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## The International Law of Economic Migration: Toward the Fourth Freedom

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# THE INTERNATIONAL LAW OF ECONOMIC MIGRATION

TOWARD THE FOURTH FREEDOM



JOEL P. TRACHTMAN

# **The International Law of Economic Migration**



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of Economic Migration  
Toward the Fourth Freedom**

Joel P. Trachtman

2009

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Printed in the United States of America.

Printed on recycled paper.

Dedicated to the memory of my  
grandparents, brave and fortunate pioneers.





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## Foreword

Attempts to build interstate cooperation on migration within a global framework are not new. In 1927, the League of Nations explored at some length the possible adoption of an international convention to “facilitate and regulate” international exchange of labor. But no definitive decision was taken, and there was little follow-up. In the wake of World War II, when Europe was economically devastated and suffered from serious labor shortages, several international and regional organizations, including the International Labour Organization (ILO), the European Economic Community (now the European Union), and the Organisation for European Economic Co-operation (now the Organisation for Economic Co-operation and Development [OECD]), were calling for freer movement of workers to help economic reconstruction and development. But by the mid-1970s, as oil prices soared and most industrial countries faced massive unemployment and looming stagflation, these calls were abandoned and new slogans of “trade in place of migration” and “taking work to workers” gained ground.

Years later, in 1980, the Willy Brandt Commission lamented the absence of a shared understanding of the principles that should guide international migration and urged nations to “build, on the basis of the interests of the countries concerned, a framework that would be more just and equitable than the present one” (Brandt 1980). Yet, again, nothing much happened.

In the past few years, however, things have been slowly, but perceptibly, changing. The enormous economic, political, and human costs of the growing mismatch between rising emigration pressure and dwindling opportunities for legal entry (especially for low-skilled labor migrants) have led a number of academics and policy analysts to call for a concerted global approach to international migration. Some have also emphasized the efficiency gains that the world economy would derive from more multilateral openness in international migration. Some have also linked these gains to future labor market, social security, and demographic trends in developed and developing regions. But while these calls from individual academics and policy analysts have become increasingly vocal, they have made relatively little institutional or policy-level impact.

A first major institutional approach to the issue was then made in 1993, when the Commission on Global Governance (cochaired by Ingvar Carlsson, the then Prime Minister of Sweden) considered a paper outlining a proposal for the establishment of a new global regime to better manage migration. As a direct follow-up, a global project (New International Regime for Orderly Movement of People [NIROMP]) was launched in 1997, with the support of

the United Nations (UN) and several European governments, to build a global consensus for such a regime. The International Organization for Migration (IOM) served as the main executing agency. A first intergovernmental meeting held in Geneva (September 1997) under its auspices generally endorsed the concept and objectives of the global regime. In December 1999 a second intergovernmental meeting, also held in Geneva, helped develop a common framework for return and reintegration of migrants as a component of the new regime. In the following year it found a regional echo in a West African ministerial conference on migration, which was held in Dakar. During 2001 the project concept and findings were widely debated in a series of meetings held in a number of capitals and university centers in Europe and the United States. A momentum was created for moving forward. However, soon thereafter, with a shift in the organization's program priorities alongside changes at the top of its secretariat, IOM lost interest in the initiative.

A next major step was the Berne initiative, a state-owned process launched by the Swiss government in 2001. In line with the NIROMP approach, it aimed to develop a broad policy framework to facilitate cooperation between states in planning and managing migration, based on interests and concerns common to all. Following its first conference (Berne I) in July 2003, it held four regional consultations in 2004 to enable regions to become associated with the initiative. A second international conference (Berne II) was held in the same year to take into account the regional inputs. But by that time the original thrust of the initiative had been considerably diluted, with a shift away from its collective and regulatory multilateral approach. The consequence was the adoption of a nonbinding agenda for pursuing well-meaning goals for migration management. With political changes in the country and transfers of key officials in the government, further activities soon tapered off.

Meanwhile, the need for a more coherent and concerted global approach to migration management was underscored by several independent international commissions. These included the Commission on Human Security (2001–2003), set up at the initiative of the Government of Japan, and the World Commission on the Social Dimension of Globalization, sponsored by the ILO. They repeated the call already made under NIROMP and the original Berne Initiative for the development of an international framework for better governance of migration. In 2004 the ILO then formally adopted a plan of action, one component of which concerned the development of a nonbinding multilateral framework for a rights-based approach to labor migration. There was, however, no mention of freer movement of labor under a multilateral arrangement.

Then came the Global Commission on International Migration, established by Switzerland, Sweden, and several other like-minded governments, with the active encouragement of the then UN secretary-general, Kofi Annan.

However, the commission shied away from the idea of a harmonized multi-lateral framework on grounds that “the governments were not ready for it,” making its deliberations more of a fact-finding, rather than a forward-looking, exercise. No action was taken on the report, except that it was used as one of the inputs for the “High-Level Dialogue on Migration and Development” (HLD), which the UN organized in September 2006. But the hopes, if any, for a reinvigorated multilaterally harmonized approach to migration were dashed as the member states were unable to agree on any new initiative by the UN in this area. It just encouraged the establishment, outside the UN’s organizational framework, of a Global Forum on Migration and Development (GFMD) to be run by willing and like-minded governments. The GFMD held its first session in Brussels in 2007 and the second in Manila (GFMD II) in October 2008. It has no formal mandate, however, and the agenda for its annual meeting is fixed mostly by the host government in consultation with others. The GFMD can thus discuss any of the issues bearing on migration and development, but it is not specifically geared to developing an internationally harmonized migration regime; however, nothing prevents it from addressing the issue.

The above narrative of events highlights the fact that, despite eloquent pronouncements and a plethora of consultations, governments and intergovernmental organizations have so far remained sluggish in giving a concrete shape to the proposed international framework. Meanwhile, however, several nongovernmental organizations and academic groups have been pushing ahead with the proposal, building on the work already undertaken. For instance, at its sixth annual conference in Rotterdam, the Canada-based International Metropolitan Project focused on the issue under the session’s keynote theme, “Managing Migration in the 21st Century.” At its ninth annual conference, held in Geneva in 2004, it revisited the theme and organized a panel discussion on the subject under the title “The Emerging Migration Management Paradigm: Cooperation and Partnership.” In the Netherlands, the 21-Point Action Programme—adopted in 2002 by the Hague Process on Refugees and Migration (THP)—includes a commitment to gathering support for developing a concerted global approach to migration management.

Professor Joel Trachtman’s excellent study appears at this juncture, which makes it particularly timely. It examines openness in migration from economic, political, and ethical perspectives, and relates the discussion to the existing international law of migration. It also puts forward proposals for a set of detailed international legal rules on liberalization of economic migration, based on reciprocity of state’s interests—a distinctive contribution that carries forward earlier work done in this area. In doing all this, Trachtman, a widely respected legal scholar, shows a high degree of professional rigor and scholar-

ship combined with an objective, balanced, and forward-looking approach to the complex issues involved.

The excellence of the book notwithstanding, it would be naïve to assume that everyone will fully agree with all that it suggests. Admittedly, there are also new or additional issues relevant to the subject of the book that remain to be further explored.

In appraising the ground for a global compact on economic migration based on reciprocity of interests, Trachtman delves into such issues as skilled migration, remittances, and temporary migration, drawing with considerable dexterity on the mainstream economic migration literature on these questions. The problem, however, is that the mainstream debate has yet to catch up fully with the changing nature of some of these issues and the most recent research findings on them. For example, following the mainstream view, the study often assumes that emigration of skilled workers is necessarily harmful for a developing country. A number of recent theoretical and empirical studies suggest however that it is not always or invariably so and that at least in some cases it may, on balance, even benefit a country. Under these “optimal skilled migration models” much depends on the country-specific situation, especially as concerns the proportion of a country’s skilled migrants abroad to the total number of its skilled workers and the quality and structure of its education system. To the extent that these findings are valid, some developing countries may be willing to send specified numbers of selected skilled migrants in exchange for the admission of a number of unskilled workers by developed countries. Although not mentioned in the study, this opens up a new window of reciprocity in the bargaining between developed and developing countries.

On the other hand, for many developing countries the net value of remittances as a compensation for their loss of skills is often much more limited than what much of the mainstream migration literature (reversing the views in the past) seems to suggest. It tends to underrate several of the potential pitfalls involved, such as excessive dependence on remittance income, postponement of essential economic reform, and volatility as well as pro-cyclicality of investment-oriented remittances. The book rightly takes a cautious view of the role of remittances in the context of any bargaining on openness in migration. In a similar vein, it shows prudence in addressing the issue of temporary migration. Although temporary immigration may be more attractive for receiving countries because (arguably) it entails lower political cost, it does raise, as a recent OECD study shows, the adjustment and training costs due to recurrent changes in workforce. Sending countries, too, may suffer due to the possible temporary unemployment of the returning migrants and the cost of their reintegration into the job markets.

The somewhat random comments I have just made do not detract from Trachtman's basic paradigm or the conceptual approach that underpins his proposal. They only point to the promising scope for further exploration of several potential areas of reciprocity or trade-offs between migrant sending and receiving countries to facilitate liberalization commitments envisioned in the book. Of some special interest in this context are the areas of reciprocity being opened up by the emerging role of transnational diasporas that link migrant receiving (developed) and migrant-sending (developing) countries. They include, in addition to remittances to sending countries, diasporas' financial and entrepreneurial engagement in business, promotion of trade and tourism, transfer of technology and skill circulation, and establishment of knowledge and information-based networks. In a globalized world economy, these links often yield benefits to both groups of countries. In several ways they add new dimensions to the conventional debate on such issues as skilled migration, remittances, and temporary movements.

Not surprisingly, a number of countries have therefore adopted dual nationality legislation or analogous arrangements to facilitate transborder movement, especially of those diasporas who are now host country citizens. It seems logical to think that countries that are not inclined to do so may find it useful to explore an alternative reciprocal arrangement—developing countries could trade their supportive measures, including access to special, multi-entry visas, to facilitate diaspora participation in productive business and other ventures in their countries against developed countries' commitments to liberalize labor immigration under the agreement. This avenue of action makes it easier for developing countries to tap the development potential of their noncitizen diasporas than through the taxation arrangements discussed in the book. There may also be some promising areas of cross-sectoral reciprocity. For example, as the recent Doha Round of trade negotiations showed, there is a glimmer of real possibility for nations, developed and developing, to exchange trade concessions in certain farm products or manufactures against admission of certain groups of labor migrants.

An attractive feature of the agreement proposed in the book relates to the flexibility and gradualness of its approach to openness. This makes Trachtman's approach, which is very much in line with the principle of "regulated openness" as envisioned under NIROMP, politically more realistic. This probably also explains why he has opted for a "positive list" approach (under this each state specifies sectors in which it would liberalize) to commitments for openness. Admittedly, one potential weakness of the positive list approach is that, unless counterbalanced by other agreed measures, it tends to give a differential edge to the more economically powerful or hegemonic states. In the present case, the rising pressure for emigration (or excessive demand for

admission) in labor-abundant countries is likely to put them in a weaker bargaining position. Fearful of excessive inflows, rich destination countries may be inclined to withhold commitments on openness. A way out of this situation may lie in a collateral commitment by both sending and receiving countries to reduce excessive labor emigration pressure, with appropriate assistance from the rich destination countries.

The book focuses on economic or labor migration, which is the most important component of contemporary international migration. But is it possible to ensure the sustainability of an international agreement that, however flexible otherwise, is confined to labor migration in isolation? Experience shows that different channels of migration are closely interconnected, and that when the pressure or demand for emigration by a particular channel far exceeds the opportunities for legal entry, the flows are diverted to an alternative legal (or irregular) channel, encouraging “category jumping.” The fact that much of the contemporary international migration is driven by mixed motivation exacerbates the potential risk of category jumping. This could clog the channel for the admission of bona fide labor migrants under the proposed agreement, unless the excessive pressures from other sources can at the same time be reduced.

The “reverse safeguard” included in the agreement does provide for increased liberalization commitments under exceptional circumstances. But do these emergency measures, however useful, go far enough? In many poor countries, causes for potential surges—such as environmental degradation, drought, floods and loss of crops, endemic poverty, widespread violence, and gross violation of human rights—are so structurally embedded that they need to be reckoned as “chronic emergencies.” If the labor migration channel is to be kept free from congestion, it seems important to address these other sources of emigration pressure through complementary measures within a comprehensive and coherent framework of interstate cooperation. As an autonomous but interconnected instrument, the proposed agreement on economic migration can then be expected to function more smoothly.

The book’s discussion makes a sharp distinction between sending (origin) and receiving (destination) countries, and sometimes assumes that all in the first group are developing countries while those in the second group are rich, developed countries. Recent ILO surveys show, however, that at least one-fourth of all countries are major senders and major receivers of migrants at the same time. For these countries, migration in large part is bidirectional. Most recent statistics also reveal that much of international migration takes place within the developing world itself. The World Bank recently suggested that some 40 percent of the world’s migrant stock was in developing countries and that roughly half of the migrants from developing countries were migrating to other developing countries. Clearly, both these trends have important

implications for a possible multilateral agreement on economic migration. For example, the involvement of a significant number of countries in both sending and receiving migrants is likely to widen the areas of reciprocity and scope for bargaining between countries. On the other hand, the divergence of interests within the developing world makes the process of group bargaining more complex. Further exploration of these issues would facilitate interstate trade-offs and cooperation envisaged in the book.

I believe that in the coming years, stung by the gathering malaise of a mismatch between rising emigration pressures and dwindling opportunities for legal entry, nations will be impelled to cooperate more closely to bring these contradictory trends into a dynamic harmony and improve the governance of human mobility. It is difficult to foresee what form(s) such cooperation would take; it would probably lead to the development of a set of autonomous but interconnected normative instruments—both hard and soft, as appropriate—complementing those that already exist. Hopefully, these specific subregimes would be formulated within a common, multilaterally harmonized framework ensuring overall policy coherence. It is conceivable that by 2025 the global migration system would become more stable and these normative arrangements will work under much less tension. This stability would come from two sources: 1) improved political and economic situation, including high rates of economic growth in some (though not all) of the major sending countries and declining income and wage differentials between these and rich receiving countries; and 2) technological progress and rich countries' increased ability and willingness to make adjustments in their labor market, social security, and demographic policies as well as in aspects of their lifestyle.

This book, while standing out for its excellence as a scholarly text, gains additional salience from the perspective of policy development as conjectured above for several reasons. First, it strengthens the arguments for a cooperative global approach to international migration, and bolsters the ongoing efforts to build support for it. Second, it delineates a specific legal model for structuring such interstate cooperation on economic migration that could fit into a wider global framework of common norms and principles. Third, it lays the basis for further research and exploration of areas of reciprocity to enhance the prospects of cooperation on economic migration.

Scholars, academics, and policymakers, as well as anyone interested in better governance of human mobility, will find it rewarding to go through this timely, well-reasoned, and lucidly written book.

Bimal Ghosh  
Mies, Switzerland





# 1

## Introduction: Toward the Fourth Freedom

*It was permissible from the beginning of the world, when everything was in common, for anyone to set forth and travel wheresoever he would.*

—Francisco de Vitoria  
(quoted in Plender [1988], p. 2)

*International migration is the missing link between globalization and development.*

—Rubens Ricupero  
(quoted in International Organization for Migration [2001])

*Something there is that doesn't love a wall,  
That sends the frozen-ground-swell under it,  
And spills the upper boulders in the sun,  
And makes gaps even two can pass abreast.*

—Robert Frost (1914)

This book explores the economic and political ramifications of liberalization of national rules of migration through international legal agreements, examines the existing international law of economic migration, and develops detailed conjectural proposals for new international legal rules in this field <sup>1</sup>

As I reviewed the prior literature on the law of economic migration, and as I interviewed policymakers and scholars active in this field, it was continually impressed upon me that “people are not commodities.”<sup>2</sup> When I began my research, I tended to set aside this caveat, thinking that this truism was simply a way to avoid grappling with the hard issues of whether to have, and how to structure, international legal commitments on labor migration. However, as I learned, and thought,

more, I understood that the point is that people are complex, with complex needs and relationships.

Goods are often single purchase events and do not broadly entail a continuing relationship between buyer and seller. Services, while often entailing more complex and durable relationships than a purchase of goods, are relatively unidimensional. Individuals, on the other hand, are multidimensional, and their movement as workers involves long-term relationships of great complexity with governments and with employers.

Throughout my research for this book I was also periodically reminded of the aphorism attributed to the Swiss author Max Frisch: “We imported workers and got men instead.” Men and women come with cultures and skills and grow up in dense familial and social networks. They have spouses and children. They need education, health care, political engagement, and all the other fruits of society. They bear responsibilities to society as well, including taxes and perhaps military service. So, as we discuss migration, we must recognize that it requires breaking and restructuring many relationships: a costly endeavor in the deepest sense.

Despite this complexity, and despite these costs, individuals sometimes determine that migration is their best option. However, there are substantial barriers in place today, which prevent people from achieving their desires to move to seek a better life. These barriers often demean human welfare. So it seems worthwhile to grapple with the complexity in order to evaluate whether and how to unlock substantial welfare gains. But it is important to say that at stake is welfare in the broadest sense: the right and power to move should be seen as an essential liberty, which is today highly constrained.

Individuals will only decide to undertake migration if they perceive that it is worthwhile to them. Throughout history, some have decided to do so while many others have not. But we must also recognize that there are costs and benefits that are external to the individual migrant. The migrant may be permitted to decide whether to accept these costs and benefits for his or her own family, but what about costs and benefits of the migrant’s decision that are felt by the migrant’s former compatriots, or by the migrant’s new hosts? The external effects of migration legitimate the desire to regulate migration to some extent.

## Migration, the State, and International Law

For millennia, human migration was unconstrained, and people and even peoples often moved to seek a better life (Diamond 1999). While migration was a mechanism of social and biological evolution, by which stronger societies overcame weaker ones, and human society expanded its geographic scope and adaptive capacity (Chua 2007), it was also a mechanism of integration, forming multicultural societies which then became new cultures.

One of the main roles, and powers, of the modern state involves citizenship, and the capacity to exclude outsiders. This role of the state stands in opposition to the natural movement of individuals, limiting human freedom. On the other hand, one might argue that the freedom to associate within a state, even exclusively of others, is an important innovation in human freedom and enhances the ability of individuals to develop unique and enhanced cultures. Perhaps freedom is on both sides of the argument. But to the extent that these freedoms are inconsistent with one another—which merits further analysis—what is the best trade-off?

The role of international law in this as in other contexts is to allow states to constrain themselves where their unregulated action would be less desirable than action constrained by international law. International law has not broadly responded to state restraints on immigration. There are a number of reasons why there is little international law addressing state restraints on immigration. One reason is that these restraints are fairly recent.

The United States, which was once a nation of immigrants, only began to restrict immigration at the federal level in 1875, and then restrictions were limited to those who were destitute, engaged in immoral activities, or physically handicapped.<sup>3</sup> These restrictions seem to be intended to protect the public fisc, as opposed to jobs. However, the U.S. Chinese Exclusion Act of 1882 responded to concerns about competition from cheap immigrant labor, as well as racism. In fact, throughout the history of immigration restrictions, we see the influence of both protectionism and racism. However, the late nineteenth century was still a period of effectively liberal policies toward migration. “Roughly

60 million Europeans emigrated to the New World between 1820 and 1914” (O’Rourke 2004, p. 2). This liberalism ended in the imposition of country of origin quotas during the early twentieth century (O’Rourke 2004).

During the early twentieth century, many popular destination states began to establish restrictions on immigration. During the past sixty years, global society has made important strides toward free movement of goods, money, and even some types of services. Yet human migration for economic and noneconomic reasons remains broadly constrained.

This book explores the law and policy of international economic migration. It analyzes the economics and politics of migration in order to assess the fit between the legal rules and institutions that presently exist to govern international economic migration, and the goal of maximizing welfare. In fact, there are practically no multilateral international legal rules regulating migration for economic purposes. This work shows that, in order to establish the domestic and international political conditions for welfare-enhancing liberalization of migration, it may be necessary to establish complex and binding international legal agreements regarding liberalization.

#### **Four Freedoms MS**

In connection with trade in goods and services, and also in connection with movement of workers, the European Union (EU) is a paradigm of advanced integration. Within the EU, the drive toward free trade and economic integration has been defined in terms of four freedoms: free movement of 1) goods, 2) services, 3) money, and 4) labor. The EU has made important progress in achieving all four freedoms, including the fourth freedom: legally authorized free movement of labor. In the global setting, we have done little to establish, or reestablish, the fourth freedom.

In the United States during the Second World War, Franklin D. Roosevelt declared four other freedoms for each citizen of the globe: 1) freedom of expression, 2) freedom of conscience, 3) freedom from fear, and 4) freedom from want. This fourth freedom—freedom from

want—is directly linked to free movement of labor: free movement of labor enhances the capacity of individuals to be free from want. While throughout history migrants have moved to avoid oppression of all kinds, today many would like to move to obtain better livelihoods. The European fourth freedom is closely related to Roosevelt’s fourth freedom: freedom from want can be enhanced by freedom of movement of labor.

This fourth freedom seems to have intrinsic value, but it also has enormous instrumental value. The dual pressures of globalization and demographic imbalance suggest the utility of greater legal structure to facilitate and regulate economic migration.

### **d emography and d estiny**

One important set of determinants of the quantity of migration is supply of and demand for work abroad.

On the demand side, the World Bank Independent Evaluation Group (2006, p. 28) explains why demographic trends—principally the relative youth of developing country populations—suggest that the number of people who wish to migrate from developing to high-income countries will rise in the period through 2026. While the global workforce is expected to increase substantially in the decade ending in 2010, the vast majority of the increase will take place in developing countries. 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 (World Bank Independent Evaluation Group 2006, p. 28).

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. The workforces in developed countries are about to begin a decline. The high-income countries will experience a general decline in working-age population during the period 2010–2025 (OECD 2007; World Bank Independent Evaluation Group 2006, p. 29).

Wealthier states such as Germany, Japan, and the United States are anticipating labor shortages that will have substantial adverse conse-

quences for their prosperity, for their ability to provide services to aging populations, and for their ability to fund social welfare programs (McDonald and Kippen 2001). The stock of immigrants to high-income countries increased at about 3 percent per year from 1980 to 2000, up from a 2.4 percent pace in the 1970s (World Bank Independent Evaluation Group 2006, p. 27). About 70 percent of this increase is accounted for by the United States and Germany, which only account for 40 percent of the population of high-income countries. The Pew Research Center has recently stated 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 percent of the increase will be due to immigrants arriving from 2005 to 2050 and their U.S.-born descendants . . .” (Passel and Cohn 2008).

In some advanced states, these shortages arise from fertility rates that are below replacement levels. It is estimated that between 2010 and 2030, the number of employed people in Europe will fall by approximately 20 million, while the number of older people will rise from 71 million to 110 million (Commission of the European Communities 2003a,b).

Thus, there are prospective increases on both the demand and supply side of international migration. Therefore, both wealthy and poor states will find themselves responsible to manage and regularize, even encourage, flows of migrant labor—flows of migrants. While this need will be reflected in part in unilateral policy measures, it will become important, for a variety of reasons addressed in this work, for states to cooperate in managing global migration. In some cases, it will be beneficial to enter into international agreements simply to manage flows of immigrant labor. There are a number of historical examples of international agreements used to regulate economically inevitable flows of workers, and there exist today hundreds of bilateral labor mobility agreements that do so. In other cases, it will be useful for states to make commitments to liberalize their restrictions on immigration.

## Force Behind The Law of Migration

There are great gains in welfare to be made in freeing up international economic migration, just as there have been and continue to be great gains to be made in freeing up international trade in goods, services, and money. The global and sectoral welfare effects of migration will be examined in detail in Chapter 2.

It is estimated that a modest increase in industrial countries' quotas on incoming temporary workers, equal to an aggregate of 3 percent of their current workforces, would result in increased world welfare of more than US\$356 billion a year by 2025 (World Bank Independent Evaluation Group 2006). Scaled to the same reference year, 2001, the gains from a 3 percent increase in the stock of migrants is \$175 billion, while the gains from *total* trade liberalization are \$155 billion (World Bank Independent Evaluation Group 2006, p. 41). "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" (Rodrik 2001).

These gains would be shared by developed and developing countries, although the greatest portion of gains would accrue to the migrants themselves. But perhaps even more important, migration, if it is managed carefully, can 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. Chapter 3 addresses the possibilities for doing so through international legal commitments.

So, poverty reduction may be an important goal of liberalization of migration. However, O'Rourke and Sinnott (2003) argue that

compared with the late 19th century . . . early 21st century policies make it far more difficult for developing countries to use migration as a means of convergence on the rich. One hundred years ago mass emigration raised living standards significantly in countries such as Ireland, Italy and Sweden, enabling them to converge on the core countries of the day, Britain and the U.S. Indeed, mass

migration can account for as much as 70 percent of the convergence in living standards worldwide which occurred during the late 19th century . . . Today's rich country immigration policies not only prevent developing economies from raising their average living standards via emigration; by admitting skilled workers rather than unskilled workers, these policies may actually hurt developing economies via the brain drain effect, and also make them less equal (by raising the relative wages of skilled workers).

There are important barriers to realizing increased welfare and increased economic equality. But the critical point is that these are policy barriers rather than natural barriers. The goal of this work is to explore these barriers, and to suggest international legal responses.

In economic terms, migration is a result of demand and supply. To think of this relationship in economic terms from the standpoint of the potential migrant deciding whether to migrate, we might understand the present value of life opportunities at home, plus the cost of migration, as the total cost to the potential migrant, while the present value of life opportunities in the destination state is the benefit to the potential migrant. Whenever the benefit exceeds the cost, the potential migrant will wish to migrate. Of course, each individual will have different opportunities at home and in the destination state, and different ways of valuing various components of their opportunities.

Of critical importance, now and in the future, will be demographic supply and demand, as discussed above. Pressure to emigrate from poor countries is increasing (Ghosh 2000, pp. 6, 10). 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 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" (Martin 2004, p. 4). "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" (Ghosh 2000, p. 17).



Source countries are sometimes ambivalent, and would at least be expected to vary in their policy responses to emigration. First, emigration can reduce pressure on domestic employment markets, and can produce remittances, which can be an important source of foreign exchange. So, important countries such as the Philippines and India have sought to promote emigration. However, the risk of brain drain might raise concerns in particular circumstances.

Demand to migrate is not exclusively dependent on demography and economic circumstances. Reduction of transportation costs due to new transportation technologies has reduced the costs of migration to a point within reach of the very poor. This change has increased the number of potential migrants (Hatton and Williamson 2005, p. 1). Costs imposed by the destination country's immigration system also affect the decision to migrate. For poor people, these costs have been a significant barrier.

Demand to migrate is also affected by conditions in departure countries, compared to conditions in destination countries. So, in addition to the critical factors of wages and productivity, human rights abuses, insecurity, disease, and other negative factors in the departure countries, combined with their opposites in the destination countries, would be expected to affect demand for migration. Famines, revolutions, government crises, and ethnic cleansing and other action have contributed to the timing and source of migration (Hatton and Williamson 2005, p. 213). There are important links between economic migration and forced migration, and the border between these phenomena is not always clear. In fact, any regime for management of either voluntary or forced migration must deal with the problem of definition and enforcement of categories.

The cost of migration is also dependent on the costs of travel and information, and on the ease of obtaining legal permission for migration to the destination country, or on the ease of evading enforcement of legal restrictions. It is important to note that migration is facilitated by reduced costs of transportation and communication. Perhaps less obvious as a causal factor is greater information and education, increasing awareness of better conditions abroad. Migration can also build upon itself, as emigrants supply information and support to future emigrants.

Earlier migration has resulted in “diasporas” in developed countries that can promote and facilitate future migration.

Restrictions on immigration reduce the supply of immigration opportunities. They can also be understood as increases to the price of migration, as the restrictions themselves would have effects on the cost of migration. Supply and demand will adjust toward equilibrium. Occasionally, shocks will occur, changing some of these parameters and thereby changing the relevant prices.

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” (Hollifield 2000, pp. 75, 87; Sassen 1996). The same perspective applies to the applicable international law. In fact, all law is to some extent dynamic, as it responds to changed conditions and aspirations. In addition to being molded to fit social conditions, law can also play a leading role, driving social change.

### **Migration, globalization, and law**

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. Rubens Ricuperro states that “migration is the missing link between globalization and development” (International Organization for Migration 2001).

Freeman (2006) 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.”

Harris (2002, p. 93) describes a globalization sequence between freeing trade (1950–1980 and beyond), freeing capital (1980 onward), and freeing movement of people. If Harris is correct regarding this sequencing, it might help us to understand why trade has been liberalized while migration has not. Harris sees xenophobic resistance to liberalization of immigration as nothing short of a survival of “the old

order of states and the reality of warfare between them” (Harris 2002, p. 94). Indeed, xenophobia, as well as a tendency to value the welfare of compatriots over that of foreign persons, is an important reason for antipathy to globalization. For Harris, the resistance to liberalization of migration is ideational, rather than necessarily economic. Law can play a leading role in changing ideas.

It seems true that free migration would challenge the nation-state-based world order, insofar as under a regime of free migration the composition of states would no longer be formally based on “nations,” and would be fluid. The ruler-subject relationship would be broken, and citizens would have greater freedom to “vote with their feet.” Furthermore, as some degree of a global society is formed through globalization, it seems increasingly reasonable to see the freedom to move within this global society—global movement—as a basic liberty comparable to the fundamental freedom to move within a national state.

### **International Law of Economic Migration**

States have found it useful to exchange authority with others in particular contexts: this is the role of international law.<sup>4</sup> What are the changing social elements that would lead states to agree to reduce their authority further in the field of migration? First, demographic change will result in increasing demand for certain types of labor in the developed world.<sup>5</sup> Second, individuals in poor countries will continue to seek better standards of living in wealthier countries. Finally, 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.

This study assesses the existing international law of economic migration, both descriptively and analytically. While the world has found it useful to establish rules regarding the entry of foreign goods, services, and investment, there is a remarkable scarcity of international law establishing commitments of states to admit foreigners to work in their markets (Aleinikoff 2003, p. 2). In 1992, Sohn and Buergenthal (1992) wrote, “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.”

On the other hand, there are significant rights accorded to migrants upon their arrival. Authorized migrants are entitled to a full panoply of human rights—but while it is clear that migrants have rights, few people outside of a few regional arrangements generally have the right to *be* a migrant—to immigrate.<sup>6</sup> The fourth freedom still seems neglected. This work seeks to explain the dog that did not bark: the failure, thus far, to establish international law regarding labor market access (Hollifield 2000, pp. 75, 87). This work is intended to contribute to a small but growing literature on this topic, commenced in the late 1990s with Bimal Ghosh’s project (2000) for a “new international regime for the orderly movements of people” and continuing recently with Lant Pritchett’s *Let Their People Come* (2006).

It is worthwhile here to observe that, as we will see in Chapters 6 and 7, the states of virtually all of Europe, most of Latin America, the Caribbean, much of Africa, and Australia and New Zealand are party to fairly comprehensive regional labor movement liberalization agreements. These agreements demonstrate that, at least outside of Asia and North America, states have been willing at some level to engage in liberalization of labor migration. There are additional initiatives in Asia, including an Association of South East Asian Nations (ASEAN) effort to liberalize movement of highly skilled and professional workers, and the North American Free Trade Agreement (NAFTA) provides for a very modest degree of liberalization of North American migration. However, most of the liberalization commitments that have been undertaken in Africa and Latin America have not been fully implemented. Furthermore, while many states have engaged in some liberalization with some states, few have engaged in liberalization with many other states.

Thus, one question that arises in connection with liberalization of migration is the conflict (or competition or synergy) between regional or plurilateral liberalization on the one hand and multilateral liberalization on the other. Are regional or plurilateral efforts in this area building blocks or stumbling blocks toward multilateral liberalization? A different but related question is whether they increase or reduce welfare. Any

multilateral agreement in this area will have to address whether most-favored nation (MFN) type prohibitions of discrimination will apply to prevent states from treating specified other states better than others, and whether regional or other plurilateral arrangements will benefit from an exception to an MFN rule.

## **Legalizing Migration**

The focus of this work will be on international legal commitments regarding legal immigration. Legal immigration has a complex relationship with illegal immigration. First, legal immigration serves as a substitute for illegal immigration, and thus can suppress illegal immigration. Second, legal immigration (like illegal immigration) produces remittances which increase wealth in sending states, also possibly suppressing illegal immigration. Third, legal immigration, to the extent that it is limited, may induce increased illegal immigration through information or other support provided by legal migrants to potential illegal migrants.

There is an ongoing competition between illegal immigration (Ghosh 2000, p. 12) and legal immigration, both in the decision making of individual migrants and in the policy of the receiving countries. A substantial percentage of global migrants are illegal immigrants.<sup>7</sup> An important research question asks to what extent the demand to migrate is elastic in relation to increased costs based on legal restrictions, or based on increased enforcement of legal restrictions.

In any event, poverty-induced migration, like the poor, will always be with us. Since half the world's workers live on less than US\$2 per day, there will be strong incentives for them to migrate, and for those seeking inexpensive labor to employ them. Experience along the United States–Mexico border shows that it is difficult for immigration law and enforcement to stop behavior required by the “laws” of economics (Pritchett 2006). However, illegal migration can have a number of adverse consequences, for the migrants themselves, for citizens of the host country, and for the political fortunes of liberalization of market access.

Of course, no system of border controls will be impermeable. Each destination state must make a policy choice regarding its investment in

controls, both in terms of financial cost and social cost. In addition, at some level, immigration controls become too expensive financially, or are inconsistent with an open society and open economy (Harris 2002). If there are otherwise gains to the destination state from excluding illegal aliens, these gains may be overcome by the costs of exclusion. Making immigration illegal increases the costs, including the dangers, experienced by migrants.

In examining national policy, it is important to examine not just the law on the books but also the law in practice. Many destination states purport to limit legal immigration, but their lax enforcement policy with respect to illegal immigration can be understood instead as evidence of a liberal policy.

For example, the United States has an ambivalent relationship with illegal immigration: it declines to legalize certain unskilled flows, but declines also to devote sufficient resources to enforce the exclusion. The then commissioner of the U.S. Immigration and Naturalization Service, Lionel Castillo, said in 1989 testimony to the U.S. Congress that “The actual policy of the U.S. government is quite different from its stated policy . . . the de facto policy is to keep the door half open” (Harris 2002, p. 80). While interior enforcement can be more effective than border control, especially if it focuses on imposing penalties on employers who hire illegal immigrants, some destination states, such as the United States, have declined to implement it. This ambivalence may represent an attempt to placate two opposing political forces: 1) employers who seek immigrant labor, and 2) general public opinion which is opposed to increased immigration.

To the extent that a state implicitly permits illegal immigration, with the presumed result (see Chapter 2) that labor prices are artificially suppressed compared to legal immigration, it may have the effect of subsidizing the domestic production of goods or services. Even in the 1940s, during the formation of the original General Agreement on Tariffs and Trade (GATT), states were concerned about the trade effects of prison labor, with some of the same trade-distorting characteristics.

At any rate, the main point is that controls on immigration—illegality—seek to stem a natural phenomenon, one that is likely to enhance global welfare and is unlikely to diminish local welfare in the destination state. Where wage or welfare differentials are sufficiently large,

individuals will find a way to overcome barriers: they will make great expenditures and incur fearsome risks in order to migrate. The barriers are simply part of the price. Yet this expenditure and risk may be a source of deadweight loss: it may be a cost incurred in order to frustrate efficient transactions. The efficiency of any particular act of migration is not assured, as there will be external costs that the migrant will not take into account, but the data presented in Chapter 2 showing the welfare gains from liberalized migration suggests that it is safe to assume that much migration is efficient.

### **Recent Initiatives**

There have been a number of recent initiatives that have sought to stimulate interest and action relating to international migration. Of course, there were earlier initiatives. For example, the League of Nations explored in the 1920s an international convention to “facilitate and regulate international exchange of labour.” In 1939, the ILO adopted a Migration for Employment Convention, which was never ratified by any state.

The purpose of this section is to introduce the current initiatives, with a focus on their perspectives and goals.<sup>8</sup> But the main point is that these are talking initiatives and have not yet resulted in significant changes in law. The formation of new international legal commitments, or protections for migrants, does not appear to be on today’s formal radar screen. However, this book examines the possibility that new international legal commitments might be worthy of greater consideration.

### **Global Commission on International Migration Report: Migration in an Interconnected World**

The Global Commission on International Migration (GCIM) was established in 2003 by a self-appointed core group of states, with the encouragement of then UN secretary-general Kofi Annan.<sup>9</sup> The mandate of the GCIM was to formulate a coherent global response to international migration. The commission was established as an independent

body consisting of 19 experts, including Mike Moore, former director general of the World Trade Organization (WTO), and Mary Robinson, former president of Ireland and former UN High Commissioner for Human Rights.

The GCIM issued an important report in October 2005. This report states that migration has risen to the top of the global policy agenda, and that “In every part of the world, there is now an understanding that the economic, social and cultural benefits of international migration must be more effectively realized, and that the negative consequences of cross-border movement could be better addressed” (GCIM 2005).

The report establishes six principles that it recommends be followed in formulating global migration policy (GCIM 2005). First, individuals should migrate out of choice, not necessity. It is worth pointing out here that choice and necessity may be difficult to separate, especially when the choice arises from poverty. Second, migration should be part of development policy. Third, states should cooperate to regulate illegal immigration. Fourth, efforts should be made to integrate immigrants into host country society. Fifth, the rights of immigrants should be respected and strengthened. Sixth, governance of international migration should be improved, with greater attention to coherence.

Importantly, while these principles otherwise provide a reasonable starting point, they do not explicitly include liberalization of market access for migrants.

The report wisely recommends that policymakers pay attention to the relationship between supply and demand for workers (GCIM 2005). So long as developed country demand is subject to political constraint, it is useful to seek to reduce developing country supply through continued focus on poverty alleviation at home.

The report concludes that “a well regulated liberalization of the global labour market would also be preferable to the current situation, in which labour market gaps are filled in part by means of irregular migration and unauthorized employment” (GCIM 2005).



## berne Initiative

In recognition that there is no comprehensive and harmonized system regulating international migration through which the movement of people can be managed in an orderly and cooperative way, the Swiss Federal Office for Refugees launched the Berne Initiative in 2001 to establish a dialogue between countries of origin, transit, and destination on the full range of migration issues with the objective of identifying common understandings and enhancing migration management at the global level (Klein, Solomon, and Bartsch 2003).

At the International Symposium on Migration (“Berne I”) in June 2001, some 80 government officials and experts from international agencies, nongovernmental organizations (NGOs), and academia comprehensively reviewed current migration dynamics and trends. The participants considered the diverging interests and perspectives of origin, transit, and destination countries, but also identified interests common to all states (Klein, Solomon, and Bartsch 2003).

The “undermining of state sovereignty and security by uncontrolled and irregular migration” was identified as a major concern for many countries, both in developing and industrialized regions, with important financial, economic, social, and legal implications. It was concluded that there is a need for a balanced approach to facilitate regular migration and prevent irregular migration, and that mutual benefits could derive from enhanced interstate cooperation. The participants decided to pursue the development of a framework of guiding principles for the management of migration, through an ongoing and broadened process of consultations, rather than through efforts to create new international law in this area (Klein, Solomon, and Bartsch 2003). This was obviously a decision to avoid formal obligations, but to pursue greater communication and informal cooperation.

However, as a first step, the Swiss authorities, in coordination with the International Organization for Migration ([IOM], an intergovernmental organization that deals with international issues of migration management), undertook the preparation and publication of an expert stocktaking on existing international law norms relevant to migration. The study, *International Legal Norms and Migration*, seeks to clar-

ify the existing legal framework and identify gaps and grey areas not adequately covered by international law, but where the elaboration of effective practices might be useful. To complement the expert study, IOM's Migration Policy and Research Programme prepared a *Compilation of Significant International Statements on Migration*. This compilation focuses on nonbinding common understandings emanating from regional consultative processes on migration and selected international migration-related conferences (Berne Initiative 2002, 2003).

The most important outcome of the Berne Initiative process is the International Agenda for Migration Management (IAMM) (Berne Initiative 2004a), a reference system and nonbinding policy framework aimed at facilitating cooperation between states in planning and managing the movement of people in a humane and orderly way. It gathers states' common perspectives and understandings on migration in a comprehensive framework in the form of a nonbinding agenda, mapping out in a comprehensive manner all major aspects of migration at the international level (Organization for Security and Cooperation in Europe 2006, p. 23). The IAMM has two components: 1) a set of common understandings underlying migration management and summarizing the values and perceptions that governments bring to migration, and 2) a set of "effective practices" for a national approach to migration. It addresses the following issues: migration and development, human rights of migrants, labor migration, integration, irregular migration, trafficking and migrant smuggling, trade and health, and return (Nielsen 2007).

At the 2004 Berne II Conference, participants engaged in a substantive exchange on three selected sets of issues addressed in the IAMM: 1) migration, development, and interstate cooperation; 2) labor, regular, and irregular migration and interstate cooperation; and 3) rights, responsibilities, integration, and interstate cooperation (Berne Initiative 2004a, p. 5). Preparatory work for the Berne II Conference included four regional consultations for each of Africa, Europe, Asia, and the Americas, where government officials and migration experts discussed the further development of the IAMM (Berne Initiative 2004a, p. 3). The Berne II Conference culminated in the following recommendations and suggestions being made. First, the IAMM should be widely disseminated amongst governments to assist them in the management of migration. Second, international organizations should be invited to

assist governments upon their request to put the IAMM to use at the national, regional, and global levels (Berne Initiative 2004a, p. 7).

## **un g eneral aSS e Mbl y' S hl gh- l evel dl alogue**

The UN High-Level Dialogue on International Migration and Development took place on September 14–15, 2006, at the UN headquarters in New York. The first high-level UN event devoted entirely to the topic of migration and development, the High-Level Dialogue brought together ministers from UN member states and representatives from UN agencies, intergovernmental organizations, NGOs, civil society, and the private sector (UN General Assembly [UNGA] 2006, p. 1).

The purpose of the High-Level Dialogue was to discuss the multidimensional aspects of international migration and development in order to identify appropriate ways and means to maximize its development benefits and minimize its negative impacts. Additionally, the High-Level Dialogue had a strong focus on policy issues, emphasizing the challenge of achieving internationally agreed development goals, including the Millennium Development Goals (UNGA 2006, p. 2).

The two-day dialogue included four thematic roundtables covering the following topics:

- the effects of international migration on economic and social development;
- measures to ensure respect for and protection of the human rights of all migrants, and to prevent and combat smuggling of migrants and trafficking in persons
- the multidimensional aspects of international migration and development, including remittances;
- promoting the building of partnerships and capacity building and the sharing of best practices at all levels, including the bilateral and regional levels, for the benefit of countries and migrants alike (UNGA 2006, p. 1).

The High-Level Dialogue produced a number of proposals for future action; in recognition of the fact that the IOM has consider-

able experience in the field, proposals were made for the IOM to take greater measures to make migration work for development, to enhance interagency coordination, and to enhance global intergovernmental cooperation (IOM 2006).

It was also at the High-Level Dialogue that the idea of a global forum on migration and development was first proposed. The first global forum on migration and development was held July 9–11, 2007, where more than 800 representatives from 156 UN member states and more than 20 international organizations participated in two plenary sessions and 12 roundtable sessions (UNGA 2007, p. 3).

### **International Organization For Migration**

The IOM is concerned with management of migration, and assists governments by providing expert support and facilitation of regulated labor migration, as well as direct assistance to migrants. The IOM facilitates the development of policies and programs that can individually and mutually benefit the concerned governments, migrants and societies in connection with migration (IOM 2008b).<sup>10</sup>

The Commission on Global Governance, meeting in 1993–1994, considered a paper on “Movements of People: The Search for a New Regime.” This was followed by the launch of a global project, financed by the United Nations and to be executed through the IOM, toward a “new international regime for the orderly movement of people” (NIROMP). An intergovernmental meeting in 1997 endorsed the concept of a global arrangement for regulated openness of international migration. A second meeting was held in 1999, and this project was debated until 2001, when it was decided not to pursue it through IOM.<sup>11</sup>

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

The IOM 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 focuses 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 type of 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.<sup>12</sup>

According to the IOM, the return and socioeconomic reinsertion of skilled and qualified nationals can benefit the national development or rehabilitation and reconstruction processes of developing countries, countries with economies in transition, or countries recovering from conflict situations. The IOM runs several programs that facilitate Return and Reintegration of Qualified Nationals and other projects that can help shape the economic and social environment in countries of origin in a manner conducive to further returns.<sup>13</sup>

The IOM's Technical Cooperation on Migration 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.<sup>14</sup>

In June 2006, IOM Brussels hosted a roundtable on labor migration gathering 20 representatives of think tanks and the European Commission. This roundtable aimed to further the public debate, launched with the adoption in January 2005 of the European Commission Green Paper on "An EU 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.<sup>15</sup> In 2007, as part of its initiative of capacity building in countries of origin, the IOM and the Republic of Korea have agreed to create a migration research and training center in Korea which aims to help governments in the region facilitate the movement of human resources.<sup>16</sup>

## **International Labor Organization**

The ILO, the UN specialized agency concerned with labor issues, is the leading international organization dealing with labor. The preamble of the constitution of the ILO assigns to it the task of protecting “the interests of workers when employed in countries other than their own” (ILO 1974).

The ILO provides advisory services and technical assistance to member states and provides a tripartite (government, worker, and employer) forum for consultations (ILO 2004a, p. 7). It has established international conventions on migration policy and protection of migrant workers, as well as a multilateral framework on labor migration in order to guide its constituents. The ILO distinguishes among three leading forms of labor migration: 1) temporary migration of professional, technical, managerial, and business workers, as well as people providing cross-border services; 2) contract migration for ordinary employment, but for a limited period of time, guest workers; and 3) migration to settle for ordinary employment purposes (Abella 2000, pp. 113–114).

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 nonbinding multilateral framework for a rights-based approach to labor migration (ILO 2004b).

## **World Trade Organization**

In terms of specific formal commitments, the World Trade Organization (WTO) 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 WTO General Agreement on Trade in Services (GATS) specifically includes commitments on trade in services by a service supplier of one member, through presence of natural persons of a WTO member in the territory of any other WTO

member. However, the GATS Annex on Movement of Natural Persons stipulates that the GATS “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 gross domestic product is derived from services.

## **The Global Migration Group**

The Global Migration Group (formerly the Geneva Migration Group) was originally comprised of the heads of the IOM, ILO, UN Office of the High Commissioner for Refugees, UN Office of the High Commissioner for Human Rights, the UN Office on Drugs and Crime, and the UN Conference on Trade and Development, and now includes the UN Development Program, the UN Department of Economic and Social Affairs, the UN Population Fund, and the World Bank. The aim of the Global Migration Group is to provide policy coherence in migration. The Global Migration Group 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” (Global Migration Group 2006, p. 1).

## **plan of The book**

The purpose of this book is first to review the economic, ethical, and political rationales for greater international legal rules in the field of economic migration (Chapters 2, 3, and 4). Second, the book describes the existing international law of economic migration (Chapters 5–8). By analyzing the existing international law of economic migration, this book will facilitate discussion and analysis of new proposals. Third,

this book attempts to show how the economic, political, and ethical rationales that it describes may be aligned with particular international legal rules and institutions. Chapters 2–8 form a basis for Chapters 9–11, which seek to suggest the dynamics of negotiation of new legal rules for labor market access, the types of new rules that may be negotiated, and the institutional structures that may be useful to assist in the implementation of these rules.

Chapter 2 reviews the existing theoretical and empirical work on the welfare economics of migration. Under a trade-based model of welfare, given wide disparities in wage rates across borders, global welfare would be increased by permitting greater trade in labor. The chapter reviews the various parameters that seem important to the welfare analysis, including distinguishing between global welfare, national welfare, welfare of migrants, and welfare of other groups. It addresses the distinction between permanent and temporary migration, as well as the distinction between migration of skilled and unskilled workers. The purpose of Chapter 2 is to describe the welfare considerations that will be important to negotiations regarding international legal rules for economic migration.

Chapter 3 examines the arguments from ethics for free movement of people. These arguments may have an effect on the preferences and voting patterns of individuals, or on the behavior of government officials. This chapter shows the weaknesses in some arguments to the effect that there is no ethical obligation, or a severely limited ethical obligation, to act to improve the circumstances of poor people in foreign states.

Political economy, reviewed in Chapter 4, adds two important dimensions to the analysis. First, how are the dictates of welfare economics mediated by domestic politics? Second, how do states fail to achieve welfare-enhancing agreements or transactions due to strategic problems or other market failures? These two dimensions combine to present a cooperation problem in connection with international migration. 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? This chapter develops a political economy schematic of the possible utility of legal rules relating to economic migration. International legal rules may



induce the formation of domestic political coalitions that support liberalized immigration in destination states.

In order to evaluate possible reforms of the international law of migration, it is necessary to describe the existing international law. Chapter 5 addresses existing customary international law and treaty law relating to human rights, as they pertain to economic migration. The core point of this chapter is that states generally have no obligation to accept economic migration by citizens of other states. However, it is important to establish the general absence of rules in this area, and to explain the modest rules that do exist. This chapter plays an additional role. It points out some of the possible human rights law requirements that may apply in connection with the formation of international legal rules to govern economic migration.

The EU has reached a very high degree of formal labor market integration, although important barriers remain and the level of actual integration is modest. The EU has developed a set of disciplines designed to permit a very high degree of labor market integration, while respecting national regulatory and public policy prerogatives. Under these disciplines, individual nationals of EU member states have the formal right to enter the labor market of any other member state, without explicit discrimination, without implicit discrimination, and without losing rights that they would otherwise have, such as social security rights. The history of the development of labor market integration in the EU is salient to a study of broader international labor market integration, insofar as it represents a kind of maximal menu of labor market integration devices. The issues that have arisen, and the way that these issues have been addressed, both substantively and institutionally, can provide, if not a roadmap, a checklist for anticipating issues that will arise as other efforts at international legalization of migration are undertaken. Chapter 6 attempts to provide this history and description.

