration "asset specific?" Any transaction where one state advances consideration at a particular point in time, and must rely on one or more other states to carry out their end of the bargain at a later point in time, or experience a significant loss in its expected value, is "asset specific." For example, a state might increase its immigration quotas. While it might be argued that this is the kind of self-enforcing transaction in which the consideration can be withdrawn, it may be difficult to re-establish restrictions on immigration, and doing so involves political and economic costs. The domestic political costs of reducing restrictions will be incurred at the time they are reduced, and perhaps cannot be fully recouped later by re-establishment of the restrictions.

Furthermore, to the extent that the barriers are reduced on a multilateral basis, under conditions of MFN, withdrawal may be made more difficult, as a matter of both international law and domestic politics, not to mention immigration administration. In addition, the entry into an international organization itself may have high political costs, again at the outset. It may not be fully possible to be reimbursed for these costs.

Williamson sees transaction costs economizing as the main purpose of vertical integration—of formation of organizations.¹⁵⁰ Vertical integration is seen as a governance response to a particular set of transaction dimensions, including high asset specificity as the principal factor. With high asset specificity, the value of contracting is increased, but the type of contract—and institution—depends on other factors.

International law is often subject to the problem of incompleteness in a way that domestic contracts are not. Domestic contract disputes always have an answer: "the common law abhors a vacuum." In international law, there are fewer general institutional and legal structures to complete contracts. First, in general international law, there is not a very complete body of law that can be applied to supply missing terms to incomplete treaties. Second, in general international law, there is no dispute resolution tribunal with mandatory jurisdiction. In general international law, informal mechanisms are more likely to apply. Thus, it is often difficult to rely on the ability to complete contracts through general international law.

Assuming asset specificity, it may be useful to establish devices to constrain opportunism in order to realize gains from cooperation, depending on the costs and benefits of these devices. Institutions may be used to constrain opportunism. Institutions entail transaction costs, as do market transactions. Institutions may specify discrete rules, but are, under positive transaction costs, always incomplete. Even the discrete rules are incomplete in their interpretation, application and enforcement.

In addition, it is necessary to specify bureaucratic, legislative or dispute resolution methods of completing incomplete contracts in order to avoid opportunism: to complete the contemplated transaction

¹⁴⁹ *Id.* at 42.

¹⁵⁰ *Supra* note 146.

as "intended." The higher the magnitude of asset specificity, the greater the incentives for opportunism and the greater the need for institutional integration: for the transfer of authority to bureaucratic, legislative or dispute resolution mechanisms.

So, in determining whether an international organization would be useful, it would be important to evaluate the strategic setting, the magnitude of the payoffs, the capacity for informal enforcement, and other aspects of the migration agreement circumstances. It is a complex determination, as the types of commitments that would be appropriate are interdependent with the types of institutional structures that would be appropriate to enforce them, including the design of the international organization.

There are many parameters of any international agreement regarding economic migration. These parameters include, among others, certain commitments, exceptions and safeguards, calculation of sharing of migration fees between home and host states, coordination of health insurance, social security, and other benefits. As states enter into agreements, they may find it efficient to specify in great detail the treatment of every possible circumstance. This would require states not only to anticipate every possible circumstance, but also to negotiate and specify the treatment of each circumstance. However, not only is it very difficult to address every known circumstance, but it is also extremely difficult to anticipate change.

Thus, complete contracts in international law, as elsewhere, are impossible. Rather, states must accept a degree of incompleteness. They may use a variety of methods to complete *ex post* their contracts. One method is simply to negotiate regarding new circumstances as they come up. This method may give rise to stalemates or strategic behavior. A second method is to provide for a legislative system that involves less than full unanimity, or that has other expediting characteristics. A third method is to provide for dispute settlement, with all of the varieties of dispute settlement structure that may be available. In particular, it is possible to delegate greater or lesser discretion to dispute settlement, through lesser or greater specificity of treaty text.

Dispute settlement is not just a method of completing an international contract, but it is also a method of enforcing rules. These are separate functions, and should be evaluated and structured separately. In the enforcement role, dispute settlement declares who is right and who is wrong, removing the subject treaty from the default international legal mechanism of auto-interpretation. This declarative role can have important informal effects, and may be sufficient to induce the desired level of compliance. However, where the declaration alone is deemed insufficient to induce the desired level of compliance, dispute settlement can be the basis for imposition of penalties or authorization of retaliation against the miscreant state.

Responsibility for international economic migration could be assigned to an existing organization or to a new organization. In this subsection, I will describe the possible features of a new international organization addressing migration. For purposes of discussion, let us call it the "World Migration Organization" ("WMO"). By describing a WMO, I do not mean to prejudge the determination of whether the relevant responsibilities could be assigned to an existing international organization, as discussed below. I simply wish to describe what functions may be appropriate. A WMO could have a variety of features beyond substantive obligations, including perhaps the following:

- Purposes. Purposes would include the facilitation of international migration in order to better the welfare of individuals. A focus on the welfare of poor individuals might be appropriate. The purposes may be expressed in broad enough terms to include collateral matters such as

- social security, health care, and other matters to the extent that they would bear on economic migration.
- Membership Arrangements and Termination. Membership could be open to states willing to accept the obligations of the WMO Treaty, including obligations to liberalize immigration. Further, the composition of delegates to the WMO could take a similar tripartite structure as the I.L.O., where representatives of states, employers and workers are integrated into the decision making process.¹⁵¹
 - Secretariat
 - Facilitating Negotiations. The WMO secretariat could be accorded responsibility to manage negotiations regarding liberalization commitments and other matters. Whether these negotiations would be continuous or focused in particular periods, like G.A.T.T./W.T.O. rounds, would be determined by the member states.
 - Facilitating Dispute Settlement. The WMO secretariat could include a function similar to that of the Legal Affairs Division of the W.T.O., or like the International Centre for the Settlement of Investment Disputes, in servicing independent dispute settlement tribunals. Alternatively, the WMO could house a specialized permanent tribunal.
 - Surveillance. The secretariat could be tasked with periodic review of member states' systems to evaluate the degree to which they could be improved in order to facilitate migration. This function could be modeled on the W.T.O.'s Trade Policy Review Mechanism.
 - Technical Assistance. Some member states will require technical assistance in support of their negotiation, as well as in support of their implementation, compliance, and dispute settlement activities. The secretariat, or an independent entity, could provide these services.
 - Research. Member states will require research to be performed about many aspects of migration, including especially the economic effects of different types of migration in different contexts. The secretariat could perform this service. One type of assistance that may be extremely useful is assistance in providing sophisticated, independent, and reliable economic analysis of the likely effects of liberalization of immigration. If states were able to develop a mechanism for providing this type of information in a way that would be separated from ordinary domestic politics, it might be seen as providing accurate information that could form a basis for political support, and policy. Thus, if analysis showed that a particular commitment to liberalize would not have adverse effects on competing domestic workers, they might be convinced not to oppose the commitment. Conversely, if analysis showed adverse effects, this determination might be used as a basis to calculate and apply adjustment assistance or other compensation.
 - Public Relations and Transparency. As discussed in Chapters 4 and 11, immigrants can often be scapegoats for economic problems. If the anti-globalization backlash has been significant with respect to goods, it may become more active, and more dangerous, with respect to immigration. Therefore, it may be appropriate to develop an effective public relations function for the secretariat. Given the criticism that has been experienced by the E.U., the O.E.C.D., the W.T.O., and other international economic organizations, it will be important to develop sufficient transparency to support the perception of legitimacy of a migration organization. Adopting the

¹⁵¹ Charnovitz, Steve, *Assessing the ILO's Efforts to Develop Migration Law*, *LEGAL ISSUES OF ECONOMIC INTEGRATION* 30(3):193 (2003).

I.L.O.'s tripartite governance structure, as noted above, may also facilitate transparency and the perception of legitimacy between employers as well as workers.¹⁵²