There are several bilateral, regional, and plurilateral arrangements for labor mobility beyond the EU. Some of these are based on historically rooted arrangements, such as the British Commonwealth. Others are more recent adjuncts to bilateral or regional free trade agreements or customs unions. Examples include the recent free trade area agreements that the United States has entered into with Australia, Chile, and Singapore. The goal of Chapter 7 is not to provide a comprehensive

survey of all arrangements, but rather to describe a set of examples and develop a basic taxonomy to assess the variety of bilateral, regional, and plurilateral arrangements for migration.

The WTO does not deal with labor or immigration per se, just as it does not deal with finance or investment per se. However, labor has entered the WTO in several ways, including, as relevant here, through the subject of trade in services. In fact, there is an important overlap between trade concerns and immigration concerns. One motivation for this book is to bring a trade perspective to the field of immigration. From a trade perspective, limits on immigration are analogous to tariffs or quantitative restrictions. These limits include quotas or other quantitative restrictions on immigration, bureaucratic formalities involved with obtaining a visa, visa fees, discrimination against foreign workers, and limits on recognition of professional qualifications.

The Doha Development Agenda negotiations included efforts by developing countries to increase developed country liberalization commitments with respect to the movement of individuals to supply low-skilled or semiskilled services. Chapter 8 describes the structure of commitments, and the applicable rules, within the WTO. Chapter 8 also provides information that will be relevant to the discussion in Chapter 11 of the extent to which the WTO provides an appropriate institutional structure for negotiation and administration of possible international legal rules on labor migration.

Chapter 9 catalogs the potential goals that states might pursue in connection with negotiations on global rules regarding labor market liberalization. Would states negotiate on a multilateral basis, and would they accept a rule of most favored nation nondiscrimination? Would negotiations over liberalization be structured around a “positive list” in which only those areas that are specifically listed are liberalized, and then only to the extent specified, or around a “negative list” in which all areas are liberalized except as stated?

Chapter 10 builds on Chapter 9, by considering what types of specific disciplines would align with the negotiation goals developed in Chapter 9. Issues considered in this chapter include

- rules relating to restrictions on national limits on emigration,
- the application of an MFN (nondiscrimination across foreign states) principle,

- the application and scope of a national treatment principle,
- taxation of migrants,
- professional regulation and licensing of migrants,
- access of migrants to public services and transfer payments, and
- rights to have family members accompany migrants.

A number of subsidiary disciplines will be required in order to guard against defection from primary disciplines. Examples of these specific disciplines are articulated in sample treaty language form in Appendix A.

Chapter 11, building on Chapters 9 and 10, describes the possible role of an organization, and structures within an organization, to manage international economic migration. An international organization may assist in resolving a number of strategic problems. This organization could provide secretariat services of various kinds, including negotiation initiatives, research, surveillance, dispute settlement, and even possibly enforcement. The types of services would depend on an analysis of the strategic utility of these services provided by an international organization in the context of the types of rules that are likely to be negotiated.

Chapter 12 provides some concluding remarks, and suggests a number of areas for further inquiry and discussion.

Appendix A provides an illustrative draft treaty. This illustrative draft is intended simply to show the types of specific provisions that could be included in an international agreement on international economic migration. Indeed, this draft is a framework agreement, which would be designed to serve as a facility for states to make the kinds of agreements that make sense to them, individually and collectively. It is only once these agreements are made that we would truly know whether states believed that reciprocal legal commitments were useful.

## notes

1. Throughout this book, I follow the conventional practice of referring to “emigration” as the act of leaving one’s home state, “immigration” as the act of entering the destination state, and “migration” as the combination of the two.
2. Indeed, Polanyi (1944) decried the commodification of labor.
3. As Neuman (1993, p. 1883) points out,
 

there existed state qualitative regulation of immigration before 1875, and this qualitative regulation was an antecedent for federal regulation: Thus, state immigration law in the century preceding 1875 included five major categories: regulation of the migration of convicts; regulation of persons likely to become or actually becoming a public charge; prevention of the spread of contagious diseases, including maritime quarantine and suspension of communication by land; and regionally varying policies relating to slavery, including prohibition of the slave trade, bans on the migration of free blacks, and the seamen’s acts. Federal statutes backed up the state quarantine laws and state laws barring importation of slaves or free black aliens.
4. For a broad statement of this argument, see Trachtman (2008).
5. Fehr, Jokisch, and Kotlikoff (2004) argue 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’s (2003) argument regarding the importance of population growth for economic growth in the United States during the near future.
6. Unauthorized migrants retain their humanity, but they may enjoy fewer rights (Lyon 2005).
7. Ghosh estimates that one-fifth of all migrants are unauthorized (Ghosh 2000, p. 18).
8. In order to do so as accurately as possible, while focusing on the issues of interest here, this section liberally adapts from the relevant organizations’ Web sites and other published materials.
9. As of August 2005, these states included Algeria, Australia, Bangladesh, Belgium, Brazil, Canada, Egypt, Finland, France, Germany, Holy See, Hungary, India, Indonesia, Islamic Republic of Iran, Japan, Mexico, Morocco, Netherlands, Nigeria, Norway, Pakistan, Peru, the Philippines, Russian Federation, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, and the EC/EU.
10. A list of the projects being undertaken by the IOM to facilitate labor migration can be found at <http://www.iom.int/jahia/Jahia/pid/706> (IOM 2008a).
11. This discussion is based on personal communication with Bimal Ghosh.
12. A fuller discussion of the two initiatives can be found at <http://www.iom.int/jahia/Jahia/pid/542> (IOM 2008b).
13. A list of such ongoing projects can be found at <http://www.iom.int/jahia/Jahia/op/edit/pid/742> (IOM 2008c).
14. The full activities of the TCM Division of IOM are described at <http://www.iom.int/jahia/Jahia/op/edit/pid/749> (IOM 2008e).

15. A full discussion on the proceedings of the IOM Brussels Roundtable on Economic Migration is available at [http://www.belgium.iom.int/index.asp?Selected=2&News\\_ID=483&sm=71](http://www.belgium.iom.int/index.asp?Selected=2&News_ID=483&sm=71) (IOM Brussels 2008).
16. The establishing of the IOM-Korea migration research and training center may even be seen as a move to improve migration management between Asia and Europe. See <http://www.iom.int/jahia/Jahia/pbnAS/cache/offonce?entryId=15964> (IOM 2008d).



# **Part 1**

## **Normative Analysis of International Migration**





## 2

# Welfare Economics of Migration

Given existing wide disparities in wage rates across borders, global welfare would be greatly increased by permitting greater mobility of labor (Bhagwati and Srinivasan 1983, pp. 61, 70). Rodrik (2001) 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.

The artificial price wedge that Rodrik refers to is of course the result of restrictions on immigration. Empirical studies of factor mobility, and estimates prepared by Winters et al. (2002) and the World Bank Independent Evaluation Group (2006), seem to confirm large potential returns from increased liberalization of migration. Barriers to both permanent and temporary movement of natural persons are still quite large, and many of these barriers lack a compelling noneconomic, or prudential, justification. Thus, there is a strong initial argument from allocative efficiency for liberalization of economic migration.

From the dynamic standpoint of destination states also, 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. Thus, while developing countries bemoan the brain drain, developed countries institute “quality-selective” immigration policies that seek to ensure that only brains are drained.<sup>1</sup> On the other hand, it

is at least theoretically possible that destination states may under some circumstances lose from immigration of unskilled workers, while origin states may gain.

We will see that 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 services they receive, are as large as possible” (Hanson 2007, p. 4). Yet it may not be a simple matter to determine relative scarcity or abundance.

“A given type of worker may be scarce 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” (Hanson 2007, p. 14). So it is not strange, as Hanson explains, that in the United States, both high-skilled software programmers and engineers employed by rapidly expanding technology industries, as well as low-skilled workers in construction, food preparation, and cleaning services, are scarce (Hanson 2007).

Perhaps another way of formulating the question of optimality is as follows: an optimal immigration policy admits all immigrants so long as the benefits they contribute exceed the costs they impose. Immigrants may bring benefits or costs in terms of the work they do, and they may bring benefits or costs from a fiscal standpoint. The core question addressed in this chapter is whether increased migration would provide welfare benefits, to whom, and how much? Armed with detailed answers, and 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.

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 improvements in the sense that even those who might otherwise be losers are better off.<sup>2</sup> 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.

Chapter 3, which examines the distributive justice perspective on migration, is predicated on the analysis presented in this chapter of the welfare and distributive effects of migration. Of course, individual voters and individual governments often seem to reject greater formal liberalization of labor movement. Even more powerfully, governments and constituencies outside the EU would be skeptical of the value of international legal commitments to liberalize. Chapter 4 examines the political economy of liberalization of labor movement, analyzing the domestic and international political bargaining barriers to realizing the welfare benefits identified in the current chapter.

Much of the remainder of this work will be devoted to identifying legal mechanisms that may be useful in overcoming political bargaining problems in order to realize these benefits.

The large potential welfare gains from immigration 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 rather illegal migration (Hanson 2007). 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, especially potential 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, thereby reducing 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.

Thus, these unrealized large welfare gains are an institutional puzzle. It would be useful to solve this puzzle and to imagine a way to restructure legal and organizational mechanisms to allow these gains to

be realized. This work is intended to advance that project, as an exercise in institutional imagination.

## **Theory**

In theory, liberalization of migration should lead to global gains in welfare. This is an application of the fundamental theorem of welfare economics: under perfect competition, the allocation of resources is efficient and output is maximized. Immigration restrictions are limits on perfect competition. Thus, liberalized migration would cause a rise in world welfare. As noted above, a number of leading economists have suggested that the potential global benefits from liberalization of migration are very significant, and therefore merit an effort comparable to, or greater than, that devoted to liberalization of trade in goods and services. Assuming that a destination country's higher wages—which attract immigrants—result from a higher marginal product of labor, mobility will be efficient. That is, by allowing migrants to move to where they can achieve greater productivity, we increase world welfare.

“By prohibiting the immigration of many persons, the United States inevitably shrinks the size of the world economic pie, reducing the economic opportunities that could be available to many persons in the source countries” (Borjas 1999, p. 181). “If we consider both the sending and the receiving countries as part of the same world, then—and on this every economist agrees—the overall effect of the migration on the average standard of living of the world's people is positive. The reason for this is that the migrant goes from a place where he or she is less productive to a place where he or she is more productive” (Simon 1999, p. 299).

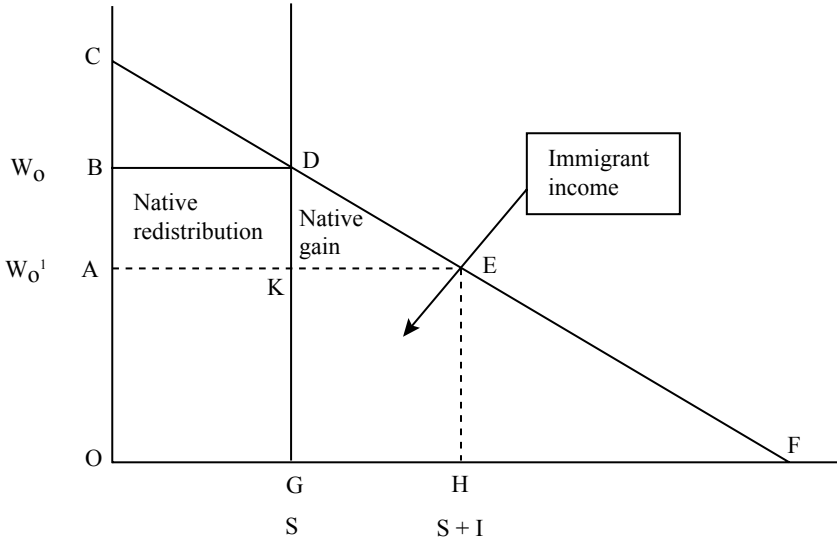
While individual workers will by definition do better by moving (absent information problems), and while it seems reasonable to expect that increased free movement will enhance global welfare, it is difficult to determine the effects of mobility on the welfare of other individuals or on national welfare. Free migration is not necessarily beneficial to all. For example, home states that make substantial expenditures on education may lose in a particular emigration transaction. However, there

may be an economic payoff to the home state, in the form of remittances, or in the form of returning workers bringing back capital, skills, and information. We even encounter a problem in defining the “home state”—does welfare of former home state residents count as part of home state welfare? A cosmopolitan perspective would ignore differences between home state and destination state welfare and consider only global welfare, but it would certainly examine the distributive consequences of immigration. From a cosmopolitan perspective, if all the residents of a home state improved their welfare by leaving the home state, immiserating the now-empty home state, that would be a welfare-improving and desirable outcome.

Destination states may experience economic benefits but also detriments, especially if they make great expenditures on social services. Individual workers in destination states may lose jobs to immigrants, and there may be costs associated with dislocation, also putting strains on the destination state’s fiscal situation. Furthermore, the destination state will incur the costs of administering an immigration system, of assimilating an immigrant population, and of potential transfer payments for medical care, education, retirement benefits, and unemployment benefits, among other social services. It would be appropriate for governments to assess these costs in formulating immigration policy.

A basic labor economics model of supply and demand views immigration as an increase in the number of workers at any given level of the wage rate. “The result is an outward shift of the labor supply curve” (Friedberg and Hunt 1999, p. 343). Figure 2.1 depicts how an increase in the supply of labor due to immigration affects the earnings of workers for whom the immigrants are assumed to substitute.  $S$  is the initial supply of labor. Immigration of  $I$  persons increases the supply to  $S + I$ . This reduces the wage from  $W_0$  to  $W_0^1$ . Total output increases by the trapezoid  $DGHE$ , but much of this gain, represented by the rectangle  $KGHE$  (labeled “Immigrant income”), accrues to the immigrants.

“The gain to residents is the welfare triangle  $DKE$ , which consists of the loss in incomes to factors that substitute for immigrants of  $BADK$  and a gain to factors complementary to immigrants” (Freeman 2006). Hatton and Williamson (2005, p. 290) find that “the overall gain from immigration to all native-born residents is likely to be very small.”

**Figure 2.1 Gains and Losses from Immigration and Emigration**

SOURCE: Freeman (2006).

All other things being equal, theory predicts that the increased supply will result in reduced prices (wages) and an increased number of employees. (We see below that empirical verification of this effect is subject to debate.) However, because the wage falls, some will decide not to work, and the employment rate will fall. Output increases, because inputs become cheaper (Friedberg and Hunt 1999, p. 343). The distributional effects are unambiguous in the sense that wage earners lose while their employers gain (Hatton and Williamson 2005, p. 290).

On the home country side, a converse simple model may be applied. A reduction in the workforce due to emigration increases wages, increases the employment rate, and decreases output.

Of course, this analysis does not examine the effects on other factors of production, or differentiation between different types of workers, not to mention both dynamic and fiscal effects. In recent years, economists have engaged in detailed empirical analysis that suggests that additional factors must be considered in order to develop a full picture of the effects of migration.

For example, immigrants are often unskilled, focusing the effects of immigration on the market for unskilled labor. This focused effect may cause substitution of unskilled workers for more skilled workers, affecting the skilled labor market, or it may call for employment of skilled workers with complementary skills, such as managers. Therefore, it is initially uncertain what the effects of unskilled migration will be on skilled workers (Friedberg and Hunt 1999).

### **Migration, Trade, and Investment**

Globalization in the form of reduced barriers to trade in goods, services, and capital may reduce the demand to migrate by increasing economic opportunity in the potential departure country. It also reduces the potential effects of migration on competing workers. “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” (Smith and Edmonston 1997, p. 147). More broadly, free trade may also have the effect of leveling wages, reducing incentives to migrate.

How does migration relate to trade? There are instances of similarity, substitutability, and complementarity. “The primary effect of both immigration and international trade is to allow us to specialize in producing those things we are good at and to consume something other than what we can produce ourselves . . . In the extreme, immigration could equalize the composition of labor skills and capital/labor ratios across countries, eliminating incentives for much of trade. In principle, so too might international flows of capital” (p. 146)

Smith and Edmonston find that in the United States, immigrants are disproportionately employed in import-competing sectors, and thus largely substitute for imports. They observe that analyses that fail to take this aspect into account may overstate the adverse effects of immigration on native workers (p. 148).

As described by the World Bank Independent Evaluation Group (2006), migration affects trade through several channels, some of which increase and others of which decrease trade. First, to the extent that migration raises global incomes, it may increase trade flows. Second,

the World Bank model assumes disproportionate migration of skilled workers (compared to historical flows), many of whom will work in nontraded sectors, such as personal services, rather than produce goods. Third, remittances increase imports and decrease exports of developing countries. Thus, while changes in migration can affect trade flows, they are not substitutes for one another. On the other hand, trade and migration may be complementary along a number of dimensions. For example, greater migration may stimulate trade due to the preferences or knowledge of migrants (Rauch and Trindade 2002). Economists find a “migration hump” that arises from increased free trade, meaning that upon trade liberalization, the number of migrants first increases, and then, due to income and job growth, decreases.

Immigration of workers who specialize in import competing sectors will result in a shift in resources into those sectors. The result should be a reduction of the relevant imports. Therefore, the terms of trade would shift in favor of the importing state, while the importing state’s comparative advantage would be smaller, and it would gain less from trade (Smith and Edmonston 1997, p. 148).

On the other hand, immigration of workers who specialize in export sectors would tend to increase the destination state’s comparative advantage. Thus, it is possible that one state would seek to accentuate its comparative advantage by attracting and admitting a particular type of worker, while other states would seek a different type of worker.

Where there is a barrier to trade in goods that inefficiently protects a domestic manufacturing industry, that domestic manufacturing industry may hire increasing numbers of immigrants. Under these circumstances, the efficiency of migration is predicated on an inefficient trade barrier. If the trade barrier were eliminated, migration would be less attractive. However, Sykes (1995) points out that if the trade barriers cannot be removed, then migration might be a second-best adaptation.

### **h eckscher-o hlin**

The standard Heckscher-Ohlin theory of trade assumes labor *immobility* as a basis for trade in goods in which labor-abundant countries export labor-intensive goods. Trade in goods in this sense substitutes for movement of people (and vice versa) (Faini, de Melo, and Zim-



mermann 1999). The Heckscher-Ohlin theory of trade holds that, all other things being equal, countries endowed with more skilled workers will export skill-intensive goods, while countries endowed with fewer skilled workers will export unskilled-labor-intensive goods. This is the operation of comparative advantage. The operation of this trade will move toward relative factor price equalization.

Trade may result in convergence of wages, in accordance with the factor price equalization theorem. Increased wages in the home country relative to the wages in the potential destination country reduce the incentives for migration. This was one of the motivations of the United States in entering into NAFTA with Mexico: to reduce incentives for illegal migration.

In order for trade and migration to be considered substitutes, five assumptions, consistent with Heckscher-Ohlin theory, must be made (Martin, Lowell, and Taylor 2000, pp. 149–152):

- 1) identical production technology,
- 2) same factors of production (factor homogeneity),
- 3) constant returns to scale,
- 4) instant adjustment to changes in international market environment, and
- 5) perfect competition.

Under these assumptions, factor prices, including wages, will be equalized between the two trading countries. There will therefore be no economic reason for migration. As Simon explains, this type of *trade* model can only explain why migration need not take place under certain conditions—ideal conditions at that. It does not explain why migration should occur (Simon 1999, p. 19).

In this simple Heckscher-Ohlin model, in which technology is identical across countries, and in which there are only two factors of production, trade and migration are thus substitutes: they have identical effects on factor prices, leading to factor price convergence, and the more one type of liberalization occurs, the less incentive there is for the other (O'Rourke and Sinnott 2003, p. 18). Furthermore, under factor price equalization, immigration will not affect wages, which are already equal.

This perspective may provide a partial answer to the question of why barriers to immigration have increased while barriers to trade in goods have decreased: the decreasing barriers to trade in goods undermines the incentives for immigration. To the extent that trade and migration are substitutes for one another, trade liberalization may reduce the pressure for migration, and vice versa. Incidentally, the same might be said with regard to investment liberalization.

Friedberg and Hunt (1999, p. 345) explain that the “predictions of this most simple trade model are thought to be unrealistic, but even more complex versions of the model predict that small numbers of immigrants will have no effect on the wage.” This simple model may be supplemented by allowing factor endowments and technology to vary between states. Friedberg and Hunt conclude that theoretical models “thus have predictions ranging from a definite fall in the wage and employment rate (the closed economy case) to a wage fall after a certain threshold of immigration is passed, to no fall in wages (open economy models)” (p. 345). They call for empirical work to address the question of the effects of migration on wages.

Of course, once the assumption that technology is identical across countries is abandoned, or once there are more than two factors of production, it becomes possible that trade and immigration would be complements instead of substitutes. For example, if technology is better in the higher-skilled country, or if the higher-skilled country is better endowed with another factor compared to the lower-skilled country, then it no longer follows that skilled workers will migrate from high-skilled countries to low-skilled countries (Markusen 1983, p. 341).

Under some circumstances, both skilled and unskilled workers may flow toward the high-skilled country. Importantly, differences in productivity explain why we still see migration from countries where high-skilled labor is scarce to countries where high-skilled labor is abundant: in countries where high-skilled labor is abundant, the productivity of high-skilled labor is often higher than in countries where high-skilled labor is scarce. Therefore, high-skilled workers may migrate to high-skilled countries in order to achieve a higher wage. “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” (Markusen 1983).

Thus, even factor price equalization does not necessarily lead to equal wages. Trefler (1993, 1998) shows that the factor price equalization theorem must be modified to refer to productivity-adjusted wages. “Trade, people flows, and capital flows were not substitutes in the U.S. economy during the 1980s and into the 2000s, when imports of goods and services, and financial capital, and skilled and unskilled immigrants increased” (Freeman 2006, p. 160). Freeman suggests that “one plausible explanation is that countries differ in technology (Markusen 1983; Markusen and Svernssoon 1985). 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” (Gierking and Mutti 1983). Similarly, Martin, Lowell and Taylor (2000, p. 150) 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.

On the other hand, free trade can change labor supply conditions. So, if an advanced country, such as the United States, is able to produce certain manufactured or agricultural goods using capital intensive technology with great efficiency, while a developing country uses less efficient labor-intensive production methods, a move to free trade may displace workers in the developing country.<sup>3</sup> Significant displacement of workers by such trade may affect the demand for emigration.

Let us relax the assumption of free trade. Under a tariff or other barrier, there may be incentives for migration (Sykes 1995). Assume that a wealthy country imposes a tariff on a labor-intensive good. This tariff is likely to cause domestic firms to increase output, increasing demand for labor and therefore increasing wages. The increase in wages may induce immigration, reducing the relevant wage. “For example, skill-abundant countries tend to import low-skilled labor intensive products and receive immigrants who are less skilled than natives on average” (Mayda 2007; Moses and Letnes 2004, p. 1610).

As countries move toward free trade in goods, the price of skilled labor rises in the country with more skilled workers, and falls in the country with less-skilled workers (O’Rourke and Sinnott 2003, p. 18). Therefore, it is expected that in skill-abundant countries, the unskilled would favor trade protection, while in low-skilled countries, the skilled would

favor protection. This is consistent with the holding of the Heckscher-Ohlin theorem: that owners of a country's abundant factors gain under trade liberalization while owners of scarce factors lose (Mayda 2007). Of course, from a policy standpoint, those who favor protection might favor *selective* protection that protects their market position.

In North America, there is an interesting historical connection between labor market integration and goods integration. The *Bracero* program, which was utilized between 1942 and 1964 to bring Mexican temporary workers into the United States, produced a degree of dependence by a group of Mexican workers on U.S. jobs, and also stimulated demand in Mexico for U.S. jobs.

Upon the termination of the *Bracero* program, the border region of Mexico faced a surge in returning workers. Mexico turned to offshore assembly processing and created the *Maquiladora* program (Martin, Lowell, and Taylor 2000, pp. 137, 142–143). The *Maquiladora* program allowed U.S. investors to create jobs in the Mexican border areas by shipping components for assembly to Mexican plants. The finished goods would be subject to tariffs only on the Mexican value added. The next step was the creation of NAFTA, raising the question of whether trade liberalization is a substitute for migration. The U.S. Commission for the Study of International Migration and Cooperative Economic Development concluded that “expanded trade between the sending countries and the United States is the single most important remedy” for unwanted immigration (U.S. Immigration and Naturalization Service 1990).

Faini, de Melo, and Zimmermann (1999, p. 7) suggest that in the absence of effective means of inhibiting informal migration, “trade policy may represent a more effective strategy to deal with migratory pressures.” They quote former Mexican president Salinas: “Mexico wants to export goods, not people.”

Furthermore, when domestic agricultural sectors experience strong competition from imports, the rural agricultural sector can lose viability, leading to internal migration from villages to cities. This internal migration can increase the pressure to emigrate to another country (Hollifield 2000, pp. 75, 87; Sassen 1996, p. 78).

## Complementarity

There are certainly elements of complementarity between migration and trade. In considering the U.S. entry into NAFTA, former U.S. Immigration and Naturalization Service Commissioner McNary put it this way: “I feel more than a bit confident in acknowledging that if immigration is not formally on the table, someone at the table will sooner or later realize as a practical matter, that moving goods and services in international commerce involves moving people who trade in these goods and services” (McNary 1992).

Furthermore, from a dynamic perspective, offshoring, foreign investment, intellectual property licensing, and other globalized economic relationships increase the demand for temporary, and in some cases permanent, migration. In fact, restrictions on immigration can suppress these other forms of commerce. So, to some extent, restrictions on immigration are restrictions on trade, investment, etc. This can be seen in Modes 2, 3, and 4 of the General Agreement on Trade in Services (GATS), where movement of natural persons (Mode 4) is necessary or important to other types of trade in services: 1) consumption abroad (Mode 2), and 2) commercial presence (Mode 3). Mode 4 is addressed in more detail in Chapter 8.

## **Bases for Trade: Comparative Advantage, Absolute Advantage, and Economies of Scale**

Simon (1999, p. 17) argues that the gains from migration are unlike the gains from trade. The core difference, based on the simple model used by Simon for illustration, is that trade-induced shifts in prices and production benefit consumers in both the importing and the exporting countries, while migration-induced shifts principally benefit the migrant. Prices of goods remain as they were before migration. “And most important, there is no gain to non-moving natives similar to the Ricardian wine-and-cloth increase in total production whose benefit is realized by native consumers in both countries” (Simon 1999, p. 20).

Furthermore, trade is based on comparative advantage, while migration is based on absolute advantage. Therefore, if productivity is sufficiently greater across categories of labor in wealthy countries as

compared to poor countries, there may be little reason for migration from wealthy countries to poor countries. Hatton (2007, p. 359) concludes that for wealthy countries, migration is a one-way street: poor country citizens wish to migrate to rich countries, but not vice versa. There is significant migration from wealthy countries to poor countries, but it is a fraction of that from poor countries to wealthy countries (UNGA 2006).

Nevertheless, there may be an opportunity for a particular type of comparative advantage to operate in the field of migration. Indeed, for example, the Philippines seems to specialize in providing maids, nurses, and merchant marine sailors to other countries. Think of the worker as a product (a capital asset, if you will). Assume that Mexico produces masons more efficiently due to agglomeration effects, economies of scale, or network externalities in training, while the United States produces electricians more efficiently for similar reasons.

Under these circumstances, “trade” between the United States and Mexico in masons and electricians might produce benefits in accordance with absolute advantage. However, even if Mexico were better at producing both masons and electricians, it might make sense for Mexico to concentrate on production of masons if its advantage in producing masons is greater than its advantage in producing electricians. This is similar to the Ricardian example of transactions in wine and cloth between England and Portugal. Simon is still correct that those remaining in the labor-exporting state do not today generally realize the same type of benefits as producers of goods. However, a Bhagwati tax (or perhaps expectations of remittances) could allow Mexico to realize the benefits of its comparative advantage, and thereby provide Mexico with incentives for efficient production of workers. A “Bhagwati tax,” discussed in detail later in this chapter, is a tax applied by the home country to earnings of emigrants that are sourced in the destination country.

Another basis for trade in workers would be economies of scale or agglomeration effects in manufacturing or production of services. It may be that it is useful for one state to specialize in a particular type of production. For example, immigration of workers who specialize in export sectors would tend to increase the destination state’s comparative advantage in connection with the relevant exported goods. Thus, it is possible that one state would seek to accentuate its comparative

advantage by attracting and admitting a particular type of worker, while other states would seek a different type of worker. This type of variation of state preferences could form the basis for a mutually beneficial arrangement between states.

### **Migration and Investment**

In addition to a certain degree of substitutability between movement of individuals and goods, there is also a certain degree of substitutability between movement of individuals and capital. That is, if the increased productivity that may be achieved by migration of individuals may also be achieved by movement of capital to the individuals, then movement of capital is a substitute for migration. As Wong (2006, p. 112) notes, one suggestion made by way of reducing incentives for migration is to encourage more investment in the home countries. On the other hand, increased emigration may reduce incentives to invest in the home country.

If, as Freeman (2006) and Markusen (1983) suggest, technological differences may explain why both capital and labor flow together to developed countries—because both are more productive in developed countries—then it is also true that reduction of technological differences may reduce this effect and reduce incentives for skilled persons in developing countries to migrate to developed countries. This effect may also increase incentives for skilled persons in developed countries to migrate to developing countries.

While we cannot expect that technology will necessarily flow to developing countries, if it were directed to developing countries, outbound migration of skilled persons would likely be reduced. To the extent that investment results in technological advancement, investment can serve as a substitute for migration.

Wong develops a theoretical model that argues that there are cases in which capital movement and migration are substitutes in the price sense, and cases in which they are complements, but that they are most likely to be substitutes. Wong's findings (2006, p. 138) support the common perception that if the movement of one factor is liberalized, then the movement of the other factor will tend to decrease. On the other hand, using a Ricardian model that emphasizes technological differ-

ences, Davis and Weinstein (2002) find complementarity and support this view with an empirical analysis.

## **GLOBAL EFFECTS**

Theory suggests that there are substantial possible benefits from migration, but it also suggests that the lion's share of these benefits accrues to the migrants themselves. In this section, I review the empirical analysis of the global effects of migration. In the following sections, I review the parameters that determine the separate effects on a number of groups.

In migration, the early work of Hamilton and Whalley (1984) provides estimates of global gains from a move to free migration. Using 1977 data, Hamilton and Whalley estimate that gains from completely free migration could reach US\$16 trillion. This exceeded world GNP for 1977. Importantly, Hamilton and Whalley assume that differences in the marginal productivity of labor are exclusively the result of barriers to mobility, and their estimates are based on politically infeasible levels of migration. They estimate movements of labor once restrictions on migration are removed, assuming that labor would continue to move until wage rate equalization is achieved. Wage rate equalization would raise the wages of the world's lowest-paid workers substantially. While these massive gains may be unrealistic for a number of reasons, including failure to reflect fully the transportation costs, externalities, and other costs involved with migration, this research motivates further research into the scope of achievable global gains.

Moses and Letnes (2004), noting that there are remarkably few analyses of global gains from freer migration, update the Hamilton and Whalley (1984) research using 1998 data. In their "most reasonable" scenario, the expected global efficiency gains from complete liberalization are almost US\$3.4 trillion. When these figures are adjusted for workforce and efficiency differences, the lowest estimate is still US\$1.97 trillion, which amounts to 5.6 percent of 1998 world income. Moses and Letnes (2004) estimate that even a 10 percent increase in in-



ternational migration would produce an annual efficiency gain of about US\$774 billion 1998 dollars.

The World Bank Independent Evaluation Group (2006, p. 31) estimates that a 3 percent increase in the stock of migrants to 2025 would produce global gains of US\$356 billion for 2025, a 0.6 percent increase in annual global real income.<sup>4</sup> The main gains come from the higher incomes that migrants can earn in the destination country.

Of course, these estimates are contingent on a number of assumptions, and it is impossible to determine with specificity the conditions that would have to be met in order to increase international migration by the specified measures. For example, it is important to note here that the World Bank's assumption is that the 3 percent rise in the workforce is allocated between skilled and unskilled workers on the basis of the proportion already existing in the destination developed country economy as a whole, rather than the proportion already existing among migrants. This requires a much larger increase in the number of skilled migrants compared to the increase in the number of unskilled migrants. The number of unskilled migrant workers increases by 39 percent, while the number of skilled migrant workers rises by 138 percent (World Bank Independent Evaluation Group 2006, p. 33). The World Bank does not explain what might cause this increase in the proportion of skilled migrants (World Bank Independent Evaluation Group 2006).

As we consider the effects on migrants, and the antipoverty effects of this type of migration, it will be useful to keep in mind the disproportionate growth in skilled worker migration assumed by the World Bank Independent Evaluation Group (2006). While this assumption seems somewhat implausible, given the fact that many destination states are selecting for higher-skilled immigrants, it may be appropriate.

I will discuss distributional issues in more detail below, but it is worthwhile here to note how these gains are distributed between wealthy and poor countries. Under a migration increase of 10 percent, in Moses and Letnes's (2004) "middle" scenario, workers in the poorest regions receive an increase in wages of 4.1 percent, while wages in the richest regions decline by 2.5 percent. On the other hand, capital owners in wealthy states are made better off, while capital owners in poor states are made worse off. According to the World Bank model, the aggregate percentage income gain to developing countries (including the

new migrants) is 1.8 percent, while the gain to high-income countries is 0.4 percent (World Bank Independent Evaluation Group 2006).<sup>5</sup> The inclusion of the new migrants in the developing countries category, despite their departure, may be questioned by some. That is, if the goal is to benefit developing *countries*, then benefits to migrants per se are irrelevant. On the other hand, for those who have a more cosmopolitan concern for the effects on former residents of developing countries, assuming that they are relatively poor, the inclusion of emigrants in this category may seem appropriate.

These models suggest that the potential global gains from reducing restrictions on migration are great. But today, almost no international diplomatic resources are devoted to realizing these gains, with the exception of highly restricted efforts under Mode 4 of GATS. (See Chapter 8.) On the other hand, the resources devoted to international trade negotiations are much greater, while the expected returns are considerably smaller.

The World Bank's trade model suggests that the gains from removing *all* barriers to goods trade would yield \$287 billion in global income gains in 2015 (Anderson, Martin, and van der Mensbrugghe 2006). The Doha negotiations are not expected to yield anything close to this level of liberalization. Anderson, Martin, and van der Mensbrugghe project that a "base Doha scenario" would yield only \$96 billion in annual gains by 2015, with developing countries capturing a mere \$16 billion of this amount.

On the other hand, we have the World Bank Independent Evaluation Group (2006), Moses and Letnes (2004), and Hamilton and Whalley (1984) studies noted above, estimating gains from migration liberalization that would exceed, in some cases greatly, the gains from a "likely Doha scenario" (Walmsley and Winters 2003). Scaled to the same year, 2001, the gains from *total* trade liberalization are \$155 billion while the gains from a *3 percent increase* in the stock of migrants is \$175 billion (World Bank Independent Evaluation Group 2006, p. 41). Not only does migration reform provide greater aggregate gains, but the gains are distributed more greatly to developing countries. No wonder thoughtful observers wonder why migration is *not* on the global agenda. However, these estimates do not appear to take into account possible adverse brain drain or dynamic effects on growth in the home country. If these

were viewed as significant, they might reduce the value of increasing migration, especially to the extent that the migration is heavily oriented toward skilled labor.

It seems reasonable to conclude that liberalization of migration presents the possibility of substantial improvement of global welfare, even though these are only estimates, with many assumptions and empirical gaps. However, the devil is in the details of the distribution of increased (and decreased) welfare, and the political consequences of these distributional details. It is also worth noting that the gains from increased migration are largest with the initial, even small, increases in migration (Moses and Letnes 2004).

### **Effects on Migrants**

It seems reasonable to assume that under a permissive, as opposed to forced, migration regime, individual migrants will benefit from their own migration. This assumption follows from the assumption of individual rationality, and from methodological and normative individualism. And indeed, we would expect to see few individuals choosing to migrate to a state where their welfare is reduced, based on a comparison of the available baskets of wages, public services, general living conditions, taxes, transfer payments, and many social and political parameters. Mexico has far fewer U.S. native immigrants than the United States has native Mexican immigrants.

However, the assumption that individual decision-making is consistent with individual welfare maximization is not always true. There may be circumstances in which migrants are prey to information asymmetry in which their decision to migrate will reduce their expected welfare (World Bank Independent Evaluation Group 2006, p. 61). Migrants may be unaware of the simultaneous decisions of other migrants, causing wage expectations to be frustrated, or causing congestion. There may be circumstances where excessive migration would cause disruption and adjustment costs that exceed the gains. If, for example, Switzerland today were to open its borders to all who wish to become Swiss citizens, it might be that so many poor people would suddenly move to Switzerland that it would become congested and their welfare would actually be diminished.

Individual migrants, and their accompanying families, hope that they will benefit by migration from two sources: higher wages and better living conditions.

First, they may benefit from higher wages in the destination country compared to the home country. This is the main source of gains. Indeed, the World Bank Independent Evaluation Group (2006, p. 35) estimates that under the scenario studied there, migrants increase their own real income by 199 percent: they nearly triple their real income, even after adjusting for a higher cost of living in the destination country. These gains are, of course, striking, although gains will vary depending on the particular home country—a less wealthy home country results in greater gains.

Where do these gains come from? Freeman (2006, p. 154) explains that

the huge gains in income that immigrants from a low-income country obtain by moving to a high-income country virtually guarantees that most of the gains to immigrants occur not because of positive selectivity of immigrants but rather because high-income countries have more complementary inputs: higher capital-labor ratios, more modern technology, superior infrastructure, more efficient markets due to greater legal protections of property and persons, and lower levels of corruption and rent-seeking.

So it is generally the factors, such as technology, that are available in the wealthy host country that allow immigrants from poor countries to achieve greater wages. Conversely, the lack of these factors generally results in lower wages for similar work in poor countries, ensuring that there is no rush of wealthy country individuals to migrate to poor countries.

Second, migrants and their families may benefit from better living conditions in the destination country. These better living conditions may arise from a number of sources, including the destination country's institutions, transfer payment programs, climate, geography, culture, economy, etc. The particular sources of benefits that seem to cause the greatest concern, perhaps because they are rival in their consumption, are transfer payments and welfare programs. These include unemployment payments, health care and insurance, retirement benefits, public education, and perhaps other programs.

There is little doubt that increased wages are an important inducement to migration, and we can expect migrants to improve their own lots whenever they migrate. However, other parameters will be important to the decision to migrate. These will include the following, each of which might be the subject of international legal rules on migration:

- Whether the migrant is permitted to remain in the destination country permanently, or is only permitted to remain temporarily. As a potential migrant calculates the total present value of migration, he or she would tend to find less value in a short-term migration than in a long-term migration. The migrant would of course want the option to return, and may well return, but the option to *stay* makes migration most valuable.
- Linguistic and cultural differences and accommodation. Destination states may require facility with local language and culture, or may provide greater accommodation to those who are not familiar with local language and culture.
- Licensing and recognition of credentials for skilled workers. For occupations that require credentials or licensing, recognition of foreign credentials and licensing would facilitate mobility.
- Access to transfer payments and welfare programs.
- Ability to bring along family members.

## h o ME STATE EFFECTS

Although much of the policy discussion of migration focuses on destination country effects, the greater effects may be felt by the home country of the migrant. As suggested above, liberalization of migration generally increases global welfare and also generally increases the welfare of migrants. But migrants themselves are only one segment of society. There are other segments whose welfare and political influence must be considered.

### Those remaining Behind in the home State

First, let us consider those who the migrants leave behind in the home country. These people might be hurt in some ways but might also be helped in other ways. The World Bank estimates that most developing countries will experience some modest aggregate gains from emigration (World Bank Independent Evaluation Group 2006, p. 37). These gains depend on continuing average remittances at prior levels equal to 17 percent of migrant income. But it is important to emphasize that the impact on particular countries will depend on their circumstances, including the magnitude of migration, the skill level of migrants, and labor market conditions at home and abroad. In addition to the magnitude of remittances, the quality of remittances—most importantly, whether they are for consumption or investment—will determine their impact.

O'Rourke (2004, p. 7) finds that wages rose in emigration countries during the late nineteenth and early twentieth centuries, converging with countries of immigration, and that “emigration was an important source of living standard convergence for [emigration countries].” Taylor and Williamson (1997, p. 27) find that international real wage dispersion declined by 28 percent from 1870 to 1910, but that without the mass migrations of this period, wage dispersion would have increased by 7 percent. Migration explains about 70 percent of living standards convergence during this period. O'Rourke (2004, p. 9) concludes that “emigration 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” (see also Williamson [2002]). Hatton and Williamson (2005, p. 3) conclude that “In the first global century, emigration raised living standards in poor countries a lot. In the second global century, emigration *could* raise living standards in poor countries a lot, but typically it does not.”

Although the World Bank Independent Evaluation Group (2006) finds that increasing emigration of low-skilled workers would significantly reduce poverty in developing countries, those remaining behind do not necessarily benefit from the emigration of their compatriots. First, emigration of high-skilled workers may reduce welfare in the sending country. Second, for the same types of reasons that workers in the destination country are not necessarily hurt by immigration, work-

ers 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. Recall that the World Bank simulation assumes an increasing proportion of skilled migrants, compared to unskilled migrants, to developed countries. So, beyond the ability of emigrants to escape poverty, what are the mechanisms that affect those remaining behind in developing countries?

### **Low-Skilled Migration and Domestic Employment in the Home State**

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 (World Bank Independent Evaluation Group 2006, p. 64). However, recent studies of Albania, Bangladesh, and Sri Lanka show no discernible wage improvements, despite large-scale emigration (Lucas 2004).

“Reducing the restrictions on low-skill emigration, while remaining sensitive to concerns in destination countries over social tensions, job opportunities for low-skilled natives and the potential burden on public expenditures, may best be achieved through managed migration programs designed jointly by origin and destination countries” (World Bank Independent Evaluation Group 2006, p. 58). This is an argument for international migration agreements. Whether these agreements are bilateral, plurilateral, or multilateral, and whether they are formal or informal, will depend on a number of factors. (See Chapter 9.)

### **High-Skilled Migration and Brain Drain**

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, the tax base, and scale economies (Bhagwati and Rodriguez 1975, p. 195; Krugman 1971, p. 483; Sykes 1995). 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” (Straubhaar 2000, p. 110; Sykes 1995).

High-skilled migration has grown as a proportion of migration, in part due to selective immigration policies in countries such as the United States, Singapore, Canada, and Australia. Those remaining behind may be hurt by brain drain. Brain drain costs to those remaining behind may include increased wage costs for employers and consequent increased prices paid by consumers and reduced returns to capital. 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 migration, whereas smaller countries with fewer skilled people, and relatively smaller capacities to produce skilled people, may experience greater harm (Bhagwati 2004, p. 215).

Brain drain may reduce both the welfare of those remaining behind 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 (World Bank Independent Evaluation Group 2006, pp. 58, 67).

Desai, Kapur, and McHale (2004) calculate that India loses \$700 million annually in tax revenues that would have been realized from emigrants to the United States under its H-1B visa program, an amount equal to approximately 12 percent of India’s tax revenues. The World Bank Independent Evaluation Group (2006) concludes that it is impossible to estimate reliably the benefit or cost to home countries of high-skilled emigration. 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 prospects and human capital formation. 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 (Beine, Docquier, and Rapoport 2003, p. 4).

Carrington and Detragiache (1998) have produced estimates of migration rates from 61 developing countries, distinguishing three educational levels. These estimates confirm that those with greater educational levels are more likely to emigrate. Beine, Docquier, and Rapoport (2003) find that countries that incur important losses are generally those that have very high migration rates, but that the magnitude of losses and gains, in terms of GDP per capita growth rate, remains limited for most countries. Except for Jamaica and Guyana, with very high migration rates, the net variation of GDP per capita growth rate is always lower than 0.20 percent per year (p. 29). While Beine, Docquier, and Rapoport find that more states are losers than winners, the winners include the most populous states, representing nearly 80 percent of the total population of their sample. These results suggest first that brain drain is not a problem in all origin developing states, and that on an aggregate basis, it is not a problem at all. However, particular origin developing states might experience a welfare loss, and may determine to take steps to reduce this loss.

Kapur and McHale (2005, p. 4) note first that the prospect of migration affects investment in human capital: potential migrants seek human capital to enhance their ability to migrate successfully (see also Beine, Docquier, and Rapoport [2003, p. 4]; Stark and Wang [2002]). Lundborg (2006) argues that “the prospect of emigration to high-wage countries raises the expected returns to education, stimulates human capital formation, and raises the growth rate in the emigration country.” This has become known as the “brain gain.” Of course, in order for this investment in education to enhance growth in the home country, a certain number of individuals must erroneously invest in education—expecting migration opportunities that fail to materialize (Mountford 1997). Kapur and McHale (2005) also note the adverse effects on the home developing country of the loss of human capital.

There is also a related dynamic public policy problem with brain drain, relating to public investment in human capital. If we understand brain drain as a positive externality conferred by home countries on destination countries in the form of subsidized education of migrants, then the home countries may not be able to capture the full benefits of

public education. Public education would become a global public good, with the risk that states may therefore invest less in public education, and public education would tend to be underproduced.<sup>6</sup>

### **Remittances, Return, and Other Diaspora Benefit**

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 know-how (Beine, Docquier, and Rapoport 2003, p. 4).

Perhaps the most significant source of positive feedback effects is remittances. 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. (International Fund for Agricultural Development 2007)

Remittances have been identified as an important compensation to origin countries, to compensate them for losses incurred with the departure of workers (Goldfarb, Havrylyshyn, and Mangum 1984). "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" (Freeman 2006).

Home countries are increasingly acting to enhance the quantity and quality of remittances. They 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.<sup>7</sup>

Assuming remittance rates at current levels, the World Bank estimates that those remaining behind would experience a net increase of 0.9 percent in their real incomes (World Bank Independent Evaluation Group 2006, p. 34). Unger (2005) estimates that income grew more rapidly in Mexican towns experiencing greater emigration, and that income growth was associated with greater remittances.

Of course, remittances have other effects. For example, while poverty alleviation is an important effect of remittances, an increase in remittances used for other consumption can draw resources away from more productive or more development-conducive uses. Remittances can cause an increase in the real exchange rate, and therefore a loss of export competitiveness. This is the standard “Dutch disease” (World Bank Independent Evaluation Group 2006, p. 39).

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. (Organization for Security and Cooperation in Europe 2006, p. 77)

Indeed, remittances may be used more for consumption than for investment, and this may limit their effect on growth (Kapur and McHale 2005, p. 150). It may be that remittances from more-skilled workers more frequently take the form of growth-promoting investment (Desai, Kapur, and McHale 2004). 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 (p. 161).

Martin (2004) 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. (p. 15)

Some home countries have tried to capture the value of remittances by regulating the activities of their emigrants.

For example, many Korean migrants in the Middle East in the late 1970s and early 1980s were considered employees of their Korean construction company, and had their Korean currency earnings sent to their families in Korea while receiving a stipend in local currency abroad. Many Chinese and Vietnamese migrants today go abroad as employees of Chinese and Vietnamese firms, and their wages are paid in a similar way—most go to the migrant’s family or bank account in local currency . . . Similarly, between 1942 and 1946, Mexican Braceros had 10 per cent of their earnings sent from US employers directly to the Bank of Mexico. (p. 15)

Return of emigrants can provide development benefits (Ellerman 2003). Brain drain may be turned into “brain circulation,” strengthening developing country human capital. For example, in India, IT workers may return from the United States with the know-how and contacts to start up new high-tech businesses. There have been a number of programs, organized by destination states or international organizations such as the IOM, established to facilitate or encourage return (World Bank Independent Evaluation Group 2006, p. 71).

In addition, the home country can benefit informally, as “a well-educated diaspora can improve access to capital, technology, information, foreign exchange, and business contacts for firms in the country of origin” (World Bank Independent Evaluation Group 2006, p. 58).

### **Producers in the home State**

Producers in developing home countries would be likely to suffer from emigration. Capital returns may decline, while labor returns may improve. In fact, multinational corporations that have the ability

to invest in developing countries may therefore find liberalization of migration unattractive.

Importantly, and unfortunately, free migration would serve, at least in the short term, as a deterrent to investment. In the World Bank simulation, developing country pools of unskilled workers only decline by 0.3 percent, while skilled workers decline by 1.7 percent (World Bank Independent Evaluation Group 2006, p. 44). However, there is at least a plausible argument that emigration may raise the productivity of those left behind (O'Rourke and Sinnott 2003, p. 6). Furthermore, the loss to capital may be offset by the gain to labor.

The generally adverse effect of emigration on producers in developing countries means that it may be difficult to develop political coalitions in developing countries to lobby to seek liberalization of immigration by destination states. On the other hand, those home state residents who anticipate a possibility for migration may support efforts to seek liberalization abroad. This will be further elaborated upon in Chapter 4.

## **DESTINATION STATE EFFECTS**

Destination states are benefited by 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 (1997) 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. 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 nonimmigrant 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 states may be harmed (in economic terms) through three mechanisms. Each of these harms must be balanced against potential benefits. 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. Costs of adjustment may include costs of retraining or of providing other social welfare programs to displaced workers, or social costs of simply having displaced workers.

Second, the destination state will experience the costs of administering an immigration system. Of course, these costs do not necessarily militate against *liberalized* immigration, unless they increase as a function of the level of immigration.<sup>8</sup>

Third, destination states may be harmed through the fiscal mechanism, whereby immigrants receive more in public services and transfer payments than they contribute through taxes. Sudak and Trebilcock (2006) propose a required insurance mechanism to ensure that each individual migrant avoids imposing an inappropriate cost to the public fisc.<sup>9</sup> As Hanson concludes (2007, p. 21), 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.” “For low-skilled immigration . . . this does not appear to be the case.”