- Substantive Expertise and Experience. A WMO might contain experience in economic negotiations, including (i) analytical capabilities that could support negotiations and dispute settlement, (ii) expertise in the human side of migration, including the capacity of societies to absorb migrants, (iii) expertise in labor market conditions and dynamics, (iv) expertise in tax policy, (v) expertise in human rights, and (vi) experience in multilateral negotiations.
- Treaty-Making and Secondary Law-Making. It is possible for an organization to be mandated to promote future treaty-making in the field of liberalization of migration, and related matters. While the original G.A.T.T. in 1947 did not contain a specific mandate along these lines, the G.A.T.T., and now the W.T.O., proceeded by “rounds” of treaty-making. This treaty-making was able to operate in the same way that all international law treaty-making proceeds: by a rule of unanimity in which only signatories are bound. It is important to note that even under a rule of unanimity, there can be great pressure on states to join where the cost of exclusion is great.
 - Committee Structure. From a bureaucratic standpoint, it may be useful to divide the work of an organization into committees, in order to prepare for law-making of various types. These types of committees may have an important agenda-setting role, and should be structured in a way that advances the goals of the organization.
 - Majority Voting. It would be highly unlikely that states would agree in the near term to allow significant liberalization or public policy decisions to be made against their individual will, by virtue of majority voting. On the other hand, many related issues have been addressed through majority voting within the E.U., so we know that such majority voting is not categorically impossible. After more experience of increased liberalization, and increased commitments for liberalization, states may determine that some matters could be addressed through majority voting.
- Dispute Settlement. As discussed above, dispute settlement is an alternative method of completing incomplete contracts, as new issues or new facts arise. Dispute settlement mechanisms may be understood as a type of agent of a collective principal, for purposes of completing the contract along the lines desired by the collective principal. Dispute settlement can be more or less limited, with more or less “legislative” discretion. Dispute settlement should be evaluated in relation to legislative capacity. Under relatively strong and expeditious legislative capacity, dispute settlement may not require great authority to complete contracts.
 - Tribunals or Permanent Bodies. In many areas of international law, we see a choice between ad hoc tribunals and more permanent bodies. In international investment law and international trade law, we see ad hoc tribunals, while in international criminal law and in some areas subject to the mandatory jurisdiction of the World Court we see permanent bodies. Permanent bodies have advantages of continuity and expertise.
 - Appeal. One possible hybrid arrangement is that used in the W.T.O. dispute settlement mechanism, with ad hoc tribunals at a first stage, and a permanent body at the appellate stage. However, not all international litigation makes provision for appeal. Appeal has the advantage of the possibility for quality control and correction

¹⁵² *Id.*

of errors, assuming that the appellate entity has the ability to provide superior decision-making.

- Acceptance. Under circumstances where legislative capacity may be limited, there may be some argument for a “political filter” to evaluate and determine whether to accept adjudicative decisions. This would prevent tribunals, as agents of a collective principal, from exceeding the wishes of the principal.
- Remedies. Remedies should be designed to induce an efficient level of compliance with obligations. Remedies may include payment of fines, withdrawal of rights, or requirements of provision of alternative concessions.
- Private Rights of Action. One important question, especially in the migration context, is whether individuals would have any rights to bring cases (i) under the relevant treaty, and (ii) before an international tribunal (as opposed to a domestic tribunal). Private rights of action may provide important advantages in terms of compliance. They motivate individuals to seek out and address violations of rules—often in cases where individuals, rather than states, are likely to have first-hand knowledge of violations. On the other hand, private rights of action may result in enforcement under circumstances where states would prefer to informally allow non-compliance.
- Scope for complex barter. In connection both with negotiations and with dispute settlement to implement negotiated concessions, greater breadth of coverage may ensure that the set of Pareto improving barter transactions among states will not be empty, and that states will have continuing incentives to comply with their obligations.

Now that we have defined some of the functions of a WMO, we can assess whether a new organization is needed, or whether one or more of the existing organizations could best take up these responsibilities. It is important to state at the outset, though, that the list of functions provided in the prior section is not required to be provided by a single organization. So, it is possible that multiple organizations could combine to provide these functions. For example, analytical work or research could be assigned to the O.E.C.D., U.N.C.T.A.D. and perhaps the I.O.M., while the I.O.M., the I.L.O., the W.T.O., or a WMO could perform other functions. Or dispute settlement for individuals could be assigned to I.C.S.I.D. (the International Centre for the Settlement of Investment Disputes), which would thereupon require a change in name. Negotiations over liberalization commitments could take place at the W.T.O., and could even be addressed in rounds in order to allow package deals to be created that would include all the subjects presently addressed at the W.T.O., plus migration liberalization.

Indeed, there are no “ideal” answers to these questions, but only practical choices to be made based on multiple criteria. I begin by describing the present relevant functions of the I.O.M., I.L.O., and W.T.O.

I.O.M.

Governments and migrants are increasingly turning to the I.O.M. for expert support and facilitation of regulated labour migration and direct assistance to the migrants. I.O.M.’s purpose in labour migration is to facilitate the development of policies and programs that can individually and mutually benefit the concerned governments, migrants and societies.¹⁵³

¹⁵³ An exhaustive list of all the projects being undertaken by the IOM to facilitate labor migration can be found here – Labour Migration, <http://www.iom.int/jahia/Jahia/pid/706> (last

The I.O.M. has had an operational role in managing specific flows of migrants, but has not served to facilitate the development and operation of international law in this field. “Facilitating the migration of the hundreds of thousands of people in Europe displaced or lacking economic opportunity in the post war period was one of the principal activities of I.O.M. when it was founded in 1951.”¹⁵⁴

Article 1(1)(e) of the I.O.M. Constitution provides that it shall provide a forum for the exchange of views and the “promotion of cooperation and coordination” among states. However, article 1(3) of the I.O.M. Constitution stipulates that it “shall recognize the fact that the control of standards of admission and number of immigrants to be admitted are matters within the domestic jurisdiction of States” Thus, the mandate of the I.O.M. does not seem to include the establishment of international legal commitments for admission of migrants. Of course, this is not an insuperable barrier: in the same instrument by which states entered into a multilateral agreement to liberalize migration within the context of the I.O.M., they could modify the I.O.M. Constitution to permit this activity.

However, the I.O.M. has no particular history or institutional commitment to liberalization of migration. The I.O.M. contains a great deal of expertise regarding the dynamics of migration, and the facilitation and management of migration, especially under dire circumstances. This expertise would no doubt be beneficial in any initiative toward liberalization of migration.

Since 2001, the I.O.M. Council has conducted an “International Dialogue on Migration” (“I.D.M.”). The I.D.M. is an informal consultation mechanism intended to contribute to a better understanding of migration and to strengthen cooperative mechanisms between governments. (Nielsen, 2007)

The I.O.M. assists in harnessing migration to achieve economic development objectives in countries of origin and destination by two specific types of initiatives. The first type of initiative focus on building the capacity of governments and other stakeholders in countries of origin to communicate with and engage their expatriate communities in initiatives related to home country development, and on contributing to the increase of more development-oriented migration policies. The second initiative contributes to addressing root causes of economically motivated migration, by enhancing the ability of governments and other key actors to focus development actions more strategically on home country migration dynamics. Projects focus on expanding economic opportunities and improving social services and community infrastructure in specific geographic areas prone to economically induced outward migration, or in need of development to absorb and sustain the return of migrants to that region.¹⁵⁵

The return and socio-economic reinsertion of skilled and qualified nationals abroad can benefit the national development or rehabilitation and reconstruction processes of developing countries, countries with economy in transition, or recovering from conflict situations. The I.O.M. runs several programs which facilitate Return and Reintegration of Qualified Nationals (RQN) and other projects that can help

visited March 19, 2008).

¹⁵⁴ Brunson McKinley, Statement to the High Level Segment, United Nations High Commissioner for Human Rights, 59th Session, 20 March 2003, <http://www.unhchr.ch/huricane/huricane.nsf/view01/0F0D56FFF683DEE8C1256CF300495425?opendocument> (last visited March 19, 2008).

¹⁵⁵ A fuller discussion of the two initiatives can be found at Migration and Development, <http://www.iom.int/jahia/Jahia/pid/542> (last visited March 19, 2008).

shape the economic and social environment in countries of origin in a manner conducive to further returns.¹⁵⁶

I.O.M.'s Technical Cooperation on Migration ("T.C.M.") Division helps governments equip themselves with the necessary policy, legislation, administrative structures, operational systems and human resource base needed to tackle diverse migration problems, to help lessen the root causes of economically forced migration.¹⁵⁷

In June 2006, I.O.M. Brussels hosted a "round table on labour migration" gathering 20 representatives of think-tanks and the European Commission. This round table aimed to further the public debate, launched with the adoption in January 2005 of the European Commission Green Paper on "An E.U. approach to managing economic migration" and the "Policy Plan on Legal Migration", adopted by the European Commission in December 2005 as a follow-up to the Green Paper.¹⁵⁸ Most recently in 2007, as part of its initiative of capacity building in countries of origin, the I.O.M. and the Republic of Korea have agreed to create a migration research and training centre in Korea which aims to help governments in the region facilitate the movement of human resources.¹⁵⁹

I.L.O.