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.

There seems to be wide agreement that the United States 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 has been the recent trend, is more ambiguous. This may ex-

plain why many destination states, such as the United States, Germany, Canada, or Singapore, provide more liberal access for high-skilled persons.

In the end, Smith and Edmonston (1997, p. 6) 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.”

There has been a lively empirical debate among economists with respect to the destination country effects of immigration to the United States, and this debate has spilled over into the public arena (Lowenstein 2006). This debate has focused, importantly, on the effects of immigration on low-skilled workers.

Before reviewing this debate, it is important to state that the outcome is not the final word with respect to global welfare, or even with respect to U.S. aggregate welfare. That is, even if it is found that the United States is harmed by liberalized immigration, it may be that global welfare is increased, and therefore it would be efficient (albeit perhaps unappealing from a distributive standpoint) to compensate the United States in order to induce the United States 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. Recall that in the GATS negotiations, 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.

Second, even if the poorest workers in the United States are otherwise harmed by liberalized immigration, it may be that the United States as a whole benefits from liberalized immigration. Again, under these circumstances, it might be efficient to compensate the harmed workers in order to induce them to accept liberalized immigration.<sup>10</sup>

### **Workers in the Destination State**

Individual workers in destination states may lose jobs to immigrants, and there may be costs associated with dislocation. Of course,

in the simplest terms, adding to the supply of workers should result in a new supply-demand equilibrium, shifting the price downward (see Figure 2.1).

Supply and demand, and historical data, suggest that the impact on specific groups of domestic workers would depend on the composition of immigrant worker groups: if the immigrants are largely unskilled, or low skilled, their effect will generally be to reduce the wages of the unskilled or low skilled (O'Rourke and Sinnott 2003, p. 14).

Under the Heckscher-Ohlin theory, we would expect high-skill workers to migrate from high-skill countries to low-skill countries, and we would expect high-skill workers in low-skill countries to oppose immigration (at least by high-skill workers). Conversely, low-skill workers would migrate from low-skill countries to high-skill countries, and we would expect low-skill workers in high-skill countries to oppose immigration (at least by low-skill workers) (O'Rourke and Sinnott 2003, p. 7). We discuss this further in Chapter 4.

It is worth noting that “between 1960 and 2000, the share of working-age native-born U.S. residents with less than twelve years of schooling fell from 50 percent to 12 percent” (Hanson 2007). By comparison, in Mexico, “as of 2000, 74 percent of working-age residents had less than twelve years of education” (p. 14). While these statistics are not proxies for abundance or scarcity, they are highly suggestive. Thus, immigration from Mexico to the United States, if unregulated, would likely be dominated by unskilled workers.

There are five potential mechanisms by which an influx of foreign workers may affect the circumstances of native-born workers (as workers—we will examine the effects on consumers and taxpayers below).

- 1) An increase in the supply of workers competing for particular jobs should, in theory, drive down wages. (See Figure 2.1.) This could result in reduced employment, as some workers determine not to work at the reduced wage.
- 2) An influx of foreign workers may result in some adjustment in industry or in the types of capital investment made by industry. Producers may adjust the composition of their workforces, or their investment, in response to changes in composition of the workforce. An increase in the number of unskilled workers by immigration may result in adjustment through a change in the



output mix—toward more products produced by unskilled workers (Gaston and Nelson 2000, p. 104).

- 3) An influx of foreign workers may induce U.S. industry to invest in a particular area, actually increasing the number and quality of jobs in that area.
- 4) An influx of foreign workers may cause U.S. workers to seek other jobs in other communities.
- 5) An influx of immigrant workers should increase the wages of complementary workers—workers whose skills become more valuable due to immigration. An influx of chefs results in increased demand for waiters.

Much depends on the degree to which labor is specific to a particular sector, and on the mobility of labor between sectors. If labor were perfectly immobile between sectors, we would expect concentrated effects on the domestic workers in the sector or sectors targeted by immigrants. If labor were perfectly mobile, wages would fall by the same proportion in all sectors. Of course, it may be that immigrants would address a broad range of sectors. The greater the breadth of sectors affected, the more diffuse the effects.

This type of natural or autonomous “diffusion” can be simulated by an “institutional” diffusion—through taxation and adjustment payments.

So, an important question regarding national welfare calculations, and political and institutional responses, relates to the composition of the immigrant labor pool. If the pool of immigrants were such that overall welfare is increased by immigration, or if the pool of immigrants could be controlled to ensure that overall welfare is increased, then the argument for liberalized immigration would be similar to the argument for broad liberalization of trade in goods or services: while some are made worse off, those who are made better off are benefited in an amount greater than the amount by which those made worse off are hurt. That is, under these circumstances, liberalized immigration would be a potential Pareto improvement. As with the argument for free trade, this argument leaves aside the question of whether actual compensation would be provided to those made worse off, making the move to liberalized immigration an actual Pareto improvement.

But the debate in the United States is even narrower in its focus than an analysis of overall U.S. welfare: it examines whether immigrants hurt the economic position of the U.S. persons with whom they compete. So, it puts aside—it ignores—questions of compensation, although the outcome of the debate might have some bearing on policy decisions to make compensation available. Juxtaposing this migration policy discussion with that surrounding trade in goods and services, we might ask why the immigration debate looks at this narrower question of whether *some groups* are hurt, while the trade discussion is often content to deal with potential Pareto efficiency: whether enough surplus is generated to make compensation, even if compensation is not actually made. One answer is that the groups who actually seem to be hurt by migration to the United States are the lowest income groups, whereas trade in goods and services may be less focused in its effects. But this narrow focus makes it even more important to consider the possibility of compensation to those harmed.

While the United States cannot stand as a proxy for all developed destination countries, this section will review this empirical debate regarding the effects on native-born workers in the United States.

Examining the U.S. context, Card (1990, p. 245) argues that the link between immigration and wage suppression is difficult to isolate. Card's work considers the "natural experiment" of the arrival of 125,000 Cuban "Marielitos" (boat people) in Miami, increasing Miami's workforce by 7 percent. He compares the changes in the labor market structure in Miami to that of other cities over the same period, and finds that the increased workforce in Miami did not have a discernible effect.

Borjas (2004, p. 2) responds that intercity comparisons are not revealing because the flow of jobs and workers in response to immigration will "effectively diffuse the impact of immigration across the national economy." Inflows of migrants may be associated with outflows of natives, with the natives accepting reduced wages in other cities. However, Card and DiNardo (2000) use a three skill-group division and find that native mobility has virtually no offsetting effect with respect to supply shocks caused by immigration. (See also Card [2005]).

Furthermore, Borjas argues that Card's method of cross-city comparison erroneously assumes that immigrants are randomly distributed across labor markets. However, if "immigrants tend to cluster in cities

with thriving economies, there would be a built-in spurious positive correlation between immigration and wages” (Borjas 2004, p. 2). This would mask the negative effects of immigration. In addition, as immigrants enter a particular city, owners of capital may move their capital to those cities to take advantage of cheap labor. This increase in demand would have the effect of supporting labor prices in the city that experiences the inflow, while depressing wages in the city that the owners of capital abandoned. Thus, Borjas asserts that “because labor markets adjust to immigration, the labor market impact of immigration may be measurable only at the national level” (p. 2).

Therefore, instead of looking at specific cities, Borjas (2003, 2004) examines specific skill groups and experience cohorts nationwide. He finds that immigration has a very strong effect on earnings. Using data from the U.S. censuses between 1960 and 2000, Borjas finds that wages grew fastest for workers in those skill groups that were least affected by immigration. He develops a statistical model describing the link between wages and immigration, by relating data across skill groups and calendar years. Based on this model, he predicts that an immigrant influx that increases the number of workers in a particular skill group by 10 percent will reduce annual earnings in that skill group by 8 percent (Borjas 2004). By increasing the labor supply from 1980 to 2000, “immigration reduced the average annual earnings of native-born men by an estimated \$1,700 or roughly 4 percent” (Borjas 2003, p. 1359). The effect was greater among those without a high school education (7.4 percent), and smaller for high school graduates (2.1 percent) (Borjas 2004, p. 5). However, when Ottaviano and Peri (2006) relax the restrictive assumptions of Borjas (2003) that capital markets did not respond to immigration and that immigrants and natives are perfect substitutes, they arrive at divergent conclusions.

In a 2005 paper, Borjas and Katz (2005) find that the influx of Mexican workers to the United States in recent years has significantly depressed the earnings of high school dropouts, while enhancing the earnings of college graduates. DeLong (2006) argues that Borjas and Katz’s finding of these large effects is “imprecisely estimated: their data are fuzzy and give an approximately one-sixth chance that the effect on high school dropouts is positive.”

Borjas (2004, p. 3) cites several national studies (Camarota 1998; Jaeger 1995; Smith and Edmonston 1997) that have found that “immigration adversely affects the wages of natives in competition with immigrants.”

On the other hand, Card (2005) finds that the wages of less-skilled natives are insensitive to supply shocks of immigrants. He reviews the possible explanations for the failure of the simple theoretical prediction that increased supply depresses prices. Card examines data suggesting rejection of both the thesis that selective mobility of native workers masks the local effects of immigrants, and the Heckscher-Ohlin model’s prediction that the supply shock is absorbed by changing industry structure. He finds that the bulk of the absorption occurs within industries, which adapt to use more unskilled labor.

Card refers to data showing significant local *supply* effects of immigration (Card 2001, 2005), meaning that the supply of immigrant labor is not dissipated by mobility (as Borjas, Freeman, and Katz [1997] suggest). However, he finds that these significant supply effects do not translate into significant wage effects. His estimates suggest that “there is no relationship between the supply of high school dropouts [including immigrants] and their relative wages . . . As in most of the previous work looking at local labor market impacts of immigration, there is a surprisingly weak relationship between immigration and less-skilled native wages” (Card [2005], p. 11, citing Friedberg and Hunt [1995] and Borjas [1994]). He refers to the fact that the relationship between wages of native dropouts relative to wages of native high school graduates has remained nearly constant since 1980, despite pressure from immigrant inflows increasing the supply of labor. Card suggests that the aggregate data relied upon by Borjas, Freeman, and Katz (1997) are uninformative without knowing the trend in relative demand for dropouts.

Further, Smith and Edmonston (1997, p. 148) find that in the United States, immigrants are disproportionately employed in import-competing sectors, and thus they largely substitute for imports. They observe that “analyses that ignore this pattern may overstate the possible adverse effects of immigrants on low-skilled natives.”

Ottaviano and Peri (2005) find that “overall immigration generates a large positive effect on the average wages of U.S.-born workers.” Their analysis, using both estimation and simulation methods, exam-

ines closely the effects of skill complementarities and physical capital accumulation. They calculate that the average wage of native workers increased between 2 percent and 2.5 percent due to the inflow of foreign workers from 1990 to 2000, although the wages of native workers without a high school degree declined by 1 percent.

On the other hand, O'Rourke and Sinnott (2003, p. 15), 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 United States, immigration had a significant negative impact on unskilled real wages."

In their meta-analysis of studies of this topic extending beyond the U.S. context, Longhi, Nijkamp, and Poot (2005) find that results differ across countries and 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."

Thus, applying the Longhi, Nijkamp, and Poot (2005) findings to the World Bank Independent Evaluation Group (2006) simulation (assuming a 3 percent increase in the stock of migrants) we would anticipate a 0.357 percent 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 percent, while skilled native wages decline by 1.1 percent (p. 44). (Recall that the 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 percent for unskilled earlier migrants and 20 percent for skilled earlier migrants. These distinctions depend, of course, on the degree of substitutability between migrants and native workers.

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 (Gaston and Nelson 2000). However, several things are clear. First, under this literature it is by no means clear that the United States, 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 United States) have had a much higher proportion of unskilled persons than the native population (Card 2005, p. 3). 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 experience, 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.

While there appears to be a consensus that the *average* destination country worker will only experience modest wage pressure (Ottaviano and Peri [2005] suggest that the average effect is indeed positive), if any, from liberalization of migration, other destination country constituencies will be affected by liberalization. Of course, each individual “belongs” to multiple constituencies, moderating or accentuating some effects.

### **Producers and Consumers in the Destination Country**

Producers in the destination country that employ the type of labor supplied by immigrants would tend to benefit from immigration. In higher-income countries, capital will enjoy an increase in returns, as wages decline (World Bank Independent Evaluation Group 2006, p. 44). As we will see in Chapter 4, this results in a radically different political economy of immigration policy, compared to the political economy of trade policy.

Assuming that migration reduces wages, or increases productivity, then consumers may gain from lower prices. Those consumers in the destination country are situated similarly to consumers of goods in importing countries. They enjoy increased welfare by virtue of lower-priced goods.

## TEMPORARY AND PERMANENT MIGRATION

While the direct economic consequences of temporary migration are comparable to those of permanent migration, with the level of impact reduced by virtue of the reduced period of foreign residence, temporary migration presents less difficult cultural, social, and political dimensions.

However, in the Walmsley-Winters model, permanent residents in home developing countries tend to lose from the outflow of even temporary migrants, despite assumed remittances, because the decrease in the labor supply reduces the return to capital and other factors of production (Martin 1990, p. 81). Winters et al. (2002) find that straight loss for the origin country is far from inevitable (as discussed above) and will depend on the length of absence. Recall that the skilled workers are likely to be achieving productivity gains by moving (assuming that they do not move erroneously). If they return or otherwise interact with their home markets, they may also bring back innovations, skills, knowledge of markets, and capital. The main uncertainty regarding the benefits to the origin country of temporary migration relates to the magnitude and quality of remittances, and the magnitude and quality of skills brought home by returning workers. Indeed, there is a possibility that return would reduce the welfare of those remaining behind. Permanent migration may provide reduced incentives for remittances or return, although a Bhagwati tax-type mechanism could address this concern.

Winters et al. (2002, p. 68) concludes that “developing countries’ policies toward the temporary movement of skilled natural persons should depend heavily on the net balance of these effects, which is currently very uncertain. Moreover, the balance is likely to vary by country.” Although temporary movement of natural persons “will clearly deliver only some of the economic benefits of straight migration in terms of output and income, it avoids most of the latter’s political costs” (Winters 2003, p. 69).

Temporary migration schemes are usually selective based on skills. A number of industrialized countries have established programs for temporary acceptance of workers (OECD 1998). Examples include the U.S. H-1B visa program, and temporary skilled migration programs in Australia and Canada.

The Walmsley-Winters model suggests that although “developing countries are the main beneficiaries of [an increase in quotas for temporary migration], the initial residents of most of the industrial countries also experience increases in welfare from the higher returns to capital and increased taxes collected” (Martin 1990). In this sense, at least from a national aggregate and global perspective, temporary migration has the same type of win-win welfare profile that trade in goods has. The problem then is to induce those harmed within national economies to accept increased temporary migration.

Importantly, programs for temporary movement may, depending on the quality of administration and incentives for return, provide incentives for increased authorized and unauthorized immigration (Ghosh 2000, p. 15). Temporary guest worker programs, like the *Bracero* (“strong arm”) program which brought Mexican workers to the United States from 1943 to 1964, led to a good deal of permanent migration (Martin 2001). The *Bracero* program admitted Mexicans under conditions similar to the currently existing H-2A temporary or seasonal agricultural visa program, which allows U.S. farmers to recruit foreign workers, after a good-faith effort to recruit U.S. workers. Both the *Bracero* program and Germany’s *Gastarbeiter* program increased legal and illegal immigration to the host countries.

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’” (Chaudhuri, Mattoo, and Self 2004, p. 15). Rodrik (2004) 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 remittances can be an important source of income support for poor families, they are generally unable to spark and sustain long-term economic development.”

Of course, brain drain also presents risks in connection with temporary migration—it is simply assumed to be reduced in magnitude. This reduction depends on the temporal relation between the brain drain harms and the length of sojourn. It could be that most of the harms



are felt during the earlier period of the sojourn, while benefits would occur later. Nor is it correct to assume that temporariness ensures benefits to developing countries. Indeed, there will be circumstances where limitations to temporariness reduce or destroy benefits to developing countries. Furthermore, there must be circumstances where permanent migration would be more beneficial globally than temporary migration, so that if it were possible to compensate developing country home states, permanent migration would be superior both for the source developing country and for the world.

While few would argue with a goal to ensure 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. Economists sometimes also seek to ensure that international economic arrangements in trade are “foolproof”: some have argued that international trade arrangements should be limited to tariff reduction, because that is the only type of liberalization where policymakers can do no harm. But it is possible that institutional as opposed to prohibitive responses to these concerns may allow greater increases in welfare.

Limitation of migration to temporary migration reduces the incentive to migrate, which can be understood as the present value of the lifetime difference in income available in the home state versus that available in the destination state. Temporary or rotational migration involves greater transportation and reinstallation costs. Thus, the ratio of migration expense to migration benefits will be reduced under temporary migration, with greater expenses and smaller benefits. Requirements of temporariness also may exclude the migrant from participation in pension and other public welfare programs, and so further reduce the incentive to migrate. Requirements of temporariness also artificially suppress the broader potential benefits of 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, 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.

### **Sk ILLED An D Un Sk ILLED MIGr ATION**

Skill levels will affect the economics of migration through at least two paths. First, as explained above, high-skilled workers will often contribute to the destination state from a fiscal perspective, and their departure may confer a loss on the home state from a fiscal perspective. Second, also as explained above, to the extent that the destination state has a deficit of high-skilled workers, or the high-skilled workers create positive externalities, high-skilled workers may benefit the destination state.

Hatton and Williamson explain that the quality of immigrants to the United States, and to other OECD destinations, declined between the 1950s and 2000, largely due to changes in the home country composition of these immigrants (Hatton and Williamson 2006). In response, a number of the wealthy destination countries have moved to quality-based selection criteria for immigrants.

In recent years, a number of destination states have moved toward “point” or other systems to admit skilled workers while excluding less-skilled workers. For example, the United States has periodically provided temporary increases in the number of H-1B visas for highly skilled workers, in response to industry demands for more skilled workers.

Developed destination states seem to be in a competition to attract highly skilled workers (Harris 2002, p. 99). “‘To maintain and improve economic growth in the EU, it is essential for Europe to become a magnet for the highly skilled,’ said Franco Frattini, the EU justice and home affairs commissioner. ‘Qualified and highly qualified migrants prefer

the U.S.A., Canada and Australia” (Bilefsky 2007). The contribution of immigrants to high technology is impressive. Wadhwa et al. (2007) report as follows:

Our research produced some startling statistics: in 25.3 percent of technology and engineering companies started in the United States from 1995 to 2005, at least one key founder was foreign-born; in California, this percentage was 38.8; in North Carolina, the percentage was only 13.9. Our analysis of Silicon Valley and Research Triangle Park (RTP) showed greater concentrations of immigrant founders. In Silicon Valley, 52.4 percent of companies had an immigrant as a key founder, as did 18.7 percent of RTP.

## **LEGAL AND ILLEGAL MIGRATION**

Interestingly, from an economic standpoint, regulation of migration is similar to other market-suppressing regulatory interventions. All other things being equal, and assuming perfect competition, this intervention reduces welfare. So it is not strange that Hanson (2007) concludes that there is little evidence that legal immigration is preferable from an economic standpoint to illegal immigration, and concludes that *illegal* immigration is more responsive to labor market conditions than legal immigration. Examining the U.S. context, Hanson argues that legal immigration “is subject to arbitrary selection criteria and bureaucratic delays, which tend to disassociate legal inflows from U.S. labor-market conditions” (p. 5). Temporary legal immigrants are far less flexible than illegal immigrants, as most work visas are linked to a particular employer, and the visa holder cannot change jobs without employer approval (p. 12).

Of course, market imperfections exist, and the welfare state provides attractions that may induce inefficient illegal immigration, at least insofar as illegal immigrants have access to transfer programs, so it is not possible to say that, from a global welfare standpoint, illegal immigration is superior to legal immigration. Furthermore, illegal immigration can erode the “rule of law” and may reduce the ability to enforce workers’ rights.

For certain types of employers, illegal immigration may be more attractive than legal immigration. Illegal immigrants may be less costly and more pliable than legal immigrants. They may be less costly in part because they have difficulty joining in efforts to organize, and because they fear exposure.<sup>11</sup> They may be in the “black economy,” and fail to pay taxes or attract contributions to social security or health care funds. Illegal immigrants may undercut the pricing and protections of domestic workers more severely than legal immigrants. Thus, certain employers may be expected to oppose expanded legal immigration. In fact, one of the preambular provisions of the International Convention on the Protection of the Rights of All Migrant Workers and the Members of Their Families (1990) recites as follows: “Considering that workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition . . .

We would expect that labor interests would prefer legal immigration to illegal immigration, all other things being equal. Some labor interests would prefer to provide amnesty to existing illegal immigrants, compared to maintaining the status quo. Freeman (2006, p. 163) explains with respect to the United States that

in 2000 the AFL-CIO reversed its long-standing support for the employer sanctions law that criminalized the hiring of undocumented immigrant workers and endorsed amnesty for millions of undocumented workers and repeal of the employer sanctions law. The underlying rationale was that the growing immigrant community would provide good recruits and political allies for unions, and that legalizing the workers would reduce the impact of such immigrants in reducing wages and opportunities for other workers.

Of course, if the legal immigration has little effect in suppressing illegal immigration, competing domestic labor interests might have less of an interest in supporting legal immigration. Similarly, if amnesty has the effect of inducing increased illegal immigration, labor interests might be ambivalent regarding amnesty.

## FISCAL EFFECTS

As noted above, migration may be induced not only by greater wages, but also by the attraction of destination country public services to migrants. Here, migration is different from trade in goods and services. And migration of *workers* for purposes of already identified employment is different from migration of other individuals. That is, goods and services are subject to a natural market discipline, as are workers who already have identified employment.<sup>12</sup> While imported goods and services compete with domestic goods and services, the market naturally clears. Individual immigrants may arrive and use resources without ever being subjected to market forces. In fact, they may be motivated by nonmarket forces to come, especially by social welfare programs such as education, health care, or income support.

Migration induced by public services, as opposed to productivity enhancement, may result in inefficiency from a global perspective and may harm the destination state. The inefficiency is simply a result of a public goods problem, in which public services are transformed from a private good available only to natives to a public good available to anyone wishing to migrate. So, when we discuss effects of migration on the destination state, we must distinguish among different types of migrants. The risk of migrants traveling to obtain the benefits of public services and transfers has increased with the rise of the interventionist, or welfare, state and the decline in the costs of transportation.

The concern from a destination state welfare standpoint is that immigrants will cost more in public services than they contribute in taxes, or in other terms, resulting in a net welfare loss for natives. Under progressive income taxation, migrating unskilled workers will be likely to pay less in taxes than *average* natives. So even if these migrants absorb an average level of public service and transfer payments, their effect will be to dilute the total fisc. Of course, we must keep in mind that the “immigration dividend” arising from decreased costs of production could countervail this type of welfare loss on an aggregate basis.

Because of the possibility that immigrants could confer a net welfare loss, destination states may determine to limit access to their markets to those less likely to use these services, or less likely to use them soon.

Alternatively, destination states may limit access to their public services. For example, in 1996, the U.S. Congress enacted legislation excluding noncitizens from access to a number of entitlement programs (the Illegal Immigration Reform and Immigrant Responsibility Act of 1996). An alternative to this type of exclusion is to establish eligibility requirements or waiting periods that would allow immigrants to enter but exclude them from these programs. This may be unpalatable, or even unconstitutional, for some states. It may raise human rights or other international legal issues. Still another alternative is to combine some degree of public service harmonization with moves toward liberalization of migration.<sup>13</sup>

Smith and Edmonston (1997, p. 293) find that each immigrant-headed household imposed a net fiscal cost of between \$1,613 and \$2,206 on the United States. "If the net fiscal impact of all U.S. immigrant-headed households were averaged across all native households in the United States, the burden would be . . . on the order of \$166 to \$226 per native household" (p. 9). The reasons for net transfers to immigrants in the United States are that immigrants tend to have younger children, utilizing school resources; immigrants tend to be poorer, and thus receive more transfer payments; and under progressive income taxation, poorer immigrants contribute less (p. 9).

However, these figures include the costs of educating the children of immigrants but not the taxes that the native-born children of immigrants pay after leaving the immigrant-headed household (p. 298). A dynamic analysis by Smith and Edmonston including these taxes indicates that the average immigrant confers a net benefit of \$80,000 in net present value (p. 336).<sup>14</sup>

Interestingly, under most scenarios, "the long-run fiscal impact is strongly positive at the federal level, but substantially negative at the state and local levels" (p. 12). This is largely because of the kinds of fiscal responsibilities undertaken by states. States like California, where immigrants tend to concentrate, may incur net long-term burdens, while other states receive net benefits.

Of course, as mentioned above, any fiscal transfers must be balanced against the immigration dividend through consumption and production channels. Furthermore, it is clear that more highly skilled immigrants would tend to make fiscal contributions rather than receive net trans-

fers. Simon shows that, at least in the case of immigration to the United States, immigrants have been net contributors when dynamic effects on production and fiscal effects are taken into account along with labor market effects (Simon 1990, pp. 105–164).

The high-income countries will experience a general decline in working-age population during the period 2010 to 2025 (World Bank Independent Evaluation Group 2006, p. 29). The expected decline in the labor force is accompanied by a rise in these countries' dependency ratios: the ratio of nonworkers to workers. In a “pay as you go” transfer system, such as the U.S. Social Security system, a rise in the dependency ratio means that fewer workers must bear a bigger burden.

Here, much depends on the relative age and skill level of the migrants. Examining forward-looking projections of the effects of immigrants, Smith and Edmonston (1997, p. 11) find that immigrants arriving at ages 10–25 produce net benefits under most scenarios. Young, skilled migrants can be expected to be net contributors, while old, unskilled migrants would be expected to be net recipients. (See also Rowthorn 2004 and Storesletten 2000.) This could provide a motivation for governments to be selective in immigration. In some contexts, increases in immigration at the right age and skill levels could contribute to financing pensions by improving the dependency ratio.

While there no doubt are some cases of transfer payment-motivated immigration, the greater effect on the transfer payment system is likely to be positive, at least insofar as migrants are relatively youthful and able to work. However, this effect is too small to support hope that migrants from relatively poor countries will, to some extent, “bail out” the U.S. Social Security system. Unless migration is very large, the bailout from this source will be very small (Freeman 2006; World Bank Independent Evaluation Group 2006, p. 29). In the past, migrants have been broadly revenue-neutral in terms of their level of consumption of public goods and services compared to their level of payment of taxes (OECD 2007; World Bank Independent Evaluation Group 2006, pp. 39–40).

Interestingly, the 2008 annual report on the U.S. Social Security system points out that illegal immigrants provide two significant benefits to the system: 1) they are more likely than others to leave before they can actually take advantage of benefits, and 2) they tend to be

younger than other immigrants and younger than the population as a whole. According to the report, the effect of illegal immigrants will close 15 percent of the U.S. Social Security system's projected long-term deficit (Board of Trustees 2008; *New York Times* 2008).

While the most politically appealing—and economically plausible—argument against liberalization of migration is that individuals will be induced to migrate inefficiently in order to take advantage of destination country transfer programs, this phenomenon does not appear to have been significant to date. As noted above, one way to avoid the risk that migration will be motivated by transfer payments is to make immigrants ineligible for relevant programs, but this strategy raises ethical, political, and human rights concerns.

### **MIGr ATIon rEST r ICTIon S AnD A Bh AGWATI TAX**

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. From the standpoint of a trade model, a numerical restriction would be similar to an export quota on goods (generally illegal under Article XI of GATT), while a tax would be similar to an export tax (generally permitted). Policy debates in the 1970s discussed whether a tax on emigration (known as a “Bhagwati tax”) could compensate the origin developing countries for brain drain (Beine, Docquier, and Rapoport 2003, p. 3).

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 (Dowty 1987). For example, Britain restricted emigration by skilled workers from 1719 to 1825 (O'Rourke and Sinnott 2003, p. 1). 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. I discuss the Soviet and Chinese tax structures below.

There may be circumstances under which developing countries would benefit from restrictions on emigration. While direct restrictions



raise human rights concerns and might prevent some efficient migration, a well-structured Bhagwati tax may provide a more subtle and appealing instrument (Wilson 2007). Perhaps a Bhagwati tax would be a superior tool, compared to remittances, for home countries to capture some of the benefits of migration. 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 (Sudak and Trebilcock 2006). 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, which are not necessarily more intrusive than a carefully delimited set of tax obligations.<sup>15</sup>

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. 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 (Sudak and Trebilcock 2006). 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 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.

### **Chinese and Soviet Taxes upon Emigration**

In this subsection, I describe the Chinese and Soviet taxes on migration. The purpose is not to advocate these particular types of taxes, but to provide an idea of how they were structured.

In 1993, the Chinese State Education Ministry announced the implementation of a tax on self-financed students who wished to study abroad (the PRC tax) (People's Republic of China State Education Committee 1993).<sup>16</sup> (Students financed by the government were subject to a different regime.) The announcement provided that students may apply for self-financed study abroad only if they have worked in the mainland for a specified number of years or after they pay the PRC tax.<sup>17</sup> The amount of the PRC tax payable by the student was calculated with reference to their level of education as well as the number of years of work experience in the mainland.<sup>18</sup> The PRC tax was repealed in 2004.

By the 1990s, it became apparent that the brain drain was a real problem for China. The PRC tax was part of a broad education program to reduce the brain drain without compromising China's reliance on overseas higher education to produce skilled labor. Steps adopted by the Central Party to remedy the situation ranged from measures to restrict study abroad (such as the PRC tax) to nonrestrictive measures to entice students to return from abroad. Restrictive measures, in addition to the PRC tax, included placing limitations on students' abilities to obtain funding from foreign aid agencies and limitations on the time

allowed for a student to complete his or her studies overseas (Orlean 1989). Nonrestrictive measures included offering returning students high-salaried positions, beneficial tax rates, special business loans, and even forgiveness for participation in organizations advocating against the government (Liu 2007, pp. 188–189; Xiang 2003).

Students in China have been heavily reliant on the state for provision of free or heavily subsidized higher education (Wang 2001). Yet, by the early 1990s, the traditional mechanism of publicly financed higher education began to dissolve. This was due, to a large extent, to unprecedented growth in the domestic higher education system (Wang 2001, p. 208). The quantum of state appropriations for higher education simply could not keep up with its costs. As a result, the Central Party decided to diversify the sources of funding for higher education, which included raising the private costs of higher education to students (Wang 2001, pp. 211, 215). Such a diversification would also include injecting funds into the higher education system from tax revenue from students who had benefited from previous free or heavily subsidized higher education. Accordingly, the circular that announced the PRC tax specifically states that the *raison d'être* of the PRC tax was reimbursement for free education and development provided by the state to the student.<sup>19</sup> Moreover, proceeds of the tax would be used to develop higher education in the mainland and support returned overseas students in their careers.<sup>20</sup>

By 2004, the Central Party's policies to entice students abroad to return to the mainland were proven successful (Xiang 2003, p. 31). Moreover, the system of financing higher education stabilized as institutions of higher learning became largely self-funded through university enterprises or by collection of tuition fees, donations, or endowments (Wang 2001, p. 214). The Central Party saw fit to repeal the PRC tax (People's Republic of China 2004).

The concept of a tax imposed on emigrants based on their levels of educational attainment was not novel. In 1972, the Soviet Union announced the imposition of such a tax which implicitly was directed toward Soviet Jewish citizens who wished to emigrate to Israel (the "Soviet Tax") (Bhagwati 1976b, p. 45; Pregelj 2005). Similar policies were later adopted in other Soviet bloc countries. This provoked strong reactions from the United States and culminated in the Jackson-Vanik

amendment, imposing trade penalties on states that restrict emigration, as part of the U.S. Trade Act of 1974.<sup>21</sup>

There are apparent similarities between the PRC tax and the Soviet tax. However, the operation of and the circumstances surrounding the imposition of the PRC tax are clearly different from those of the Soviet tax.

While the intent of the Soviet tax was political, the intent of the PRC tax was policy-oriented. Tellingly, the PRC tax was repealed after the policy objectives of reducing the brain drain and stabilizing the system of financing higher education were met.

The Soviet tax contemplated “compensation for the Soviet investment in the education of the emigrants” (Bhagwati 1976b, p. 45). There is a fine but crucial distinction between a tax directed at students and one directed at emigrants. While the Soviet tax assumed that the emigrant would not return to the Soviet state, China always made the contrary assumption. The policy position in the 1990s was “support study overseas, encourage returns, guarantee freedom of international movement” (Xiang 2003, p. 29).

The same distinction can be made with the Bhagwati tax. As Bhagwati (1976b, p. 45) recognizes, “We conceive of our tax rather as compensation for the loss imposed by the emigrant on those left behind, or alternatively as a method of earning, for a poor country, a share in the improved income accruing to the émigré.” Indeed, to the extent that differences in wages arise from differences in productivity due to complementary factors, the Bhagwati tax is a way for the poor home country to share in the benefits of increased productivity. It allows not only for the individual migrant to cross borders, but allows those left behind to share in the benefits of the trip.

Bhagwati (1976b, p. 47) continues, “In a world composed of nation states, where immigration policies are typically devised to reflect national advantage rather than notions of utopian world order, it surely makes sense for countries to seek suitable restrictions on emigration as well, in their own interest. A tax of the kind we have proposed seeks to combine in a suitable way the pursuit of this national self-interest in the poor countries, consistent with maintaining open the possibility of emigration as a value itself.”

In that sense, the imposition of the PRC tax clearly was a policy measure taken by China to mitigate the negative effects of brain drain while ensuring that its labor force retained opportunities to seek higher education abroad.

## **FISCAL Co MPETITION An D Th E TIEBo UT Mo DEL**

Most analyses of the welfare economics of migration focus on economic effects within the labor market. However, the prior two subsections show that liberalized migration may have effects in the market for governmental services. Specifically, mobility of labor may affect certain competitive pressures on governments. “Emigration countries are challenged to keep their brightest citizens. They have to avoid a *brain drain* and offer attractive local club goods (low taxes, cheap complementary factors of production like infrastructure, construction sites, and good business opportunities)” (Straubhaar 2000, p. 127). Similarly, there is a growing competition among destination countries for the best and the brightest (Shachar 2006). The OECD (2007, p. 96) reports that most OECD countries have instituted new policies to attract skilled workers in recent years. In 2005, France introduced a special tax regime for “impatriates” employed by multinationals in France, taxing these individuals in line with the most favorable tax regimes among competing countries (p. 120).

Interestingly, there are two levels at which welfare may be assessed in the international legal context. The first level, addressed in the earlier part of this chapter, examines welfare derived from efficiency in the market. The fundamental theorem of welfare economics and Heckscher-Ohlin theory address this type of efficiency. The second level involves welfare in connection with the efficiency of government provision of goods and services. A variant of the fundamental theorem of welfare economics, the Tiebout model, addresses this type of efficiency. The basic concern is that efficiency in the market for privately supplied goods and services may, under certain circumstances, be inconsistent with efficiency in the market for publicly supplied goods and services. Where

these two types of efficiency may conflict with one another, it would make sense to seek an optimal level of each in relation to the other.

Most claims in favor of regulatory competition are based on the Tiebout model (1956, p. 416), which predicts a Pareto optimal (first best) outcome assuming certain parameters are met. To the extent that the criteria for efficiency of the Tiebout model are met,<sup>22</sup> it may be that mobility increases the efficiency of government provision of goods and services. Where these criteria are not met, there can be no assurance that mobility enhances the efficiency of governments. The Tiebout model has been described and debated in great detail in many important works. It posits that competition among small cities for mobile individuals results in the efficient supply of local public goods by those cities, subject to the satisfaction of five conditions (Inman and Rubinfeld 1997)

- 1) publicly provided goods and services are produced with a congestible technology (there is an optimal size of jurisdiction),
- 2) there is a perfectly elastic supply of jurisdictions, each capable of replicating all attractive economic features of its competitors,
- 3) mobility of households among jurisdictions is costless,
- 4) households are fully informed about the fiscal attributes of each jurisdiction, and
- 5) there are no interjurisdictional externalities.

Of course, these conditions are never satisfied; in fact, the point of this work is that T3 is not close to realization in the legal system that presently exists. As to T1, there may not today be an optimal size of jurisdiction that is smaller than the entire world for certain global concerns. T2 requires greater homogeneity of resources than exists in the international setting. As to T4, again, there are serious concerns regarding whether individuals, firms, or investors are fully informed regarding the attributes of each jurisdiction. Finally, as to T5, the world is beset by interjurisdictional externalities.

The theory of the second best suggests that, given that all of the conditions of the fundamental theorem of welfare economics are not satisfied, there can be no assurance that increasing the level of satisfaction of any other conditions—such as enhanced mobility of individuals—will yield greater efficiency. While we are uncertain as to whether the

competition leads to efficiency, it seems that states compete, and it seems worthwhile to examine the structure of this competition.

The Tiebout model can only be suggestive in the realm of the second best (Bratton and McCahery 1997). However, it contains important insights about the benefits of regulatory competition, which should not be ignored simply because the model itself cannot be applied. Our existential task is to engage in policy analysis even where formal tools come up short. Moses (2005) expects greater migration to make states more responsive to citizens.

What would be the parameters of fiscal competition? States would, in theory, seek to provide a package of governmental goods and services that would attract the type and number of constituents that are desired. Individuals would migrate in response to their assessments of these packages (Moses 2005). So, assuming that there is great demand for highly skilled software engineers, due to positive externalities or complementary assets, states could reduce taxes on these individuals or provide the types of public services that these individuals desire. States might finance these attractions by reducing their own investment in human capital, hoping to attract individuals who have benefited from human capital investments in other countries. Thus, investment in human capital could become an international public good, subject to underinvestment.

It is worthwhile to address the mechanism by which fiscal competition operates to induce changes in governmental policy. Presumably governments are motivated to maximize the basket of goods that they provide, and in order to do so, seek to attract migrants. But this assumption is consistent with a public interest–motivated government. Under circumstances where government officials are optimizing their own utility by optimizing their political support, there is less reason to expect that benevolent fiscal competition will result. Another mechanism by which fiscal competition may operate is through demonstration effects, or more simply, observation by citizens of superior baskets of goods provided in other states (Salmon 1987).

Furthermore, there are substantial concerns as to whether the Tiebout model can result in a stable equilibrium (Breton 1991; Gramlich 1987). The stability of intergovernmental competition is separate from its efficiency: an unstable market for regulation might be char-

acterized by “price wars” or a race to the bottom. Externalities, such as the inability of a home state to capture the benefits of its investment in human capital, can be a source of instability. Breton points out that centralization may not be the best way to provide stability, but the existence (without necessarily the assertion) of central authority appears necessary to address problems of instability.

Breton concludes that in the international context, it is not possible to prevent an unstable competitive process from degenerating, unless, in the language of international relations “realists,” a hegemonic power undertook to intervene in order to stabilize competition (Breton 1996). There appears to be no reason in theory why this hegemonic power must be a state; we have seen the EU emerge as just such a power in Europe, and it might be argued that the WTO or functional organizations may play such a role also. Alternatively, perhaps the United States or EU exercise, or share, hegemony through these organizations. But the point is that, to realize the benefits of regulatory competition, and to avoid the detriments, it may be necessary to centralize certain governance areas. This insight suggests at least some linkage between particular areas of policy and migration. That is, just as the EU, as it emerged and established greater mobility, found it necessary to establish greater centralization of policy making, and just as current concerns about globalization may be understood as fundamentally addressing a mismatch between economic integration and governance, it may be that increased economic integration in the field of migration may give rise to greater calls for coordination of some types of regulatory measures.

Perhaps a dynamic governance structure along the lines of “co-operative federalism” may provide a kind of contingent hegemony or centralization that can maintain stability. Within the U.S. federal system, stability is provided by the ability of the federal government to intervene; this is an important distinction between regulatory competition in the U.S. domestic context and regulatory competition in the international context, and may be an important distinction between corporate law, where the federal government has not intervened, and securities law, where it has chosen to intervene.

In the international context, in order to have a similar institutional capability, we would need to build and empower a central authority. Furthermore, Breton (1996) argues that horizontal cooperation cannot



solve the problem of horizontal instability. The practical question for the international community is how much authority it must cede to a central “government” in order to develop satisfactory horizontal competition. This question of centralization cannot be answered separately from other questions about the level at which governmental power should be assigned: from questions of subsidiarity. The question of centralization to stabilize regulatory competition may best be joined with the question of subsidiarity raised in the property rights/theory of the firm literature: as we consider the utility of centralization—of institutional ownership of regulatory assets—we must consider the utility of establishing an authority capable of intervening to support regulatory competition.

Thus, as we consider modified rules for international migration, considerations of interjurisdictional competition may enter into a cost-benefit analysis of various institutional components. If greater migration could induce a beneficial fiscal competition—a race to the top—that would make greater migration more attractive. Conversely, if externalities or other problems cause an inefficient or unstable fiscal competition, that would make greater migration less attractive, as it would presumably accentuate this effect.

Wilson (2007) explains that the “literature on optimal income taxation in an open economy has built a case for home-country taxation of skilled emigrants by analyzing the difficulties in collecting a progressive income tax when emigrants cannot be taxed.” Wilson argues that progressive taxation increases the incentive to migrate (although it should be kept in mind that the destination state will also be likely to impose progressive taxation).

Hufbauer (1989) criticizes a Bhagwati tax as inconsistent with beneficial fiscal competition, on the basis of the Tiebout model. However, as noted above, the Tiebout model assumes no spillovers, whereas migration of educated workers may be understood as a positive externality conferred on the destination state. Therefore, an appropriately structured Bhagwati tax—one that is well-designed to internalize this externality—might be conducive to efficient regulatory competition

## Con CLUSIon

The foregoing analysis of the welfare economics of international migration supports an analysis of the potential value, in welfare terms, of agreements to liberalize migration. Generally speaking, migration results in global gains, but in local winners and losers. And so, while agreements to liberalize migration will often be potential Pareto improvements, this will depend on the particular circumstances, including whether losers are actually compensated. The international legal system generally requires consent as a basis for obligation, so states that would be losers would be expected to decline to consent to a treaty that reduces their welfare, unless there is an alternative worse than the status quo that can be imposed upon them.<sup>23</sup>

Legal rules in this area cannot be derived solely from *a priori* analysis. While Chapter 3 develops a distributive justice analysis that suggests the normative appeal of obligations to liberalize, distributive justice analysis does not necessarily carry the day in political discourse, and perhaps even more importantly, distributive justice analysis does not provide detailed answers to most of the important questions. Therefore, legal rules must be analyzed in terms of their utility to increase welfare, or to change the distribution of welfare. In Chapter 10, I develop a set of possible legal rules for consideration in light of the welfare economics analysis described here, the distributive justice analysis described in Chapter 3, and the political economy analysis described in Chapter 4.

## n otes

1. See Beine, Docquier, and Rapoport (2003). Many developed countries favor visa applicants with academic degrees or specific professional skills.
2. It is not correct that every policy change must be a Pareto improvement, but as a first approximation of political feasibility, the Pareto improvement criterion is useful. Indeed, it is possible that a policy change that made the very wealthy somewhat less wealthy would be determined to be desirable, despite its inability to satisfy the Pareto criterion. In the trade policy context, analysts often use the potential Pareto improvement criterion (also known as the Kaldor Hicks criterion): if enough surplus is created to compensate the losers, even if actual compensation is not made, then the measure is a potential Pareto improvement. This criterion raises important distributional, fairness, and political problems.

3. Martin, Lowell, and Taylor (2000, p. 150) use the example of corn between the United States and Mexico.
4. More specifically, the World Bank introduces an increase in migration from developing to high-income countries sufficient to raise the labor force of high-income countries by a total of 3 percent over the period 2001–2025. This assumed increase, roughly one-eighth of a percentage point a year, is close to that which took place over the 1970–2000 period. The World Bank analysis uses the welfare theory concept of “equivalent variation.” Welfare is affected by changes in income as well as by changes in prices. For new migrants to high-income countries, it is usually possible to achieve much greater income, but prices are higher also. The equivalent variation concept allows the inclusion of changes of prices in the calculation. Perhaps more importantly, in order to estimate global gains, it is necessary to sum equivalent variation across households. Economic analysis generally refrains from interpersonal comparison of utility, so it is not possible to compare the gains of the “winners” with the losses of the “losers.” As in the trade context, it is useful to evaluate whether there is a net increase in welfare, even if there is no mechanism by which to compensate the losers in order to ensure that the policy change is a Pareto improvement. It may be best analytically to first evaluate whether there is a significant global increase in welfare, and then consider the distributional effects (World Bank Independent Evaluation Group 2006, pp. 36–37).
5. This distribution includes the gain to migrants, which makes up the largest share of the gain, on the developing country side. Of course, other than remittances and perhaps other transfers, the gain itself would not actually redound to the benefit of the home country itself, but it would redound to the benefit of people who, *ex ante* but not *ex post*, lived in the home country. It is important to recognize, however, that under this assumption, the gains are available to improve the situation of poor people, but not necessarily poor countries. One might criticize this assumption, and combine it with the assumption that the proportion of skilled migrants would increase, to argue that the World Bank simulation assumes that the wealthier inhabitants of poor countries move to rich countries and become even wealthier, while the less-skilled and less-wealthy inhabitants of the poor countries stay behind, both physically and economically.
6. While it might be argued that a move to private education, paid for by the student, could solve this problem, the financial markets in many countries do not efficiently allow poor students to finance their education based on future earnings. A “Bhagwati tax” might be a method for the home country government to achieve a similar result.
7. Clubs of Mexican immigrants to the United States have formed to invest in their local communities at home (Lapper 2007).
8. I am grateful to an anonymous referee for noting this clarification.
9. This insurance mechanism is reminiscent of early requirements of bonds and head taxes. See Neuman (1993).
10. Compensation has sometimes come in the form of adjustment assistance. It should be noted that in a complex government with a variety of harmed groups and ben-

efited groups, compensation may not be direct or specific. Often, compensation does not occur at all.

11. See Inter-American Court of Human Rights (2002): Aware of the desperation of these people and the unprotected state in which they normally live, particularly from a legal standpoint, employers very frequently offer employment in conditions that fall a long way short of safety and sanitation standards and pay very low salaries, normally less than the legal minimum wage. Furthermore, they deny them labor benefits, such as health or industrial accident insurance, and restrict their freedom of association. Situations of exploitation in which the employer forces migrant workers to work exhausting hours without rest, or in which they simply do not pay them for their work, are also common. Accusations of physical mistreatment and intimidation—such as threatening to report undocumented persons to the authorities—to discourage complaints of abuse are also reported.
12. Trebilcock (2003) makes prescriptions motivated by the idea that it is useful to devolve and decentralize power over immigration decisions to private parties.
13. See the discussion of the EU in Chapter 6. A program of essential harmonization and mutual recognition—or interstate allocation of responsibility for individuals who cross borders—may be required.
14. I am grateful to an anonymous referee for noting this point.
15. The EU governs the recognition and enforcement of civil and commercial judgments among its member states by a regulation, Council Regulation (EC) No. 44/2001 of December 22, 2000 (see European Union [2001]). For a convention among OAS member states, see the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards (1979). See also the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (1985).
16. The idea of restrictions on study abroad was reported to be under consideration as early as February 1990. However, as of 1990, it was “unclear to what extent (the PRC Tax) had been implemented” (Shive 1990).
17. *Id.* at Section 2(1). The Circular states that to be exempted from payment of the PRC tax, a self-financed student shall be required to have worked five years for undergraduates, three years for graduate (nondoctoral graduates) students, and two years for faculty graduates and adult university graduates.
18. *Id.* at Section 2(4).
19. Section 1(2) of the Circular.
20. Section 1(4) of the Circular.
21. Pregelj (2006, p. 1) notes:

The enactment of the so-called Jackson-Vanik (“freedom-of-emigration”) amendment (Section 402) of the Trade Act of 1974 (P.L. 93-618; January 3, 1975) was a U.S. reaction to the Soviet Union’s highly restrictive emigration policy of the time, but particularly to the assessment, begun in August 1972, of exorbitant “education reimbursement fees” (also referred to as “diploma taxes”) on its citizens wishing to emigrate to nonsocialist countries . . . The legislation would condition the restoration of most-favored-nation status to nonmarket economy

(NME) countries (including the Soviet Union), their access to U.S. financial facilities, and their ability to conclude a trade agreement with the United States on their compliance with the free-emigration criteria of the proposed legislation.

22. After stating that current empirical evidence is suggestive that competitive local governments can provide an efficient level of congestible (local) public goods, Inman and Rubinfeld (1997) offer the following caveat: What is not assured is the efficient allocation of public goods with significant spillovers. In this case, a subsidy is needed to internalize the externalities. But any such policy to control inter-jurisdictional spillovers would require the agreement of the competitive city-states. For such agreements we must look to more encompassing political institutions. In Madison's compound republic this is the representative central government.
23. For example, in connection with the conclusion of the Uruguay Round of trade negotiations, some observers argued that the U.S. threat to withdraw from the existing GATT agreement served to coerce developing countries to accept a WTO bargain that was worse than the status quo, but better than the alternative.



# 3

## Ethics of Migration

Chapter 2 reviews the welfare economics of international migration in order to develop a “map” of the benefits and detriments of migration. The underlying assumption, of course, is that these benefits and detriments, and the maximization of benefits, will or should influence domestic and international policy relating to migration. However, another influence on domestic and international policy is likely to be an ethical analysis of the distributive effects of alternative migration regimes that may influence the political preferences of individual voters.

This chapter reviews the distributive ethics of international migration. It explores and challenges the moral right of nationals of a state to exclude foreign persons from the opportunities associated with residence in that state. Conversely, it suggests the rights of a citizen of one state to migrate to another.