The International Labor Organization ("I.L.O."), the U.N. specialized agency concerned with labor issues, is the leading international organization dealing with labor, and in connection with this study, labor migration. The preamble of the constitution of the International Labor Organization assigns to it the task of protecting "the interests of workers when employed in countries other than their own."

The I.L.O. was established in 1919 as part of the League of Nations system, and became a specialized agency of the United Nations in 1946. The I.L.O., with 179 members, engages in analytical work and in facilitating negotiations relating to labor. It states its goals as follows:

The International Labour Organization (I.L.O.) is devoted to advancing opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity. Its main aims are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue in handling work-related issues.

While this set of goals does not necessarily include liberalization of migration, there are important relationships. Moreover, liberalization of migration may be a critical means to advance opportunities to obtain the kind of decent work described in this statement. "In the view of the ILO, the main route out of

¹⁵⁶ A list of such ongoing projects can be found here – Capacity Building Through Qualified Human Resources and Experts, <http://www.iom.int/jahia/Jahia/op/edit/pid/742>.

¹⁵⁷ The full activities of the TCM Division of IOM are described at Technical Cooperation on Migration Management and Capacity Building, <http://www.iom.int/jahia/Jahia/pid/749>.

¹⁵⁸ A full discussion on the proceedings of the IOM Brussels Roundtable on Economic Migration see, Economic Migration: Roundtable on Economic Migration, http://www.belgium.iom.int/index.asp?Selected=2&News_ID=483&sm=71.

¹⁵⁹ The establishing of the IOM-Korea migration research and training centre may even be seen as a move to improve migration management between Asia and Europe. See Government and IOM to create Migration Research Centre, <http://www.iom.int/jahia/Jahia/pbnAS/cache/offonce?entryId=15964>.

poverty is work.”¹⁶⁰ Yet, surprisingly, the I.L.O. does not seem to see facilitation of liberalization of migration as one of its “fields of action.” Article 10 of the I.L.O. Constitution states that it shall focus on “international adjustment of conditions of industrial life and labour.” The Declaration of Philadelphia, concerning the aims and purposes of the I.L.O., calls for the provision . . . of facilities for . . . the transfer of labour, including migration for employment and settlement”

In 2004, the I.L.O. adopted a “Multilateral Framework on Labour Migration” as part of a plan to manage labour migration better. However, none of the activities planned under this framework seem aimed at liberalizing migration. In 2004, the I.L.O. adopted a Plan of Action with respect to migration, which includes as one component the development of a non-binding multilateral framework for a rights-based approach to labour migration.

The I.L.O. has produced a number of treaties, mostly addressing issues relating to the conditions of work. The I.L.O. also provides technical assistance in areas such as vocational training and rehabilitation, employment policy, labor administration, working conditions, and social security. So it has important experience in many critical areas relating to migration.

The I.L.O. also has some salient governance features. One of the intriguing, and attractive, features of the I.L.O. for purposes of work on issues of labor migration, is its tripartite governance, which includes representatives of states, employers, and workers. Each member state has four representatives at the International Labor Conference, which is held annually: two state delegates, one employers’ delegate, and one workers’ delegate. Each delegate has one vote, and there is no requirement for the four delegates of each state to vote as a bloc.

The I.L.O. provides advisory services and technical assistance to member states and provides a tripartite (government, worker and employer) forum for consultations.¹⁶¹ The I.L.O. has established international conventions on migration policy and protection of migrant workers. The I.L.O. has recently established a multilateral framework on labor migration in order to guide its constituents. The I.L.O. distinguishes among three leading forms of labor migration: (i) temporary migration of professional, technical, managerial and business workers, as well as people providing cross-border services, (ii) contract migration for ordinary employment, but for a limited period of time—guest workers, and (iii) migration to settle for ordinary employment purposes.¹⁶²

In 2004, the 92nd Session of the International Labour Conference included a discussion of the challenges of labor migration under globalization. The Conference concluded with a resolution for a comprehensive plan for migrant workers, including a non-binding multilateral framework for a rights-based approach to labour migration.¹⁶³

WTO

¹⁶⁰ *Supra* note 134.

¹⁶¹ International Labor Organization, *The ILO: What it is. What it does* 7 (2004), available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms_082364.pdf .