While the ethical analysis presented in this chapter supports a duty of individuals, and their states, to work to provide freedom of movement for other individuals, it must be recognized that this duty will not be fulfilled in the near future. Rather, it seems best to understand changing perceptions of our duties as a contributing vector in complex domestic politics in destination states. In Chapter 4, I will focus on what I assume to be the strongest vector in domestic politics: rational citizen perceptions of their economic interests. I will even propose arrangements to harness these rational citizen perceptions in order to promote agreements to liberalize migration. However, these arrangements might result in discrimination against migrants in areas such as taxation, and in this dimension they would be likely to be inconsistent with the ethical duties outlined in this chapter.

## Th E righ T To b E a Migran T

Thabo Mbeki, the former president of South Africa, described the present international distribution of wealth in terms of “global apartheid.” We might understand this phrase as describing a circumstance in which the legal system is used to lock certain people into a position of poverty, inequality, and disenfranchisement, or to artifically separate groups of people. Under apartheid, the accident of birth into a particular race radically affected one’s life opportunities. Under the international legal system as it exists, the accident of birth into a particular nationality has a similar effect. “Indeed, geographic variation in wages and living standards around the world gives the global economy the appearance of a gated wealthy community consisting of the advanced countries, surrounded by impoverished ghettos, with immigration restrictions preventing the ghetto residents from moving to where their productivity and well-being would be higher” (Freeman 2006).

Global apartheid could be reduced by allowing workers from poor countries to take jobs in wealthier countries—the current global system of restricted migration may be understood in at least one dimension as a macrocosm of the internal passport system that was used under apartheid.<sup>1</sup> Joseph Carens observes that “citizenship in Western liberal democracies is the modern equivalent of feudal privilege—an inherited status that greatly enhances one’s life chances” (Carens 1987).

The iconic American political philosopher John Rawls would seem to accept global apartheid, with a limited duty of interstate assistance that is not intended to lift the poor out of poverty, and sharply limited rights to immigrate.<sup>2</sup> Up until 1993, with the publication of the article “The Law of Peoples” (Rawls 1993), Rawls seemed simply to *assume* closed societies, isolated from other societies, as a modelling device rather than as a normative commitment.<sup>3</sup> In the article, Rawls seeks to defend closed societies, principally on moral hazard grounds.<sup>4</sup>

This chapter develops a Rawlsian perspective on migration, arguing that a fully realized Rawlsian perspective would not defend closed societies. The argument will support the position that borders are ethically artificial and therefore should not be accepted as determinative of ethical duties or life opportunity.<sup>5</sup>



## Crossing Imaginary Borders: a Critique of Territorial Borders in The Law of Peoples

Is there an ethical duty to open wealthy countries to immigration from poor countries? Let us begin with the Rawlsian analysis of the foundation of ethical responsibility to assist the poor. As is well known, Rawls argues that his two principles of justice only apply within a domestic society. (Note that the second principle of justice, the difference principle, permits inequalities only to the extent that they improve the position of those who are worst off.) For Rawls, the factual context of political borders, which are territorial borders, is decisive.

Rawls's work has been intensively criticized for finding a lesser duty to foreign persons than to compatriots. This criticism is concerned with the justificatory role that Rawls's work may play, for nothing less is at stake than the question of whether individuals in wealthy countries, and therefore their governments, have an ethical duty to open their markets to immigration by poor persons. If we find no duty, there will be less basis to encourage the growth of political will for change.

### Goal and background assumptions regarding the appropriate Political unit

All social scientists must be careful to ensure that their methodological assumptions do not insinuate themselves into normative positions. Rawls's goal in his monumental *Theory of Justice* (1971) was to articulate principles of justice for a national society, and so it made sense, as a methodological convenience and first approximation, to assume closed borders.

If a closed system was all that was required, however, he could have described a global theory of justice, using *that* closed system (Pogge 2004). So, in this sense the particular selection of the state or people as the salient vertical unit of society is largely arbitrary, and therefore, like gender, race, and other arbitrary categories, has no moral force for our purposes (Nussbaum 2004). If one defends Rawls's choice as part of ideal theory, as Beitz does (2000, pp. 669, 680), then the "people" would be a mere variable, rather than a substantive concept related to the world as it exists today.<sup>6</sup>

Another defense of Rawls's choice is that the principles of justice that he articulated in *A Theory of Justice* are applicable only within politically liberal societies and peoples. Thus, one argument for focusing on the state, or the people, is that it may support an assumption of consensus around political liberalism, which is a predicate for Rawls's domestic theory of justice. However, this assumption is just as problematic in a real domestic society as it is in global society. After all, today it is often as implausible to assume consensus regarding political liberalism within a society, as to assume consensus across societies. Part of the reason for this implausibility is immigration itself. Indeed, as we will see below, integration has undermined Rawls's assumptions.

Rawls's main topic is the basic structure of society, defined as "a cooperative venture for mutual advantage" (1996, p. 4). In his later work, responding to skepticism expressed by Brian Barry (1982, pp. 232–234) regarding the determinacy of the concept of mutual advantage, Rawls focused on reciprocity based on a "benchmark of equality." This reference to reciprocity based on a benchmark of equality also fails to achieve the intended goal of distinguishing domestic society from international society.

As many have now pointed out, globalization has at least raised a question regarding the salience, or exclusive salience, of the state under this definition of society.<sup>7</sup> Again, lawyers can point to scores of international cooperative ventures for mutual advantage: all international law may fit this description, and international law is a rapidly growing body (Benhabib 2004; Kaul, Grunberg, and Stern 1999). There is increased discussion of international public goods. World Trade Organization law is replete with references to reciprocity, and is understood by many as a system of reciprocal economic liberalization.<sup>8</sup> The arbitrary selection of the state as the exclusive system for mutual advantage, or for reciprocity, cannot withstand much factual pressure.

International lawyers can assert pressure on the essential differences between the national state and other subdivisions, or other supranational organizations, and it is impossible to specify a sharp substantive distinction. Is a Swiss canton the right unit? What about a member state of the EU? When in U.S. federal history did the states of the union stop being the salient unit? The rise of the national state and the increasing globalization of concerns and governance structures demonstrate the

historical contingency of the state. Mathias Risse (2006) has used this data to show that even those who are not reflexively cosmopolitan can no longer take the normative role of the state for granted. It is strange for a moral theory to depend so much on such incompletely specified categories.

### **whose original Position, with what results?**

Rawls begins with his well-known original position, in which each representative operates under a veil of ignorance as to his principal's actual position in society. This original position is a heuristic, designed to generate principles that would be acceptable to each person under ignorance as to his or her actual position.

Importantly, in order to develop the law of peoples, Rawls articulates a second original position, among diplomats representing "peoples." Rawls thereby takes for granted an international, as opposed to a transnational, world. He does so because he wishes to take the world "as we see it" (Rawls [1993]; revised and updated in Rawls [1999, p. 83]) and work out a foreign policy for a "liberal people."

Furthermore, Rawls's analytical goal is sharply and arbitrarily inconsistent with his method in developing the rules of justice among individuals (Pogge 2004, pp. 1739, 1755) where he does not take society "as we see it," but takes social rules as wholly contingent and subject to formulation *ab initio* in the original position.

Rawls argues that in the domestic original position, representatives of individuals would select two principles of justice. The first principle of justice holds that "each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all" (Rawls 1971, p. 291). The second principle of justice holds that "social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society" (pp. 5–6). These two principles of justice would be implemented differently in different societies.

According to Rawls, neither of these principles would be selected in the second original position among representatives of peoples, and

therefore they would not apply across national borders. In fact, Rawls appears to subscribe to a standard Westphalian concept of international law (Buchanan 2000), with ruggedly independent states and, most importantly, where the rights and obligations, even relating to human rights, appear to be available only to states. This is definite *y*, and intentionally, not a cosmopolitan vision (Rawls 1993; 1999, p. 119). Rawls concludes that his approach in *The Law of Peoples* is concerned not with individual welfare, but with justice and stability of liberal and decent societies. So, under Rawls's law of peoples model, the kind of broad equality of liberty, opportunity, and redistribution available at home would not be available to foreigners.

Yet we might ask why would the representatives of peoples choose different principles of justice from those selected by the representatives of individuals? At least from a normative individualist perspective, peoples are merely aggregates of individuals.<sup>9</sup> Would not true diplomatic representatives of aggregates of individuals select exactly the same safeguards as the individuals themselves selected in the first original position? If, as I have suggested, the "people" unit is arbitrary, why would the principles chosen within a people be different from those chosen by multiple peoples together? In order to posit a different selection of principles of justice, it is necessary to assume a different set of concerns.<sup>10</sup>

Thus, even if we imagine, as Rawls does, an original position among *representatives* of peoples, we must understand this two-level original position as an integrated original position. That is, the representatives of states should be assumed to represent their principles with perfect fairness and accuracy, not with the public choice and other agency problems that are endemic in the real world.<sup>11</sup> This integrated two-level original position, then, should not be assumed to be different from a single, global, original position. Under perfect representation, a federal original position is not different from a unitary original position.

Rawls's heuristic assumption regarding the participants in the international original position results in the inapplicability of the principles of justice, including the difference principle, the core redistributive component of Rawls's theory of justice. This is because strangely, arbitrarily, and counterfactually, Rawls assumes that states (or peoples) do not have interests in the distribution of wealth.<sup>12</sup> Therefore, instead of

requiring conformity with the difference principle, the law of peoples prescribes at the global level only a modest “duty of assistance,” which does not have any specified redistributive goal (Rawls 1999, pp. 105–120). It certainly does not appear to have the power of the difference principle, as the recipient state may remain “relatively poor.”<sup>13</sup>

Rawls’s position is contradicted, however, by the consistent behavior of states: no one can study the international economic system without recognizing that states seek wealth (among other things). Actually, the states that fail to seek wealth are generally failed states: the states where dictators are able to enrich themselves the most by declining to seek broad wealth for their constituents. Shall we construct a theory of justice based on the preferences of failed states?

There are important arguments that Rawls’s separation between national and international society—that is, his particular conception of a two-part original position, one for international and one for domestic principles—is artificial (Beitz 2001; Carens 1987; Forst 2001). Political philosophers, including Charles Beitz (1999) and Thomas Pogge (Pogge 1989), argue for a cosmopolitan approach, in which each individual, regardless of borders, enters into a global original position.<sup>14</sup> Of course, under this global original position, individuals (or their representatives), fearing that they might in the real world be among the poorest persons, would almost certainly decide on a difference principle, in the same way that they would in a domestic original position (Carens 1987, pp. 257–258). As the risks are the same, or even greater, the principles would be the same.

Under the law of peoples, Rawls believes that “a people has at least a qualified right to limit immigration” (1993, p. 48). He articulates two reasons for this “right.” The first reason is rooted in efficiency, in the sense of avoiding moral hazard. For Rawls, restrictions on immigration serve to avoid moral hazard in the form of failure to husband territorial resources. I discuss the efficiency or moral hazard argument in detail below.

Second, Rawls refers to Walzer’s argument (1983) based on a desire to protect a people’s political culture.<sup>15</sup> However, this argument seems susceptible to an economic critique. Chang (2006, p. 10) shows that rational people would be willing to sacrifice the purity of their national political culture in exchange for the welfare benefits of international

mobility. Furthermore, it is clear that distinctive culture (including political culture) can survive free immigration, as we have found in the EU.<sup>16</sup> Even if it cannot, we cannot assume that individuals in an original position would value distinctive culture over other benefits, especially under poverty.

Walzer's argument, as adopted by Rawls, would seem artificially to insulate existing cultures from challenge, although Walzer concedes that "the collective version of mutual aid might require a limited and complex redistribution of membership and/or territory" (p. 47). Indeed, Walzer would go farther than Rawls. He cites Sidgwick's proposal (1891, pp. 296–297) that immigration might be restricted "in order to maintain an adequately high standard of life among the members of the community generally—especially the poorer classes" as a "primitive and parochial version of Rawls's difference principle . . ." (Walzer 1983). However, it is important to note that this proposal is parochial: it artificially restricts the scope of concern to *local* poorer classes. This is highly relevant in connection with the discussion in Chapter 2 of the effects of immigration on unskilled workers. Given that there are other, less restrictive ways to ensure that local poorer classes are protected, such as redistributive domestic taxation, can the protection of local poorer classes serve as a justification for the imposition of harm on foreign poorer classes?

Of course, it is necessary, both ethically and politically, to ensure that the domestic poor do not bear the burden of improving the lot of the foreign poor: "If securing native benefits is a means to maintain domestic support of immigration, this should also serve an enhanced role of international migration in the global attempt to alleviate world poverty" (Felbermayr and Kohler 2006).

The important point is that the artificially constrained domestic difference principle conflicts with an international difference principle. This economic concern is real but may be addressed through domestic redistribution. That is, it is not possible to justify injustice to outsiders in order to provide justice to insiders, when the insiders who are hurt by a policy that satisfies obligations to outsiders may be compensated for their harm in a way that satisfies the domestic difference principle. If this argument were accepted, an "intrafamily" or "intra-locality" difference principle could trump the statewide difference principle.

Also, we must note the fear that concerns for cultural integrity may be a disguise for irredentism. It is worth considering the argument made by Hampton (1995) that “in most of the world the concept of nationality is intimately connected to the ethnicity or race (narrowly defined) of the members of that society.” Irredentism is morally questionable, and it raises important issues for the “encompassing group” concept advanced by Raz and Margalit (1990, p. 439). As Carens (1987, p. 258) points out, ideal theory does not require the elimination of all linguistic, cultural, and historical differences. Nor does it mean that restrictions on immigration are justified, that all differences are to be preserved, or that all existing features of state sovereignty are justified.

If proximity resulting from immigration is the basis for solidarity or redistribution, and proximity is restricted in order to maintain cultural integrity, it must be asked whether the true motivation is cultural integrity, or to what extent reluctance to engage in redistribution is the motivating force. If there were an obligation to redistribute regardless of proximity, then we could at least be certain of the bona fides of the cultural integrity motivation.

Furthermore, most of the arguments for free immigration parallel the arguments for free trade, which Rawls seems to endorse. It may be that some states are hurt and some are helped by free immigration, and that some individuals are hurt and some are helped. For example, as discussed in Chapter 2, states with high-quality public education systems may undesirably confer a positive externality on other states through emigration. In addition, natives of destination states who compete with immigrants may find their incomes reduced by immigration. Therefore, we might expect representatives in the original position to agree to free immigration accompanied by a redistributive mechanism in order to compensate those who are hurt by free immigration.

### **Liberty or distribution?**

I have been focusing on distribution, but from a very practical standpoint, international borders restrict liberty. They restrict the liberty to move, the liberty to engage in commerce, and the liberty to accept employment. It is worth noting from the outset that, at some level, these liberties are included in Rawls’s list of basic (domestic) liberties (1996),

protected by his first principle of justice. However, Rawls also stipulates that “while some principle of opportunity is surely [a constitutional] essential, for example, a principle requiring at least freedom of movement and free choice of occupation, fair equality of opportunity . . . goes beyond that and is not such an essential” (p. 228). While this distinction may make sense in Rawls’s framework, in a practical sense, freedom of movement and free choice of occupation go a long way toward achievement of equality of opportunity. So, we must recognize that Rawls’s first principle of justice is supportive of liberalized immigration to the benefit of poor persons.

But does the first principle of justice apply to foreign persons? Can it be restricted to exercise by foreign persons from politically liberal states? It would seem an artificial constraint on freedom of movement and free choice of occupation to say that “you can have all the freedom you want, so long as you exercise it within your own state’s borders.” It would seem sensible, and likely, that diplomats in the original position would reciprocally agree to extend these liberties to one another’s citizens.

Once we relax the assumption of closed societies, restraints on immigration seem to interfere with liberty in a way that violates the domestic principles of justice. However, in *The Law of Peoples*, Rawls supports restrictions on immigration. How are we to distinguish between immigration on the one hand, and the liberties of freedom of movement and occupation on the other? One way is to use a guest worker category. However, guest worker categories, to the extent that they constitute second-class citizenships, may be deeply problematic, particularly if they do not convert over some reasonable period of time into first-class citizenship.

There is a conflict between the domestic and international principles of justice in the context of international immigration. When applied globally to the immigration context, the principles of justice would suggest freedom to emigrate. However, when applied domestically in a poor state, the second principle of justice requires that constitutional arrangements be structured to benefit the poorest. It may be that brain drain of the middle class would confer a detriment on the poorest, and so a domestic difference principle would limit migration.



As Sidgwick (1891) pointed out, there may be settings in which free immigration, as well as foreign assistance, would confer a detriment on the poorest members of domestic society.<sup>17</sup> Under these circumstances, the operation of the domestic difference principle would either prevent these cosmopolitan acts, or would require domestic compensation sufficient to balance the damage done to the poorest. Recall that the first principle is lexically prior to the second (Rawls 2001). So, in order to comply with a global difference principle, or even a global first principle of justice, it may be necessary to compensate the domestic poor. There is a systemic relationship between domestic and global justice.

### **Moral hazard and regulatory Competition**

Rawls (1999, pp. 8, 39) assumes that people will only act responsibly in connection with the stewardship of their physical territory if they are confined to it, in perpetuity. Importantly, this incentive-based rationale is not sufficient even for Rawls, as he argues that the problem of immigration is not simply left aside, but is eliminated by virtue of the establishment of social justice in a realistic utopia—within each state. Under a realistic utopia, Rawls suggests, people simply would not have any motivation to migrate. Note the tension between this perspective, which would seem to assume that citizens have an identical utility function, or perhaps that there are a limited number of utility functions, and the Tiebout regulatory competition perspective, outlined in Chapter 2, which assumes a wide variety of objective functions and incentives to migrate in order to find matching arrays of public services.

Will national societies have appropriate incentives to become prosperous if outsiders can simply invite themselves to the table, or if they can simply call for a redistributive bailout when lack of industry has its inevitable results? This is the issue of public goods or policy externalities addressed in Chapter 2. If citizens could rely on unconditional global redistribution, or simply move to share in the fruits of the industry of others, they would lack appropriate incentives to cause their own state efficiently to achieve their goals—in economic terms, there would be “moral hazard” or a “soft market constraint.”<sup>18</sup> Rawls and other philosophers reject global redistribution largely because they do not believe this soft market constraint can be overcome. So the moral

hazard argument stands in the way of both free immigration and international redistribution.

Rawls's argument, which Pogge (2001, pp. 139–144) calls “explanatory nationalism,” assumes first that differences in position result from governance choices, and second that citizens are responsible for governance choices. Thus, explanatory nationalism argues that if citizens could rely on global redistribution, they would lack appropriate incentives to cause their own state to achieve their goals efficiently; in economic terms, there would be a “soft market constraint” or “moral hazard.” The argument is that because the apparatus of the state exists and has responsibilities, the consequences of failure must be felt by those who control the state.<sup>19</sup>

While the underlying assumptions are suspect, there is a sense in which states and their citizens should bear the consequences of their choices.<sup>20</sup> Under ideal circumstances, we might assume that states are accountable to citizens. However, in the non-ideal world, governments are often not accountable. Furthermore, there are other ways to make governments accountable than to leave their citizens in misery. Three important mechanisms of accountability are regulatory competition, international legal requirements, and conditionality.

Actually, as suggested in Chapter 2, free immigration may, under certain conditions, have beneficial competitive effects on governments, as well as on producers of goods and services. In fact, the very mobility that Rawls would restrict is a critical assumption within the powerful literature of competition among governments (Breton 1996).<sup>21</sup>

It is entirely plausible that in a global original position, representatives would not agree to closed states but to states open to immigration, in order to enhance regulatory competition, as discussed in Chapter 2. I do not want to assert this argument too strongly, as there are substantial questions regarding the mechanism and efficiency of regulatory competition (Trachtman 2000, p. 331), but I do want to highlight this additional reason why, in an original position, openness might be selected. The critical question is how we can maximize incentives for good government while minimizing punishment of innocent citizens. This question has much in common with the sanctions debate with respect to so-called rogue states.

Furthermore, economists and lawyers have much experience with moral hazard in the fields of corporate law, bank regulation, and insurance. There may be ways to obtain the benefits of appropriate incentives for good governance without giving up the possibility of “bailout.” In the private sector, this is done through insurance premiums and deductibles, supervision, or other mechanisms. If this possibility exists, why would representatives in the original position give it up?

Moreover, Rawls’s moral hazard position is dependent on citizen empowerment: the ability of citizens to get the government they want, and so to have the government they deserve. A host of failed and kleptocratic states have demonstrated that letting citizens absorb the consequences of their governments’ failures does not necessarily result in governmental reform. The predatory state seems to benefit from a vicious cycle of predation of its citizens, giving rise to further concentration of power and wealth that, in turn, allows further predation. Government officials may find that policies that reduce total welfare maximize their individual welfare. Thus, the moral hazard argument for restrictions on emigration may be undermined in just the type of case where Rawls would most hope that it would be operative.

Furthermore, if the moral hazard problem could be addressed through a mechanism other than restricting emigration by citizens, this argument against liberalized migration would fall away. So, is there a less-restrictive alternative? It is possible that conditionality in the intergovernmental context can play a role similar to bank supervision or risk-based deposit insurance premia in the private banking sector. Although conditionality as applied by the World Bank and the International Monetary Fund (IMF) has many critics, it is an example of externally applied discipline on the state—of a constraint that might reduce the problem of moral hazard and disrupt the cycle of predation. Conditionality is a form of intervention, and some call it a form of neocolonialism. Conditionality certainly reduces the bundle of autonomous state rights known as “sovereignty.” But sovereignty, in the form of absolute state control over its own affairs, has been oversold to poor small states, and more specifically to citizens. Local control does not benefit individuals when the control is in the hands of predatory or incompetent governments—we must be open to a post-postcolonial possibility of intervention, in cases of failed domestic governance. If

predatory governments can be disciplined, through a regime of analysis, transparency, and conditionality, it is possible to improve the lot of their citizens.

It may seem strange to be advancing greater international intervention and conditionality, at a time when the policies underlying World Bank and IMF conditionality have been hotly criticized. While international governance is quite imperfect, to the extent that it can engage in a policy dialogue with poor countries, it is possible that useful measures will result, and will be less imperfect than the alternatives. Mechanisms need to be created to ensure and facilitate reasoned dialogue based on agreed principles and citizen welfare, rather than on theory and diktat. With such a dialogue, states may be subjected to appropriate disciplines without imposing excessive restrictions on migration.

Even within a state-based original position, diplomats faithful to their constituents might agree that if they empower states, there should be restrictions on the authority of states and a possibility of international intervention under certain circumstances—specifically, in order to provide the constituents a minimum level of security and welfare. This is the role of international law. Such an agreement might be compared to a form of federalism in that the individuals would be authorizing a central, supranational government to intervene—to exercise jurisdiction—in particular areas. Certainly diplomats faithful to individual constituents would adhere to contingent intervention under some conditions.

## **Con Clusion**

Under a liberal, normative individualist, ethical framework, each of us would enter into society to maximize the achievement of our preferences. Given variations in economies of scale, externalities, and preferences, it is natural that we would work together in different horizontal and vertical frameworks. It is also natural that in a Rawlsian original position as to each of our social structures, we would be concerned with distributive justice.<sup>22</sup> Furthermore, it is natural that we would link our various horizontal and vertical social structures so as to maximize the achievement of our preferences: a federal style sys-

tem, or a network of international legal commitments, characterized by subsidiarity.

Imagine a global cosmopolitan original position. It would begin with representatives not of peoples but of individuals. These individuals would pay no regard to political borders in formulating exactly the two principles of justice that Rawls derives from the domestic original position. But they might also agree to establish subunits called states, or peoples. As Rawls finds, principles of justice would need to be worked out for different social units.

Considering the vertical structure of society, whether the sequence of pyramidal original positions is top-down, from global to domestic, or bottom-up would not make any difference. Either way, the cosmopolitan nature of the original position would draw on individual perspectives. Either way, the deliberations would be recursive, and so would draw together lower and higher levels of organization. In fact, participants in a *domestic* original position, aware of global society, would choose precisely the same principles that would be chosen in a *global* original position.

Similarly, participants in the global original position, without particular cultures and without histories, would also stipulate some rules of permitted diversity. In this ideal context, there is no path dependence; therefore the participants can choose any unit of organization. But they would wish to establish units that allow individuals to maximize the achievement of their somewhat diverse preferences. This wish would give rise to a rule of constitutional subsidiarity, determining allocations of authority and responsibility to subglobal units based on preference maximization. Of course, preferences here include those for cultural diversity, as well as all of the rights to influence government, and to be protected from excesses of government, that people would wish for in establishing subglobal units. However, before we show too much respect to culture, let us remember that not all cultures are beneficial, and that cultural change is an instrument of human improvement.

A global system following these principles would seek to institute free movement of labor. From a practical standpoint, as Chapter 2 shows and as Rawls understood, free movement of labor puts some pressure on welfare states, and may perpetuate failed states. Therefore, it may give rise to some need for contingent intervention or harmonization. As

discussed in Chapters 2 and 4, at some level, it would be necessary to compensate those harmed by these liberalization measures.

This system of governance would entail some difficult allocative decisions. But the decision of whether to help a compatriot to obtain goods above basic goods while foreigners suffered without basic goods would always be unacceptable, just as the decision to give one's own child a luxury before taking care of the basic needs of a neighbor's child would always be morally unacceptable.

Perhaps a governance system along these lines would have some degree of proximity-based tiering in the intensity of redistribution, after basic needs are met, or more properly some reflection of the human tendency to compare ourselves with those nearby. Perhaps it would also have a kind of extended purchasing power parity concept, which would accept that different integrated baskets of goods are needed for a good life in different contexts. In the end, it seems clear that borders, as part of the basic construction of society, must be structured—including features of permeability—in order to advance the position of the least fortunate.

My basic premise is cosmopolitan in the sense of individual duty, as well as individual rights, so we need to begin with the duty of individuals as opposed to the duty of states or peoples. Should we really feel that we owe duties to those near but not those far? Certainly the idea of the original position is to identify ideal duties, as opposed to narrowly reciprocal real obligations. So the fact that a compatriot is behaviorally more likely to reciprocate, should not, in the original position, make a difference. And in the original position, distance is a mere abstraction and should count for little.

Could it be that Rawls declined to apply the principles of justice developed for domestic society to international society because of the tremendously disruptive, even revolutionary, redistributive effect of applying these principles in an international context?<sup>23</sup> If we consider Rawls's formulation (1971, pp. 212–213) of the lexically prior first principle of justice, we see that even its liberties can be constrained in favor of public order. As Carens (1987, p. 259) points out, even in a global original position, participants would approve restrictions on immigration in order to avoid chaos and the breakdown of order.

A sudden move to global free migration would be unattractive. Individuals need time to adjust, and might agree in the original position to gradually make some changes, even those required to do justice. Over time, complex factors may provide natural and beneficial limits on emigration that would not be able to operate instantly. As we discussed in Chapter 2, economic integration is a self-equilibrating mechanism in the sense that trade, migration, and investment are to some extent substitutes and result in a degree of price homogenization.

Clearly one might back away from recommending—indeed, calling for—disruptive changes, but it is striking that the position Rawls takes on this matter calls for little change, and seems difficult to justify within his own framework. An alternative approach seems consistent with Rawls’s methodology, and could avoid sudden revolutionary disruption. Modeled on the experience of trade liberalization over the past 60 years, a gradual approach combined with adjustment seems intuitively appealing within a global original position. “You are not required to finish the task, but neither are you free to abstain from it” (Pirke Avot 2:21).

Thus, we might understand Rawls’s duty of assistance as a starting point. Expanded immigration could be introduced gradually in order to avoid disorder and allow adjustment, and in order to provide time for the other parameters to have an effect that reduces the desire to emigrate.

### notes

1. Howard Chang (2006) makes an explicit comparison between apartheid and restrictions on immigration: “Just as we condemn segregation at the local level for undermining equality of opportunity in the domestic context, I suggest, we should condemn immigration restrictions for undermining global equality of opportunity.”
2. In using Rawls’s work as a basis and as a foil, I follow an established tradition. “Rawls’s *A Theory of Justice* is generally considered to be the most complete and systematic account of a rights-based justice in contemporary philosophy. It is not surprising, therefore, that the important attempts at developing a systematic theory of global justice have been attempts at ‘globalizing’ Rawls’s theory of justice” (Tan 2004, p. 54).
3. Rawls (1971, 1996) notes: “I shall be satisfied if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a closed system isolated from other societies . . . It is natural to

conjecture that once we have a sound theory for this case, the remaining problems of justice will prove more tractable in the light of it.”

4. “Moral hazard” is an economic concept describing a circumstance in which individuals do not bear the full adverse consequences of their decisions, and so may have perverse incentives to act in a way that diminishes social welfare.
5. For a similar perspective, see Johnson (2003).
6. The distinction between peoples and states need not concern us, as Rawls’s intent (1993) is to emphasize the responsibility of states to their individual constituents—the people, and avoid implicit acceptance of some of the powers he understands states to have at traditional international law. This position is revised and expanded in Rawls (1999).
7. This question seems to have been asked by Beitz (1979).
8. The third preambular statement of the WTO Charter may be cited as evidence of the existence of a reciprocal cooperative venture for mutual advantage: *Being desirous* of contributing to these objectives [raising standards of living, full employment, expanded production, sustainable development] by entering into *reciprocal and mutually advantageous* arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations (emphasis added: the italicized language suggests that the draftsmen were aware of the international justice debate).
9. For a criticism of the use of “peoples” from both an empirical and methodological perspective, see Benhabib (2004).
10. Even assuming an illiberal people, it seems subversive of Rawls’s domestic principles of justice to assume that individuals in the domestic original position would select an illiberal political culture.
11. Rawls (1993, 1999) makes the assumption of fair representation in the domestic original position.
12. Their interest is to live in a well-ordered (liberal or decent) society. This society is one that can provide basic goods (Wenar [2001], citing Rawls [1993]; revised and expanded in Rawls [1999]).
13. This duty is limited to an amount sufficient “to help burdened societies to be able to manage their own affairs reasonably and rationally and eventually to become members of the Society of well-ordered Peoples” (Rawls 1999, p. 111).
14. Beitz (1999, p. 291) states that, “I believe that the philosophical weakness most characteristic of cosmopolitan theories—although not found equally in all of them—is a failure to take seriously enough the associative relationships that individuals do and almost certainly must develop to live successful and rewarding lives.” However, Beitz accepts a federal possibility: “It is hardly clear that a sophisticated cosmopolitanism *cannot* explain how local affiliations might give rise to special responsibilities. Such a view would recognize the value to individuals of their associations with domestic or local communities and argue that ethically significant properties of these associations justify internal distributive arrangements that are different from, although not inconsistent with, what is required by global principles.” (citations omitted) (emphasis in original).
15. For a summary and critique of Walzer’s argument, see Bosniak (1994).



16. See the interesting argument by Kok-Chor Tan (2004) that nationalism can be reconciled with cosmopolitanism.
17. There is no clear evidence that free immigration would generally confer a detriment on domestic workers. See Chapter 2.
18. Rawls (1999, p. 8) makes this argument explicitly.
19. It is also worth noting the flip side of this argument: that states would have reduced incentives to become wealthy due to the prospect that they would be taxed to help the poor. Of course, this argument has no more impact internationally than it would in domestic society; the difference principle seems to survive this concern.
20. Tan (2004, pp. 74–76) makes an important argument that Rawls seems to accept collective responsibility for governmental choices, in a manner inconsistent with his domestic focus on normative individualism.
21. For application in the migration field, see Straubhaar (2000, p. 127)
22. On application of the principles of political justice to all domains, see Rawls (2001, p. 166).
23. This issue is touched upon by Caney (2001).



## 4

# International Political Economy of Migration

Chapter 2 discusses the welfare economics of migration, raising the possibility that legal rules might be structured to enhance global welfare. Yet it is well understood that states do not necessarily behave in accordance with the dictates of welfare economics (Dixit 1998). Not only is it possible that they would take actions that are inconsistent with global welfare, in pursuit of their individual welfare, but it is also possible that states would take actions that are inconsistent with their domestic welfare. Rather, the distributive consequences within states, and the relative political influence of the various constituencies, determine national policy. The political decision-making and behavior of states in connection with international economic relations is the subject of international political economy.

However, the international political economy academy has devoted much less attention to migration than to international trade or finance, both theoretically and empirically (Facchini, Mayda, and Mishra 2007). This chapter reviews some of the work to date, and suggests the implications of this analysis for international legal rules relating to migration. As Grossman and Helpman (1994, p. 849) 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 process in different [international] institutional settings, and therefore to evaluate which rules give rise to preferred policy outcomes.”

Chapter 3 assesses the ethics of migration, yet it is also well understood that states do not necessarily behave in accordance with the dictates of ethics, and of course, the dictates of ethics are more contest-

able than the dictates of welfare economics. Martin (2004) shows that destination states tend to structure restrictions on immigration to meet their own needs, pursuing national gains, rather than altruism. Yet we must recognize that altruism may have some marginal effect on domestic politics in destination states.

In this chapter, I examine how welfare economics concerns, and others, are mediated through national political processes, and how the resulting national political equilibria may result in an international political equilibrium. I then take up the Grossman and Helpman challenge to assess the relative desirability of international legal rules to change the nature of the strategic equilibrium, both between governments and within domestic coalition politics. Once we evaluate the domestic politics of states arising from the distributive consequences of migration, we must also recognize that other factors, including recession, income inequality, history, ignorance, demagogic scapegoating, chauvinism, and even racism may be added to the forces that determine policy, and that the alchemy of domestic coalitions is complex.

As seen in Chapter 2, the welfare factors themselves are complex and variegated, and welfare analysis would require individual country evaluation, and customized solutions, with the possibility for change over time. Despite this complexity, at the level of the state we may generalize and say at least that in the current world economy, most states will benefit from immigration of high-skilled persons, while they may be more ambivalent about low-skilled persons. Some states may be harmed by emigration of high-skilled persons: brain drain. Some suggest that temporary migration may present a win-win possibility for home states and destination states.

Within each state, some groups of individuals will be harmed by liberalization, while some will be helped. In order to assess domestic political dynamics, we must analyze and synthesize the domestic coalition politics of migration. As discussed in detail in Chapter 2, those domestic workers who compete with immigrants may experience reduced wages and, unless adjustment assistance is provided, reduced welfare. This result is not certain, nor is the magnitude necessarily very great. Nor does it appear that immigrant workers generally consume public services excessively. However, in certain cases it may be that some segments of native workers are hurt significantly or that immi-

grants consume greater amounts of public services than they contribute. Alternatively, perhaps workers and voters may succumb to prejudice or demagogic appeals, and therefore oppose immigration (Faini, de Melo, and Zimmermann 1999, pp. 6–7).

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 (Olson 1965; WTO 2007).

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 (see Chapter 2 for more on this point). 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. This presents the possibility of bootlegger-Baptist coalitions between multinational corporations on the one hand, and wealthy country unskilled labor on the other hand, in support of restrictions on immigration.

As mentioned in Chapter 2, 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 another type of bootlegger-Baptist coalition.

We might expect better-organized producer interests, combined with diffuse consumer interests, to be able to overcome less well-organized labor interests. As suggested above, much would depend on the extent to which producer interests benefit from use of illegal immigrants, or derive a competitive advantage from differential access to cheap labor markets abroad. In addition, much would depend on the extent of labor organization. If labor interests were less well-organized, or otherwise weaker, under the standard political economy simplification that government decision-makers are rational political support-maximizers, we would expect government policy to be favorable to immigration. Indeed, Freeman (1995, pp. 882–883) argues in 1995 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.”<sup>1</sup>

Freeman (1995) suggests that the liberal bias may depend on a clientelistic political influence model in which policy interactions take place outside of public view. The governments of destination states have sometimes been able to overcome skeptical public opinion, in favor of the superior organization of employers. They did so by making policy in administrative settings, “without public participation and with little parliamentary supervision” (p. 891, citing Hammar [1985]). 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 argues that “there are serious barriers to the acquisition of information about immigration and . . . there is a highly constrained process by which immigration issues are debated that distorts the information that is available” (p. 883). We need only refer to the debate among economists such as George Borjas and Andrew Card, discussed in Chapter 2, as to the effects of immigration on wages, to understand that the problem goes even further, in that consensus-based information simply is not necessarily available. Yet this lack of information could cut either way in the political debate.

“Despite public indifference or opposition, and often in apparent disregard of rising unemployment rates, governments in the settler soci-

eties substantially increased immigration intakes [from 1975 to 1995]" (p. 887). The "settler societies" include the United States, 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 did not directly oppose immigration during this period, and political parties avoided intense political debate regarding immigration. The United States in the early twenty-first century may constitute a departure from this pattern, but even there, the debate often transcends party politics.

The so-called new countries of immigration—Portugal, Spain, Italy, and Greece—became both receivers and senders of migrants in the 1970s and 1980s. Mass publics varied in their reaction to immigration, but public opinion was not a major influence on policy, and each of these states remained receptive in the 1990s. As in the western European states, much decision making took place at the administrative level, and was not the subject of intense political debate (p. 895).

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" (p. 885).

Interestingly, Freeman suggested in 1995 that this liberal dynamic is reinforced by an antipopulist norm in mainstream political parties, according to which politicians decline to exploit racial, ethnic, or immigration-related fears in order to succeed. We might wonder whether the same observation would be made today. Politicians do sometimes engage in demagoguery to exploit or precipitate these meaner sensibilities of their constituents, and it appears more acceptable to target "outsiders" through immigration-related fears than to target citizens of particular racial or ethnic groups. 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.

As suggested above, politics is driven by more than just welfare, and it is certainly driven by the intranational distributive aspects of welfare. That is, the politics of migration policy involves complex historical, so-

cial, 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.

Therefore, while Chapter 2 begins with global welfare, and then examines the welfare of individual states and groups of constituents, this chapter begins at the local level, and then moves to the global, or in this case international, level. Once we are able to establish a set of parameters that determine national policies with respect to migration, we are able to turn to the international politics of migration. Once we understand the national politics and the international politics, we can examine the potential role of international law.

Political economy analysis thus adds three important dimensions to our analysis:

- 1) 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 through political and social mechanisms. What additional parameters are important to political decision-making regarding migration?
- 2) At the international level, how do states fail to achieve welfare-enhancing agreements or transactions due to strategic problems or other market failures?
- 3) 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 counterparties. 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?

This chapter is an exercise in normative political economy, insofar as it examines the extent to which existing national and international political equilibria are consistent with the maximization of global, national, and individual welfare. Alternative legal rules and institutions may allow achievement of welfare-enhancing domestic and international political equilibria.

### **Trade Policy and Migration Policy: a dual Policy Paradox?**

A number of scholars have asked, if there is some equivalence between importing a good and importing a worker capable of making the same good (see Chapter 2), why does it appear that domestic labor is strong enough to block greater openness in immigration, while the world has moved toward greater liberalization in trade in goods? The factual predicates for this question are not unassailable, as the economic equivalence between these two phenomena is questionable, as liberalization of trade in goods still has substantial deficits, and as it is not clear that domestic labor has indeed successfully blocked openness in immigration. However, at least from the standpoint of competing domestic workers there are important similarities.

Hatton and Williamson (2006) and Mayda (2007) explore this “dual policy paradox” that a simplified theory predicts that immigration and import restriction policy should coincide, but never have. Hatton and Williamson find that immigration policy was very open compared to trade policy up to 1914. The policies of the United States, Canada, Ar-

gentina, Brazil, and Australia were proimmigration from 1860 to 1890, and then gradually tightened.

Hatton and Williamson emphasize the fiscal importance to destination governments of tariff revenues during the earlier periods, providing disincentives to liberalize in trade that do not apply with respect to immigration. In fact, since government welfare functions were still rather modest, and since immigrants were more productive compared to natives, threats to the national treasury did not play the role prior to 1914 that they do today. “Thus, tariffs brought plenty of fiscal benefit in the era before 1914 while immigrants brought no fiscal costs” (p. 13).

As the fiscal importance of tariffs declined in industrializing states that introduced income taxation, and as increased governmental services and transfer programs increased the potential fiscal cost associated with immigrants, this pattern began to change. Hatton and Williamson explain that these factors, combined with increased voting by lower-skilled and unskilled workers, combined to explain restrictive immigration policy in the later period. Restrictions were raised sharply in destination states, led by the United States, beginning in 1917, and immigration was subjected to a general worldwide clampdown with the onset of the Great Depression.

Hatton and Williamson (p. 20) find that in the present context, the average citizen in 14 relatively labor-scarce OECD countries would like to see *both* immigration and imported goods reduced—they find little difference in the average opposition.

Analyzing modern survey data, Mayda (2007) finds, consistent with the Heckscher-Ohlin model and the Stolper-Samuelson theorem, that individual skill and protrade attitudes are positively correlated in skill-abundant countries and negatively correlated in skill-scarce countries. Similarly, she finds that individual skill and promigration attitudes are positively correlated in countries that receive unskilled immigrants and negatively correlated in countries that receive skilled immigrants. Along similar lines, O’Rourke and Sinnott (2002) find that unskilled workers in wealthy countries evince the greatest opposition to immigration, and that this opposition is stronger in more egalitarian countries, such as continental European countries.

On the other hand, Hainmuller and Hiscox (2007) find that “In contrast to predictions based upon conventional arguments about la-

bor market competition, which anticipate that individuals will oppose immigration of workers with similar skills to their own, but support immigration of workers with different skill levels . . . people with higher levels of education and occupational skills are more likely to favor immigration regardless of the skill attributes of the immigrants in question.”

Mayda finds that individuals are today more protrade than proimmigration across several countries studied. She suggests that the reason for this difference is that in the trade context, as compared to the immigration context, there is a distinction between individuals working in traded as opposed to nontraded sectors. Individuals in nontraded sectors do not oppose trade. When Mayda examines labor market determinants of trade and immigration preferences in a short-run sector-specific model, where factors are immobile across sectors, she finds that the distinction between traded goods and nontraded goods sectors applies only to trade, and not to immigration. The proliberalization perspective of workers in nontraded goods sectors does not apply to immigration. “Workers in nontraded sectors feel shielded from foreign competition working through trade but not from labor-market competition of immigrants” (p. 4).

Thus we see that the political economy of migration policy has substantial differences from the political economy of trade, and that the factors driving the political economy of migration policy are distinct, although there are some overlaps. So, it is not surprising that migration and trade policy have diverged, and converged, at various times.

### **Labor versus capital**

One important distinction between the political economy of trade in goods and that of migration is the fact that labor and capital often have more antagonistic interests in relation to migration. While owners of firms that manufacture for the domestic market may be hurt by imports of goods, they are generally not hurt by imports of workers that make the same goods. In fact, the opposite is often true.

Importantly, greater mobility of labor has a double-edged effect on workers. Mobility can allow workers to overcome barriers, enabling them to engage in the same type of factor arbitrage that multinational

corporations are able to achieve. In fact, to the extent that this arbitrage involves the competition of immobile factors for mobile resources, mobility of labor can change bargaining power. Multinational corporations seek the cheapest inputs (including labor) and the greatest prices for their output. Mobile labor can also seek the greatest prices for its output and thereby counter the market power of local employers and even multinational corporations.

However, it must be recognized that not all labor can be made mobile, and the types of workers that will be hurt most by immigration—those whose types are scarce—would ordinarily find that international mobility does not help them. On the other hand, workers whose types are abundant may be assisted by mobility and unharmed by immigration.

According to Freeman (1995), immigration tends to result in concentrated benefits and diffuse costs within the destination state. Those who benefit from immigration in the destination state therefore have greater prospects to organize than those who are hurt. This is similar to, but the reverse of, the politics of protectionism in trade (where the *illiberal* policy causes concentrated benefits and diffuse costs). In destination states, the principal beneficiaries of liberal immigration are generally employers in labor-intensive and in particular unskilled labor-intensive industries. Other beneficiaries may include industries that benefit from population growth, such as the construction industry, and family members of the immigrant who migrated earlier.

However, perhaps it can be argued that the more intense or directly observable nature of the effects on employees, by virtue of the fact that they may observe immigrant workers employed at lower wages, causes them to lobby with greater intensity against immigration than they do in connection with trade. In connection with trade, the competing workers would be abroad rather than at home. Indeed, it may be that this intensity could give rise to a greater lobbying effort, explaining a more protectionist approach to immigration. However, the other difference between trade and immigration is that, largely due to the way tariff schedules are negotiated, each separate manufacturer of a particular classification of product, and its workers, may lobby intensely and separately with respect to trade in the relevant good. This lobbying may be more fragmented than lobbying regarding general immigration policy, but it is focused on a much more precisely specified target. Im-

migration lobbying does not necessarily distinguish among particular types of production, or narrow categories of worker. On the other hand, in connection with licensing or qualification requirements for particular professions, we might expect to see more focused lobbying.

The initial costs of immigration fall directly on workers who compete with the immigrants, as well as others who compete with immigrants for housing and other consumption items. These latter individuals may lack the ability to organize or to mobilize resources to influence policy, and they may fail to observe the effects that immigrants have on the prices that they pay.

However, immigrant-competing workers may be members of unions, and so may be able to pool resources and organize effectively to oppose immigration. It would be an interesting test of this political economy model to examine whether migration is more liberal in countries and sectors where labor is less well-organized.

On the other hand, Freeman (1995, p. 888) observes that in Australia, Canada, New Zealand, and the U.S., unions "have generally come to support immigration, resigning themselves to defensive rather than restrictive measures, such as employer sanctions against hiring illegal workers and labor certification programs tying the composition of inflows to employment sectors where demand is high" (citations omitted). Watts (2002, p. 3) finds that French, Italian, Spanish, and U.S. unions carry out educational programs for their members to convince them that the best strategy is to seek more open immigration policies. French, Italian, and German union leaders have worked to facilitate legal immigration and improve the treatment of migrant workers.

The opposition of unions to illegal immigration suggests the possible validity of the assumption that illegal immigration reduces the bargaining power of unions. Illegal immigrants have more limited options than comparable natives or legal immigrants, and so may have reduced bargaining power (Friedberg and Hunt, 1999, p. 344). An alternative or contributory explanation may be that illegal immigrants are less likely to join unions, reducing the income of unions. The willingness of unions to support selective immigration pursuant to labor certification programs suggests a sophisticated willingness to be selective in determining market access.

It is important to recognize that while migration may have adverse effects on the wages of scarce classes of workers in the destination state, similar mobility could provide market power to abundant classes of workers in the home state. Thus, in a state that is as likely to be a sending state as a destination state, workers as an aggregate may not have a very strong position for or against migration. In effect, under nonselective liberalized migration, scarce types of workers give up market power so that abundant types of workers may gain market power.

Thus, a possible basis for international agreement to liberalize migration may be the decision of labor to accept inbound migration in exchange for promises of mobility that confers market power. Indeed, labor may be at the heart of potential international commitments to reduce barriers to migration, insofar as labor in any particular country would like to attain mobility. I discuss this possibility in more detail in the latter part of this chapter.

### **Fiscal considerations**

In many modern OECD states, there is a concern that immigrants may contribute less to the welfare state than they receive. This issue did not arise in earlier periods of mass migration, as the welfare state was much smaller (Felbermayr and Kohler 2006).

The research discussed in Chapter 2 suggests that immigrants have not generally caused significant adverse or beneficial effects in fiscal terms: either in taxes collected or in public resources used. Note, though, that if more unskilled immigrants, or other immigrants who could not contribute to the workforce and tax revenues, were admitted, they could have adverse fiscal effects. Over the long term, immigrants and their children are more likely to be net fiscal contributors.

### **adjustment**

Of course, at the most fundamental levels of both trade and migration, there will be some who are harmed by liberalization. Assuming aggregate national benefits, adjustment assistance may promote the development of proimmigration coalitions.<sup>2</sup> Many have argued persuasively, in connection with trade, that liberalization is facilitated by appropriate safety net or other redistributive mechanisms that allow

working voters to accept liberalization without worrying about their livelihoods.<sup>3</sup> Presumably, a similar approach of “embedded liberalism” (Howse 2002; Polanyi 1944; Rodrik 1999; Ruggie 1982) could apply to address the distributive impacts of migration. However, in order to fund the adjustment assistance and other programs of embedded liberalism, it will be necessary for the government to identify the necessary revenues.

### **Endogenous Policy Models of Trade and Immigration**

Grossman and Helpman (1994) develop a paradigmatic model of trade politics in which owners of particular factors organize a lobbying group in order to influence the government by political contributions. Grossman and Helpman focus on the campaign contributions channel of influence on government. In this model, the motivation of lobbyists to contribute to political campaigns is not necessarily to affect the outcome of elections, but to “buy influence.”

In the Grossman-Helpman model, each interest group has a “contribution schedule” linked to various alternative policy vectors. In response, government chooses a policy vector in order to maximize a weighted sum of both contributions and national social welfare. National social welfare is part of the calculus because it is assumed to affect votes. The Grossman-Helpman model relates an industry’s equilibrium protection to its political organization, its ratio of domestic output to net trade, and the elasticity of import demand or export supply. The equilibrium is that set of contribution schedules such that each lobby’s schedule maximizes the aggregate utility of the lobby’s members, taking as a given the schedules of other lobby groups.

Grossman and Helpman assume a small competitive economy, for which free trade is optimal. Under that assumption, government interventions in the form of tariffs or subsidies may be assumed to be motivated by political considerations rather than national welfare. The standard trade model of protectionism explains protection in national public welfare terms by reference to terms of trade externalities, and

holds that protectionism can only be welfare-improving for a large country (with market power), which can use trade barriers to improve its welfare as compared with free trade (Bagwell and Staiger 1999, p. 215; 2001, p. 281; 2003).<sup>4</sup>

One commonly accepted extension of the Grossman-Helpman approach to the domestic political economy of trade recognizes the possibility to link the interests of domestic producers for export to the interests of domestic consumers through *reciprocal* free trade agreements. By virtue of these agreements, the political power of domestic producers *for export* is added to the political power of domestic consumers, overcoming the political power of domestic producers that compete with imports for domestic consumption. The possibility of reciprocal international trade agreements induces an antiprotection coalition to form, in support of liberalization pursuant to these agreements. Thus, the domestic political economy of trade is critically linked, by reciprocal trade agreements, to the international political economy of trade.

Is this approach to international trade relations adaptable to migration? As discussed above, migration does not display the same pattern of domestic interests as trade. In the migration context, destination state manufacturers, both for domestic consumption and for export, would generally be expected to be in favor of liberalized immigration. Facchini, Mayda, and Mishra (2007) suggest that migration politics is strongly affected by political contributions by manufacturers, as well as by labor union activity. However, destination state manufacturers may experience difficulties in organizing, as the breadth of interest in immigration could result in collective action problems unless immigration policy is selective by sector. Facchini, Mayda, and Mishra assume selectivity in their model of protection against immigration.

We show that in equilibrium, in a given sector, the amount of protection afforded to labor, i.e. the restrictiveness of the migration policy adopted by the government, depends on both the lobbying expenditures made by organized labor, as well as on the expenditures made by capital (which is its complement). In particular, if labor in a sector spends larger amounts, *ceteris paribus* it will obtain higher levels of protection from foreign inflows of workers to that sector and, hence, it will lower the equilibrium number of immigrants. At the same time, if organized business owners spend higher amounts, this will *ceteris paribus* make migration policy in



that sector less restrictive and, therefore, increase the number of immigrants. (p. 4)<sup>5</sup>

In that model, a lobby for labor and a lobby for capital engage in a noncooperative game where each chooses an amount to pay in order to maximize its own net welfare.<sup>6</sup> It is uncertain, however, to what extent the sectoral divisions assumed by Facchini, Mayda, and Mishra actually exist. In the United States, for example, there are few formal distinctions between different occupations at the legislative level where lobbying is expected to operate.

If destination states had no market power, as Grossman-Helpman assume with respect to importing states, then the Facchini, Mayda, and Mishra model would seem to provide a plausible tool by which to analyze immigration policy. However, popular destination states seem to wield important market power, allowing them to improve their welfare at the expense of migrants and home states. The ability to import labor at a price lower than the price that would otherwise apply, by using policy measures to extract some of the income from the imported worker, or to extract welfare from the home state, seems analogous to the use of tariffs to increase domestic welfare at the expense of foreign welfare. Market power of this type might be a more important factor in connection with less skilled labor than in connection with highly skilled labor. Even wealthy states may find that they must compete in order to attract highly skilled labor.

Some destinations, such as the United States, the EU, 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 may give 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. Of course, market power also requires that a state be sufficiently large as a fraction of the global economy to affect the world price of labor through its policies.<sup>7</sup> Do these leading destination states use market power to extract welfare gains from immigration? Consider the following three possibilities:

- 1) States with market power in this context may exert that power by accepting immigrants and denying the home state of the immi-

grants the ability to tax those migrants—declining to implement a Bhagwati tax. By doing so, the destination state may impose a negative externality on the home state.<sup>8</sup>

- 2) Another 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.
- 3) 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 (Bucovetsky 2003). Considering the United States' relationship with Mexican or other illegal immigrants, it may be that denial of public services or public transfer payment benefits could be understood as discriminatory provision of public benefits, with the same motivation and effect. 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 in terms of negative externalities?<sup>9</sup>

These types of measures are likely to provide disincentives for migration, in a way that may reduce global welfare insofar as migration would otherwise be efficient<sup>10</sup> Indeed, it may be that a sufficient rationale for states to cooperate in this area is simply to agree to suppress these types of measures in order 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 are 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, nor does it feel the full welfare loss caused by the destination state's policy. Therefore, the home state may not be sufficiently 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 (2006) explains this 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 governments with internationally appropriate incentives that lead them to choose internationally efficient levels of trade protection."

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, the goal is to provide an avenue by which emigrants and those left behind in home states can have their interests represented in immigration policies of destination state governments. To the extent that destination state governments take these interests into account, they will be more likely to choose internationally efficient levels of immigration protection.

In the trade context, the terms of trade approach, focusing on the exercise of market power, seems only to provide a rationale for negotiations among states with market power. As noted above, economists expect that welfare-maximizing states without market power would unilaterally make policy choices that are internationally efficient, since they cannot gain welfare by raising barriers. Furthermore, they therefore expect that states with market power would see little benefit from negotiating agreements with states that lack market power (WTO 2007). There is no clear understanding regarding the extent of poor or small

states' market power, except an understanding that it is generally less than that of wealthy and rich states.

In the labor migration context, it appears that states without market power frequently do not impose restrictions on immigration. One reason, no doubt, is that the demand to immigrate to those states is, by definition, not very great: their productivity rates generally do not result in increased wages for immigrants. But the important point here is that states without market power in migration would have little to bargain with in a reciprocal liberalization transaction. On the other hand, we must remember that in this context, market power is relative. Thus, a middle-income developing country may have market power as a destination state vis-à-vis a lower-income developing country: it may be attractive for residents of the latter to migrate to the former in order to realize wage gains.

In the trade model addressing terms of trade externalities, the role of international law is to allow states credibly to commit to exercise reciprocal restraint. Even in a model that does not include terms of trade externalities, in which states are failing to achieve optimal volumes of trade and therefore are failing to achieve maximum global welfare, international law could play a similar role in allowing states credibly to commit to exercise restraint, or to make compensation, as appropriate.

This type of cooperation problem has often been modeled, assuming a certain structure of payoffs, using the prisoner's dilemma game. The assumption is that the states could be better off if neither of them defected, but that each is individually better off if it defects while the other cooperates, and receives the worst payoff 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.

Figure 4.1 shows a diagram of the prisoner's dilemma, as applied to trade. In this set of assumed payoffs, if international legal rules can impose a cost on defectors (states that fail to liberalize or impose terms of trade externalities) greater than 1 (in Figure 4.2, for illustration, I use 1.5), then they will decide to liberalize instead.

In Figure 4.2, the dominant solution for each player is to liberalize: no matter what State B does, the best payoff for State A is to liberalize.

**Figure 4.1 a Trade Prisoner's dilemma game without International legal rules**

		State B	
		Liberalize	Defect
State A	Liberalize	A: 2 B: 2	A: 0 B: 3
	Defect	A: 3 B: 0	A: 1 B: 1

If, in the migration context, home states saw themselves as harmed by the kinds of negative externalities described above imposed by destination states in connection with migration, and if the positions were symmetrical, a similar set of payoffs might arise. Alternatively, if states saw themselves as harmed by global failure to achieve optimal volumes of migration, a similar strategic setting, based on a public goods problem, might arise. On the basis of the example of trade, we might too quickly assume that international migration agreements could play a similar role. However, as I have suggested, the explanations developed in connection with the political economy of trade do not neatly map into the migration context: while the welfare economics analysis bears

**Figure 4.2 a Trade Prisoner's dilemma game plus International legal rules Imposing Penalties for defection (no longer a Prisoner's dilemma)**

		State B	
		Liberalize	Defect
State A	Liberalize	A: 2 B: 2	A: 0 B: 1.5
	Defect	A: 1.5 B: 0	A: -0.5 B: -0.5

some limited similarities, and the international setting may be comparable, the domestic political economy parameters are different. There are important reasons why we do not observe international agreements for liberalization of migration.

Greenaway and Nelson (2006) state that there is little empirical research on immigration policy with a direct link to endogenous policy modeling, in part due to weak evidence of economic impact and strong evidence of noneconomic forces in determining preferences. They find that “endogenous policy models of migration policy seem to provide very little analytical leverage” (p. 312). One reason is that “there is no equivalent, long-lived, group-based politics surrounding immigration” (p. 314). Greenaway and Nelson conclude that “trade is seen as national and essentially economic; while immigration is local and essentially social” (p. 315). However, this conclusion may be seen as more an observation of a result than an identification of a cause. A casual observer of U.S. immigration politics might conclude that immigration is becoming more like trade: group-based, national if not international, and essentially economic. Indeed, Willmann (2006), commenting on Greenaway and Nelson, finds counterevidence in the work of Borjas (2003) and Mayda (2003). Willmann (2006, p. 329) cites examples of political positions that seem consistent with economic expectations.

### **Ma PPIng Th E dE s TI na TI on s Ta TE Pol ITical Econo My o F MIgra TI on**

In order to develop some simple schematics of the possible coalition dynamics in the political economy of the destination state regarding migration, comparable to the model of the political economy of the importing state regarding trade described above, it is necessary to make a number of simplifying assumptions and to exclude much detail.<sup>11</sup> These assumptions are supported by the discussion above, as well as in Chapter 2.

For simplicity’s sake, I largely exclude from these schematics the more contextual, historical, social, and political factors discussed in subsequent sections of this chapter. Hatton and Williamson (2005, p.

179) find that in the long run, “the New World countries tried to protect the economic position of their scarce factor, the unskilled worker.” They find “no compelling evidence that xenophobia or racism was driving immigration policy in the New World economies,” once you ignore Asian exclusions and absent Africans. These factors are not 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, it is to develop an idea of the way that the welfare economics considerations may be translated into political pressures, the strategic constraints that domestic interests face, and the strategic constraints that states face, 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 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.

I assume that citizens seek to influence their own governments through two main channels: 1) political contributions, and 2) voting. Governments act in response to utility functions based on an attempt to maximize a weighted sum of these two components: they maximize political support.<sup>12</sup>

As noted above, there is a domestic coalition-building game and a linked international cooperation game: thus, migration policy is a two-level game in the Putnam sense (1988). The question raised by this book is whether governments may find it useful to enter into international agreements in order to induce the formation of domestic political coalitions in support of liberalization. I describe the domestic coalition-building problem textually, 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, proliberalization forces would not be suc-

cessful in inducing formal liberalization, international agreements may increase the possibility of formation of proliberalization coalitions.

In the following four sections, I develop four simple schematics of possible structures of political support for liberalization of immigration. The first two schematics use the assumption, based on Heckscher-Ohlin theory, that unskilled labor would migrate to where it is scarce, and skilled labor would migrate to where it is scarce. Opposition also follows Heckscher-Ohlin theory: the scarce factor in the destination state has the most to lose in connection with immigration. The third schematic adds the possibility of capital mobility or offshoring, or illegal immigration. The fourth schematic assumes that wealthy country labor has no interest in migrating to poor countries. Under this schematic, potential reciprocity within migration policy would play no role, as wealthy country labor would not seek access to poor country markets.

- 1) *Symmetric labor markets.* I develop a schematic in which two states are symmetric, with equal endowments of labor, including equal proportions of skilled and unskilled labor. This schematic could describe migration between poor or middle-income states or between wealthy states. An example might be the migration relationship between the United States and the EU. Here, engineers, doctors, or professors might migrate in search of a particular type of position or better pay. Although I assume symmetry in terms of general endowments, it would be likely that some states might have an advantage in producing a particular type of worker. France would be expected to produce better chefs than the United States, while the United States might be expected to produce better basketball players than France. (While this schematic is based on the Heckscher-Ohlin model, since there is no differential between the two states in relative abundance and scarcity, migration cannot be said to be motivated by Heckscher-Ohlin factors.)
- 2) *Asymmetric labor markets with two-way migration.* I develop a schematic that assumes asymmetry, where one state has abundant skilled labor while the other has abundant unskilled labor. Here, the relationship between Spain and Morocco, or between the United States and Mexico, are examples. Generally, developing countries are likely to have greater abundance of unskilled



labor, while developed countries have greater abundance of skilled labor.

- 3) *Asymmetric labor markets with offshoring or illegal immigration.* I add to the asymmetric context the possibility of offshoring or illegal immigration as an alternative to liberalization of migration.
- 4) *Asymmetric labor markets with one-way migration.* I develop a schematic that assumes asymmetry, but, contrary to Heckscher-Ohlin theory, assumes that poor country labor flows only toward the wealthy country: wealthy country natives do not wish to migrate to the poor country.

These schematics are structured in bilateral terms. Obviously, multilateral arrangements will be more complex. Indeed, multilateral arrangements with most-favored nation nondiscrimination may be very difficult to achieve where they include both relationships of symmetry and asymmetry, and both “two-way street” migration relationships and “one-way street” relationships.

### **symmetric labor markets: a coordination problem**

Assume two symmetric states: domestic labor and foreign labor are symmetric overall in quantity and skill level. Assume that in each economy, skilled labor is abundant, and unskilled labor is scarce. (This schematic would also apply to the opposite: symmetric economies where unskilled labor is abundant and skilled labor is scarce.) Levels of productivity and wages are closely aligned. In this context, there may be little reason for migration, and little by way of welfare gains to be captured by liberalizing migration. Conversely, there may be little reason to *oppose* immigration, because it brings no pressure on wages in the destination country. On the other hand, within certain sectors, such as cooking, language training, software engineering, or baseball, some countries might produce more highly skilled workers than others. This would constitute a basis for migration, within the particular sec-

tor. It might also constitute a basis for protectionism by the competing domestic workers.

Nielson (2003, pp. 93, 94) suggests that generally, agreements among countries that are geographically proximate and at similar levels of development entail greater liberalization of labor mobility. Ghosh (2007, p. 102) suggests that migration liberalization agreements among countries of similar levels of income are most likely to emerge and survive.

In Table 4.1, I set forth a stylized conjecture as to the likely positions of different broad groups under this condition of labor market symmetry. I first describe each state's unilateral policy and then examine how a regime of reciprocity would affect the groups' positions. Below the table, I explain my reasons for characterizing each group's position as I do. The main difference between the nonreciprocal case and the reciprocal case is that the abundant labor factor, seeing opportunities abroad that could be opened up by reciprocity, favors reciprocal liberalization. In some cases, this will be sufficient to change the balance of lobbying power, resulting in a new, proreciprocal liberalization equilibrium. Indeed, this may be especially true in particular vocational sectors, and not true in other vocational sectors. So it may be that an international agreement that differentiates by vocational sector, in which states make schedules of liberalization commitments by vocational sector, would allow states to make the most precise choices in this field. This would allow a kind of cross-vocational reciprocity, in which, for example, the United States opens its market to French chefs in return for France opening its market to U.S. basketball players.

**Table 4.1 symmetric Labor Markets with Equal Productivity**

	Scarce labor	Abundant labor	Capital	Consumers
No reciprocity	Opposed to liberalization	Weakly in favor of liberalization	Weakly in favor of liberalization (symmetry reduces returns)	Weakly in favor of liberalization (dispersed)
Reciprocity	Opposed to liberalization	More strongly in favor	Weakly in favor	Weakly in favor (dispersed)

**scarce labor factor opposes liberalization.** Assume, consistent with Heckscher-Ohlin, that unskilled workers believe that they are hurt by immigration.<sup>13</sup> Unskilled workers therefore oppose liberalization of immigration. However, under conditions of equal productivity and symmetry, with little wage differential between the symmetric states, and little expected migration, this opposition may not be strong. As noted above, certain sectors may demonstrate greater concern than others.

**capital weakly supports liberalization.** Domestic capital supports liberalization of immigration. (See Facchini, Mayda, and Mishra [2007] on the contributions of labor and capital to policy.) Benefits to capital may include greater labor market flexibility. As wage differentials are assumed not to be significant, the benefits to capital are not great, and therefore the support is not strong.

Furthermore, capital may have a more difficult time organizing in connection with immigration than in connection with trade liberalization, because of accentuated collective action problems, unless the state permits sector-selective immigration policy. In connection with trade, tariffs are industry or product specific, as are many subsidies, giving rise to concentrated incentives for lobbying. Immigration policy may not be product or industry specific, at least at the legislative level, and so there may be temptations to free ride. This will vary by state. While many states require labor market certification, it is unclear to what extent this type of certification is susceptible to lobbying influence. Some states have point systems or other devices for preferring individuals with certain vocations over others. On the other hand, GATS, as described in Chapter 8, allows states to make vocation-specific commitments.

**consumers weakly support liberalization.** Except to the extent that they compete with immigrants for consumption opportunities, consumers would benefit in welfare terms from immigration. However, as the wage differentials are not significant, the likely savings to consumers would not be great. Moreover, as in trade, consumers are often not sufficiently organized to articulate this preference in destination country politics.

**abundant labor factor weakly supports liberalization.** Abundant types of workers benefit from liberalization to the extent that there are complementarities by virtue of which increased immigration of unskilled workers may increase the returns to skilled workers. These are

not powerful incentives for skilled workers to advocate liberalization, and the actual position of the abundant type of workers would depend on many factors.<sup>14</sup> As noted above, one important caveat is that within certain sectors, skilled workers may benefit from liberalization.

**a bundant labor factor seeks mobility—a basis for recipro-  
cation.** Assume that domestic abundant labor 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 is presumed to accrue to the segment of labor that is plentiful. But note that under the assumption of symmetry, mobility is not as valuable as it would be under an assumption of asymmetry. This benefit gives plentiful labor a modest added incentive to seek foreign liberalization.<sup>15</sup> Again, within certain sectors, we might see greater interest in mobility.

Mobility of labor allows workers to “countervail” multinational corporation mobility, allowing labor to seek the highest wages. Furthermore, foreign labor mobility would increase foreign labor bargaining power and price, and therefore reduce the possibility that domestic multinational corporations might offshore to foreign labor. However, for the same reason that the scarce labor factor’s opposition is weak in this symmetric context, mobility in this context does not provide great incentives for support by the abundant factor. As noted above, however, one important caveat is that within certain vocations, workers may benefit more greatly from liberalization, and so to the extent that liberalization can be differentiated by vocation, there may be stronger support for liberalization in some vocations than in others.

Thus, it is possible that the added factor of reciprocal foreign liberalization, perhaps with the possibility for differentiation by vocation, could induce the formation of a coalition between capital and abundant labor, along with consumers, to overcome scarce labor’s opposition to liberalization of immigration. However, note that while capital supports liberalization of immigration at home, it is unlikely to support increased emigration by virtue of liberalization of immigration abroad. Thus, reciprocal liberalization may actually reduce capital’s support. The position of capital would depend on the extent to which capital is a complement for emigrant labor, and the degree of mobility of capital. Mobile capital might actually benefit from a more efficient allocation of labor between countries.<sup>16</sup>

On the other hand, it may be that if the true costs and benefits are quite different depending on the sector involved, we would observe sectorally differentiated positions among workers.

**a djustment and voters.** Under this symmetric context, the gains from liberalization are not likely to be very great. Therefore, the surplus generated may not be sufficient to cover the costs of adjustment assistance plus its administration. It may be that unskilled labor simply absorbs any loss that accrues to it—this loss is not likely to be great. If the gains from liberalization accrue largely to capital, it might 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. The United States charges such a fee in connection with its H-1B visa program, discussed in Chapter 7. If these domestic institutional arrangements could be made, a wider range of reciprocal commitments to liberalize would become feasible. All other things being equal, if we can assume that liberalization improves global welfare, and if this redounds to the general benefit of voters, we might expect a slight impulse toward liberalization. This impulse would be vulnerable to being countervailed by concern for those who lose their jobs, and by a variety of noneconomic factors.

**c oordination game.** Given all these factors, it may be that the best outcome for both states may be reciprocal liberalization. Under these circumstances, this game could be understood as a coordination game, like a stag hunt, in which each state government does better in this political support game if it seeks liberalization, but only if other states reciprocally liberalize. The critical question, then, is whether states may provide assurance to one another regarding their liberalization. This assurance need not be great, as there are not strong incentives to defect. This may explain why liberalization of migration among wealthy states generally appears to require no international legal commitments to provide additional incentives for compliance. Note that the inducement to domestic skilled labor to support liberalization is foreign market access. If foreign market access can be achieved without liberalizing at home—without reciprocation—domestic skilled labor will still be satisfied. But

liberalizing at home does not harm domestic skilled labor, and so the only reason to defect would be the concerns of unskilled labor.

Under the stag hunt, which is a type of “assurance” game, each state may obtain smaller payoffs—in our case, a lower level of gains from liberalization—by seeking protection for its own workers, without providing liberalization for foreign workers, while the other state liberalizes. But if states are able to coordinate to forego settling for lower payoffs from their own protection in favor of greater payoffs from global mobility, they will each be better off. Part of these increased payoffs will come from increased global output. Cooperation may break down if players are uncertain about the preferences and strategy of others.

The stag hunt game is derived from a Rousseauvian fable of cooperation among hunters (Abbott 1989). Unless all hunters are committed to catching the stag, it will escape. Each individual hunter may be tempted by a passing rabbit. Each hunter prefers a share of stag to an individual portion of rabbit, but is uncertain about whether other hunters are sufficiently committed to capturing stag. Figure 4.3 shows the analogy to international migration policy: each state prefers its share of global liberalization of migration (stag), but may be distracted by the opportunity to obtain local protection (rabbit), especially if it is unsure of the commitment of other states.

In international legal or organizational terms, compared to a prisoner’s dilemma context, a stag hunt context may require a lesser level of international legal inducements to compliance because each player’s best strategy is to cooperate in global liberalization. Sufficient clarity regarding the definition of the cooperative behavior, monitoring to ensure

**Figure 4.3 a stag hunt game**

		State B	
		Liberalize	Defect
State A	Liberalize	A: 4 B: 4	A: 1 B: 3
	Defect	A: 3 B: 1	A: 3 B: 3

compliance, and modest penalties should be sufficient. Note that we are assuming symmetry of preferences: no player actually prefers protection. However, Sandler (2008) shows that as the number of players increases, depending on whether gains are dependent on uniform compliance, coordination can become quite difficult.

**Externalities.** I have assumed no labor market externalities in this model—no benefits that accrue more broadly than to the specific groups named. However, if skilled labor is scarce (even where unskilled labor is also scarce) and brings positive fiscal growth or other externalities, while unskilled labor brings negative externalities, this game could be transformed into a prisoner’s dilemma (illustrated in Figure 4.1) between governments seeking to attract and retain skilled labor, depending on the magnitude of the effects and how the political constituencies influence government decisions. Given positive externalities of this type, states would compete to attract skilled labor. There is evidence that increasing numbers of wealthy states see themselves in such competition for skilled labor. International agreements might be used to resolve the prisoner’s dilemma (to change the payoff structure so that it is a different game), assuming that the aggregate payoffs from cooperation exceed the aggregate payoffs from defection.

### **a symmetric labor Markets with Equal Productivity: a Prisoner’s dilemma or “bully” game**

Now, 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.

Under this assumed asymmetry, as contrasted with schematic (1), there are significant gains from trade: aggregate welfare in each of State A and State B can be increased by reciprocal liberalization (see Figure 4.3). 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. In Table 4.2, I summarize a stylized conjecture as to the likely positions of different broad groups under this condition of labor market asymmetry, assuming equal productivity across markets.

**Table 4.2 a symmetric 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 reduce returns due to emigration	Weakly in favor (dispersed)

**scarce labor factor opposes liberalization.** Given that these states have asymmetric labor markets, under Heckscher-Ohlin, mobility (if made available without selectivity between classes of labor) is likely to benefit skilled labor in State A, and unskilled labor in State B, and conversely, is likely to harm unskilled labor in State A and skilled labor in State B.<sup>17</sup> Actual positions, here and in connection with other factors, would depend on cross-elasticities of substitution among the various factors of production. Therefore, we would expect unskilled labor in State A to oppose liberalization, while skilled labor in State B opposes liberalization.

**capital strongly supports liberalization.** Besides the migrants themselves, capital is the main beneficiary of liberalization of immigration. Here, under asymmetry, there are greater cross-country price differences, strengthening capital's support for liberalization.

**consumers weakly support liberalization.** Except to the extent that they compete with immigrants for consumption opportunities, consumers would be likely to 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 not well-organized to articulate this preference in destination country politics.

**abundant labor factor weakly supports liberalization.** Abundant labor may benefit 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.



**a abundant labor factor seeks mobility—a basis for reciproca-  
tion.** As in the symmetric case, however, 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 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.

**c cooperation game.** 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—to avoid its own liberalization. This strategic setting may give rise to a prisoner's dilemma-type 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 (see Figure 4.1).

In this asymmetric schematic, international legal rules could play a role in migration similar to that described above with respect to international legal rules in trade (see Figure 4.2): international legal rules could be entered into by states in order to resolve the prisoner's dilemma, allowing states to achieve greater welfare.

Note the difference between the role of international legal rules in schematic (1) and the role described here in the context of schematic (2). Schematic (1) involved principally a coordination game, in which international legal rules are useful in order to provide a focal point, but each player has incentives to cooperate. Schematic (2), on the other

hand, involves a prisoner's dilemma in which each party has an incentive to play a strategy that would confer harm on the other party. However, sufficiently strong international legal rules, changing the payoffs so that states comply, may restrain this behavior.

A reciprocal agreement to liberalize would create increased surplus, possibly allowing government to utilize this surplus to redistribute to those harmed (the scarce factor). Arrangements within each state in order 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 (Hatton and Williamson 2005, p. 382). If these domestic institutional arrangements could be made, a wider range of reciprocal commitments to liberalize would become feasible.

**Externalities.** Alternatively, if skilled labor brings sufficient positive fiscal growth or other externalities while unskilled labor brings sufficient negative externalities, this game could be transformed into a "bully" game between governments, depending on the magnitude of the effects and how the political constituencies influence government decisions. In this "bully" game, the state that has abundant high-skilled labor may have little incentive to liberalize reciprocally, in order to encourage outflows of high-skilled labor in exchange for inflows of low-skilled labor, particularly if it will have to compensate its low-skilled labor for its losses.

Note that protection by State A with liberalization by State B is not only State A's dominant strategy, but it is also the efficient outcome of this game: it maximizes the joint payoffs. State A's payoffs from protection are derived from its ability to avoid harm to its unskilled labor, and its ability to avoid loss of skilled labor where State B also protects. State B does not have a dominant strategy, but if State B understands State A's dominant strategy to protect, it can increase its payoff from 0 to 1 by playing "liberalize" while State A protects. Assuming that State A understands State B's dilemma, it will simply protect. This strategic setting may describe the typical relationship between developed countries and developing countries. It is not attractive to developing countries from a distributive standpoint.

### **a symmetric Labor Markets, with Mobile capital/offshoring or Illegal Immigration**

In the prior schematics, capital has not played a decisive role, in part because it is not allied with labor, as it often is in the trade context. Yet offshoring or illegal immigration may give capital a further source of power that is not necessarily dependent on affirmative government action.<sup>18</sup> The ability to offshore, or to hire illegal immigrants, reduces the benefits of protection to scarce labor, thereby reducing its opposition to legal immigration. Indeed, as suggested above, simple liberalization of trade in goods or services plays a similar role. However, greater capital mobility and greater access to illegal immigrants will reduce the returns to capital from liberalization of immigration, reducing its support for formal liberalization.

“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” (Smith and Edmonston 1997, p. 147). This is a critical point, as it suggests that resistance to immigration may be reduced as trade in goods and services is liberalized. 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. Perhaps this point helps to account for the ability of the EU to engage in extensive liberalization of labor movement, and suggests that multilateral liberalization of markets for goods, services, and investment will facilitate, and yet render less valuable, liberalization of labor movement. For further discussion, see Chapters 2 and 9. Interestingly, globalization in one factor supports globalization in other factors by reducing the returns to protection. In Table 4.3, I summarize a stylized conjecture as to the likely positions of different broad groups under this condition of labor market asymmetry, with the possibility of offshoring or illegal immigration.

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

**Table 4.3** a symmetric labor Markets, with Mobile capital/offshoring or Illegal Immigration (Position of country of Immigration)

	Scarce labor	Abundant labor	Capital	Consumers
No reciprocity	Weaker opposition	Weakly in favor of liberalization	Less strongly in favor of liberalization	Weakly in favor
Reciprocity	Weaker opposition	Strongly in favor of liberalization	Reciprocity may reduce returns due to emigration, reducing support	Weakly in favor

change relaxing restrictions on immigration (Jain, Kapur, and Mukand 2006). For example, U.S. farmers are increasingly shifting production to Mexico in order to overcome barriers to immigration in the United States.<sup>19</sup>

This type of change would ordinarily benefit owners of firms and 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.

Furthermore, if illiberal formal migration policies will result in greater informal migration, with unorganized and vulnerable illegal immigrants competing with organized labor in the destination state, then organized labor might find some attraction in managed formal migration (Watts 2002).<sup>20</sup> Watts suggests that labor unions may form a coalition with employers in favor of legal immigration.

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 increased formal migration, as legal immigrants might join unions and would be subject to destination country cost structures, resulting in less competitive pressure than under the alternatives. Thus, offshoring and illegal immigration would tend to promote greater permission from labor for formal migration to the wealthy state.

On the other hand, these same factors of capital mobility or offshoring, or illegal immigration, may reduce the returns to capital from liberalization of migration.

### **a symmetric one-Way Flow with compensation**

Despite the Heckscher-Ohlin theory, as discussed in Chapter 2, there is some reason to believe that for citizens of popular destination states, there may not be great interest in migration to the typical sending states. As suggested above (Trefler 1993, 1998), under some circumstances, both skilled and unskilled workers may flow toward the high-skilled country—the wealthy country (Hanson 2007, p. 14). “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” (Markusen 1983). In Table 4.4, I summarize a stylized conjecture as to the likely positions of different broad groups under this condition of labor market asymmetry, assuming unequal productivity across markets.

**Table 4.4 a symmetric one-Way Flow: unequal Productivity (Position of country of Immigration)**

	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

**a abundant skilled labor in state a does not support reciprocity.** I assume here that the skilled labor in the skilled labor–abundant country is not interested in migrating to the unskilled labor–abundant country because the wages are substantially lower. 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.

**c apital supports liberalization.** Under circumstances of asymmetry, capital is strongly in favor of liberalization. However, 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.** State A’s dominant strategy will likely be to protect, and it will protect unless some other arrangements are made to induce a different move by State A. The payoffs may be similar to the Bully Game scenario described in connection with the externalities variation of schematic (2) above. Thus, the question is whether State A constituencies could be given increased incentives to support liberalization, in order to unlock an expected global welfare increase from liberalized migration. Figure 4.4 illustrates the Bully Game.

**side payments or linkage.** Although a side payment might result in an efficient solution, it might also 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, State A capital might find this opportunity valuable, and State A skilled labor might benefit from opportunities to be employed or otherwise to provide services to State B.

**Figure 4.4 a “bully” game with a symmetric Payoffs**

		State B	
		Liberalize	Defect
State A	Liberalize	A: 1 B: 2	A: 0 B: 3
	Defect	A: 3 B: 1	A: 2 B: 0

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 cross-sectoral linkage, by which two efficient policy changes that do not have the political support to be effected alone, may be viable together 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 tariff barriers, while developing states still have substantial tariff barriers, the outlines of a “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 or additional type of “side payment” is to allow State A to achieve compensation by imposing a special fee or tax on immigrants (Clarke 1994; Freeman 2006).

Because 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. (Freeman 2006, p. 165)

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. This capacity might transform the payoff structure of the migration schematic into more of a collective action problem between states, with greater incentives for cooperation. Of course, the problem with a migration fee alone is that it would not necessarily provide incentives for any particular political group to

lobby for liberalization of immigration. So, the migration fee might be used to fund adjustment assistance in the destination state, and perhaps development assistance in the home state.

Any proposal of a special fee or tax on immigrants would have to separate itself from the stigma associated with the early twentieth century “head taxes” imposed by the United States and Canada in order to deter Chinese immigration.

### **Other Factors Influencing Destination Country Policies**

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. 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 may affect policy in any particular state.<sup>21</sup> 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 (Freeman 2006). 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.

However, Meyers (2004, p. 173) finds “extraordinary” similarity among destination states in immigration policy for over a century. He shows that immigration policy moved in broad synchronization for the major destination states from the 1770s 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 policies” (p. 181). 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 (2006, p. 24) find that “today, 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.” 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 nineteenth 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 United States, after the unprecedented immigration of the nineteenth century, there was a backlash that resulted in the head taxes, the Chinese exclusion acts, and other measures to restrict immigration (O’Rourke 2004, p. 15). When the United States began to restrict access, it was in response to the concerns of the unskilled or semiskilled urban working man median U.S. voter (Hatton and Williamson 2006). O’Rourke (2004, p. 17) 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 nineteenth century anti-immigration backlash—the impact of immigration on wages—is present

in today's world as well." As detailed in Chapter 2, there is a continuing debate regarding the empirical support for the latter proposition. Perhaps the most important point for purposes of this chapter is that the link between immigration and wage suppression has significant political traction, if not clear empirical support.

Freeman (1995, p. 886) 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. This political cycle may or may not be synchronous with the economic cycle.

### **r ecession and s capegoating**

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 (Meyers 2004). Immigrants may be blamed for the effects of recessions that arise from other causes.

Meyers (2004) uses a comparative case study method examining the history of immigration policy in the United States, 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. For example, during the Great Depression of the 1930s, the United States 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 (Freeman 1995, p. 891, citing Straubhaar 1992). Prompted by recession in the 1970s,

European public opinion was stimulated and European citizens organized, providing an effective counter to proimmigration forces.

The observation (Meyers 2004) that recessions lead to restrictions may suggest either a safeguard 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 economic theory, immigration may accentuate income inequality. An increase in the labor supply reduces wages relative to returns to capital and rents on land. "Since capital and land are held by those at the top of the distribution pyramid, immigration-induced labor supply growth should create more inequality, and the demise of immigration should create less, *ceteris paribus*" (Hatton and Williamson 2005, p. 192).

In connection with immigration policy in the United States, Canada, Argentina, Australia, and Brazil from 1850 to 1930, Timmer and Williamson (1998) show a significant relationship between income inequality and increasing barriers to immigration. O'Rourke and Sinnott (2002, p. 16) argue that "The late nineteenth century experience indicates that absent international institutions which can restrain individual countries' policies, globalization can undermine itself. Labor market integration undermined itself by increasing income inequality in the New World, which in turn led to immigration barriers."

During the late nineteenth century, "immigration restrictions appear to have been motivated by economic concerns, and in particular by fears that the immigration of unskilled workers would lead to increased levels of inequality" (O'Rourke and Sinnott 2002, p. 28). Consistent with Heckscher-Ohlin theory, unskilled workers moved from Europe to the "new world" (where unskilled workers were 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" (p. 29).

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.

### **n ational h istory 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: 1) English-speaking settler societies, including Australia, Canada, New Zealand, and the United States; 2) western European states, including Germany, France, Britain, Switzerland, the Netherlands, Sweden, and Belgium, and 3) southern European states, including Portugal, Spain, Italy, and Greece (Freeman 1995).

Meyers (2004) 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 (Freeman 1995, p. 887).

The western European states mentioned above are distinguished, according to Freeman, 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 postwar 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” (Freeman 1995, p. 890). These states are much less positive toward immigration (although we must note that these states have all subscribed to broadly free migration within the context of, and among the states of, the EU).

### **Ethnicity, nationalism, and chauvinism**

As we consider the political economy of migration, it is not possible to ignore the noneconomic politics of immigration. Heterogeneous societies are more likely to accept dissimilar immigrants than homogeneous societies, such as Japan. While Meyers (2004) 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 or 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 United States in the middle of the nineteenth century 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 (Meyers 2004, pp. 29–30). 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 twentieth century, the United States and other destination countries began to eliminate ethnic discrimination, which had served as a proxy for economic discrimination. Hatton and Williamson (2006, p. 9) 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.”

O’Rourke and Sinnott (2001) examine international survey evidence, and find that noneconomic factors such as patriotism and chauvinism (the sense that locals are “better” than immigrants) play a major role in determining attitudes of voters, and that individual views relate to individual skill levels in a manner consistent with Heckscher-Ohlin theory. They find that patriotism and chauvinism are significant factors in hostile attitudes toward immigration during the modern period, while economic factors remain important.

While in a number of European countries, right-wing parties have adopted chauvinistic positions and have attracted substantial support at times, they generally have 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 warns 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" (Freeman 1995, p. 885). 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 WTO rules, with scant attention to the value of the reciprocal benefits and jobs gained (Buchanan 2006). 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 include an active public education and public relations component in order to counter these opportunists. 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 (and trade) more clearly and honestly.

### **Determinants of Specific Components of Destination Country Policy**

Of course, in addition to the more general factors adduced above, 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 (Freeman 1995, 2005; Joppke 1998, p. 266). 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 able themselves to arbitrage among labor markets may benefit from labor market segmentation, and may prefer barriers to im-

migration in order to deny their domestic competitors access to cheaper labor. Since those barriers would simultaneously provide cheaper labor to producers abroad, whether multinational corporations derive a net advantage from migration barriers is ambiguous. However, they may derive a more obvious benefit from the efficient allocation of labor among countries, which would maximize the return to mobile capital.<sup>22</sup>

Meyers (2004) 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—number of immigrants (size), 2) ethnic selectivity (ethnic composition), and 3) permanence versus temporariness—the additional dependent variable of 4) skill level (skill composition). Meyers 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 (Freeman 2005). “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” (p. 238). On the other hand, in the United States, more vigorous interest group politics has developed in this field.

## **h o M E c o u n T r y P o l I T I c s**

Home country policy seems less critical: most home countries allow freedom of emigration, and as we will see in Chapter 5, there are international human rights norms that require this freedom. But it is important to determine whether and with what level of enthusiasm home countries would seek liberalization abroad. Governments would consider their tax base, the local effects on domestic wages and em-

ployment, the local welfare and growth effects of departing workers, the magnitude of potential remittances, and the political clout of both potential emigrants, and domestic employers. As discussed in Chapter 2, emigration of skilled labor may have a negative effect on per capita income in the sending state under increasing returns to scale (Krugman 1971, p. 483). 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, or by reductions of export 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, but there is also a collective action problem for capital's lobbying here. That is, because labor liberalization is not necessarily sector-specific (unlike trade liberalization), no single sector of capital would necessarily have concentrated incentives to lobby against requesting foreign liberalization.

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 or 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 United States to liberalize immigration to the United States of unskilled and semiskilled labor, while at the same time refraining from requesting the United States 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 EU 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 un-

likely 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 bidirectional. That is, as Hatton (2007) points out, migration of the most important type is not a “two-way street.”

On the other hand, as suggested above, 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 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?<sup>23</sup> 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.

## To Ward a r a Tional E For In Terna Tional I a W o F MIgra Tion

The above analysis suggests that different states will have different strategic positions, that different economic sectors within these states will have different strategic positions, and even that different occupational groups will have different strategic positions. Thus, it is clearly impossible to specify a single arrangement for international cooperation, or even to predict whether international cooperation will occur.

However, we know that in the aggregate, liberalization is expected to provide increased surplus, and, assuming that there are mechanisms that can be devised to overcome the strategic problems that may exist between different domestic constituencies, and between different states, and that the increased surplus exceeds the cost of its capture, we would expect states to move to do so. This book is an exercise in institutional imagination intended first to evaluate whether the surplus may exceed the cost of its capture, and how states may move to capture it. That they have not made these moves generally thus far does not mean that such moves are not available: it would be difficult to argue that the international legal system as we see it is already efficient. Some may argue that capital markets, with their clear pricing, narrow profit motives, and numerous transactions, are already efficient, and that therefore, new transactions cannot result in profits. However, the international legal system is far less efficient, so we may expect that new transactions—of the nature described above—could make the parties better off.

In order to move forward, it will be necessary to analyze different states, different sectors within states, and different occupations within those sectors in order to understand the strategic position of each. Then, once we know what game is being played, we can evaluate which international legal rules, if any, are useful in order to allow for the maximum net payoffs.

A framework agreement that allows for states to agree on the structure of reciprocity, to allow sending states to share in the benefits of liberalization through a Bhagwati tax or other mechanism, to make side payments through linkage to other areas of liberalization, and to make side payments through immigration fees, would establish an appropriate

institutional framework—would minimize the transaction costs—for states to negotiate optimal arrangements. While such a framework agreement might best be legally binding, it is possible that it might alternatively be best kept informal. In international law, the distinction may have only subtle behavioral implications.

Assuming that liberalization of migration is potentially Pareto efficient, it may be that states are unable to achieve the efficient liberalization unless a move is made toward actual Pareto efficiency: toward compensation of states and individuals that are otherwise made worse off.

The national political economy of international migration is complex: it mediates imperfectly the welfare considerations developed in Chapter 2, and mediates even more imperfectly the ethical considerations developed in Chapter 3. However, even an imprecise assessment of the interplay of interest and power yields insights into the possibility that international legal rules may play a role in committing other states to act, in order to support domestic coalitions that will support liberalization. The game theoretic abstractions developed here are merely conjectures as to the possible interplay of interest and power, but the research discussed in this chapter makes these conjectures plausible.

## n o t e s

1. In a liberal democracy, it is possible to define optimal immigration policy as “that preferred by the median voter where voters are utility-maximizers with complete information” (Freeman 1995, p. 883).
2. Even under aggregate global benefits, international adjustment assistance may compensate losing states for liberalization that is Kaldor-Hicks efficient.
3. This is the concept of embedded liberalism first theorized by Karl Polanyi and recently extended and popularized by John Ruggie. For a recent example, see Scheve and Slaughter (2007).
4. “Terms of trade” refers to the relative prices of a state’s imports and exports. States may improve their terms of trade, and their welfare, by reducing the price of imports relative to exports or increasing the price of exports relative to imports. Under this model, international trade agreements are understood to be beneficial in order to avoid a “beggar thy neighbor” trade war in which states, in a strategic prisoner’s dilemma, obtain suboptimal outcomes by imposing terms of trade externalities on one another.

5. Facchini, Mayda, and Mishra (2007) thus assume that migration policy can be disaggregated into sectoral components. This assumption raises significant questions regarding the extent to which migration policy is disaggregated into specific sectoral components.
6. Their model, following Grossman and Helpman (1994), does not include the ability of lobbies to influence voting, except to the extent that this is captured in the amount of the lobby's expenditures.
7. I am grateful to an anonymous referee for this point.
8. 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.
9. An empirical test might examine the scope of "differential fiscal treatment" in different destination states, and compare it to the proportion of legal versus illegal immigration in those states. The hypothesis is that the greater the differential fiscal treatment, the greater the immigration.
10. Below, I suggest that discriminatory taxation of immigrants may, under limited circumstances, be useful to promote liberalization, or to reduce transfer program-motivated migration.
11. 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.
12. Grossman and Helpman (1994) substitute aggregate social welfare for voting. They do so partly, it appears, because aggregate social welfare is a proxy for voting, and partly because they have a hybrid model of government official behavior that may partially reflect fidelity to public welfare. In the politics of immigration policy, domestic employers would largely deploy political contributions, while labor unions could deploy both political contributions and voting.
13. This set of assumptions seems slightly more pessimistic than the economic reality, but it seems to comport with popular opinion regarding the effects of immigration.
14. Illegal immigration, as opposed to legal immigration, accentuates negative effects on labor. Labor prefers legal to illegal immigration, because legal immigration maximizes bargaining power of immigrants, allows unionization of immigrants, and allows gradualism or regulation of immigration. Therefore, where the alternative to increased legal immigration is increased illegal immigration, labor may support increased legal immigration. On the other hand, increased illegal immigration may be inevitable, and may be accentuated by increased legal immigration, and so labor may simply decline to support increased legal immigration. Assume that capital's first-best alternative is increased illegal immigration, and that its second-best alternative is increased legal immigration. So far, without introducing international arrangements, the political equilibrium may be in equipoise. While it is possible that the influence of capital, and the threat of increased illegal immigration, would cause labor to support increased legal immigration, the incentives are not great. Labor solidarity may prevent acceptance of increased immigration, unless adjustment assistance is provided to compensate those unskilled workers

who are made worse off. Furthermore, under uncertainty as to the magnitude and distribution of gains, labor may simply determine to maintain the status quo.

15. In the two-country, symmetrical model I have been assuming, the abundant labor factor may not seek mobility, because the other country has a symmetrical labor market.
16. I am grateful to an anonymous referee for this point.
17. Hiscox (2002) suggests that highly skilled workers may already have greater mobility across sectors, and therefore may be less concerned about migration.
18. It may be dependent upon government inaction; that is, offshoring could be prohibited or otherwise deterred. In the 2004 presidential elections in the United States, John Kerry, the Democratic nominee, referred to companies that offshored as “Benedict Arnold” companies (Rai 2004).
19. Of course, Mexico benefits from free trade in goods under NAFTA, and transport costs are relatively low (Preston 2007, p. A:1).
20. Undocumented workers benefit from fewer labor rights protections than authorized workers or citizens (American Federation of Labor–Congress of Industrial Organizations 2007).
21. Hollifield (2000, p. 92) states that “economic arguments [in the migration context] tend to be overshadowed by political, cultural, and ideological arguments . . .” He finds that migration policy is heavily influenced by national or founding myths, codified in citizenship and nationality laws.
22. I am grateful to an anonymous referee for this point.
23. In connection with negotiations for the Doha Round of WTO trade negotiations, the Indian Minister of Commerce, Kamal Nath, insisted that the United States should provide a greater number of H-1B visas—should provide greater liberalization as a destination state for migrants (Beattie and Johnson 2007).

## **Part 2**

# **Existing International Law of Migration, Labor Migration, and Trade in Services**





## 5

# Customary International Law, Human Rights Law, and Multilateral Migration Conventions

In order to evaluate possible reforms of the international law of economic migration, it is necessary to describe the existing international law. The core point is simple: despite the argument for a moral obligation presented in Chapter 3, states generally have no legal obligation to accept economic migration of citizens of other states. Furthermore, despite the right to emigrate discussed in this chapter, the right to emigrate may be seen as incomplete without a right to immigrate somewhere (Ghosh 2007, p. 102). However, other rules are salient to a comprehensive approach to economic migration. It is worth emphasizing that neither this chapter nor the book deals with forced migration.<sup>1</sup>

The existing international law consists of both customary and conventional law.<sup>2</sup> In this chapter, I describe existing customary international law, including customary human rights law relevant to migration. I also discuss conventional human rights law relevant to migration, as it does not make expository sense to treat conventional human rights law separately from customary human rights law in this context. In Chapters 6 and 7, I discuss other existing conventional law of migration.

As we commence our discussion of the international law of migration, it is appropriate to refer to the *Lotus* principle: states retain sovereign discretion except to the extent that they have accepted international legal constraints (*Case of the S.S. Lotus* 1927). These constraints generally arise either by custom or by convention. In the field of labor market access, there do not appear to be customary international constraints on the discretion of states to exclude foreign persons from their domestic labor markets.

The U.S. Supreme Court said in 1892 that “it is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the

entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe” (*Nishimura Ekiu v. U.S.* 1892).

As a matter of customary international law, this seems to remain true, although Plender (1988) argues that this principle does not have the long pedigree sometimes asserted.<sup>3</sup> In fact, Nafziger (1983) points out that in the same year that the U.S. Supreme Court made the statement above, the Institute of International Law made a contrary proposal:

Article 6. Free entrance of aliens to the territory of a civilized State may not be generally and permanently forbidden except in the public interest and for very serious reasons, for example, because of fundamental differences in customs or civilization, or because of a dangerous organization or gathering of aliens who come in great numbers . . .

Article 7. The protection of national labor is not, in itself, a sufficient reason for non-admission . . .

Article 12. Entrance to a country may be forbidden to any alien individual in a condition of vagabondage or beggary, or suffering from a malady liable to endanger the public health, or strongly suspected of serious offenses committed abroad against the life or health of human beings or against public property or faith, as well as to aliens who have been convicted of the said offenses.<sup>4</sup>

While there may be a growing custom of admission for tourism, commerce, investment, or other temporary purposes, or even of admission for refugees, this is not the concern of this study. (Furthermore, in most cases, the question of whether this custom is supported by *opinio juris*, and is therefore customary international law, would likely be answered in the negative.) This study is concerned with international law of migration for labor purposes, and it seems fairly clear today that there is no customary international law rule requiring states to provide access to their labor markets. However, it is worthwhile to review other relevant customary international law rules, including possible rules of access and egress for nationals, residents, and aliens, as they may have important effects on labor migration.

Of course, while the customary international law of international migration still does not seem to establish any obligation on the part of states to accept immigrant workers, it is entirely possible that states

would enter into new customary or conventional commitments to accept these immigrants. The reasons why states may turn from a policy of remaining unbound to a policy of accepting commitments are discussed elsewhere in this work.

The main relevant principle of customary international law today seems to be one of national discretion in determining the entry of aliens, subject to the possibility of treaty or other modification (Aleinikoff 2003, p. 3). There is greater treaty- and custom-based regulation of national discretion regarding entry of nationals, and exit of both aliens and nationals.<sup>5</sup> During the nineteenth century, on the other hand, state practice differed, with individuals unrestricted in their movements (Nafziger 1983; Sohn and Buergenthal 1992, p. 3).

There seems to be some argument that the right to be free of arbitrary restrictions on departure is part of customary international law. Of course, it is also expressed in human rights instruments, such as Article 13(2) of the Universal Declaration on Human Rights.<sup>6</sup>

## **Cust o Ma Ry Inte Rna t Iona L Law and Hu Man RIg Hts La w**

In this section, I discuss rights of migrants derived from customary international law and from human rights law. In subsequent sections, I examine rights under ILO treaties and under the UN Migrant Workers Convention.

### **Citizenship and n aturalization**

Importantly, there do not seem to be substantial legal limits on the authority of states to determine which individuals are or become citizens.<sup>7</sup> States may use the principle of *jus soli* or *jus sanguinis*. Thus, it is possible for states to determine to deny citizenship to children of immigrants born within the state (on the basis of *jus sanguinis*).

Given general state autonomy in determining nationality, on varying bases, it is possible for individuals to become stateless, or to intentionally or inadvertently become citizens of multiple states (Martin and

Hailbronner 2003). To the extent that individuals are subjected to tax, military service, or other obligations by multiple states, migration or other actions that may result in multiple nationality will be deterred.

The European Convention on Nationality (ECN) states that individuals shall only be obligated to perform military service for one state. Hailbronner suggests that the primary obligation of dual nationals should be to the country of habitual residence (Hailbronner 2003, p. 81). Another possible disadvantage for multiple nationals is the possibility that diplomatic protection may be unavailable against a state of which the individual is a national.