¹⁶² ABELLA, MANUEL I. *SENDING WORKERS ABROAD* 113, 114 (2000).

¹⁶³ International Labor Organization, *Resolution Concerning a Fair Deal for Migrant Workers in a Global Economy*, ILC, 92nd Session, 2004, available at http://www.ilo.org/public/english/protection/migrant/download/ilcmig_res-eng.pdf .

The W.T.O., formed in 1995, addresses trade in goods, trade in services, and intellectual property rights. Unlike the I.L.O. and the I.O.M., the W.T.O.'s main function is to facilitate and service national commitments, mostly in the area of liberalization of trade in goods and services. The W.T.O. generally makes decisions by consensus, meaning that decisions can generally be adopted if no state objects, although its charter provides for voting on certain issues. But any significant new commitments are made by treaty, where a state is only committed if it actually signs. The W.T.O. has a very highly articulated system of mandatory dispute settlement, and it is used frequently.

The W.T.O.'s GATS Mode 4 already addresses movement of natural persons to perform services, but has an ambivalent relationship with immigration law in the host state. The W.T.O. has a highly developed and successful system of dispute settlement. While states would be able to make "cross-concessions"—exchanging liberalization for example in goods for liberalization in migration—even if migration were not assigned to the W.T.O., such cross-concessions might be facilitated by inclusion of these subject matters in a single organization.

In terms of specific formal commitments, the W.T.O. has avoided addressing immigration *per se*. Nevertheless, it is clear that because immigration is importantly related to trade in goods and trade in services, immigration will increasingly be linked to negotiations on goods and services. The W.T.O. G.A.T.S. specifically includes commitments on trade in services by a service supplier of one Member, through presence of natural persons of a W.T.O. member in the territory of any other W.T.O. member. However, the G.A.T.S. Annex on Movement of Natural Persons stipulates that the G.A.T.S. "shall not apply to measures affecting natural persons seeking access to the employment market of a member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis." Furthermore, the scope of coverage of Mode 4 is limited to the category of "service suppliers." This is a limited category, although most developed country GDP is derived from services.

The Global Migration Group

The Global Migration Group ("G.M.G.") (formerly the Geneva Migration Group) was originally comprised of the heads of the I.O.M., I.L.O., U.N. Office of the High Commissioner for Refugees, U.N. Office of the High Commissioner for Human Rights, the U.N. Office on Drugs and Crime, and the U.N. Conference on Trade and Development, and now includes the U.N. Development Program, the U.N. Department of Economic and Social Affairs, the U.N. Population Fund, and the World Bank. The aim of the G.M.G. is to provide policy coherence in migration. The G.M.G. seeks to "promote the wider application of all relevant international and regional instruments and norms relating to migration, and to encourage the adoption of more coherent, comprehensive and better coordinated approaches to the issue of international migration."¹⁶⁴

Coherence

Any analysis of international cooperation in the field of international labor migration, or of lack of international cooperation, must examine the relationship among the different "regimes," or in this case, organizations, involved in this area. To some extent, examining the I.O.M., I.L.O., and W.T.O., it is striking how liberalization of labor migration seems to have been deemed to fall outside the mandate of each of these organizations, even though their formal mandates arguably could be understood to include much broader activities in this field.

¹⁶⁴ GLOBAL MIGRATION GROUP. *INFORMATION NOTE 1* (2006), available at <http://www.un.int/iom/GMG%20Information%20Note.pdf>.

Yet, as we examine the rationales for international cooperation in this field, it appears that as many economists have suggested, the greatest payoff from cooperation may come from liberalization of migration. International law, and these international organizations, has done little to address this issue. Presumably, it is the determination of the member states of these organizations to avoid addressing commitments regarding migration that has kept these organizations from moving into this area.

The Global Migration Group was established in order to provide coherence in migration policy. Indeed, the G.C.I.M. report suggested the establishment of an inter-organizational facility for coherence among international organizations dealing with migration issues.

As Jagdish Bhagwati wrote in 2003,

We have only a fragmented set of institutions to deal with flows of humanity. The International Labour Organisation looks after workers' rights. The United Nations High Commissioner for Refugees deals with forced migrants. The World Trade Organisation, under its services agreement, manages the temporary access of professional and semi-professional workers - from builders to doctors - to other countries. The International Organisation for Migration is a cross between a consulting body and an altruistic group. Besides, its status is not defined by a treaty. Indeed, we do not have a treaty-defined "World Migration Organisation" (WMO) that could oversee the whole phenomenon, according to internationally agreed objectives and procedures.¹⁶⁵

As stated above, there would be many parameters to consider in order to determine the organizational structure that would be appropriate to perform the functions useful in connection with international liberalization of migration. But perhaps it would be appropriate here to speculate, or brainstorm, a possible structure.

One alternative would be the status quo. This would involve utilizing the existing organizational structure, and assigning new functions to particular agencies based on the affinity of those functions to existing functions and capacities. These agencies would be required to cooperate with one another in an intensified manner. The cooperation might take place under the umbrella of a coordinating agency, such as the Global Migration Group.

Of course, it would be straightforward to simply assign liberalization to the WTO, insofar as the W.T.O. is the premier organization for negotiations over international liberalization of factors. Cross-concessions would be facilitated, the W.T.O.'s experience with dispute settlement would be made available, and cross-retaliation in the event of a violation might support compliance. And if this path were followed, the O.E.C.D., U.N.C.T.A.D., I.O.M., and I.L.O., could keep their current functions, and engage in cooperative activities. However, while cross-concessions seem appropriate, these could be facilitated in other ways, as discussed above.

The I.L.O. has broad experience in a variety of labor and migration issues, and its tripartite structure may facilitate negotiations that necessarily will involve the concerns of industry and labor. However, the I.L.O. has little experience in the kinds of distributive negotiations that have been the subject matter of the W.T.O.

¹⁶⁵ Jagdish Bhagwati, *The World Needs a New Body to Monitor Migration*, FINANCIAL TIMES, October 23, 2003.

None of the other existing agencies seems to have special institutional features that would make them a likely candidate for authority over economic migration. Perhaps if there were thought to be a sufficient relationship between forced migration and economic migration, the expertise of the IOM would be relevant.

On the other hand, a new agency—a WMO—might be designed with an agreement that it would draw specified resources from, and engage in specified joint activities with, the other agencies with relevant responsibilities.

6. Conclusion

In geologic time, the period during which migration has been restricted has been quite short. As noted at the outset of this article, migration has served throughout time as a mechanism of human betterment.

Restrictions on migration are probably the strongest corollary of the strict theory of national sovereignty—derived from the idea of a sovereign and its subjects. After all, the other core concomitant of sovereignty—exclusive territorial authority—has been eroded along many dimensions.

Given advances in understanding of international law and international economics, it seems that restrictions on migration can no longer be presumed to be beneficial. Indeed, leading economists seem to agree that broad restrictions on migration diminish human welfare. So, the next question is which restrictions might best be dismantled, and what are the political conditions for dismantling them? This work has reviewed the welfare economics and political economy of migration, in order to suggest the answers to these questions. It is clear that the answers will vary from state to state, and that a legal structure that accommodates diverse approaches to liberalization is required.

The role of international law, in this area as in other areas, is to allow states to cooperate—to allow them reciprocally to cede autonomy in order to achieve superior outcomes. In order to increase human welfare, and in order to achieve poverty-reduction benefits, an appropriate structure for liberalization of migration seems desirable. For practical reasons, and for ethical reasons, it seems appropriate to establish a framework for gradual negotiation of liberalization in this field.

This work has suggested the possibility of a migration fee levied on migrants, perhaps in the form of a tax, which could be split, as determined to be appropriate, between the host state and the home state. The calculation of this migration fee, and its allocation, would depend on two principal components: (i) the value of the home state contribution to human capital of the migrant, and (ii) the value of the increment to productivity, and wages, that the migrant attains simply by moving from the host state to the home state. In a sense these components together measure the societal contribution to the individual's productivity. They also are a measure of the “moral luck” of the individual in receiving from society a certain measure of productive capacity. It would be ethically innovative to charge individuals a tax or fee calculated by reference to their moral luck. This structure, combined with redistribution designed to provide equality of resources, might be understood as a way to implement Dworkinian egalitarianism¹⁶⁶

¹⁶⁶ Dworkin, Ronald, *What Is Equality? Part 2: Equality of Resources*, *PHILOSOPHY AND PUBLIC AFFAIRS* 10(4):283-345 (1981).

as to resources. Of course, application of this type of redistribution only to migrants might be improperly limited, and might have the result of distorting migration.