For long-term migrants and their children, acquisition of host country citizenship may be an important attraction and protection. While customary international law of citizenship per se does not accord any right to become a citizen, it may be argued that human rights law provides some limited rights (Orentlicher 1998; Zilbershats 2002).

Of course, conventional law may provide rights to citizenship. For example, the ECN provides that each state party “shall provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory” (European Convention on Nationality 1997). While the ECN permits states to set conditions for naturalization, they may not require residence longer than 10 years. Many destination states have experienced the truth of Max Frisch’s words quoted at the beginning of this book: “We imported workers and got men instead” (Borjas 2007).

### **d iscrimination in a dmission**

While there are extensive international human rights protections against discrimination, these protections do not necessarily guard against discrimination in admission policy. Generally, of course, there is no obligation in customary international law or in human rights law to treat foreign persons as well as nationals in connection with *admission*: nationals generally have a right to admission to their home state. Other types of discrimination in connection with admission may raise issues under human rights law.

Some have argued that states must come forward with a plausible justification for distinctions among foreign persons (Martin 2003, p.

35; Sohn and Buergethal 1992, p. 18). Explicit racial discrimination is thought to violate international human rights law, while nationality-based discrimination does not (Martin 2003, p. 35). The latter principle is important: otherwise human rights law would supply a rule of most favored nation (MFN) nondiscriminatory treatment in connection with immigration.

For example, in the *East African Asians Case (Patel and Others v. U.K.* [1971]), the European Commission on Human Rights found that the United Kingdom's Commonwealth Immigrants Act 1968 discriminated against immigrants on the basis of race, violating Article 3 of the European Convention on Human Rights. Article 3 does not expressly address discrimination, but it prohibits degrading treatment.

In Chapter 9, I discuss the potential application of the MFN principle of nondiscrimination to immigration. This principle is central to the trade context, as it allows the operation of comparative advantage *among states*. Most favored nation would seem to play a similar role in labor markets, allowing the operation of comparative advantage among *nationals* of states. Furthermore, MFN may be supported by ethical principles of nondiscrimination.

### **Postadmission discrimination and Minimum standard**

Discrimination inevitably involves a comparison of treatment. In the present context, there are two relevant references for comparison: citizens and other immigrants from different home countries. As suggested above, the two corresponding types of antidiscrimination rule are national treatment and MFN treatment. As stated above, it is clear that foreign persons do not benefit from national treatment in connection with admission, meaning that foreign persons have no customary international law or human rights law-based right of entry. However, once they have been permitted entry, they are entitled to a certain level of treatment.

While, as set forth above, states may not have substantial general international law obligations to admit aliens, much of the general customary and conventional international law of human rights applies to aliens in a host state (Hailbronner 2003; United Nations Human Rights Committee 2000). For example, the International Covenant on Civil

and Political Rights (ICCPR) applies to “all individuals within [a State Party’s] territory and subject to its jurisdiction.” “With narrow exceptions relating to citizens’ rights to political participation and exemption from immigration measures, the denial or limitation of migrants’ human rights must be justified as serving legitimate state aims pursuant to measures that are proportionately linked to their migration status” (Fitzpatrick 2003).

In addition, of course, aliens may enjoy certain additional rights beyond those available to citizens. For example, aliens may benefit from bilateral investment treaties, while citizens may not.

### **e xpulsion and Return**

Under general international law, states seem to have wide discretion to accept or expel aliens. For example, Article 13 of the ICCPR requires that expulsion be decided in accordance with law and minimal procedural requirements.<sup>8</sup> The grounds for individual expulsion asserted by states have generally not been economic. However, it is difficult to say that a rule of customary international law prohibiting expulsion on economic grounds has developed.

There seems to be little consensus that states are required by customary international law to accept the return of their citizens. To some extent, this debate was colored by the Cold War, in which the Soviet Union sought to deter emigration by blocking the return of those who left without permission. It is often argued that the customary international law obligation to accept return is a corollary of the customary international law right of a host state to remove nonnationals (Noll 2003).

In some cases, states have entered into bilateral agreements regarding readmission of returned citizens. These agreements may distinguish between voluntary returnees and involuntary ones. Further, some home states have conditioned acceptance on development or adjustment assistance, in order to be able to deal with the economic consequences of large numbers of returnees (Noll 2003, p. 67).

### **t he Right to e migrate**

A number of human rights instruments specify a right to leave for both nationals of the host state and aliens. Indeed, Article 13(2) of the

Universal Declaration of Human Rights specifies that “Everyone has the right to leave any country, including his own, and to return to his country.” The ICCPR specifies a right to leave in Article 12, subject to exceptions that are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in that convention.

The right to leave includes both the right to travel abroad temporarily, and the right to emigrate for a more indefinite period (Chetail 2003, pp. 47, 54). In this work, we are more interested in the latter—the “right to emigrate.” While most of this study is concerned with limitations on *entry* to the host state—the right to immigrate—there are important reasons to pay attention to limitations on *exit* from the home state.

In its General Comment No. 27, the United Nations Human Rights Committee (1999, para. 8) suggests that home states are prohibited to make freedom to emigrate “dependent on any specific purpose or on the period of time the individual chooses to stay outside the country . . . Likewise, the right of the individual to determine the state of destination is part of the legal guarantee.” The Human Rights Committee also suggests that the right to leave includes the right to obtain necessary travel documents (para. 9).

The Organization for Security and Cooperation in Europe (OSCE 2006, p. 56) reports that

in Asian labour-sending countries, however, there exist a varying range of exit controls as part of protection measures. In the Philippines, for example, it is mandatory for migrant workers to have [Philippines Overseas Employment Administration] clearance before leaving the country. Pakistan, Bangladesh and Indonesia have varying degrees of restrictions on female migrant workers leaving the country. In India, emigration clearance is required for certain blue-collar occupations.

It is worth noting that the Philippines Overseas Employment Administration plays a role in ensuring the protection of migrating workers, but also charges them a significant fee.

## **International Labor Organization (ILO) Conventions**

While each ILO convention provides rights for migrants (Sivakumar 2004, p. 120), two of them focus directly on migrant workers. These are the Migration for Employment Convention of 1949 (No. 97) (the “Migration Convention”) and the Migrant Workers (Supplementary Provisions) Convention of 1975 (No. 143) (the “Supplementary Provisions”).

Forty-eight states ratified the Migration Convention as of January 15, 2009, including a number of European states, but excluding, for example, the United States, Japan, Australia, and Canada. The Supplementary Provisions have been ratified by only 23 states at January 15, 2009, and of these the only wealthy states are Italy, Norway, Portugal, and Sweden.

The Migration Convention includes an interesting and important antipropaganda provision in Article 3: parties are required “so far as national laws and regulations permit, [to] take all appropriate steps against misleading propaganda relating to emigration and immigration.” While this type of provision might not have a substantial formal effect, it shows that parties recognized the concern that populist or scapegoating propaganda might be leveled against migrants.

The Migration Convention has an important nondiscrimination obligation in Article 6. The nondiscrimination obligation is limited to lawful immigrants. Furthermore, the obligation is limited to areas that are subject to regulation or governmental control. On the other hand, the nondiscrimination obligation includes labor conditions such as membership of trade unions and access to social security.

Under Article 9 of the Supplementary Provisions, an illegal immigrant is entitled to “enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.” The limited rule of nondiscrimination provided in the Migration Convention is extended in Article 10 of the Supplementary Provisions, which provides that “each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by



methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.”

Article 9 of the Migration Convention requires member states to allow remittances, but permits them to take into account their own rules regarding inflows and outflows of money. This is an area of overlap between migration law and international monetary law.

Under Article 14 of the Supplementary Provisions, states are permitted to “make the free choice of employment, while assuring migrant workers the right to geographical mobility, subject to the conditions that the migrant worker has resided lawfully in its territory for the purpose of employment for a prescribed period not exceeding two years or, if its laws or regulations provide for contracts for a fixed term of less than two years, that the worker has completed his first work contract.

Optional Annex 1 of the Migration Convention regulates recruitment activities. These activities are limited to public bodies, except insofar as national law or international agreement permits certain private bodies to engage in recruitment. Article 8 of the Annex provides that “any person who promotes clandestine or illegal immigration shall be subject to appropriate penalties.” Article 3 of the Supplementary Provisions requires each member to take all necessary and appropriate measures “to suppress clandestine movements of migrants for employment and illegal employment of migrants.” Article 6 of the Supplementary Provisions further requires states to make arrangements to detect and to sanction illegal employment of migrants, as well as organization and assistance of movement of migrants. In fact, the Supplementary Provisions seem more concerned with preventing unauthorized migration than with any other issue. The reference in Article 3 to a purpose to prevent abuse of migrants does not appear to limit the scope of obligations to suppress illegal immigration.

## un Convent Ion on t He R Ig Hts of Mlg Rant w o Rke Rs

In July 2003, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (“Migrant Workers Convention”) entered into force. At that time, 21 states had acceded to the convention. As of January 15, 2009, the following states had signed, ratified, or acceded: Albania, Algeria, Argentina, Azerbaijan, Bangladesh, Belize, Benin, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cambodia, Cape Verde, Chile, Colombia, Comoros, Ecuador, Egypt, El Salvador, Gabon, Ghana, Guatemala, Guinea, Guinea-Bissau, Guyana, Honduras, Indonesia, Jamaica, Kyrgyzstan, Lesotho, Liberia, Libya, Mali, Mauritania, Mexico, Montenegro, Morocco, Nicaragua, Paraguay, Peru, the Philippines, Sao Tome and Principe, Senegal, Serbia, Seychelles, Sierra Leone, Sri Lanka, Syria, Tajikistan, Timor, Togo, Turkey, Uganda, and Uruguay.

The wealthy destination states are notable for their absence. So, while the Migrant Workers Convention no doubt will benefit some migrants, it will not be available to immigrants to wealthy states, unless those wealthy states accept its obligations.

Importantly, the Migrant Workers Convention provides no commitments regarding access to the employment market of any state. Interestingly, Article 66 of the Convention leaves open the possibility for either home states or destination states to limit recruitment activities in the home state to public bodies of the destination state.

Article 7 of the Migrant Workers Convention provides an obligation of nondiscrimination among migrant workers in terms of the rights provided under the convention. These rights must be provided without discrimination based, *inter alia*, on nationality, race, ethnicity, or economic position. While this provision has broad application, one component of it provides a kind of MFN obligation. However, there are some important limitations on MFN treatment. For example, Article 52:3(b) provides that for migrants whose permission to stay in the destination state is limited by time, the destination state may “limit access by a migrant worker to remunerated activities in pursuance of a policy of granting priority to its nationals or to persons who are assimilated to

them for these purposes by virtue of legislation or bilateral or multilateral agreements.”

Article 25 provides for national treatment in respect of conditions of work and terms of employment, including for illegal aliens. But note the language of Article 52:3(b) mentioned above. Article 27 extends national treatment rights to migrant workers with respect to social security. It leaves it to the competent authorities of the state of origin and the state of employment to “establish the necessary arrangements to determine the modalities of application of this norm.” Article 30 provides rights to education for the children of migrant workers, on the basis of national treatment. Article 54 provides national treatment for documented migrants in connection with protection against dismissal, unemployment benefits, and access to public work schemes intended to combat unemployment. Article 8 protects the right of departure, including from the state of origin.

A number of the substantive provisions of the Migrant Workers Convention deal with human rights issues, such as freedom from involuntary servitudes, right to life, freedom of conscience, etc. These rights apply to both legal and illegal immigrants.

Part IV of the Migrant Workers Convention grants certain additional rights only to documented migrants. These include rights of free movement within the territory of the destination state, rights to unionize, and rights to vote. Further, Article 43 provides documented migrants with national treatment in connection with access to education, health services, and housing.

Article 46 addresses customs duties on personal belongings—an interesting connection between migration and trade. Article 47 protects the right to remit money to the migrant’s home country or any other state—an interesting connection between migration and international monetary law.

Article 48 provides for a sort of national treatment in connection with taxation. It also calls on a state’s party to endeavor to adopt appropriate measures to avoid double taxation.

Article 49:2 provides that, where separate permissions to reside and to engage in employment are required, “migrant workers who in the State of employment are allowed freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall

they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permits or similar authorizations.”

Thus, legal migrants are not required to remain in any particular employment, but enjoy flexibility as to their employment. Article 52 provides that legal migrants generally have the right to freely choose their remunerated activities, subject to limitations such as limitations on alien occupation in certain activities and requirements for licensing for regulated occupations.

Finally, Article 68 of the Migrant Workers Convention requires states to collaborate to prevent illegal immigration and employment of workers in an “irregular situation.” In particular, destination states are required to “take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers.” Article 69 provides that states “shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate measures to ensure that such a situation does not persist.”

## **Con CLus Ion**

Individuals seem to enjoy a wide range of human rights in connection with their treatment once they arrive in foreign states. However, this chapter has found that, under human rights law, individuals do not have rights, vis-à-vis destination states, to immigrate. It is interesting that individuals have reasonably clear rights to emigrate, or to depart. Of course, the right to emigrate without a right to immigrate may be viewed as rather empty, or at least limited by the available destination states (Sané 2007). Human rights law is currently undergoing a period of uncertainty regarding the obligor of particular human rights obligations. In some cases corporations are charged with protecting human rights under the rubric of “corporate social responsibility.” In other cases states other than the state of residency or citizenship are argued to bear responsibilities to protect certain human rights of foreign citizens,

as in the argument that states should not seek to enforce their legal rights under the WTO's intellectual property agreement in cases where to do so would restrict the ability of the home state to satisfy its obligations under the right to health. It would be too speculative, however, to say today whether destination states will ever have human rights-based obligations to admit aliens.

### notes

1. However, it may be that the substantive division, in terms of human security, between forced migration and economic migration, is less than clear (United Nations Human Rights Committee 2000).
2. Customary international law arises from the practice of states, combined with *opinion juris*: a sense of being legally bound. Conventional international law is treaty law: formal written agreements between states.
3. Plender (1988) notes, "As recently as at the end of the nineteenth century there continued to be support for the view that the power to control the ingress and egress of aliens was circumscribed by international law." (See also Goodwin-Gill [1978].)
4. Resolutions of the Institute of International Law 104 *et seq.* (Institute of International Law 1916). The Institute of International Law was a private body, involved in formulating principles for adoption by states.
5. For a historical perspective, see Plender (1988).
6. See also Article 12(2) of the ICCPR 1966 and Article 5(d)(ii) of the International Convention on the Elimination of All Forms of Racial Discrimination; Hannum (1985).
7. See Martin (2003, p. 43), who cites the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 12 April 1930, Art. 1, 179 LNTS 89, which states that it is "for each state to determine under its own laws who are its nationals." See also *Tunis and Morocco Nationality Decrees* (1923).
8. See also Protocol 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention for the Protection of Human Rights and Fundamental Freedoms 1950).



## 6

# Europe

The EU has reached a very high level of formal labor market integration. It is fair to say that the EU has developed a set of disciplines designed to ensure a high degree of labor market integration, while respecting national regulatory and public policy prerogatives. Under these disciplines, individual nationals of EU member states have the formal right to enter the labor market of any other member state, without explicit or implicit discrimination, and without losing rights that they would otherwise have, such as social security rights.

The history of the development of labor market integration in the EU is salient to a study of broader international labor market integration, insofar as it represents a kind of maximal menu of labor market integration devices. It is important to keep in mind that in the EU, free movement of workers is the fourth freedom, with free movement of goods, services, and capital, and is part of a broader integration project. It is also important to keep in mind that Europe exhibits a high degree of ethnic and political homogeneity. The issues that have arisen, and the way that these issues have been addressed, both substantively and institutionally, can provide a checklist for anticipating issues that will arise as other efforts at international legalization of migration are undertaken. Therefore, this chapter attempts to provide a brief historical perspective on the legal measures taken toward EU labor market integration. The treatment is by no means exhaustive or detailed, but it is designed to show the relative depth of integration.

It is also important to note at the outset that the EU still allows certain restrictions on freedom of movement, which include the possibility of exclusion, the possibility of expulsion from the state of residence, and limitations on the recognition of professional qualifications. For example, persons who have never worked and who are dependent on social assistance are generally denied the right of free movement, although Union citizens may have short-term rights of residence, and family members of workers have greater rights.

Finally, it is important to note that despite the formal facilitation of intra-EU free movement through a remarkably extensive set of rules for market access, equal treatment, and avoidance of disadvantage, Europeans do not migrate within Europe with great alacrity. There has been a high degree of economic homogeneity, making migration less attractive. Given the heterogeneity in the broader international context, we could not expect the experience of the EU to be replicated. Indeed, the lesson of the EU is one of integration on a number of fronts, with investment and free movement of goods and services rendering migration less compelling. While there are relations both of complementarity and substitutability among these types of integration, it seems reasonable to believe that the parallel integration along a number of dimensions moderates the extent to which any one dimension experiences excessive flows.

There are four important components of free movement in EU law.

- 1) Article 39 of the 1957 Treaty of Rome, formerly Article 48, provides for free movement of European Community “workers” within the European Community, without discrimination as to employment.<sup>1</sup> Article 39(3) permits exceptions for “public policy, public security, or public health” reasons.<sup>2</sup>
- 2) Article 43 of the Treaty of Rome provides for the “right of establishment,” including the right to take up and to pursue activities as self-employed persons.
- 3) Article 49 prohibits restrictions on freedom to provide services within the community, in respect of nationals of member states who are established in a member state other than that of the person for whom the services are intended.
- 4) Finally, under Article 18 of the Treaty of Rome, added in the 2001 Treaty of Nice, “every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.” This incorporated in the Treaty of Rome extensions of the right of movement that had been adopted by directives in June 1990.<sup>3</sup>



## Free Movement of Workers

Article 39, which provides the basic commitment to free movement of workers, is worth quoting in full:

- 1) Freedom of movement for workers shall be secured within the Community.
- 2) Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
- 3) It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
  - a) to accept offers of employment actually made;
  - b) to move freely within the territory of Member States for this purpose;
  - c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
  - d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
- 4) The provisions of this article shall not apply to employment in the public service.

As discussed in subsequent sections, similar freedoms apply to self-employed persons who wish to establish in another member state, and to service providers who wish to travel to another member state temporarily in order to provide services.

Most member states of the EU have gone further to eliminate most border formalities between member states through the 1985 and 1990 Schengen Agreements.<sup>4</sup> See the discussion below. A total of 30 states, including also three non-EU members (Iceland, Norway, and Switzerland), have adhered to the Schengen Agreements. Ireland and the United Kingdom do not participate in the common border control or visa arrangements.

### s cope of Application: “Workers”

Article 39 only provides direct obligations with respect to “workers,” understood to be employees.<sup>5</sup> Under Article 39, “the essential feature of an employment relationship . . . is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration” (*Lawrie-Blum v. Land Baden-Wurtemberg* 1986, para. 17). The definition of “workers” is a community definition, not one determined by national law (para. 16).

Although Article 39 grants free movement to “workers” or “workers of member states,” and does not explicitly require that these workers be nationals of EU member states, as opposed to nationals of third countries, the implementing regulation limits freedom of movement to nationals of member states (Council of the European Union 1968a). The issue of nationality is a matter of member state law.<sup>6</sup> Furthermore, recall that all “citizens” of the EU—meaning all member state citizens—are now entitled to free movement under Article 18 of the Treaty of Rome.

Under Article 39(3), movement is predicated on the employment relationship—the freedom of movement is to accept offers of employment actually made. Individuals also have the right to look for employment in another member state (*Royer* 1976).<sup>7</sup> The European Court of Justice (ECJ) has found a “right for nationals of the Member States to move freely within the territory of other Member States and to stay there for the purpose of seeking employment” (*Antonissen* 1991). However, the duration of the stay for purposes of seeking employment is limited to “a reasonable time” (*Commission v. Belgium* 1997).

Regulation 1251/70 provided that workers and family members may remain in the territory of a member state after the worker’s employment there terminates.<sup>8</sup> This provision has been supplemented, and probably obviated, by the Residence Directive.<sup>9</sup> The Residence Directive also provides for certain rights of permanent residence for workers who have reached pension age, or who have become incapacitated. Under Article 17 of the Residence Directive, family members who reside with a worker in a host member state are entitled to remain if the worker has acquired permanent residence, and under certain circumstances if the worker dies while still working but before acquiring permanent residence.

Furthermore, individuals have the right to reside in another Member State regardless of their employment relationship, so long as they meet an economic needs test and are covered by health insurance (Council of the European Union 1990c.) Retirees also have the right of residence.<sup>10</sup>

### **s cope of Application: s elf-Employed Persons through Establishment or Freedom to Provide s ervices**

Self-employed persons benefit from protections similar to those available to employed persons. Self-employed persons may benefit either from freedom to provide services, or from freedom of establishment, depending on the circumstances (Weiss and Wooldridge 2007, p. 89). Self-employed persons who establish in a host state are covered by Articles 43–48 of the Treaty of Rome. Article 49 provides that “restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.” *Establishment* in this context “involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period” (Council of the European Union 2000).

Self-employed persons who engage in temporary travel in order to provide services are covered by Articles 49–55. Under Article 50, a “person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.” Services include activities of an industrial character, activities of a commercial character, activities of craftsmen, and activities of the professions. Under these provisions, travel must be temporary, the services must be remunerated, and the services must have some transnational, as opposed to wholly domestic, character.

### **Citizenship**

Citizenship of the EU was established under the Maastricht Treaty, which entered into force on November 1, 1993. Under Article 17(1) of the Treaty of Rome, “[e]very person holding the nationality of a Member State shall be a citizen of the Union.” The first recital of the

Residence Directive states that citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

One of the goals of the Residence Directive was to link movement more firmly to the citizenship status of citizens, rather than to their status as workers, retirees, students, or other categories. The Residence Directive makes clear that citizens have

- rights of entry and exit;
- the right of residency for up to three months without conditions;
- the right of residency for longer if they are workers or self-employed persons, or if they have sufficient resources not to become a burden on the host state's social security system as well as health insurance;
- the right to have family members accompany them; and
- the right to permanent residence after a period of five years

### **scope of Application: new Member states**

Interestingly, a transitional arrangement was put in place in 2004 with respect to migration by workers from 10 newly acceding member states. This transition arrangement provided for three periods of two years, three years, and two years. At the end of each period states that had previously been members of the EU—the “EU 15”—would determine whether they would liberalize for the subsequent period. A similar arrangement was put in place for the two states that acceded in 2007, Bulgaria and Romania. These temporary derogations from freedom of movement of workers were required to expire after seven years. Therefore, from May 1, 2011, for the initial 10 new adherents, and from January 1, 2014, for Bulgaria and Romania, the transition period will end and free movement of workers will be applicable in full.

Ireland, Sweden, and the United Kingdom did not opt to apply the transition provisions to the first round of 10 new adherents, and so initially decided not to restrict immigration from the new member states. After a review of the transition arrangements in 2006, Greece, Italy,

Spain, Portugal, and Finland decided to lift their transition restrictions, and Belgium, Denmark, France, the Netherlands, and Luxembourg decided to reduce their restrictions. With respect to the first round of 10 new adherents, only Germany and Austria have maintained full restrictions through the end of the transition period.

In 2007, in connection with the accession of Bulgaria and Romania, all EU-15 countries except Sweden and Finland decided to restrict Bulgarians' and Romanians' access to their labor markets.

In 2006, the EU Commission was able to conclude, as to migration from the 10 initial acceding states to the EU 15 as follows: "mobility flows between the EU-10 and the EU-15 are very limited and are simply not large enough to affect the EU labour market in general" (Commission of the European Communities 2006, p. 13).

### **Dis Cri Min Ation**

The pattern of nondiscrimination protection, and other protection, applied to migrant workers from EU member states, is extensive. It is extensive enough that there is little room for host state measures to deter or to disadvantage immigration, and thus little scope for extraction of rents from immigrants.

Under Article 39(2) of the Treaty of Rome, migrant workers who are EU citizens are protected from discrimination based on nationality, as regards employment, remuneration, and other conditions of work and employment. Regulation 1612/68 was intended, and has been interpreted by the ECJ, to prohibit discrimination of various kinds against workers from other Member States (Apap 2002, p. 35). Under Article 1, nationals of Member States have the right to take up employment in other Member States under the same conditions as nationals.

Article 7 of Regulation 1612/68 prohibits all forms of direct and indirect, *de jure* and *de facto*, discrimination. Areas covered include social, housing, and tax advantages. Those in search of work are excluded from coverage of Article 7.

Interestingly, Article 7(4) of Regulation 1612/68 provides that any clause of a collective agreement or individual agreement concerning

eligibility for employment, remuneration, or other conditions of work is null and void insofar as it provides for discrimination against nationals of other Member States. This type of provision is needed to ensure that restrictions under domestic collective bargaining agreements are not used to replace immigration restrictions in order to exclude foreign workers. Furthermore, Article 8 of the regulation provides for equality of treatment in connection with membership in trade unions.

### **Dependents and social security**

Free movement may be less attractive to workers if their dependents are not permitted to join them, or to work once they arrive, or if by moving they may forfeit accrued social security rights, or the opportunity to accrue social security rights.

Under Article 10 of Regulation 1612/68, the families of migrants are required to be admitted to the host state. Under Article 7(2) of Regulation 1612/68, families of workers are entitled to the same social advantages as families of national workers. Article 11 entitles a community worker's family members to work in the host state, even where they are not community nationals. These provisions have been repealed and replaced by similar provisions in the Residence Directive. Article 12 of Regulation 1612/68 provides that children of migrants shall be admitted to general education and vocational training under the same conditions as nationals. Council Directive 77/486/EC requires that children of migrant workers be provided with tuition-free education, including teaching of the official language of the host state (Council of the European Union 1977).

Under Article 39(2) of the Treaty of Rome, workers from other member states are entitled to equal treatment as to employment, remuneration, and other conditions of work and employment. This entails the same social and tax advantages as nationals of the host state (Council of the European Union 1971, Article 7[2]). The requirement of nondiscrimination includes such programs as interest-free loans for parents (*Reina v. Landeskreditbank Baden Württemberg* 1982) educational grants for students (*Casagrande v. Landeshauptstadt München* 1974), and even certain nonpecuniary benefits (*Netherlands v. Ann Florence Reed* 1985). Member states have coordinated their social se-

curity legislation in order to ensure that these measures do not restrict mobility or result in unequal treatment. This coordination addresses both workers and self-employed persons. Regulation 1408/71 addresses the application of social security schemes to workers. Regulation 1390/81 extends this pattern of arrangements to self-employed persons. It should be emphasized that this is a system for coordination rather than harmonization.

The general approach is to ensure that an individual only must contribute to a single social security scheme, and that the individual obtains benefits that are not reduced by virtue of his or her transnational movement. Three principles are involved. First, Community citizens are permitted to receive benefits from the “source” state—the state in which they were earned, despite a change in residency (Council of the European Union 1971). Second, periods of employment or residence in multiple member states are aggregated for purposes of meeting the paying member state’s requirements. Third, the law of the state of employment is generally the governing law; Article 13(2) and Title II of Regulation 1408/71 establish the principle of *lex loci laboris*.

Regulation 1408/71 covers sickness and maternity benefits, occupational accident and disease benefits, family benefits, unemployment benefits, invalidity pensions and benefits, old age benefits, death grants and survivors’ benefits (Council of the European Union 1971). It excludes social and medical assistance (Council Regulation 1408/71, Article 4[4]). Nondiscrimination in social assistance and other “social advantages” is addressed in Regulation 1612/68.

### **n on Dis Cri Min At or y (in Distin Ctl y APPLi CABl E) rE gul Ation AnD Pro Fession Al Qu Ali FiCations**

Generally speaking, the freedom to provide services “may be restricted only by rules justified by overriding requirements to public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, in so far as the service is not safeguarded by rules to which the provider of such a service is subject in the Member State where he is established” (*Arblade* 1999).

In *Terhoeve* the ECJ held that “provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his freedom of movement constitutes an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned. It is therefore unnecessary to consider whether there is indeed discrimination on grounds of nationality” (*Terhoeve* 1999). This principle was established for the first time in *Van Binsbergen* (1974). Under these cases, a restriction may be justified if it is adopted in pursuit of a public interest that is not incompatible with community objectives, is nondiscriminatory, and is proportionate to the aim pursued.

For workers in regulated fields, which may require specified qualifications or licensing, freedom of movement requires that the relevant qualifications be accepted in the host state, and that a license be made available. The right of establishment under Articles 43, 49, and 54 of the Treaty of Rome has been found to include a right of national treatment, barring limitation of specified professions to nationals of the host state (*Reyners v. Belgium* 1974). It also includes a right to have educational qualifications from another member state recognized in the host state (*Patrick v. Ministre des Affaires Culturelles* 1977; *Thieffry v. Conseil de l'Ordre des Avocats a la Cour de Paris* 1977).

Thus, “even if applied without any discrimination on the grounds of nationality, national requirements concerning qualifications may have the effect of hindering nationals of other member states in the exercise of their right of establishment guaranteed to them by Article [43] of the EEC Treaty. That could be the case if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another member state” (*Vlassopoulou* 1991).

Article 47 of the Treaty of Rome authorizes the Council of Ministers to legislate directives on the mutual recognition of diplomas and other evidence of qualifications, and the council produced a number of sectoral directives for certain professions. These sectoral directives provided for essential harmonization, and conditions for recognition of diplomas and other qualifications in particular sectors.

In addition, the so-called General Systems Directives, generally provided for recognition across regulated professions, other than those covered by sectoral directives. These directives had broad coverage, basing recognition of qualifications on the principle of mutual trust.



This principle of mutual trust seems more likely to be workable within a broader integration project, within a thick institutional context, than on a stand-alone basis.

The General Systems Directives, and the sectoral directives noted above, were repealed as of October 20, 2007, and were replaced by Directive 2005/36/EC, providing for both freedom of establishment and freedom to provide services (Council of the European Union 2005; Weiss and Wooldridge 2007, pp. 24, 96–109). However, the method of recognition of qualifications established in the General Systems Directives will continue. The purpose of this new directive is expressed as follows: “This Directive establishes rules according to which a Member State which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications (referred to hereinafter as the host Member State) shall recognise professional qualifications obtained in one or more other Member States (referred to hereinafter as the home Member State) and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession.”

Articles 6 and 7 of Directive 2005/36/EC prohibit restrictions on the freedom to provide services based on lack of professional qualifications if the service provider is legally established in another member state for purposes of pursuing the same profession there. This structure is usefully compared with the process provided under GATS, described in Chapter 8 below.

Under Directive 2005/36/EC, the member states retain the sovereignty to set their own standards of competency, but they must accept foreign credentials as satisfactory of these standards. They may also impose “compensation” requirements, such as adaptation periods, in order to make up for differences in training and preparation in different member states.

## Public Policy Exceptions, Exclusion, and Public Service Exceptions

Under Article 39(3) of the Treaty of Rome, member states may limit freedom of movement for certain public policy reasons. Similarly, Article 46 allows limitations on the right of establishment by self-employed persons. Directive 64/221 stipulates that exclusions under these provisions must be based on the “personal conduct” of the individual concerned. “Personal conduct” can include the individual’s membership in an organization (*Van Duyn v. Home Office* 1974). Furthermore, to rely on a public policy exception, member states must act in a nondiscriminatory manner by prohibiting similar conduct domestically (*Rutili* 1975; *Adoui and Cornuaille v. Belgium* 1982). Generally, these exceptions are to be construed narrowly.

Article 28 of the Residence Directive provides detailed restrictions on a member state’s right to expel nationals of other member states. EU citizens and their family members who have acquired permanent residence cannot be expelled except on the basis of serious grounds of public policy or public security. These grounds must be “imperative grounds of public security” if the individuals have resided in the host state for 10 years or more.

Under Article 29 of the Residence Directive, “the only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organization and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.”

This type of external reference to an expert multilateral organization with a different functional remit may be understood as a response to the phenomenon of fragmentation in international law.

Articles 39(4) and 45 of the Treaty of Rome provide that the freedom of movement to provide services, and the freedom of establishment, do not apply to employment in the public service. This exception is limited to activities involving “direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interest of the State or of other public authorities. Such posts

in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the state . . .” (*Commission v. Belgium* 1980).

## **bor DEr Controls      An D sCh Eng En**

Under the original Treaty of Rome, member states retained the right to impose identity checks at their borders. In 1985, however, France, Germany, Belgium, Luxembourg, and the Netherlands created an area without internal borders: the “Schengen area.”

The Schengen agreements do not extend the right of movement *per se*, but facilitate it by abolishing border controls for all people among the EU member states that are party to the Schengen agreements. A protocol to the 1997 Treaty of Amsterdam (the “Schengen Protocol”) incorporated the 1985 Schengen Agreement and the 1990 Schengen Convention (the “Schengen Agreements”) into the EU. The Schengen Protocol authorized the signatories of the Schengen Agreements to establish closer cooperation among themselves, so long as the cooperation takes place within the institutional framework of the EU (Weiss and Wooldridge 2007, p. 38). Thus, the Schengen “*acquis*” has been incorporated within the EU.

Article 62 of the Treaty of Rome authorizes the adoption of “measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders.” This authorization is intended to work with the Schengen Protocol to create the concept of “free circulation” within the EU: once an immigrant crosses the external border, he or she may travel throughout the internal borderless territory. Within the Schengen area, only one state—the state of entry—is responsible for carrying out European immigration formalities. The principle is something like “mutual recognition” for prudential regulation: it requires member states to trust the initial state to apply appropriate rules: “The removal of internal border controls under the Schengen Agreement is compensated for by an extensive range of measures relating to the intensification of police cooperation; judicial cooperation regarding

mutual assistance and extradition; the handing over of criminals; cooperation in combating drugs; the creation of the Schengen Information System (SIS, a centralized databank of people and objects): the implementation of unified and stricter border controls, and the coordination of asylum policies” (Weiss and Wooldridge 2007, p. 36).

This suggests that removal of border controls (as opposed to liberalization of the right of movement *per se*) can only be effected under conditions where collateral measures are in place or may be implemented in coordination with the removal of border controls.

Currently, European immigration law includes a common visa regime, common requirements for crossing external borders, common standards for border controls, and common conditions governing the movement of third country nationals within the EU (Hailbronner 2000, p. 125).

The United Kingdom and Ireland join in limited aspects of the Schengen area, including police matters. According to the Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland, the United Kingdom and Ireland are entitled to exercise such border controls as they “may consider necessary” in order to determine the right to enter their territories of citizens of European Economic Area Member States, and in order to determine whether or not to grant other persons admission. Ireland exercises its rights under this protocol in order to maintain its “common travel area” with the United Kingdom.

The 10 member states that acceded to the EU in 2004 will participate in Schengen following a transition period intended to allow them to upgrade their border controls and information systems.

It is worth noting that the Schengen agreements, and the general treatment of free movement of people in Europe, owe much to the Benelux treaty arrangements. These arrangements themselves had a long and complex history, growing functionally and geographically over the years from 1945 (Plender 1988, pp. 273–276).

## summary

Table 6.1 sets out the basic points of the EU program for free movement of labor. As has been apparent from the discussion thus far, the EU has addressed the issues that are critical to migration within the EU. Up until recent eastern European accessions, the EU was characterized by a high degree of labor market homogeneity compared to the rest of the world. This homogeneity, as suggested in Chapters 2 and 4, makes it less likely that large numbers of workers will migrate. It is also true that the extensive liberalization of movement of goods and services trade across EU borders also makes it less likely that large numbers of workers will migrate (except to the extent that migration is *complementary* to trade). This latter effect also applies to the new accession states. With the Fifth Enlargement, in 2004 and 2007, greater migration was expected due to greater wage differentials. However, thus far, migration has not been as great as expected.

## Internal Migration and Migration to the EU

Of course, the EU has both an *internal* migration policy and an *international* migration policy. While EU citizens have broad internal migration rights, third-party nationals also obtain more limited internal migration rights and practically nonexistent rights to migrate into the EU.

The EU has not extended to third-country nationals broad rights to enter the EU in order to work. The Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the member states for employment mandates that “Member States will refuse entry to their territories of third country nationals for the purpose of employment.”<sup>11</sup> It then provides a number of exceptions, and sets out procedures for admission of third-country nationals for employment.

Articles 61, 62, and 63 of the Treaty of Rome, added in the Amsterdam Treaty of 1999, provide authority for establishment of a common approach to immigration of third-country nationals. Under Article 63,

**Table 6.1 European Migration instruments**

Free movement of labor	Free movement to seek employment	Free movement for self-employed	National treatment	Dependent access	Social security	Professional qualification	Border controls
ECT 18, 39	ECT 18, <i>Antonissen</i> (1991), C-292-89	ECT 18, 43–49	ECT 39, Reg 1612/68	Reg 1612/68	ECT 39, Reg 1408/71	Dir 2005/36/EC	Schengen Agreements
Liberal	Liberal	Liberal	Liberal	Liberal	Liberal	Liberal but incomplete	Liberal but incomplete

NOTE: EC = European Community; ECT = Treaty Establishing the European Community; Reg = Regulation; Dir = Directive.

the council is directed to adopt measures, *inter alia*, on “conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion . . . ”

The European Council agreed in Tampere (Finland) in October 1999 on the elements of an EU immigration policy:

- It will be based on a comprehensive approach to the management of migratory flows so as to find a balance between humanitarian and economic admission.
- It will include fair treatment for third-country nationals aiming as far as possible to give them comparable rights and obligations to those of nationals of the member state in which they live.
- A key element in management strategies must be the development of partnerships with countries of origin including policies of codevelopment (Commission of the European Communities 2000).

Third-country nationals present in the territory of the EU occupy an ambiguous position in connection with their eligibility for EU rights (Hailbronner 2000, p. 307). Moreover, different groups of third-country nationals have different rights. We must distinguish among different types of rights. For example, the social rights incorporated in Articles 138, 139, and 140 of the Treaty of Rome are generally applicable to third-country nationals. For these purposes, we must also distinguish among different categories of third-country nationals, including refugees, family members of EU citizens, and those who acquire rights pursuant to an association agreement, cooperation agreement, or other international agreement.

### **Eu blu E CAr D Pro Pos Al**

Pursuant to Article 63, the EU has proposed the introduction of a Blue Card program as part of a plan to encourage the migration of skilled labor in the form of third-country nationals into the EU (the Blue Card Proposal) (Commission of the European Communities 2007a,b).

This proposal is expected to be implemented in 2009. The proposed draft directive (the Draft Directive) provides that, like the U.S. Green Card, the Blue Card shall be a combination of a residence permit and a work visa that would allow holders and their families to live, work, and travel within the EU. The Blue Card shall be administered by individual member states.

Specifically, Article 5 of the Draft Directive provides that third-country nationals may apply for a Blue Card if they present a valid work contract or an offer of a job of at least one year in the member state concerned and satisfy the conditions set out under the member state's national regulations in the case of particular regulated professions or have at least three years' professional experience in unregulated professions. Further, Article 9 of the Draft Directive allows member states to apply their labor market policies regarding vacancies in their labor markets when deciding whether or not to approve an application for the Blue Card. As noted in the preamble to the Draft Directive, the Blue Card proposal is meant to be a "flexible demand driven entry system" (Commission of the European Communities 2007a).

Once granted, the Blue Card entitles the holder to the same tax benefits, social assistance, and payment of pensions as EU nationals when moving to another country (Article 15 of the Draft Directive). Also, Article 13 provides that the Blue Card shall be valid for two years and may be renewed. Further, the holder of a Blue Card shall be allowed to cumulate periods of residence in different member states (after two years of legal residence in a member state) so as to apply for long-term residence status in the EU (Articles 17 and 19 of the Draft Directive).

The Blue Card proposal requires approval from the EU Member States but has been hailed by the EC as a step toward solving problems of the EU's aging population (European Union 2007). Most recently, it was noted by EC President Jose Barroso that the EU attracts 5 percent of skilled labor from developing countries while the U.S. attracts 55 percent. It is hoped that the Blue Card proposal will help to even this out (EurActiv 2008). Despite this optimism, the proposal has seen some resistance from inside and outside the EU. Germany has commented that immigration should remain the competence of individual member states. Further, the Netherlands has expressed reservations while Austria called for further "clarifications" in the field of social security and



minimum wages, saying it was already offering higher levels of protection. The UK has also suggested an alternative plan which is based on a points system (Deutsche Welle 2007). In addition, the African, Caribbean, and Pacific Countries commented that the Blue Card proposal may cause a brain drain in Africa.

## **t h E Eu An D t urk Ey**

Turkey has a closer and more complex relationship with the EU, especially in the field of migration, than any other associated state. Article 12 of the association agreement between Turkey and the EU provides that the contracting parties shall be guided by Articles 39, 40, and 41 of the Treaty of Rome for the purpose of progressively securing freedom of movement of workers. This provision is aspirational, and does not have direct effect. Member states are prohibited under Article 37 of the additional protocol to the association agreement to discriminate against Turkish workers in relation to conditions of work and remuneration. This requirement amounts to a requirement of national treatment and has direct effect (Weiss and Wooldridge 2007, p. 209).

Under Decision 1/80 of the EC-Turkish Council of Association, a Turkish worker who has been duly admitted and registered to work in a member state of the EU has the following rights (Weiss and Wooldridge 2007, p. 210):

- 1) After one year of legal employment, to the renewal of his permit to work for the same employer.
- 2) After three years of legal employment and subject to the priority of EU workers, to take up another offer of employment for the same occupation with an employer of his choice.
- 3) After four years of legal employment, to have access to any legal employment of his choice.

This type of graduated accretion of rights is a way of managing the transition from worker to man, while providing some protections against excessive numbers of foreign workers claiming permanent rights to work. It may be instructive in terms of the management of a

transition from temporary to permanent employment in other international migration arrangements.

A similar graduated structure is provided for family members under Article 7 of Decision 1/80: The members of the family of a Turkish worker duly registered as belonging to the labor force of a member state who have been authorized to join him:

Shall be entitled—subject to the priority given to Member States of the Community—to respond to any offer of employment after they have been legally resident for at least three years in that Member State.

Shall enjoy free access to any paid employment of their choice provided they have been resident there for at least five years.

Children of Turkish workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided that one of their parents has been legally employed in the Member State concerned for at least three years.

## notes

1. See Article 48 of the Treaty Establishing the European Economic Community (throughout this chapter, I use the updated numbering of provisions).
2. For an application, see *Rutili v. Minister for the Interior* (1982).
3. See Council of the European Union (1990a,b; 2004) on residence rights. Directive 2004/38/EC repealed and replaced Directive 90/365/EC, providing for similar rights.
4. See the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Controls at the Common Frontiers, June 14, 1985 as amended by Convention Applying the Schengen Agreement of June 14, 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at Their Common Borders, June 19, 1990. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Annex B Protocol Integrating the Schengen Acquis into the Framework of the European Union (“Treaty of Amsterdam”) (entered into force May 1, 1999).

5. See Council Regulation 1612/68 of 15 October 1968, and Directive 68/360 of 15 October 1968, referring to the right to take up an activity as an “employed person” (Council of the European Union 1968a,b).
6. Declaration No. 2 on nationality of a member state attached to the Maastricht Treaty on EU states that “whenever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned.” See also *Micheletti and Others v. Delegacion del Gobierno en Cantabria* (1992). The Treaty of Amsterdam added Article 17 to the Treaty of Rome, providing that “citizenship of the Union shall complement and not replace national citizenship.”
7. See also Council Regulation 1612/68 on freedom of movement for workers within the Community (Council of the European Union 1968a).
8. See Council Regulation 1251/70 of 29 June 1970, on the right of workers to remain in the territory of a member state after having been employed in that state (Council of the European Union 1970).
9. Council Directive 2004/38/EC (the “Residence Directive”). The Residence Directive is applicable to all EU citizens who move to or reside in a member state other than that of which they are a national, as well as their family members who accompany or join them (Council of the European Union 2004).
10. See Directive 90/365/EEC of June 28, 1990, on the right of residence for employees and self-employed persons who have ceased their occupational activity (Council of the European Union 1990a).
11. Council Resolution of June 20, 1994, on limitation on admission of third-country nationals to the territory of the member states for employment.



## 7

# Other Bilateral, Regional, and Plurilateral Arrangements

The intellectual history of international agreements regarding migration is reflected in preexisting international agreements. Draftsmen prefer to use existing precedents, existing precedents often have been produced through negotiations under similar constraints, and negotiators often find it compelling to request a concession granted by their counterparty in another context. So each international agreement that addresses migration has antecedents and descendents. Furthermore, as negotiators seek to determine what may come next, it is useful to examine what already exists and ask why it exists. Regional or plurilateral agreements have served as models for the WTO's GATS, and have also incorporated and expanded upon GATS commitments. I point out in Chapter 6 how some of the EU's arrangements may serve as models for future agreements. The EU's arrangements are the most sophisticated and are among the most liberal arrangements so far devised for international legal liberalization of movement of workers.

However, there are several bilateral, regional, and plurilateral arrangements for labor mobility beyond the EU. Some of these are based on historically rooted arrangements, such as the British Commonwealth, the Nordic arrangements, or bilateral treaties of friendship, commerce, and navigation. Others are bilateral agreements for management of labor flows. Others are more recent adjuncts to bilateral or regional free trade agreements or customs unions. The goal of this chapter is not to provide a comprehensive survey of all arrangements, but to provide a reasonably descriptive set of modern examples in order to assess the variety of arrangements for migration.

As mentioned in Chapter 4, Nielson suggests that, generally, agreements among countries that are geographically proximate and at similar levels of development entail greater liberalization of labor mobility (Nielson 2003, pp. 93, 94). This itself is an interesting observation and may be suggestive of patterns that we might expect to see in global ar-

rangements. Of course, if global arrangements are subjected to a broad MFN-type principle of nondiscrimination, then liberalizations motivated by proximity and economic similarity would also benefit those farther away and at differing levels of development.

Indeed, it is worthwhile here to observe that, as we will see below, the states of virtually all of Europe, most of Latin America, much of Africa, and Australia and New Zealand are party to fairly comprehensive regional agreements for liberalization of labor movement. These agreements do operate at fairly homogeneous economic levels, and in fairly proximate geographic circumstances. However, some of these agreements in Africa and Latin America have not been fully implemented. These agreements demonstrate that, at least outside of Asia and North America, states have been willing to negotiate legal commitments for liberalization of labor migration.

One of the critical questions in any global liberalization of migration will be the scope of application, if any, of the principle of MFN. Of course, the arrangements examined in this chapter are all inconsistent with a global principle of MFN, and may even raise issues under existing GATS MFN obligations. I discuss the issue of MFN in detail in Chapter 9.

### **Bilateral Labor Agreements**

The principal type of international arrangement—formal or informal—between states relating to labor migration is the bilateral labor agreement. These agreements are generally, although not exclusively, concluded between labor sending and labor receiving countries. These agreements generally exclude coverage of commitments to accept migrants: they are not labor market access agreements. While they do not contain commitments, they often have the result of providing privileged labor market access to citizens of the sending country partner. They therefore raise some issues of MFN-type treatment, and of competition among potential sending countries (Panizzon 2008).

Puri (2007, p. 105) warns

There exists the danger of exclusivity and marginalization for countries that are not on the radar screen of major developed country receiving markets for political, cultural, or geographical reasons. Not all developing countries wishing to export their labour can expect to be engaged by the major developed countries in bilateral labour agreements. Even if they do, their bargaining power would be very weak as receiving countries would have the upper hand in determining the conditions of the bilateral relations, for example, in terms of defining the sector, job or occupation, quotas, period of stay and renewability, and terms and conditions of employment.

Most bilateral labor agreements deal, often in nonbinding terms, with managerial and collateral issues of recruitment, remittances, and return: they address important issues of management related to migration that will be permitted unilaterally by the home and destination states. Sending countries may be responsible for prescreening migrant workers, including ensuring that they do not have criminal records. These agreements also may provide for measures to ensure return to the home country. These measures may include incentives or sanctions applied to employers or employees to ensure return. Recent agreements have also sought to ensure cooperation to restrict illegal immigration.

There are hundreds of bilateral labor agreements in force. The OECD countries alone have entered into more than 176 bilateral labor agreements (OECD 2004).

Geronimi (2004, pp. 23–26) lists 24 basic elements of an international labor agreement. I have highlighted the provisions that might be expected to be found in an international agreement for labor market access:

- 1) The competent government authority.
- 2) Exchange of information.
- 3) Migrants in an irregular situation.
- 4) Notification of job opportunities.
- 5) Drawing up a list of candidates.
- 6) Pre-selection of candidates.
- 7) Final selection of candidates.
- 8) Nomination of candidates by the employers (possibility for the employer to provide directly the name of a person to be hired).
- 9) Medical examination.
- 10) e ntry documents.**
- 11) Residence and work permits.**
- 12) Transportation.
- 13) Employment contract.
- 14) Employment conditions.
- 15) Conflict resolution mechanism.**
- 16) t he role of trade unions and collective bargaining rights.**
- 17) s ocial security.**
- 18) Remittances.**
- 19) Provision of housing.
- 20) Family reunification**
- 21) Activities of social and religious organizations.
- 22) Establishment of a joint commission (to monitor the agreements' implementation).
- 23) Validity and renewal of the agreement.
- 24) Applicable jurisdiction.

These bilateral agreements, while very important to deal with a number of managerial and practical issues, ordinarily do not provide formal commitments to market access, national treatment, or most favored nation treatment, or address other important economic issues.

In the 1960s and 1970s, a number of northern European countries had bilateral agreements with southern European and North African countries, or with developing countries, seeking to ensure orderly migration (Leary 2003). Germany, France, and Belgium had similar programs in the late 1950s and 1960s, sometimes covered by bilateral agreements governing working conditions and home country obligations.

From 1942 to 1964, the United States and Mexico had a series of agreements relating to temporary farm work, generally known as the



*Bracero* program. The *Bracero* program was initiated due to predictions in the U.S. agricultural market that there would be labor shortages during the fall harvest in 1942. Accordingly, the U.S. agricultural sector requested the U.S. government to recruit Mexican workers. Consequently, a number of bilateral agreements were concluded between the two governments. The Mexican government, sensitive about the conditions under which some of its nationals had previously worked in the United States, and doubtful that there was a real labor shortage, insisted that the U.S. government guarantee the contracts that the farmers provided the migrant workers. The *Bracero* program brought 5 million rural Mexicans to the rural United States over the next two decades, and the status of many Mexicans was legalized after they arrived in the United States (Martin 1993, pp. 60–61).

More recently, bilateral labor agreements have emphasized issues of management, focusing on recruitment, remittances, and return, as well as action to limit informal migration. These bilateral labor agreements may be viewed as incorporating a particular type of reciprocity. The home state assists with recruitment, remittances, and ensuring return, while also perhaps acting to limit informal migration, and in exchange the destination state unilaterally accepts migrants from the home state (Panizzon 2008).

## **Free Trade Areas and Customs Unions**

This section examines the migration features of free trade area and customs union agreements. These agreements address broader issues of trade in goods and services, but also accept that migration is relevant to trade in goods and services. These agreements also sometimes address migration in its own right, as a “fourth freedom” of movement of factors.

### **Comprehensive Arrangements for mobility**

In this section, I describe arrangements that provide for comprehensive free movement of workers. In the next section, I describe

arrangements that provide for free movement by selected groups of workers. Nielson (2003) provides a more refined taxonomy of these agreements, from which the organization of this section is adapted.

### **the European Economic Area and the European Free Trade Agreement**

Iceland, Liechtenstein, and Norway are members of the EEA, with the EU. The European Free Trade Agreement (EFTA) states are Iceland, Liechtenstein, Norway, and Switzerland.

Under the European Economic Area Agreement (EEAA), EEA nationals may enter the EU as workers, self-employed persons, or service providers. These arrangements are very similar to those available to EU citizens, as described in Chapter 6.

The EEAA agreement provides that workers can stay or move freely within EU and EFTA states for the purpose of employment and remain after having been employed. Immigrants are required to have sufficient funds to avoid reliance on public support. There are a number of exceptions from liberalization, including access to public service employment. The EEAA protects workers against discrimination based on nationality with regard to employment, remuneration, and other conditions of work and employment (Nielson 2003, p. 99).

Article 28 of the EEAA provides as follows:

- 1) Freedom of movement for workers shall be secured among EC member states and EFTA states.
- 2) Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC member states and EFTA states as regards employment, remuneration, and other conditions of work and employment.
- 3) It shall entail the right, subject to limitations justified on grounds of public policy, public security, or public health
  - to accept offers of employment actually made;
  - to move freely within the territory of EC member states and EFTA States for this purpose;
  - to stay in the territory of an EC member state or an EFTA state for the purpose of employment in accordance with the

provisions governing the employment of nationals of that state laid down by law, regulation, or administrative action; and

- to remain in the territory of an EC member state or an EFTA state after having been employed there.
- 4) The provisions of this article shall not apply to employment in the public service.
  - 5) Annex V contains specific provisions on the free movement of workers.

Rights of establishment are also guaranteed, even for self-employed persons (Article 31 of the EEAA). There are no restrictions on the freedom to provide services, and temporary service providers receive national treatment. However, there are exceptions for public policy, public security, or public health and the exercise of official authority. Exceptions also apply for the exercise of official authority, and special conditions apply to transport, financial, audiovisual, and telecommunications services (Nielson 2003, p. 99).

Moreover, the EEAA facilitates the free movement of labor by providing for an integrated social security structure. Article 29 of the EEAA states that

in order to provide freedom of movement for workers and self-employed persons, the Contracting Parties shall, in the field of social security, secure, as provided for in Annex VI, for workers and self-employed persons and their dependants, in particular:

- a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
- b) payment of benefits to persons resident in the territories of Contracting Parties.

Furthermore, Article 30 of the EEAA ensures that measures are taken for mutual recognition of educational and professional qualifications: “In order to make it easier for persons to take up and pursue activities as workers and self-employed persons, the Contracting Parties shall take the necessary measures, as contained in Annex VII, concerning the mutual recognition of diplomas, certificates and other evidence

of formal qualifications, and the coordination of the provisions laid down by law, regulation or administrative action in the Contracting Parties concerning the taking up and pursuit of activities by workers and self-employed persons.”

The Agreement Amending the Convention Establishing the EFTA (which entered into force on June 1, 2002) (the EFTA Agreement) has similar provisions to the EEAA. These amendments largely extend to the entire EFTA area (i.e., also including Switzerland) the arrangements existing amongst the EFTA-EEA states (Iceland, Liechtenstein, Norway). However, there are some limits and transition periods. Freedom of movement *into* Switzerland from the other EFTA states is subject to transition periods of up to five years. Switzerland reserves special quotas for EFTA citizens. Special rules govern frontier workers, public service and public authority activities, and the acquisition of real estate in Switzerland (Nielson 2003, p. 99).

However, Annex K to Chapter VIII of the EFTA Agreement is a new development in comparison to the EEAA provisions on free movement of persons, as it sets out a comprehensive framework with respect to administration of free movement of persons. In particular, it specifies particular rights of such persons and consolidates previously elucidated rights into a specific document. Specific provision is made for right of entry, right of residence, nondiscrimination, recognition of professional qualifications, and coordination of social security. One notable development in Annex K of Chapter VIII of the EFTA Agreement is the establishment of a “Committee on the Movement of Persons,” which provides a centralized authority for the management and proper implementation of Annex K.

### **the Trans-Tasman Travel Arrangement and Australia–New Zealand Closer Economic Relations Trade Agreement**

The Trans-Tasman Travel Arrangement (TTTA) is not a formal treaty but a set of parallel policies whereby Australian and New Zealand citizens may live and work in the other country indefinitely.

Although the TTTA previously required no visas, New Zealand nationals are currently required to hold a Special Category Visa, denoted in their passports with an arrival date stamp. This requirement stems from the negotiation of the Australia–New Zealand Closer Economic

Relations Trade Agreement (ANZCERTA) Review of 1992 where there were concerns on the part of Australia over use of New Zealand as an easy transit point for international criminals who could use liberal movement privileges to enter Australia. This requirement was only accepted by New Zealand after Australia had made assurances that this new policy would not violate the spirit of the TTTA. Use of a special category visa meant that there would be no cumbersome application procedures for New Zealand citizens entering Australia (Hoadley 1995, pp. 89, 94–97).

Australian citizens are exempt from any requirement to hold a visa to travel to New Zealand or a permit to be in New Zealand, and residents of Australia are exempt from the requirement to obtain a temporary or residence visa. Certain exclusions apply, principally for persons with a criminal record. Australians traveling to New Zealand require only a valid Australian passport.

The most recent reaffirmation of the TTTA was on February 26, 2001, when Prime Ministers Helen Clark and John Howard announced new trans-Tasman social security arrangements (New Zealand Ministry of Foreign Affairs and Trade 2001). Articles 6 and 7 of the Agreement on Social Security provide that a person would be entitled to receive a benefit under the social security laws of either New Zealand or Australia except that he or she is not ordinarily resident or resident and present in either state on the date of application for that benefit, that person shall be deemed, for the purposes of that application, to be ordinarily resident and resident and present in either state on that date, if he or she is present in either state, is a resident of either state, or intends to be a resident of either state.

The ANZCERTA regime, through its protocol on services, provides a parallel arrangement relating to the provision of full market access and national treatment for all service providers, including individual service providers. Article 4 of the ANZCERTA Protocol on Services provides as follows:

Each Member State shall grant to persons of the other Member State and services provided by them access rights in its market no less favourable than those allowed to its own persons and services provided by them.

Article 5 of the ANZCERTA Protocol provides for national treatment:

- 1) Each Member State shall accord to persons of the other Member State and services provided by them treatment no less favourable than that accorded in like circumstances to its persons and services provided by them.
- 2) Notwithstanding paragraph 1 of this Article, the treatment a Member State accords to persons of the other Member State may be different from the treatment the Member State accords to its persons, provided that:
  - a) the difference in treatment is no greater than that necessary for prudential, fiduciar , health and safety or consumer protection reasons; and
  - b) such different treatment is equivalent in effect to the treatment accorded by the Member State to its ordinary residents for such reasons.
- 3) The Member State proposing or according different treatment under paragraph 2 of this Article shall have the burden of establishing that such treatment is consistent with that paragraph.
- 4) No provision of this Article shall be construed as imposing obligations or conferring rights upon either Member State with respect to Government procurement or subsidies.

Further, Article 6 of the ANZCERTA Protocol provides MFN treatment: “In relation to the provision of services inscribed by it in the Annex, each Member State shall accord to persons of the other Member State and services provided by them treatment no less favourable than that accorded in like circumstances to persons of third States.”

Nielson (2003, p. 100) notes, “Because all service suppliers are covered, the agreement does not feature detailed definitions of types of personnel, nor does it distinguish between different modes of delivering services. However, certain service sectors are excluded from coverage by the parties (in the Annex to ANZCERTA Protocol) and the agreement also is subject to the foreign investment policies of the member states.” Sectors excluded by the annex to the ANZCERTA Protocol include, for both states, aviation sector, communications, and shipping.

Moreover, to facilitate the liberalization of trade in services, ANZCERTA’s ancillary agreement, the Trans-Tasman Mutual Rec-

ognition Agreement (TTMRA), provides for mutual recognition of professional qualifications

Article 5.1.1 of the TTMRA provides as follows:

Under this Arrangement, a person who is Registered to practise an occupation under a law of an Australian Party will be entitled to practise an Equivalent occupation under the law of New Zealand and a person Registered to practise an occupation under a law of New Zealand will be entitled to practise an Equivalent occupation under the law of any Australian Party. As a condition of Registration the person seeking Registration will be required to lodge with the relevant Local Registration Authority a written notice containing certain basic information relating to his or her current Registration.

Further, Article 5.1.2 of the TTMRA states: “The Arrangement is not intended to affect the operation of laws that regulate the manner of carrying on an occupation, provided those laws: (a) apply equally to all persons carrying on or seeking to carry on the occupation; and (b) are not based on the attainment or possession of some qualification or experience relating to fitness to practise the occupation.

Yet, despite these developments, a completely integrated Trans-Tasman labor market has not yet developed. As Carmichael, Buetow, and Farmer (1993, p. 9) note, “[the TTMA and ANZCERTA] have rendered unlikely any major restriction of the free flow of people between Australia and New Zealand . . . ANZCERTA may have promoted some long-term migration at the upper end of the occupational spectrum as companies became more Australasian in outlook. According to many commentators, a common trans-Tasman labour market has been developing. It is characterized by free access but persistent wage differences, with specific occupational groups migrating in response to changes in demand.”

### **Andean Community**

In 2003, the Andean Community adopted the Andean Community Labour Migration Instrument (Decision 545), which provides for the progressive establishment of freedom of movement and temporary residence for employment purposes among the member states: Bolivia, Colombia, Ecuador, Peru, and Venezuela (Andean Community 2003a). (Venezuela has since withdrawn from the Andean Community.) The In-

strument was preceded by an earlier effort, Decision 503, which was limited to entry and exit for tourism, and did not address establishment or movement for labor. Therefore, Decision 545 provides as follows:

Article 1. The objective of this Instrument is to establish provisions that will progressively and gradually permit the unhampered movement and temporary residence of Andean nationals in the subregion as wage workers.

Article 2. This Decision shall be applicable to Andean migratory workers. Excluded from its sphere of application are people who work for the public administration and those whose activities threaten public morals, law and order, human life and health and the essential interests of national security.

Decision 545 establishes four categories of migrant workers: 1) individually moving workers; 2) company workers; 3) seasonal workers; and 4) border workers (Article 4). Individually moving workers are those who have signed an employment contract or answered a call for employment (Article 5). Company workers are already employed and are sent to another Andean country by their employer (Article 6).

The decision also establishes the rights of Andean migrant workers. In particular, it guarantees equal treatment (Article 10), and provides for protection of the families of migrant workers. It includes permission for unhampered entry and exit of migrant workers and their spouses, children, parents, and dependents.

Decision 545 elucidates additional rights of migrant workers intended to facilitate migration. Article 13 provides as follows:

Member Countries shall guarantee Andean migrant workers the following:

- a) Freedom to transfer funds earned by their work, with the observance of the pertinent legal provisions insofar as tax obligations or judicial orders are concerned;
- b) Freedom to transfer sums owned by migrant workers in payment for food; this cannot be impeded in any case;
- c) That the income from their work can be taxed only in the country where it was earned;
- d) Free access to the competent administrative and legal authorities in order to exercise and defend their rights;



- e) Access to the social security systems, in keeping with the Community provisions that are in effect; and
- f) The payment of social benefits to Andean migrant workers who work or have worked in the territory of the Member Countries, in keeping with the legislation of the Country of Immigration.

Importantly, Decision 545 provides for a safeguard mechanism, which is worth quoting at length:

Article 16.

In the event of a disturbance that seriously threatens the employment situation in a given geographic zone or a given sector or branch of economic activity, that is capable of causing effective damage or that poses an exceptional risk to the people's standard of living, Member Countries may make a temporary exception of up to six months in the principle of equal access to employment and shall communicate that circumstance and the period of that exception to the rest of the Member Countries and to the Andean Community General Secretariat. The latter may propose the amendment or suspension of the measure if it is not proportional to the damage or risk that is to be avoided or is not in keeping with the principles established in Andean law. Venezuela may establish a temporary exception lasting up to one year, for reciprocal application by the rest of the Member Countries.

If the situation envisaged in this article makes it necessary to take immediate measures, the interested Member Country may apply those measures as an emergency response, and shall in that case communicate them immediately to the General Secretariat, which shall announce its decision within the following thirty days, either authorizing, amending or suspending the measures.

The Member Country that has adopted that exception, with the presentation of the pertinent substantiation, may extend that measure once only and for an equal period of time with the authorization of the Andean Community General Secretariat.

A Member Country that makes use of the safeguard clause contained in this article shall respect the stability of the workers who migrated before the date of its application.

The right of access to social security was given particular emphasis in Decision 546 on the creation of the Andean Community Social

Security Instrument, which recognizes the need to “guarantee the appropriate social protection of migrant workers and their beneficiaries so that their social rights are not reduced as a result of their migration” (Andean Community 2003b). It further provides in the preamble that “migrant workers and their beneficiaries shall be acknowledged in any of the Member Countries to possess the same social security rights and obligations as the nationals of those countries.”

The Andean Community Social Security Instrument provides guidelines to determine the national legislation that governs a particular migrant worker’s access to social security (Articles 5 and 6 of the Social Security Instrument).

### **the Economic Community of West African states**

In 1975, the member states of the Economic Community of West African States (ECOWAS) entered into the ECOWAS Treaty, providing for free movement of individuals, the right of establishment, and the prohibition of discrimination (ECOWAS 2001a).<sup>1</sup> ECOWAS members include Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. Article 59 of the ECOWAS Treaty provides that “citizens of the community shall have the right of entry, residence and establishment and Member States undertake to recognize these rights of Community citizens in their territories” in accordance with the Protocols entered into by the member states.<sup>2</sup>

The 1979 ECOWAS Protocol Relating to Free Movement of Persons, Residence and Establishment, A/P.1/5/79, provides in Article 2 as follows:

The Community citizens have the right to enter, reside and establish in the territory of Member States. The right of entry, residence and establishment referred to in paragraph 1 above shall be progressively established in the course of a maximum transitional period of fifteen (15) years from the definitive entry into force of this Protocol by abolishing all other obstacles to free movement of persons and the right of residence and establishment.

The right of entry, residence and establishment which shall be established in the course of a transitional period shall be accomplished in three phases, namely:

Phase I—Right of Entry and Abolition of Visa

Phase II—Right of Residence

Phase III—Right of Establishment

Upon the expiration of a maximum period of five (5) years from the definitive entry into force of this Protocol, the Commission, based upon the experience gained from the implementation of the first phase as set out in Article 3 below, shall make proposals to the Council of Ministers for further liberalisation towards the subsequent phases of freedom of residence and establishment of persons within the Community and phases shall be dealt with in subsequent Annexes to this Protocol. (ECOWAS 2001b)

Phase I was to be implemented via Article 3 which provides that any citizen of the community who wishes to enter the territory of another member state shall be required to possess a valid travel document and an international health certificate. Moreover, citizens are not required to have visas if they are visiting for less than 90 days. Article 11 of this protocol also provides for the circumstances in which a citizen may be expelled and the rights of expelled citizens.

This was followed by several supplementary protocols. Supplementary Protocol A/SP.2/7/85 on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment specifies the obligations of states to establish cooperation between respective immigration authorities, clarifying the rights of illegal immigrants. Also, Decision A/DEC.2/7/85 on the Establishment of ECOWAS Travel Certificates for Member States provides for a harmonized travel document other than national passports for use within ECOWAS in order to facilitate and simplify formalities governing movement of persons across borders (ECOWAS 1999).

In 1986, Supplementary Protocol A/SP.1/7/86 (the Phase II Protocol) implemented Phase II, providing for rights of residence (ECOWAS 2001c). Article 2 of the Phase II Protocol provides as follows: “For the purpose of implementing the second phase (right of residence) of the Protocol on free movement of persons, the right of residence and establishment, each of the Member States shall grant to citizens of the Community, who are nationals of other Member States, the right of residence in its territory for the purpose of seeking and carrying out income earning employment.”

Further, the right of residence includes the right to apply for jobs offered, to travel freely for the purposes of applying for jobs, to reside in one of the member states in order to take up employment and to live in the territory of a member state. Exercise of these rights is only contingent upon the citizen of the community's acquisition of an ECOWAS residence card or residence permit (Article 5 of the Phase II Protocol).

The Phase II Protocol also distinguishes between border area, seasonal, or itinerant workers. Articles 10, 11, and 12 provide for the rights of each category respectively. Border area workers have the right to choose their employment freely and also enjoy all rights to which they are entitled through their presence and their work in the territory of the host member state, with the exception of rights relating to residence. Seasonal workers are entitled to enjoy all rights to which they are entitled through their presence and their work in the territory of the host member state. Itinerant workers shall enjoy the same except with respect to rights relating to residence or to employment.

Further, Articles 13 and 14 of the Phase II Protocol provide for protection against collective and arbitrary expulsion as well as individual expulsion. They also provide for respect for the fundamental rights of the migrant worker. Article 25 states that rights guaranteed in this protocol may not be withdrawn or waived: "Any form of pressure exerted on migrant workers or members of their families to force them to give up any of these rights or to refrain from exercising them shall be prohibited. Any clause of an Agreement or Contract designed to force the migrant worker to give up any of these rights or refrain from exercising them shall be null and void according to the provisions of this Protocol."

To facilitate the free movement of the migrant workers specified in the Phase II Protocol, Article 17 provides for freedom of remittance.

In 1990, Supplementary Protocol A/SP/2/5/90 was entered into to provide for the implementation of Phase III (the Phase III Protocol): the right of establishment (ECOWAS 2001d). Article 4 states:

In matters of establishment and services, each Member State shall undertake to accord non-discriminatory treatment to nationals and companies of other Member States. If, however, for a specific activity, a Member State is unable to accord such treatment, the Member State must indicate as much, in writing, to the Executive Secretariat. Other Member States shall then not be bound to accord

non-discriminatory treatment to nationals and companies of the State concerned.

The provisions of this Protocol and measures taken as a result thereof shall be without prejudice to the application of legislative and administrative provisions, which provide a special treatment for non-nationals and are justified by exigencies of public order, security or public health.

On the recommendation of the Commission, and on the proposal of the Council, the Authority shall take the relevant decision for the co-operation and harmonisation of legislative, statutory and administrative provisions which, in at least one Member State, make access to certain non-salaried activities (liberal or non-liberal professionals) and the exercise of such activities subject to protective or restrictive measures.

To facilitate access to non-salaried activities and the exercise of such activities, the Commission shall recommend to the Council, which shall propose to the Authority that decisions be taken for the mutual recognition at Community level of diplomas, certificates and other qualifications.

Activities which, in a Member State, form part, even occasionally, of the exercise of public authority, shall be exempted from the provisions of this Protocol.

Despite this impressive set of legal rules, implementation of free movement within ECOWAS remains a challenge. “Most countries of the subregion have enacted, or retained, a series of laws that in effect restrict ‘foreigners’ (including nationals of ECOWAS) from participating in certain kinds of economic activities . . .” (Adepoju 2007). Addressing a media briefing ahead of the ECOWAS commission’s 32nd anniversary scheduled for May 28, 2007, Mohammed Ibn Chambas, president of the ECOWAS Commission, said that “the effective implementation of our regional protocol on free movement of persons remains one of our major challenges since the creation of ECOWAS” (People’s Daily Online 2007).

### **t he Common market for e astern and s outhern Africa**

The Common Market for Eastern and Southern Africa (COMESA) is the largest regional organization including southern African coun-

tries. Article 4 of the COMESA Treaty states that one of the objectives of COMESA is to “remove obstacles to the free movement of persons, labor and services, right of establishment for investors and right of residence within the Common Market . . . In the interim, COMESA is implementing a Protocol on the gradual relaxation and eventual elimination of visa requirements and a Protocol on the free movement of persons, labour, services and the right of establishment and residence” (Nielson 2003, p. 100). COMESA members are Angola, Burundi, the Comoros, the Congo, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, the Seychelles, Sudan, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe.

Article 164 of the COMESA Treaty provides:

- 1) The Member States agree to adopt, individually, at bilateral or regional levels the necessary measures in order to achieve progressively the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence by their citizens within the Common Market.
- 2) The Member States agree to conclude a Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Right of Residence.
- 3) The Member States agree that the Protocol on the Gradual Relaxation and Eventual Elimination of Visa Requirements within the PTA adopted under the PTA Treaty shall remain in force until such time that a Protocol on the Free Movement of Persons, Labour, Service, Right of Establishment and Residence enters into force.

While protocols have been prepared, as of May 2007, only four member states (Kenya, Rwanda, Burundi, and Zimbabwe) had signed the Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence. Implementation has also lagged (COMESA 2007, p. 45).

One possible reason behind the failure of member states to ratify the various protocols may be the wide jurisdiction that the COMESA Treaty accords to the COMESA Court. Pursuant to Article 23 of the COMESA Treaty, the COMESA Court has the jurisdiction to adjudicate regarding all matters referred to in the Treaty. Further, Article 26 pro-

vides that a resident of a member state may refer to the COMESA Court for determination on the legality of any act of state on the grounds that any such act is unlawful or an infringement of the treaty. This is itself a novel creation, as it allows nationals to have direct access to an international tribunal, similar to that allowed in the ECJ. However, this type of strong adjudication may present states with concerns regarding the strictness of enforcement of their obligations.

### **Arrangements for mobility for selected types of Workers**

The agreements described below provide for mobility for selected groups of workers. The selectivity is established in two ways. First, it is applied by focusing on “business persons,” a category which includes certain business visitors, traders and investors, intracorporate transferees and professionals. Second, selectivity can be based on a schedule of commitments that is selective as to the type of vocation or profession that will be admitted. However, it is quite clear in these agreements that liberalization of immigration is neither comprehensive nor normally available to low-skilled workers.

#### **u.s. Free Trade Agreements: NAFTA, Chile, Singapore, Australia, and Jordan**

The structure and content of the migration provisions of recent free trade agreements to which the United States is a party largely reflect important congressional resistance to negotiating immigration commitments in the context of trade agreements. Congressman James Sensenbrenner, Chair of the House Judiciary Committee, noted in 2003 that

members of this Committee spoke with a united bipartisan voice that immigration provisions in future free trade agreements will not receive the support of this Committee. . . . I am also concerned that there not be future changes in the basic immigration law contained in future trade agreements. Article I, Section 8 of the Constitution makes immigration and naturalization law an exclusive enumerated power of the Congress, and we intend to follow the Constitution and not to delegate this authority to the executive branch of Government. (U.S. Congress 2003)

Of course, the trade agreements that Congressman Sensenbrenner discussed are required to be approved by Congress pursuant to majority voting, so there is little formal question of full delegation of authority to the Executive. The Naturalization Clause of Article I, Section 8, of the U.S. Constitution, in relevant part, states that “Congress shall have Power . . . To establish a uniform Rule of Naturalization.” However, Article I, Section 8, of the Constitution also makes regulation of commerce with foreign nations the exclusive jurisdiction of Congress—this is the reason why the U.S. has used “Fast Track,” now termed “Trade Promotion Authority,” to bring trade agreements to an up or down vote in Congress without amendment. So there is really no significant constitutional difference between migration and trade in terms of the role of Congress. However, Sensenbrenner describes a substantial political difference, and it is true that Congress has not made the kinds of delegations or preliminary delegations in the immigration area that it has made in the trade area.

U.S. organized labor has opposed the negotiation of immigration commitments in trade agreements. Hart noted that while negotiating the U.S.-Canada Free Trade Agreement (FTA), “The United States was prepared to see relatively easier access for managerial and professional travelers, but was reluctant to include general service and sale personnel, largely due to strong opposition from organized labour” (Hart 1994, p. 305).

Hence, to varying degrees, the U.S. FTA regime does not treat immigration commitments in the same manner as the EU, EEAA, EFTA, and certain other preferential trade agreement-based regimes, some of which provide for freedom of movement, establishment, and residence. The U.S. FTA approach to negotiating immigration commitments, like its approach to GATS, focuses on facilitating liberalization of trade in services, providing for temporary entry for business persons.

To a large extent, as a reflection of consistent United States policy with respect to negotiating immigration commitments in the context of trade agreements, the immigration provisions in the various agreements in the United States FTA regime appear to be modeled after or structured similarly to corresponding provisions in NAFTA.



## n Aft A

Signed in 1992, NAFTA established immigration provisions for certain types of business persons modeled on commitments in the 1988 U.S.-Canada FTA (Wasem 2006). For avoidance of doubt, NAFTA states clearly that nothing in the relevant chapter, Chapter 12 on Cross-Border Trade in Services, shall “impose any obligation on a Party with respect to a national of the other Party seeking access to its employment market, or employed on a permanent basis in its territory, and does not confer any right on that national with respect to that access or employment” (Article 1201[3] of NAFTA).

Similar language is found in the MONP Annex to the GATS, and has been replicated in a number of subsequent FTAs. (See Chapter 8.)

Chapter 16 of NAFTA, “Temporary Entry for Business Persons,” contains commitments from Mexico, Canada, and the United States to allow for temporary migration of business workers. Importantly, these provisions are limited to *temporary* entry (NAFTA Secretariat 2001). Article 1601 of NAFTA provides as follows: “This Chapter reflects the preferential trading relationship between the Parties, the desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry, and the need to ensure border security and to protect the domestic labor force and permanent employment in their respective territories.”

The agreement defines “business person” as “a citizen of a Party who is engaged in trade in goods, the provision of services or the conduct of investment activities” (NAFTA, Article 1608). NAFTA distinguishes among four main categories of temporary entry for business persons: 1) business visitors, 2) traders and investors, 3) intracorporate transferees, and 4) professionals (Annex to Article 1603 of NAFTA).

*Business visitors* include persons in research and design, growth, manufacture and production, sales, marketing, and other sectors.

*Traders and investors* include “business person[s] seeking to: (a) carry on substantial trade in goods or services principally between the territory of the Party of which the business person is a citizen and the territory of the Party into which entry is sought, or (b) establish, develop, administer or provide advice or key technical services to the operation of an investment to which the business person or the business

person's enterprise has committed, or is in the process of committing, a substantial amount of capital, in a capacity that is supervisory, executive or involves essential skills."

*Intracorporate transferee* is defined as a "business person employed by an enterprise who seeks to render services to that enterprise or a subsidiary or affiliate thereof, in a capacity that is managerial, executive or involves specialized knowledge, provided that the business person otherwise complies with existing immigration measures applicable to temporary entry." Further, "a Party may require the business person to have been employed continuously by the enterprise for one year within the three year period immediately preceding the date of the application for admission." No party may limit the number of "intra-corporate transferees."

*Professionals* are provided for in Appendix 1603.D.1, which also specifies the minimum education qualifications for each profession. States may not provide a numerical restriction on the number of professionals except for particular circumstances.

These categories parallel similar categories in U.S. visa law under §101(a)(15) of the Immigration and Nationality Act: B-2 visitors, E-1 treaty traders, L-1 intracompany transferees, and H-1B professional workers.

The NAFTA professional status is designated "TN." Neither Canadian nor Mexican professional workers otherwise meeting the requirements for TN status are subject to labor certification or similar tests. In the U.S. system, labor certification requires that employers conduct a search for U.S. workers and that the Department of Labor determine that admitting alien workers will not adversely affect the wages and working conditions of similarly employed U.S. workers (Wasem 2006, p. 5).

Under NAFTA, "each Party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to public health and safety and national security, in accordance with this Chapter, including the provisions of Annex 1603" (Article 1603[1] of NAFTA). "Work permits are required for all but business visitors and visas are still required but are limited to the approximate costs of services" (Nielson 2003, p. 101). Other existing immigration requirements (relating to public health and national security) continue

to apply. Furthermore, a “Party may refuse to issue an immigration document authorizing employment to a business person where the temporary entry of that person might affect adversely: (a) the settlement of any labor dispute that is in progress at the place or intended place of employment; or (b) the employment of any person who is involved in such dispute” (Article 1603[2] of NAFTA). The applicant must submit an application including a letter of offer of professional employment that describes the activity to be performed, the purpose of entry, and the proposed duration of stay, along with evidence of professional status.

The United States amended its *Immigration and Nationality Act of 1952* to accommodate the new commitments.

The major nonimmigrant category for temporary workers is the H visa. The current H-1 categories include professional specialty workers (H-1B) and nurses (H-1C). There are two visa categories for temporarily importing seasonal workers, i.e., guest workers: agricultural workers enter with H-2A visas and other seasonal workers enter with H-2B visas. Temporary professional workers from Canada and Mexico may enter according to terms set by the North American Free Trade Agreement (NAFTA) on TN visas. The law sets numerical restrictions on annual admissions of the H-1B (65,000), the H-2B (66,000) and the H-1C (500) visas. (Wasem 2005, p. 5, citations omitted)

Under the agreement, the United States initially made a numerically limited commitment for up to 5,500 Mexican professionals to enter annually under H-1 visas (Section 1 of the Appendix to 1603.D.4 of NAFTA). This limitation on the U.S. commitment expired in 2005 and was not renewed. Thus, there is no limit on TN visas (Wasem 2006). The U.S. visa commitments with respect to temporary business visitors, traders, and investors, and intracorporate transferees have remained the same. NAFTA prohibited the imposition of numerical restrictions on the quantity of visas available to these three categories of business persons (Section A[4], section B[2] and section C[2] of the Annex to Article 1603 of NAFTA). Canadians may obtain a TN visa at the port of entry, so long as they present a letter from a U.S. employer. Mexicans must have their employer file a labor condition application before applying for a visa at the U.S. embassy.

Under NAFTA, “parties shall encourage the relevant bodies in their respective territories to develop mutually acceptable standards and cri-

teria for licensing and certification of professional service providers and to provide recommendations on mutual recognition to the Commission” (Section 2 of Annex to Article 1210.5 of NAFTA).

Under Chapter 16 of NAFTA, a party may initiate dispute settlement proceedings under Article 2007 in relation to denial of opportunities to business persons, only if: “(a) the matter involves a pattern of practice; and (b) the business person has exhausted the available administrative remedies regarding the particular matter.” The remedies upon successful dispute resolution are deemed to be exhausted if a final determination in the matter has not been issued by the competent authority within one year of the institution of an administrative proceeding, and the failure to issue a determination is not attributable to delay caused by the business person.

### **u.s.-Chile FTA**

The United States and Chile entered into a free trade agreement in 2003 (U.S. Congress 2003). Chapter 14 of the U.S.-Chile FTA, based largely on Chapter 16 of NAFTA, is devoted to temporary entry of business persons. The “general principles” of Chapter 14 state that the parties seek to establish an agreement on temporary entry in order to enhance “. . . the preferential trading relationship between the Parties, the mutual desire of the Parties to facilitate temporary entry of business persons under the provisions of Annex 14.3 on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry, and the need to ensure border security and to protect the domestic labor force and permanent employment in their respective territories.”

Like NAFTA, the U.S.-Chile FTA also contains the express qualification that “this chapter does not apply to measures regarding citizenship, nationality, permanent residence, or employment on a permanent basis” (Article 14.1.2). Like NAFTA, the U.S.-Chile FTA makes the same distinction among traders and investors, professionals, intracorporate transferees, and business visitors. In addition, there is a definition of professional: “a national of a Party who is engaged in a specialty occupation requiring: (a) theoretical and practical application of a body of specialized knowledge, and (b) attainment of a post-secondary degree in the specialty requiring four or more years of study (or the equivalent

of such a degree) as a minimum for entry into the occupation” (Article 14.9 of the U.S.-Chile FTA). Additionally, the U.S.-Chile FTA requires a “labor attestation” (Section D(5) of Annex to Article 14.3 of the U.S.-Chile FTA).

Notably, the number of visas that the United States is to issue for professionals under the U.S.-Chile FTA is 1,400 (Appendix to Article 14.3(D)(6) of the U.S.-Chile FTA).<sup>3</sup> An aggregate of 6,800 visas is set aside during each fiscal year for the H-1B1 program under the terms of the legislation implementing the U.S.-Chile FTA and the U.S.-Singapore FTA together. This block of 6,800 H-1B1 visas is initially reserved from the annual limit (currently 65,000) for H-1B visas. Unused numbers in this pool can be made available for H-1B use. For fiscal year 2008, the U.S. Customs and Immigration Service has estimated that only 1000 of the H-1B1 visas will be used, and therefore has added 5,800 visas to the number of H-1B visas available for fiscal year 2008.

H-1B1 professional worker visas are counted against the aggregate U.S. H-1B cap of 65,000 visas during the first year and again after the fifth year of renewal.<sup>4</sup> Of course, the fact that these visas are counted against the total U.S. H-1B cap means that visas issued under these programs reduce those available to nationals of other states. This raises the same type of MFN issue that we see in trade law and investment law, albeit with distinct economic ramifications. From a trade perspective, we can think of this arrangement as a quota (the total cap) administered on a non-MFN basis. When the EU attempted to justify such a quota with respect to goods in the Bananas litigation, the WTO appellate body found a violation of the MFN requirement.<sup>5</sup>

There is also provision for mutual recognition of each state’s academic structure. Hence, Chile recognizes the baccalaureate, master’s, and doctoral degrees conferred by institutions in the United States as such, while the United States recognizes the *licenciatura* degree and *titulo profesional* and higher degrees conferred by institutions in Chile as such degrees (footnote to Article 14.9 of the U.S.-Chile FTA).

Dispute settlement is also similar to NAFTA insofar as there is no direct access to dispute resolution without having to prove continuous conduct as well as exhaustion of existing administrative remedies (Article 14.6 of the U.S.-Chile FTA).

## **u.s.-singapore FTA**

The U.S.-Singapore FTA contains temporary entry provisions similar to the U.S.-Chile FTA and NAFTA, including provisions allowing for temporary entry of business persons, traders and investors, and intracompany transferees.

As with the U.S.-Chile FTA, the chapter in the U.S.-Singapore FTA that provides for temporary entry of business persons starts with a strong qualifying statement that “this chapter does not impose any obligation on a Party with respect to a national of the other Party seeking access to its employment market, or employed on a permanent basis in its territory, and does not confer any right on that national with respect to that access or employment” (U.S. Trade Representative 2003a).

Similar to the U.S.-Chile FTA, the U.S.-Singapore FTA provides that professionals must have the following credentials to qualify for temporary entry: “(a) theoretical and practical application of a body of specialized knowledge; and (b) attainment of a post-secondary degree in the specialty requiring four or more years of study (or the equivalent of such a degree) as a minimum for entry into the occupation. Such degrees include the Bachelor’s Degree, Master’s Degree, and the Doctoral Degree conferred by institutions in the United States and Singapore” (Section IV[1] of Annex to Article 11A of the U.S.-Singapore FTA).

As noted above, the qualifications for temporary entry in these FTAs prevent entry under these agreements by lower-skilled persons. Although certain types of business exchanges were deemed suitable for the FTA, the importation of lower-skilled labor was not open to negotiation. This was as agreeable to Singapore as it was to the United States, as Singapore had a preexisting “Foreign Talent” policy where it seeks to attract highly skilled, as opposed to lower-skilled, labor (Koh and Chang 2004, p. 210).<sup>6</sup>

The U.S.-Singapore FTA provides the same types of obligations as the U.S.-Chile FTA with respect to entry of “professionals.” Notably there is also a similar requirement for labor market attestation. This can be found in the side letter between the U.S. Trade Representative and the Singapore Ministry of Trade and Industry. In addition, another side letter clarifies that Singapore’s intention of setting a salary criterion does not constitute breach (U.S. Trade Representative 2003b).

Under the U.S.-Singapore FTA, the United States committed to provide up to 5,400 visas annually to Singaporeans (appendix to Article 11A.3 of the U.S.-Singapore FTA). Holders of an FTA professional worker visa, unlike holders of an H-1B visa, may remain in the United States indefinitely. Holders of the FTA professional worker visa are temporary residents, and may only work for employers that meet the labor attestation requirements. The U.S.-Singapore and U.S.-Chile FTAs provide that the United States shall not require labor certification as a condition of entry and shall not impose numerical limits on intra-company transfers.<sup>7</sup>

The same types of arrangements as those found in NAFTA and the U.S.-Chile FTA were used in the U.S.-Singapore FTA in relation to the issues of dispute resolution and bases for denial of visa (Article 11.4 and Article 11.8 of the U.S.-Singapore FTA, respectively).

#### **u.s.-Jordan FTA and Australia-u.s. FTA**

The U.S.-Jordan FTA and the U.S.-Australia FTA do not follow the NAFTA structure of regulating the temporary entry of business persons. While the U.S.-Australia FTA, signed May 18, 2004, contains no immigration provisions, the United States subsequently passed legislation for 10,500 visas for Australian nationals to perform services in specialty occupations under a new E-3 temporary visa, as part of supplemental appropriations for 2005 to support military operations in Iraq and Afghanistan (U.S. Trade Representative 2004). The professional requirements of the E-3 visa mirror requirements in the Chile and Singapore FTAs, but eligibility is significantly expanded. According to the Government of Australia's Department of Home Affairs and Trade (and illustrating the MFN issue raised above),

Qualified Australians, wishing to reside and work in the United States, now find themselves in a privileged position. They have access to a dedicated visa that is easier and less costly to obtain than the traditional H-1B business visa. Under the regulations, 10,500 E-3 visas per annum have been reserved exclusively for Australian nationals (by comparison only 900 Australians succeeded in gaining the US H-1B business visa in 2004). Unlike the H-1B visa, spouses of E-3 visa holders are now able to work in the United States, eliminating a barrier that in practice stopped many Aus-

tralian from applying for the H-1B visa. E-3 visa holders will be able to apply for extensions. (Australian Government, Free Trade Agreements 2005)

The commitments to Chile, Singapore, and Australia, like those made in the WTO GATS, generally exclude low-skilled workers.

The introduction of the “E-3” visa in connection with the U.S.-Australia FTA in May 2005, which is essentially an H-1B visa only for 10,500 Australians a year, will make the annual congressional H-1B cap less reliable as a measure of foreign high-skilled labor inflows into the United States. As the *Immigration and Nationality Act* draws a clear distinction between H-1B visas and E-3 visas, the number of E-3 visas provided to Australians should not count against the numerical limit which only applies to H-1B visas. However, this special treatment for Australia raises MFN-type issues. The E-3 arrangements for Australia further indicate that at least for “allied developed countries,” visas for high-skilled persons are increasingly becoming a bargaining chip in FTA negotiations. This does not so far seem to be the case in U.S. FTA negotiations with developing countries (Kirkegaard 2005, p. 10).

The U.S.-Jordan FTA is also different from the NAFTA model. Nielson defines it as “an agreement using the GATS model with some additional elements” (Nielson 2003, p. 103). In the U.S.-Jordan FTA, labor mobility is covered under the section on trade in services, which is modeled after GATS. Accordingly, the same types of limitations on rights and obligations relating to immigration and entry of the domestic labor market provided under the GATS Annex on Movement of Natural Persons, discussed in Chapter 8, apply under this agreement. Additionally, the U.S.-Jordan FTA provides that Jordan nationals are eligible to apply for treaty-trader (E-1) and treaty-investor (E-2) visas (footnote 12 to Article 8(2) of the U.S.-Jordan FTA), no numerical limitation or commitment was stipulated. Moreover, the numerical limitations that apply to H-1 visas as provided in the *Immigration and Nationality Act* would not apply to E visas (U.S. Trade Representative 2002).

While additional U.S. FTA partners have requested inclusion of temporary entry provisions, the U.S. Trade Representative (USTR) has consistently demurred and instead referred FTA partners to Congress for any potential new visa commitments.<sup>8</sup> United States-Dominican Republic-Central America Free Trade Agreement has no explicit im-



migration provisions. This is noteworthy in light of the large amount of illegal immigration to the United States from these countries.

It is reasonably clear, after a survey of the above U.S. FTAs, that most of them follow a distinct NAFTA prototype. Even in the cases of the U.S.-Jordan FTA and the Australia-U.S. FTA, deviations from the NAFTA prototype are explained according to the specific negotiation contexts. As will be seen later, some other countries (in particular, Japan and Singapore in the JSCEPA) have also adopted the NAFTA model to some degree.

### **Caribbean Community**

The original 1973 Treaty of Chaguaramas did not address migration, but merely stated that member states should “as far as practicable” extend to persons belonging to other member states, preferential treatment over persons belonging to states outside the common market with regard to the provision of services. A 2001 revised Treaty of Chaguaramas (CARICOM 2001) integrates the obligations contained in a 1998 protocol, and provides for the prohibition of new restrictions to the right of establishment and removal of existing restrictions on the right of establishment. Article 32(3) provides as follows:

- 1) The right of establishment within the meaning of this Chapter shall include the right to:
  - a) engage in any non-wage-earning activities of a commercial, industrial, agricultural, professional or artisanal nature;
  - b) create and manage economic enterprises referred to in paragraph 5(b) of this Article.
- 2) For the purposes of this Chapter “non-wage earning activities” means activities undertaken by self-employed persons.

Further, the management of removal of restrictions is also provided for in Article 34. A committee of national ministers of trade and development (COTED) is generally empowered, by a three-fourths majority vote, to take a number of types of supplementary actions to secure the right of establishment, including to “require the Member States to remove all restrictions on the movement of managerial, technical and supervisory staff of economic enterprises and on establishing agencies, branches and subsidiaries of companies and other entities established in

the 23” (Article 34[c]). COTED is also empowered to make decisions relating to “the conditions governing the entry of managerial, technical or supervisory personnel employed in such agencies, branches and subsidiaries, including the spouses and immediate dependent family members of such personnel” (Article 34[d][2]).

Furthermore, Article 45 of the revised Treaty establishes a commitment to the “goal” of free movement of Community nationals within the Community. Article 46 establishes free movement in order to seek employment for university graduates, media workers, sportspersons, “artists,” and musicians. It also provides that member states must act in order to

provide for movement of Community nationals into and within their jurisdictions without harassment or the imposition of impediments, including

- i) the elimination of the requirement for passports for Community nationals travelling to their jurisdictions;
- ii) the elimination of the requirement for work permits for Community nationals seeking approved employment in their jurisdictions;
- iii) establishment of mechanisms for certifying and establishing equivalency of degrees and for accrediting institutions;
- iv) harmonisation and transferability of social security benefits

To facilitate the free movement of highly skilled labor, the revised Treaty also provides for the establishment of “common standards and measures for accreditation or when necessary for the mutual recognition of diplomas, certificate and other evidence of qualifications of the nationals of the Member States in order to facilitate access to, and engagement in, employment and non-wage-earning activities in the Community.” Further,

Member States shall establish or employ, as the case may be, appropriate mechanisms to establish common standards to determine equivalency or accord accreditation to diplomas, certificates and other evidence of qualifications secured by nationals of other Member States and COHSOD [the Council for Human and Social Development] shall also establish measures for the co-ordination of legislative and administrative requirements of the Member States for the participation of Community nationals in employment and

for the conduct of non-wage-earning activities in the Community.  
(Article 35 of the revised Treaty)

In addition, the Caribbean Community (CARICOM) regime provides a “safeguard mechanism” which allows for derogation from obligations by states in cases of hardship. Article 47 provides a nuanced procedure that can allow states to respond to “serious difficulties in any sector of the economy of a Member State or occasions of economic hardships in a region of the Community.”

Despite these measures, however, there are still significant gaps in CARICOM labor mobility, including limitations of free movement of labor to highly skilled labor, and slow and inconsistent implementation (Jessen and Rodriguez 1999, pp. 16–71).<sup>9</sup>

CARICOM has also implemented a CARICOM visa arrangement in 2007. This new visa arrangement was intended to enhance measures being taken to reduce the risks associated with drug trafficking, terrorism and trafficking in humans during ICC Cricket World Cup 2007. More importantly, it also is a step toward harmonization of visa policy and procedures as part of common policy on the free movement of persons.

### **Japan-singapore Closer e onomic Partnership Agreement (Js Ce PA)**

The obligations with respect to movement of labor in the JSCEPA are modeled after the GATS framework, and only apply to movement of persons entering either territory for business purposes. As Nielson (2003, pp. 102–103) notes, “Chapter 9 (Movement of natural persons) applies to measures affecting the movement of natural persons of a Party (nationals of Japan and nationals and permanent residents of Singapore) who enter the territory of the other Party for business purposes (including as investors). Carve-outs are similar to the GATS Annex (i.e., regarding nationality, citizenship, residence or employment on a permanent basis).”

Further, like the U.S. FTA regime, the JSCEPA provides for specific commitments which distinguish between four kinds of persons entering for business purposes. They are business visitors, intracorporate transferees, investors, and natural persons who engage in work on the basis of a personal contract with public or private organizations.

Article 92(4) limits the specific commitments to allow entry of persons for business purposes only to sectors provided under Chapter 7 (the chapter that deals with trade in services).

Singapore's specific commitments allow for business visitors to stay for one month, extendable up to three months. Intracorporate transferees who are managers, executives, or specialists of firms providing services in Singapore (note the linkage to services), and have been in the employ of their firm for at least one year, may remain for a two-year period extendable for periods of up to three additional years each time for a total term not exceeding eight years (further extensions may be possible). Independent service suppliers are limited to engineers recognized under the domestic laws and regulations of Singapore, and are admissible under similar terms.

Japan's specific commitments allow for business visitors (as defined) to remain for a period not exceeding 90 days. Intracorporate transferees who have been employed for at least a year, and who are high-level managers, work with high technology or high-level human science, and certain types of legal specialists, may also enter and stay without specific limits. Finally, independent engineering professionals are permitted to enter and stay without specific limits.

Also, the JSCEPA, in Article 93, provides that either state *may* recognize the professional qualifications of the other state. To this end, Article 94 establishes a Joint Committee on Mutual Recognition of Professional Qualifications. The Joint Committee is responsible to review the issues concerning the effective implementation of Article 93, identifying and recommending areas for and ways of furthering cooperation between the parties.

## **Agreements using the GATS model with some Additional elements**

### **eu -mexico Free Trade Agreement**

The EU-Mexico Free Trade Agreement (EU-Mexico FTA) called for the negotiation of a services integration agreement under Article V of GATS and addresses labor mobility through trade in services. Article 27(4) guarantees that individual states retain their sovereignty to regulate immigration in their own jurisdictions.

Nothing in this title shall prevent a party from applying its laws, regulations, and requirements regarding entry and stay, work, labor conditions, and establishment of natural persons provided that, in so doing, it does not apply them in a manner as to nullify or impair the benefits accruing to the other party under the terms of a specific provision of this title.

Article 9 of the EU-Mexico FTA also provides that parties shall move toward mutual recognition of requirements, qualifications, licenses, and other regulations, for the purpose of the fulfillment, in whole or in part, by service suppliers of the criteria applied by each party for the authorization, licensing, operation, and certification of service suppliers and, in particular, professional services.

### **Agreements that use the GATS model**

#### **mercosur**

Mercosur has not moved toward general free movement of labor. As can be seen from the Protocol of Montevideo on Services (the Montevideo Protocol), Mercosur's treatment of movement of labor directly replicates the GATS model.<sup>10</sup> Market access is based solely on specific commitments which are annexed to the Montevideo Protocol covering the movement of all categories of natural persons who provide services within the framework of the protocol (Pena 2000, p. 158). The Annex to the Montevideo Protocol on the Movement of Natural Persons Supplying Services is largely similar to that under GATS.

Article XI of the Montevideo Protocol addresses the possibility that a Mercosur member state might enter into an arrangement for mutual recognition of profession qualifications with a third state. It provides in paragraph (a) that this will not necessarily violate the obligation to provide MFN treatment.

When a Member recognizes, unilaterally or by way of an agreement, the education, experience, licenses, matriculation records, or certificates obtained in the territory of another Member or any country that is not a member of Mercosur:

- a) Nothing in this Protocol shall be construed to require this Member to recognize the education, experience, matricula-

tion records or certificates obtained in the territory of another Member; and

- b) The Member shall accord to any other Member an adequate opportunity to i) demonstrate that the education, experience, licenses and certificates obtained in its territory should also be recognized; or ii) to conclude an agreement or treaty of equivalent effect.

Modest progress toward liberalization has been made in other areas. Mercosur approved in two decisions in 1999 and 2000 an agreement to facilitate movement across neighboring borders. In 1997, Mercosur had approved an agreement to coordinate social security rights. In 2000, Mercosur approved an agreement on visa exemptions allowing artists, scientists, sportspersons, journalists, specialized technicians, and professionals to enter other member states without a visa for a stay of up to 90 days, extendible to up to 180 days.

The 2002 Agreement on Residence in Mercosur States, Bolivia and Chile (the Residence Agreement) provides that citizens of the member states may live and work in other member states. The Residence Agreement is not yet in force. It provides that citizens of member states may apply for temporary residence in other member states, with a maximum of two years, and may apply for permanent residence thereafter. Immigrants are permitted to bring their families with them, except for those who are disabled. Immigrants are permitted to work in any occupation, and are accorded broad rights of national treatment.

The Residence Agreement is an important step, as it was motivated in part by the need to stop illegal human trafficking and exploitation—it does so by making movement legal.

## **COncLusi On**

As stated at the outset of this chapter, the review of agreements performed here advances our discussion in two ways. First, it provides evidence that many states are indeed engaging in negotiations of liberalization of international labor migration. While these efforts are regional and often limited, they show that states believe that cooperation may

be useful in this area. Second, this review provides a broader supply of examples of methods of cooperation. It will assist negotiators as they examine the possible methods of cooperation available to them.

### n otes

1. For a recent look at the state of legislation on migrant workers in West Africa, see Ba and Fall (2006).
2. It should be noted that due to the conclusion of the various protocols relating to freedom of movement, residence and establishment, the ECOWAS Treaty has been amended to reflect the rights and obligations contained in the respective protocols. References to the ECOWAS Treaty here all are made to the revised treaty.
3. The implementing legislation amended §101(a)(15)(H) of the Immigration and Nationality Act to designate a portion of the aggregate H-1B visas (H-1B1 visas) for professional workers entering pursuant to the Chile and Singapore FTAs.
4. Arguably, U.S. commitments under NAFTA to provide H-1B visas are not subject to the general numerical limitation on H-1B visas as provided in the Immigration and Nationality Act. Sections 214(e)(i) and 214(e)(ii) of the Immigration and Nationality Act give the Attorney General the authority to regulate the admission of Canadian and Mexican nationals pursuant to NAFTA and the Canadian-U.S. FTA, including establishing numerical limits on the admission on Mexican nationals. Further, U.S. commitments under the U.S.-Australia FTA and U.S.-Jordan FTA are not affected by the numerical limitations in the Immigration and Nationality Act as the limitations only relate to H-1B (professional worker) visas and not to E visas.
5. WTO (1997). Adopted by Dispute Settlement Body, November 17, 1997.
6. See also Low (2002, pp. 409–425) for discussion on aspects of Singapore’s Foreign Talent Policy.
7. Chapter 11, §3 of the U.S.-Singapore FTA, Annex 11A, signed May 6, 2003; Chapter 14, §3 of the U.S.-Chile FTA, Annex 14.3, signed June 6, 2003.
8. Mikael Lurie, who served, along with Jeremy Leong, as research assistant to the author in connection with the preparation of this chapter, participated in FTA negotiations between the United States and the United Arab Emirates in November 2005 where the UAE delegation repeatedly requested temporary entry provisions in the FTA USTR and State Department negotiators insisted that the United Arab Emirates negotiators would have to lobby the U.S. Congress directly, akin to the strategy employed by Australia following Judiciary Chairman Sensenbrenner’s objections to including immigration provisions in the Chile and Singapore FTAs.
9. Duchs and Straubhaar provide a useful overview of the state of ratification of the various CARICOM protocols (Duchs and Straubhaar 2003, p. 12). They conclude that “Fourth, the establishment of free movement within CARICOM might not stimulate strong migration flows. There are not many incentives for a broad reallocation of labour within CARICOM” (Duchs and Straubhaar 2003, p. 55).

10. Franciso Prieto (2000, p. 230) argues that commitments negotiated in regional trade agreements for services provided through GATS (temporary movement of natural persons) are limited. He states, "The limited commitments in this field are restricted to intracompany personnel movements and to top-level executives, with little progress in the provision of professional services and much less or none at all in the provision of technical and specialized services." The same criticism may also be directed by analogy to arrangements using the GATS model with some additional elements as discussed above.



## 8

# Mode 4 of the General Agreement on Trade in Services

The WTO does not deal with labor or migration per se, just as it does not deal with finance or investment per se. However, labor has entered the WTO in several ways, including through the subject of trade in services. In fact, there is an important overlap between trade in services concerns and migration concerns.

From a trade standpoint, limits on immigration, where immigration is necessary to cross-border trade in services, are barriers to that trade. These barriers include quotas or other quantitative restrictions on immigration, bureaucratic formalities involved with obtaining a visa, visa fees, discrimination against foreign workers, and limits on recognition of professional qualifications (Chaudhuri, Mattoo, and Self 2004). Indeed, some states have imposed wage parity conditions that require those employing foreign personnel to pay them a wage similar to that paid to domestic personnel. This is reminiscent of antidumping measures in connection with goods trade. Other states impose economic needs tests or labor market conditions that have not been used in connection with trade in goods or other types of trade in services (although economic needs tests have been scheduled in some sectors under Mode 3). Of course, individuals are not commodities, but there are salient analogies and overlaps between trade and migration.

From the founding of the General Agreement on Tariffs and Trades (GATT) in 1947 until the founding of the WTO in 1994, the multilateral trade system paid little attention to labor (Charnovitz 2003a, p. 241). Under the 1994 WTO GATS, one mode of supply of services across borders is the so-called Mode 4, specified in Article I:2(d) of GATS: “by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.”

Perhaps surprisingly, Mode 4 was seen as compensation to developing countries for inclusion of Mode 3 (commercial presence, which includes investment in services enterprises) at the request of developed

countries (Nielson and Taglioni 2003, p. 6).<sup>1</sup> This is surprising from an economic standpoint because, first, investment is generally understood to be beneficial to developing countries, and second, the risk of brain drain makes Mode 4 of uncertain benefit to developing countries, especially because Mode 4 commitments as agreed in 1994 generally did not cover unskilled labor (although there is no *a priori* reason why they could not have). Of course, the fact that Mode 4 is limited to temporary migration reduces any brain drain concern.

Furthermore, the 1994 Uruguay Round commitments in Mode 4 were modest (see Carzaniga 2003; OECD 2002; and WTO 1999a). The GATS is a framework agreement in the sense that it is a positive list in which most obligations only apply to service sectors listed and then only to the extent not excluded. Most countries only made limited commitments. However, this does not mean that greater commitments cannot be made in the future, or that the character of GATS as a positive list agreement cannot be modified if states determine to do so.

The basic GATS disciplines include national treatment and market access. But in connection with these disciplines, GATS is a positive list-based agreement. Therefore, the application of these disciplines is dependent upon scheduling of the relevant service sector in the schedule of commitments of the relevant state. In other words, unless the service sector is scheduled, there is no national treatment or market access obligation. States were permitted to specify limits to their national treatment or market access obligations on the face of their schedules of commitments, and the schedules are replete with such limits. On the other hand, the MFN obligation contained in GATS applies regardless of the scheduling of the relevant service sector. This obligation was subject to the much more limited, and degressive, list of Article II exemptions. Finally, GATS contains rather modest disciplines on domestic regulation.

There are three critical limitations on Mode 4 as agreed in the Uruguay Round. First, GATS does not cover all labor, only that which is related to the supply of services as specified in Article I:2(d). So, labor related to the production of goods is generally not covered (even though in theoretical terms production of goods results from the application of “services” to raw materials).<sup>2</sup> Second, as mentioned above, GATS is a positive list agreement, meaning that only those service sectors

that are scheduled are the subject of commitments, and states negotiate over these schedules. In the 1994 WTO agreement, Mode 4 services commitments did not fare very well. Third, the GATS Annex on Movement of Natural Persons Supplying Services under the Agreement (the MONP Annex) restricts the scope of application of GATS to immigration measures.

In fact, the commitments were generally limited to high-skill-based services. Many commitments were linked to Mode 3—commercial presence: movement of natural persons as intracorporate transferees in connection with commercial establishments. Most commitments were limited to cases of intracorporate transferees where the transferee had worked for the corporate transferor for a minimum period of time. The requirement of a Mode 3 linkage limits availability to developing countries, which are generally capital importing rather than exporting countries. For commitments relating to independent service providers, most commitments specified that a prior contract would be required: Mode 4 did not open up the domestic market to contract seekers. See the discussion of the MONP Annex below. Many of the commitments still contain economic needs tests or labor market condition tests that are highly discretionary with the destination state.

### **The MONP ANNEX**

The MONP Annex specifies as follows:

- 1) This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.
- 2) The Agreement 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.
- 3) . . . Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.

- 4) The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment. (footnote omitted)

Under the first clause of paragraph 2, states have no obligations under GATS with respect to those seeking employment. The exclusion by paragraph 2 of the GATS MONP Annex of “measures affecting natural persons seeking access to the employment market of a Member” would seem to allow member states to prevent individuals from looking for a job within the member state (Mattoo 2003, p. 4). However, once an individual secures a position, it would seem that GATS would apply.

One interpretation of the MONP Annex is that it adds emphasis to the limitation imposed by the first clause of Article I:2(d) of GATS: “by a *service supplier* of one member” (emphasis added). “Service supplier” includes both juridical and natural persons.<sup>3</sup> This interpretation assumes a distinction between service supplier and job seeker. Of course, at the margins the difference between an individual as service supplier seeking clients (covered) and an individual as labor market entrant (excluded) is one of contractual style, and not necessarily of substance (Winters et al. 2002, p. 87). This is the distinction between an independent contractor and an employee.

The second clause of paragraph 2 also makes clear that GATS does not apply to measures regarding citizenship, residence, or employment on a permanent basis. Thus, GATS does not address permanent migration. However, the second clause of paragraph 2 would seem to suggest, by reverse implication, that GATS does apply at least to measures regarding employment on a *temporary* basis. This understanding is especially interesting when combined with paragraph 4. The “shall not prevent” language of paragraph 4 can reasonably be understood as a “necessity” test. Paragraph 3 seems to confirm this understanding.

In its Turkey–Restrictions on Imports of Textile and Clothing Products decision, the appellate body examined the relationship between Article XXIV of GATT, regulating the formation of customs unions and free trade areas, and other provisions of GATT. In that provision,

the appellate body emphasized the words “shall not prevent” and held that “Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed” (see WTO 1999b, para. 46). If the same language in paragraph 4 of the MONP were understood similarly, it would mean that the purposes listed in paragraph 4 would justify action inconsistent with GATS *only* to the extent that achievement of those purposes would be prevented if the measure were not allowed.

By allowing states unrestricted authority to “regulate” the entry of natural persons, does paragraph 4 allow prohibition, or is “regulate” meant in a narrower sense? After the appellate body decision in *U.S.—Gambling Services*, we might expect some bias toward foreclosing state discretion that could be used to reduce the value of concessions (see WTO 2005). Thus, a narrower approach to “regulate” seems more likely (Charnovitz 2003a, pp. 243–244).

Paragraph 4 of the MONP Annex provides that immigration measures shall not violate the GATS “provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.” Thus, no exception is available for immigration measures that nullify or impair benefits accruing under a specific commitment

Footnote 13 to paragraph 4 states that “the sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.” This clarification can be read under an *expressio unius* interpretation to mean that other types of discrimination among natural persons of members might nullify or impair specific commitments. The “specific commitment” most likely to be considered nullified or impaired by discrimination between natural persons of different members would be the MFN obligation in Article II, although there is certainly an argument that by “specific commitment” the authors intended to address positive list-type commitments for national treatment and market access, rather than the “negative list” MFN obligation, which is applicable unless specifically excepted.

Furthermore, there is at least some question whether such measures could be the basis for a complaint that they nullify or impair existing concessions, even if no violation of a specific GATS obligation exists. Article XXIII of GATS provides the possibility for this type of nonviolation complaint. The possibility for such a complaint, against measures specifically excluded from coverage in the agreement, is not free from doubt. Moreover, a nonviolation nullification or impairment claim would generally depend on the restriction being imposed *after* the date that the nullified or impaired concession is made, and in a way that the complaining state should not have anticipated (Trachtman 1998).

The GATS MONP Annex seems to require states to allow service suppliers and employees of service suppliers to enter temporarily, provided that they are covered by a commitment (Arup 2000, p. 125). As suggested above, the temporary nature of entry is derived by reverse inference from the second clause of paragraph 2 of the GATS MONP Annex.

No guidance is given by GATS as to what is meant by “temporary,” which itself is not treaty language but is inferred from the exclusion of “permanent” employment. While this issue was debated extensively in the original GATS negotiations, negotiators determined to allow flexibility to reflect different circumstances (Self and Zutshi 2003, p. 35). Thus, it is open to states in their schedules of commitments to specify the period of time for which people admitted under particular concessions may remain. Where states do not define the period of time for admittance in their schedules, they could be understood not to make any commitment as to the period of admittance (WTO 2001b).

In any event, there seem to be substantial limits on the scope of labor market access that can be provided by Mode 4. This seems intentional. In 1994, few would have thought it practical to suggest that extensive commitments for labor market access would be feasible. This work argues elsewhere that it may be normatively attractive to reconsider the possibility for such commitments, and to do so in a comprehensive manner that considers detailed issues to an extent similar to, or even beyond, the level addressed in the GATT and GATS.

## GATS COMMITMENTS

GATS is best understood as a framework agreement, providing a structure that states may use in order to negotiate services commitments over time. So the discussion above of the framework must be qualified by the degree to which states actually have made, or will make, commitments in particular areas.

It is also worth noting that states approached their Mode 4 commitments in the Uruguay Round, as they did other services commitments: warily. In connection with Mode 4, they generally made commitments at *lower* levels of liberalization than those applied in practice (Chaudhuri, Mattoo, and Self 2004, p. 7; Nielson and Cattaneo 2003).

So far, commitments in Mode 4 have been quite limited. Mode 4 today is estimated to account for less than 2 percent of the total value of services trade. Present commitments refer almost exclusively to higher-level personnel. More than 40 percent of Mode 4 commitments are for intracorporate transferees whose mobility is intimately related to foreign direct investment; another 50 percent of commitments cover executives, managers and specialists, and business visitors. All this means that the Mode 4 liberalization achieved to date has been of limited significance for developing countries whose comparative advantage lies in the export of medium- and low-skilled, labor-intensive services (World Bank 2004). It also means that Mode 4 might facilitate brain drain, with the possibility of adverse effects for developing countries under some conditions, although the limitation of Mode 4 to temporary movement ameliorates this risk.

### Schedules of Commitments

States may make different commitments in different service sectors or subsectors and as they make these commitments, they are permitted to impose limitations on the extent to which these commitments provide national treatment or market access. National treatment and market access only apply to the extent of commitments. Thus, states can craft their schedules of commitments to respond to particular concerns, or to allow space for particular types of protective measures. For example, many GATS commitments refer to short-term employment,

and distinguish between business visitors staying less than three months and temporary movement of up to a few years (Nielson and Taglioni 2003, p. 6).

States are also permitted to distinguish among the four modes of supply comprehended by GATS. So, they may make a commitment as to commercial presence (Mode 3) in accountancy services but determine not to make any Mode 4 commitment in accountancy services. Again, the key is that states may determine the scope of their commitments, even to the extent of including in their commitments rules that are discriminatory against foreign service providers. It is in this sense that GATS must be understood as a framework agreement. Moreover, in connection with Mode 4, many schedules begin by stating that the sector is “unbound” in Mode 4, and then make narrow exceptions to this basic unbound position.

The main exception to the positive list principle is in MFN: states are required to provide unconditional MFN treatment in connection with all measures covered by GATS, except in the rather limited cases where they listed an exemption to their MFN obligations.<sup>4</sup> This raises important questions for bilateral, plurilateral, or regional agreements for labor market integration or free trade in services. These questions are addressed below.

### **Sectors Addressed**

Most of the Uruguay Round service commitments in Mode 4 are confined to higher-skilled types of service: manager, executive, or specialist (Nielson and Taglioni 2003, p. 8). “Only 17 percent of all horizontal entries cover low skilled personnel (e.g., ‘business sellers’) and only 10 countries have allowed some form of restricted entry to ‘other level’ personnel” (Nielson and Taglioni 2003, p. 12). States made fewer fully liberal commitments in Mode 4 than in other modes. Where states made Mode 4 commitments, they often imposed restrictions. For example, there are a number of commitments that are subject to economic needs tests or labor market tests: is the relevant area underserved, or is it glutted? Other types of restrictions include quotas or specified proportions of foreign versus local workers and senior staff.



## h orizontal Commitments

Nearly all WTO members made liberalizing commitments under Mode 4 in the Uruguay Round (Self and Zutshi 2003, p. 35). Most of these commitments were in the form of *horizontal* commitments—applying broadly to all sectors listed subsequently in the member state’s schedule of commitments. However, these horizontal commitments often take the form of “unbound, except for . . .” and then specify particular conditions for admission of particular types of service workers. The sector covered by these horizontal commitments are themselves limited: an OECD study found that “there is a particularly low incidence of commitments in those sectors of particular importance to Mode 4” and that generally, “commitments for Mode 4 are restricted compared to other modes” (OECD 2002).

According to a WTO analysis of GATS *horizontal* Mode 4 commitments made in the Uruguay Round (and through 2002), 42 percent of these commitments relate to intracorporate transferees, 28 percent relate to other executives, managers, or specialists, and 23 percent relate to business visitors. Thus, 93 percent of commitments are irrelevant to semiskilled or unskilled labor. In connection with Mode 4, the horizontal part of many states’ schedules represents the limit of their commitment (Carzaniga 2003, p. 24).

The original U.S. GATS schedule of commitments included a horizontal commitment relating to Mode 4. However, this commitment was limited to temporary entry of services salespersons for up to 90 days, intracorporate transferee managers, executives, and specialists, as defined, for up to three years with the possibility of extension for up to two years, and managers or executives in connection with establishment of commercial presence under the GATS. Note that service salespersons do not perform the services themselves. Currently, managers and executives can remain in the United States for a total of up to seven years (under the L1-A program) and “specialists” can remain up to five years (L1-B). The U.S. Immigration Service is subject to no limits in the number of L-1 visas that it can issue, and these visas are not subject to a wage parity or economic needs test.

Thus, like the commitments of many other developed countries, these U.S. commitments are limited to certain hierarchical criteria that

tend to exclude low-skilled labor. Horizontal commitments as of April 2002 are largely concerned with executives, managers, and specialists (Carzaniga 2003, p. 25). With respect to intracorporate transfer and managers and executives in connection with the establishment of a commercial presence, developed countries such as the United States have linked Mode 4 to Mode 3 and have thereby ensured the movement of capital (or at least establishment) in connection with labor. As the users of Mode 3 are more likely to be capital-exporting countries, this type of linkage results in a certain bias.

In addition, in connection with employment-based movement, the U.S. bound temporary entry for up to 65,000 persons annually as set out in the U.S. H-1B visa program (Grimmett 1998), consisting of certain fashion models and persons engaged in a specialty occupation, requiring theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's or higher degree in the specialty. This horizontal commitment represents the maximum U.S. commitment—specific sectors do not provide additional market access, but in some cases reduce market access. For the H-1B program, employers must not pay below the prevailing wage, and there may be no layoffs for the position within six months before or 90 days after the date of hiring. Workers entering under this program can stay for three years, with a possible extension to a maximum total stay of six years.<sup>5</sup> Many H1-B visa holders move from temporary migration to permanent residence status (Lowell 2000).

### **e conomic Needs and Wage Parity Tests**

As discussed above in connection with GATS commitments, many states continue to impose economic needs tests—or labor market needs tests—as conditions for market access. Another related test is a wage parity test, which seeks to ensure that imported labor does not undercut the pricing of domestic labor. Wage parity tests, while distinct from antidumping duties and antisubsidies countervailing duties in the goods field, serve a similar purpose: to limit the degree to which domestic persons are placed under price pressure by imports.

## DOh A Ne GOTiATiONS

Many developing countries have emphasized Mode 4 in the Doha Round negotiations, which began in 2002 (the services negotiations actually began in 2000, pursuant to the “built-in agenda” of the Uruguay Round agreements). The negotiations for increased market access proceed through a “request-offer” system in which states make requests to other states that they liberalize, which respond with initial offers.

Immigration and Mode 4 interests of developing countries have received some attention in the Doha Round, but there are few signs that substantial commitments will be made that would allow developing country personnel, especially at less than the highest skill levels, to enter other countries (Winters 2003).

Fourteen developing countries (Argentina, Bolivia, Chile, The People’s Republic of China, Colombia, Dominican Republic, Egypt, Guatemala, India, Mexico, Pakistan, Peru, the Philippines, and Thailand) made an informal proposal in 2003 (WTO 2003a). They stated that “developing countries in general have comparative advantages only across a narrow range of service activities. The primary mode for most of these relates to Mode 4.” They suggested that

commitments in Mode 4 are primarily horizontal and bound for only a small subset of personnel related to commercial presence and at higher levels of skills. There is an asymmetrical absence of commitments for categories of personnel delinked from commercial presence and at lower skill levels, areas in which developing countries have comparative advantage. Recognition of common categories of movement, both linked to as well as delinked from commercial presence in the horizontal commitments of Members could prove useful and valuable. (WTO 2003a)

These states also suggested the codification or abolition of economic needs tests. As mentioned above, economic needs tests as structured in the Uruguay Round left wide discretion to states. They may be understood to play a similar role to that of safeguards, without the multilateral discipline.

In 2006, India prepared a collective request on behalf of itself and 14 other developing countries: Argentina, Brazil, Chile, China, Colombia, Dominican Republic, Egypt, Guatemala, Mexico, Morocco,

Pakistan, Peru, Thailand, and Uruguay. The target of the request was a group of wealthy countries. One of the main thrusts of this request was to de-link Mode 4 commitments from Mode 3, and to establish commitments relating to contractual service suppliers (CSS) and independent professionals (IP). Contractual service suppliers are employees of foreign-based enterprises with no commercial presence in the territory of the other WTO member. Independent professionals also provide services pursuant to contract, but as self-employed persons. Access would be permitted only for provision of services at a level of complexity and specialty that require, at a minimum, a diploma or a university degree, or demonstrated experience. For both CSS and IP, market access would not be subject to wage parity or economic needs tests, or if economic needs tests persist, they would be subject to narrower definition. Duration of stay would be for one year or for the duration of the contract (if longer) with provision for renewal. The concept of these categories is to address high-skilled-type activities.

Immigration and visa issues have generally been avoided. There has been discussion of a so-called GATS visa, which would facilitate temporary movement of natural persons through greater transparency and ease of administration, and impose clear limitations on the duration of stay.

The relationship between movement of natural persons under Mode 4 and immigration should be addressed directly, with specific commitments regarding the relationship between immigration rules and market access. Instead, under the MONP Annex, immigration is largely retained within the *domaine réservé*. Immigration might be understood as a “border measure” not unlike a tariff or a quota, while domestic regulation is an “internal measure.” While this distinction should not be accorded great substantive effect, it may be useful to consider the approach to immigration and Mode 4 commitments as part of general liberalization, while domestic regulation issues are treated separately.

Transparency has been a critical issue in Doha Round negotiations around Mode 4. Immigration rules, and visa and qualification requirements, remain complex and difficult, especially for unskilled and semiskilled labor unable to afford sophisticated legal advice. Developing countries have made proposals for greater predictability and transparency.

India proposed establishment of a “GATS visa” to ease entry of individuals benefiting from Mode 4 liberalization.<sup>6</sup> The United States and EU service industry associations have made similar proposals. This would entail a streamlined process for a limited visa. The Indian proposal includes more transparent criteria and improved administrative procedures for visas and work permits.

### **MFN Obligations and Exceptions Relating to Economic Integration, Labor Markets Integration, and Recognition**

As we evaluate the lessons of GATS for rules relating to free movement of labor, one of the most critical issues is the role of MFN-type antidiscrimination rules, and the exceptions to these rules for arrangements for closer economic integration.

Article II of GATS provides as follows: “With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.”

Thus, bilateral, regional, or other plurilateral agreements for service market integration, relating to measures covered by GATS, such as some of those discussed in Chapter 7, are regulated by Article II of GATS. These obligations are *not* dependent upon scheduling. However, bilateral, regional, or other plurilateral agreements may be eligible for exceptions under Article V (economic integration), Article V *bis* (labor markets integration agreements) and Article VII (recognition).

Of course, before we go too far it is necessary to recall that to the extent that the MONP Annex effectively excludes “measures affecting natural persons seeking access to the employment market of a Member . . . [as well as] measures regarding citizenship, residence or employment on a permanent basis,” these types of measures are not subject to the Article II MFN obligation, because these measures are not covered by the GATS. On the other hand, measures relating to temporary employment other than those affecting access to the employment market of

a member would generally be subject to the MFN obligation. So these distinctions will determine whether the MFN obligation applies or not.

However, Article V of GATS, similar to Article XXIV of GATT pertaining to goods, permits agreements for economic integration that cover services. Article V of GATS sets two main requirements. First, agreements must have “substantial sectoral coverage.” Footnote 1 of GATS provides that “this condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply.” Importantly, Mode 4 should not be a priori excluded. Second, within covered sectors, “substantially all discrimination” must be eliminated.

Article V *bis* of GATS provides that GATS shall not prevent states from entering into agreements for full labor market integration, provided that they exempt citizens of other parties to the agreement from requirements concerning residency and work permits. Footnote 2 to GATS states that “typically, such integration provides citizens of the parties concerned with a right of free entry to the employment markets of the parties and includes measures concerning conditions of pay, other conditions of employment and social benefits.” Qualifying agreements must exempt “citizens of parties to the agreement from requirements concerning residency and work permits.” Some of the GATS negotiators speculate that this provision may be ineffective because, as noted above, the MONP Annex excludes issues of access to labor markets (Self and Zutshi 2003, p. 35).

Under GATS Article VII, member states that develop mutual recognition arrangements are required to “afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it.” Recognition arrangements provide that the receiving state will recognize certain licenses or credentials attained in the home state. GATS Article V permits economic integration arrangements. The relationship between these two provisions, and the circumstances under which developing countries will be permitted to participate in recognition arrangements among developed countries, is an emerging issue. Under the WTO appellate body’s jurisprudence, it is at least arguable that recognition arrangements within regional integration arrangements are not

protected by Article V, and would be required to comply with Article VII.

Both Article V and Article V *bis* state that “this Agreement shall not prevent” entry into plurilateral services liberalization or labor market integration agreements. This type of language has been interpreted by the WTO appellate body (in the GATT Article XXIV context) as establishing a kind of “necessity” test (Trachtman 2003b). This necessity test in this context would permit measures necessary to fulfill the requirements specified in order to constitute a qualifying services liberalization agreement or labor market integration agreement.

Finally, Article VII of GATS, discussed below, allows member states to enter into recognition arrangements relating to standards or criteria for the authorization, licensing, or certification of services suppliers.

## **NATIOnAL TRe ATMe NT u NDe R ARTiCle x Vii**

In trade law, national treatment obligations are generally used to ensure that domestic regulation or taxes are not used so as to protect domestic production, implicitly renege on liberalization commitments. National treatment obligations are generally understood as “behind the border” measures, although they can of course be applied at the border with respect to imported goods. In services, there is often no customs or other border administration, so that all services regulation is, in effect, behind the border. In services, GATS was intended in part simply to establish national treatment as a direct form of liberalization, where domestic regulation sometimes simply prohibited foreign persons from supplying a particular service. In migration, national treatment obligations would serve a similar function. However, they may serve a more extensive function as well. Not only would they provide for market access, but they would also ensure that destination states do not, through discriminatory treatment, reduce the value of migration to the migrant, diverting rents to themselves. In this way, some types of discrimination may function similarly to a tariff.

Article XVII:1 of GATS provides that “in the sectors inscribed in its schedule, and subject to any conditions and qualifications set out

therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers.”

Thus, as already noted, national treatment under GATS is not universal, but is subject to the positive listing of the relevant service sector in the relevant state’s schedule. In addition, it is subject within each listed sector to the negative listing of any exception to the national treatment obligation in that schedule. Deciding that national treatment should not be a general principle as in GATT, but a concession to be bargained over, is one of the distinctive features of GATS. The core of a nondiscrimination obligation such as national treatment is the comparison between the favored good, service, or service supplier, and the disfavored one. Article XVII sets up the comparison as being one between “like” services or service suppliers, referring on its face to the “like products” concept articulated pursuant to Article III of GATT.

What makes two services alike? For example, is Swedish massage like chiropractic adjustment? Similarly, is Internet telephony like standard telephone service? More fundamentally, is it permissible to make distinctions between services on the basis of the identity of the service supplier as well as the way the service appears to the consumer? While it would be plausible to attempt to apply the border tax adjustments factors to services, it is not clear that these parameters of likeness make sense even in GATT. And, of course, the word “like” has meant different things in different contexts, even within GATT.

The majority of the appellate body in *E.C.—Asbestos* found that likeness under Article III:4 is, “fundamentally, a determination about the nature and extent of a competitive relationship between and among products.”<sup>7</sup> To perform such an assessment, the appellate body recalled that the four basic criteria, derived from the border tax adjustment report (GATT BISD 1970)—1) the physical properties of the products in question, 2) their end uses, 3) consumer tastes and habits vis-à-vis those products, and 4) tariff classification—are to be used as tools in the determination of this competitive relationship between products. These criteria do not exhaust inquiry (WTO 2001a, para. 101). This approach is intended to approximate the competitive relationship between the relevant goods—it is not as accurate or refined as simply testing



cross-elasticity of demand. But the more important point is that this test is relatively ignorant of factors that motivate regulation. The economic theory of regulation suggests that regulation is necessary precisely where consumers cannot adequately distinguish relevant goods—where they are in close competitive relation. Thus, a competitive relationship test for likeness will often result in a finding that goods that differ by the parameter addressed by regulation are indeed alike, and should be treated the same.

Interestingly, on its face, the structure of Article XVII seems to indicate that a national regulation imposed on a foreign service provider must meet two tests: it must provide treatment no less favorable than that accorded domestic like services and domestic like service providers. Therefore, even if the service providers are not alike, and thus there is no possible basis for finding illegal discrimination between them, it is still possible that the services they provide may be alike, giving rise to a claim of violation of the requirement of national treatment. So, if a nurse and a doctor perform the same service, but their performance is regulated differently, there is a concern that such differential regulation would violate the national treatment obligation. This may lead to absurd outcomes.

Thus, a better reading would read the two requirements above in the disjunctive, i.e., to separate the evaluation of treatment of services from the evaluation of treatment of service providers.<sup>8</sup> It would simply evaluate regulation of services by determining whether the regulation treats like services alike, full stop. If this were the case, regulation of service providers would be evaluated to determine only whether like service providers are treated alike. Using this interpretation, there would be no violation of national treatment if like services were treated differently where the reason for the difference in treatment is the regulation of the service provider. This is likely to be the interpretation that a WTO panel or the appellate body would apply.

Service regulations, as such, would only be evaluated to determine whether like services are treated alike, while service provider regulations, as such, would only be evaluated to determine whether like service providers are treated alike. The WTO dispute settlement body would be required to distinguish between regulation of services and regulation of service providers. In addition, the analogy to products might be taken

one step further, suggesting stronger constraints on host state regulation of the service provider than on the service.

Thus far, GATT/WTO dispute resolution has been unable to provide a predictable, consistent approach to determining when products are alike. We cannot expect GATS dispute resolution to do better as to services. Thus, for example, we might ask whether two accountants, each with advanced university degrees from different states, are like service providers. Under GATT jurisprudence, these questions cannot be answered predictably, or in the abstract, but must be determined on a case-by-case basis. While this jurisprudence results in a degree of unpredictability, the appellate body has now addressed several cases, providing experience in how these multiple factors are likely to be viewed and applied. The question for us is whether this situation of case-by-case analysis by the dispute settlement mechanism is superior to a more discrete, *ex ante*/specification that could be provided by treaty making or other quasi-legislative process?

Once services or service providers are determined to be alike, it is necessary to determine that the measure imposes less favorable treatment on the foreign service or service provider compared to the domestic ones. In its *Asbestos* decision, the appellate body emphasized that this is a distinct analysis, and that not every national measure that treats foreign goods differently from domestic goods would result in less favorable treatment.

### **Qu Ali FiCATiON Re Qui Re Me NTS, I iCe NSiNG Re Qui Re Me NTS AND PROCe Du Re S, Te Ch NiCAI Re Gul ATiONS, AND TRANSPARe NCy**

For professional labor, subject to qualification or licensing requirements, states may have a nonprotectionist, or prudential, reason for imposing qualification or licensing requirements. However, it is also clear that these requirements and related technical regulations pose barriers to labor movement.

Article VI (domestic regulation) spells out general obligations for service sectors that have been included by contracting parties in their

national schedules, except for measures that are covered by reservations in these schedules under Article XVII (national treatment) and XVI (market access).

In vague terms, Article VI:1 provides that domestic regulations, applied in a sector that a member has agreed to include under specific liberalization commitments, must be administered in a “reasonable, objective, and impartial manner.” This commitment will be very important to ensure the utility of Mode 4. Furthermore, it is possible that this requirement—especially its reasonableness prong—may be employed and developed in WTO dispute settlement to impose substantive obligations of proportionality in connection with domestic regulation (but see WTO [2005]). Interestingly, and provocatively, the relevant portions of the dictionary definition of “reasonable” include “in accordance with reason; not irrational or absurd,” “proportionate,” and “within the limits of reason; not greatly less or more than might be thought likely or appropriate” (Brown 1993). The limitation of this discipline to the “manner of administration” may be important, although it will be difficult to separate the manner of administration from the substance of rules.

Article VI also includes procedural guidelines requiring that decisions in cases where the supply of a service requires authorization in the host country must be issued within a reasonable period of time, and that signatories establish tribunals and procedures to process potential complaints by foreign service suppliers.

Article VI:4 of GATS calls on the Council for Trade in Services (CTS) to develop any necessary disciplines to ensure that measures relating to qualification requirements and procedures, technical standards, and licensing requirements do not constitute unnecessary barriers to trade in services. We will discuss the Article VI:4 work program and its fruits below.

Prior to the agreement and entry into force of more specific rules under Article VI:4, disciplines on national measures are available under Article VI:5 in sectors in which the importing member has undertaken specific commitments. In order for these disciplines to apply, two sets of criteria must be satisfied

- 1) the licensing or qualification requirements or technical standards must nullify or impair specific commitments in a manner that

could not reasonably have been expected at the time the specific commitments were made; and

- 2) the measure must not be based on objective and transparent criteria, or be more burdensome than necessary to ensure the quality of the service, or in the case of licensing procedures, in itself be a restriction on the supply of the service.

I examine these two criteria in turn.

### **Nullification o Impairment**

Nullification or impairment (N/I) has served as a central feature in GATT and WTO dispute resolution. Under Article XXIII of GATT, redress pursuant to the dispute resolution system of GATT is only available in the event of N/I. Where a provision of WTO law is violated, N/I is presumed. On the other hand, it is possible, although infrequent, for N/I to serve as the basis for a successful complaint in the absence of an actual violation of GATT: so-called nonviolation nullification or impairment. Article VI:5 of GATS incorporates this concept of nonviolation nullification or impairment

In the leading nonviolation nullification or impairment case, *Film*, the panel reviewed in detail the basis for certain U.S. expectations, in order to decide whether the U.S. had “legitimate expectations” of benefits after successive tariff negotiation rounds (see WTO [1998a]). As the complaining party, the U.S. was allocated the burden of proof as to its legitimate expectations. In order for the U.S. to meet this burden, it was required to show that the Japanese measures at issue were not reasonably anticipated at the time the concessions were granted. Where the measure at issue was adopted after the relevant tariff concession, the panel established a presumption, rebuttable by Japan, that the U.S. could not have reasonably anticipated the measure.

The import of this approach in the services context is clear. The complaining party must show that the measures attacked were not reasonably anticipated. Thus, long-standing regulatory practices or circumstances are protected. This provides a certain advantage to developed countries, as compared to developing countries that may be establishing new regulatory regimes. Furthermore, this understanding means that the domestic circumstances as they are form a background

for all concessions; as a matter of negotiation strategy, members of GATS must recognize this and bear the burden of negotiating an end to existing measures that reduce the benefits for which they negotiate. It is also clear, as described in more detail below, that Article VI:5 will not impose substantial discipline on existing domestic regulation, placing a greater burden on Article VI:4 as a source of discipline.

It is worthwhile to compare this structure with that applicable to goods under the GATT and under the two WTO agreements applicable to regulatory standards: the Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures. Neither GATT nor these agreements include the N/I requirement in the prohibition itself. Therefore, in connection with trade in goods, determination of a violation of a provision of a covered agreement results in *prima facie* N/I under Article 3:8 of the D.S.U., placing the burden of rebutting the existence of N/I on the respondent. In the context of Article VI:5 of GATS, without N/I, there is no violation. Without a violation, there is no *prima facie* N/I. Consequently, it will be for the complaining party to show nullification or impairment. This will make it more difficult for national services regulation to be addressed under Article VI:5.

We may speculate as to why GATS relies on the N/I concept so heavily in this context. N/I is an extremely vague standard, but one which by itself has been difficult to meet. Thus, in the absence of an ability to negotiate more specific disciplines on national regulation, N/I provides a modicum of more general discipline. It might be viewed as a “least common denominator,” insofar as the parties could agree not to nullify or impair concessions earnestly made, but could not agree on more pervasive, blanket restrictions on their national regulatory sovereignty. Thus, Article VI:5 is first and foremost merely a standstill obligation.

### **The Necessity Test**

Under this additional component of the GATS Article VI:5 test, we focus on the requirement (incorporated from Article VI:4(b)) that the national measure not be more burdensome than necessary to ensure the quality of the service. Even if it is possible to show that a national mea-

sure nullifies or impairs service commitments, a complainant would still be required to show that the national measure does not comply with the criteria listed in Article VI:4, the most likely of which is the necessity test examined here.

Until the E.C.—Asbestos and Korea—Various Measures on Beef decisions of the Appellate Body, “necessity” was generally interpreted as requiring the domestic regulation to be the least trade restrictive method of achieving the desired goal. In Korea—Various Measures on Beef, the Appellate Body interpreted the necessity test of Article XX(d) to imply a requirement for balancing among at least three variables:

In sum, determination of whether a measure, which is not ‘indispensable’, may nevertheless be ‘necessary’ within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports. (See WTO [2000].)

In the context of Article VI:4(b), the reference is to measures “not more burdensome than necessary to ensure the quality of the service.” The last clause could be very interventionist. It could restrict not just the means to attain a given regulatory goal but even the types of regulatory goals that might be achieved, as when the regulatory goal is not to maintain the quality of the service but to avoid some other externalization or regulatory harm by the service provider. For example, if a bank is required to maintain a particular reserve in relation to a loan, is that necessary to ensure the quality of the service? Many types of service regulation might be subject to similar, inappropriate, attack. This provision should be revised.

Furthermore, in a placement comparable to the inclusion of the N/I criterion in the substantive prohibition, here the necessity criterion is included as a parameter of the substantive prohibition, in addition to being included in the exceptional provisions of Article XIV(c), relating to health, morality, and other regulatory goals. Therefore, in order to make out a violation of Article VI:5 under this clause, the national measure will be required to be shown to be unnecessary in the sense

described above. Then, in order for the respondent to claim an exception under XIV(c), it will be required to show that it is necessary in the broader sense defined there. One interesting question involves the burden of proof. Under the products jurisprudence of the Appellate Body, it appears that the complainant will be required to show the lack of necessity under Article VI:5, while the responding state would ordinarily be required to prove the affirmative defense of necessity under Article XIV(c). This is at least an odd legal circumstance, where each side is allocated the burden of proof on the same issue at different phases. The complaining state, say for example the EC in an attack on U.S. separation of commercial from investment banking, would be required to show that the U.S. regulatory approach is “unnecessary” under Article VI:5, while the U.S. would be required to demonstrate its necessity under Article XIV(c).

In 1998, the Committee on Trade in Services adopted the *Disciplines on Domestic Regulation in the Accountancy Sector* (the Accountancy Disciplines), developed by the GATS Working Party on Professional Services (now the Working Party on Domestic Regulation) (see WTO [1998b]). These disciplines apply to all member states that have made specific commitments in accountancy (positive list) but do not apply to national measures listed as exceptions under Articles XVI and XVII (negative list). They generally articulate further and tighten the principle of necessity: that measures should be the least trade restrictive method to effect a legitimate objective. In fact, these provisions replicate requirements that have been imposed in the EC pursuant to the ECJ’s single market jurisprudence. They also replicate the approach of the EC’s General System Directives on professions, codifying principles of proportionality, or necessity. They have the following features relevant to this chapter:

- *Necessity*. Member states are required to ensure that measures relating to licensing requirements and procedures, technical standards, and qualification requirements and procedures are not prepared, adopted, or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. Such measures may not be more trade restrictive than necessary to fulfill a legitimate objective, including protection of consumers, the quality of the service, professional competence, and the

integrity of the profession. As will be clear from the discussion above, this necessity requirement is substantially stronger than that contained in Article VI:5 of GATS.

- *Qualificatio requirements.* Member states must take account of qualifications acquired in the territory of another member state, on the basis of equivalency of education, experience, and/or examination requirements. Examinations or other qualification requirements must be limited to subjects relevant to the activities for which authorization is sought.
- *Technical standards.* Technical standards must be prepared, adopted, and applied only to fulfill legitimate objectives. In determining conformity, member states must take account of internationally recognized standards (of international organizations) applied by that member.

It is worth noting that the EC has stated that the following should be considered in defining necessity under Article VI:4: “A measure that is not the least trade restrictive to trade will not be considered more burdensome/more trade restrictive than necessary so long as it is not disproportionate to the objective stated and pursued.”<sup>9</sup> This is substantially more lenient in respect of domestic regulation than the definition of “necessity” developed in GATT/WTO jurisprudence. Furthermore, it is not clear precisely what “disproportionate” means in this context. Proportionality *stricto sensu* (Emiliou 1996, p. 6) inquires whether the means are “proportionate” to the ends: whether the costs are excessive in relation to the benefits. It might be viewed as cost-benefit analysis with a margin of appreciation, as it does not require that the costs be less than the benefits. At the same time that it prefers proportionality and necessity to a least trade restrictive alternative test, the EC seems to suggest that “the validity, or rationale, of the policy objective[s] must not be assessed.” (See WTO [2001c, para. 17].)

Necessity has a complex relationship with recognition. That is, a necessity test, interpreted as a requirement that the national measure be the least trade restrictive alternative reasonably available to address the regulatory concern, can either be an absolute requirement or a relative requirement. Thus, a less restrictive option might make sense irrespective of the home regime or conversely might only be justified in



reference to the home country regulatory regime, as a *complementary* measure. Judgments based on the former assessment reflect a high degree of judicial activism and are unlikely to be found legitimate.

In the latter case, where the home country regulatory regime satisfies the host country concerns, necessity may require recognition. This would be an extreme interpretation of necessity as least trade restrictive alternative analysis, stating in effect that *no* regulatory intervention on the part of the importing country is necessary at all. The least restrictive alternative is to do nothing. We have seen this in the ECJ's jurisprudence, and there are also treaty provisions reflecting this concept in Article 4 of the SPS Agreement and Article 2.9 of the TBT Agreement. Under this interpretation, recognition may be mandated, or equivalence may be determined, by *judicial fiat*

Note that Article VII of GATS and paragraph 3 of the Annex on Financial Services, in contrast, do not require recognition, but merely authorize it. Although a strong GATS standard of necessity might eventually lead to such judicially required recognition, this is unlikely to be the case under current treaty language for reasons we will come to in the last section. But the necessity test might nevertheless mandate partial recognition of some regulations and not others, whereby partial recognition becomes the operational consequence of the principle of proportionality. It is important to note that the Accountancy Disciplines require recognition of professional qualifications in accountanc .

As noted above, the Accountancy Disciplines include a greatly enhanced necessity test, applicable within that sector.

GATS, like GATT, does not specifically require the use of international standards, and provides weaker incentives for the use of international standards than the SPS Agreement or the TBT Agreement. As noted above, Article VI:5(b) requires that account be taken of compliance with international standards where a member state's compliance with Article VI:5(a) is being evaluated. This is a nod toward a safe harbor for states that comply with international standards, although it should provide only very modest incentive effects, because of the weakness of Article VI:5(a). It does not provide a presumption of compliance, as do Article 2.5 of the TBT Agreement and Article 3.2 of the SPS Agreement.

The Accountancy Disciplines require that member states take account of internationally recognized standards of international organizations in determining conformity with technical standards (see WTO [1998b, para. 26]). This is a different and additional requirement. Under Article VI:5(b), compliance with international standards is taken into account in determining the compliance of a member's regulation with WTO law.<sup>10</sup> Under the Accountancy Disciplines, a member state must take compliance with international standards into account in determining the acceptability of foreign service providers. This is a gentle shove toward recognition based on essential harmonization.

The Article VI:4 Work Program was intended to deal over time with certain regulatory barriers to trade in services, through decisions made by the C.T.S. under its authority. The WTO Secretariat, with the assistance of member states, has prepared a list of examples of measures to be addressed by disciplines under GATS Article VI:4 (WTO 1999a, 2001d). These examples included, *inter alia*, residency requirements, failure to recognize foreign qualifications, and national standards that diverge from international standards. By focusing on examples of regulatory barriers that service suppliers actually face, it is possible to target additional disciplines more precisely. Developing countries should participate actively in this process in order to focus attention on the barriers that their service providers face.

So far, the Article VI:4 Work Program has operated sectorally, and only in the single sector of accountancy. However, it may be that other professional service sectors, and even other service sectors, may be amenable to similar types of disciplines. Thus, it would be possible to evaluate application of similar necessity, equivalence, and other disciplines on a horizontal basis.

The proposed draft annex on domestic regulation prepared by Japan suggests adoption of the core disciplines contained in the Accountancy Disciplines, with some modifications, on a horizontal basis (see WTO [2003b]). This would retain the possibility for separate, additional, or alternative disciplines on a sectoral basis.

## Notes

1. The other modes are cross-border supply (Mode 1) and service consumer travel (Mode 2).
2. The scope of activities that may be included in the word “service” may be determined, in part, by reference to the Services Sectoral Classification List, W/120.
3. GATS, Art. XXVIII(g).
4. For a list of MFN exemptions affecting Mode 4, see Nielson and Taglioni (2003).
5. As discussed in Chapter 7, the NAFTA, U.S.-Australia, U.S.-Chile, and U.S.-Singapore free trade agreements allow for employment-based movement, facilitated by a streamlined visa.
6. For a useful discussion, see Self and Zutshi (2003).
7. See WTO (2001a, para. 99). Note the different opinion with regard to the very specific aspects mentioned in para. 154
8. But see WTO (1997, para.7.322), considering that like service suppliers are producers of like services.
9. See WTO (2001a, para. 22). Note that the appellate body may be understood to have adopted a similar position in Asbestos and Korean Beef.
10. Article VI(5)(b) refers to standards “of relevant international organizations,” which are defined as “international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.” This definition might exclude, for example, the Basle Committee.



## **Part 3**

# **Evaluating Possible Institutional Structures**



## 9

# Negotiating Global Disciplines on Migration

This chapter examines some of the main dynamics of international agreements on migration. The present chapter builds on the welfare economics, the ethical, and especially the international political economy perspectives developed in Chapters 2, 3, and 4, respectively. It also utilizes as data the legal rules described in Chapters 5, 6, 7, and 8. This chapter develops the broad contours of the possible negotiation dynamics that may develop in the field of migration, based in part on the schematics advanced in Chapter 4. Based on these contours, Chapter 10 discusses a number of more specific disciplines in this field, and Appendix A provides a conjectural outline of a possible multilateral agreement on migration.

**Bilateral, Regional, Plurilateral, and  
Multilateral Negotiations**

As we begin to consider the possibility of international legal rules of labor migration, we must first consider the alternatives. There are three main types of alternative forms of institutionalization in this field: 1) bilateralism, 2) regionalism (or other plurilateralism), and 3) multilateralism. These can be either formal or informal. Of course, another alternative is unilateralism. In Chapter 11, I will discuss possible organizational features of a multilateral organization dealing with migration.

The first question is that raised in Chapters 2 and 4: what benefit do legal commitments produce—to what extent is formalism desirable? Thus, states may choose to engage in no legal institutionalization at all: they may continue to determine their immigration policy unilaterally, without legal restriction. This is similar to Coase's postulated choice between the market and the firm, with the informal structure of

relationships theoretically equivalent to the market (Trachtman 1997). This is the system that broadly applies today: aside from the regional efforts already described, we generally have 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.

However, outside of the EU and forced migration contexts, international law and organizations have so far had little influence over migration policy. According to Meyers (2000, p. 1266), “The 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.”

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 Chapter 2 suggests that there is a substantial welfare gain to be won by liberalization of migration. The demand for immigrants may be more complex than Meyers describes, especially with respect to skilled workers, but also in some contexts with respect to unskilled workers. Chapter 3 describes a rights-based approach to migration that may support legal confirmation and delineation of this right. Chapter 4 describes a domestic political equilibrium that might fail to support liberalization of migration unless some reciprocal arrangements are made, either within the migration field or in cross-sectoral linkage. Chapter 4 models states’ immigration policies in some contexts as a coordination game along the lines of a stag hunt, in other contexts along the lines of a prisoner’s dilemma, and in still other contexts as a game in which the efficient equilibrium is noncooperation.

Chapter 4 suggests the possibility that states might benefit from the ability to bind one another to liberalization. It is likely that the utility of reciprocal commitments will only be fully known once a framework agreement is developed and states begin earnest negotiations to determine the scope of acceptable commitments.



Recall that some of the ideas developed in Chapter 4 suggest the possible utility of reciprocity, but do not require formal legal commitments for reciprocity. However, the more specific the arrangements, and the more carefully balanced the reciprocity, the more likely it will be that states will determine to act more self-consciously through formal legal regimes. 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. As a matter of fact, in many circumstances, including some relating to the global environment, states are able to reach implicit (customary) or explicit (treaty) agreements to cooperate, and to enforce these agreements (Norman and Trachtman 2005; Scott and Stephan 2004). They are able to do so among relatively patient states, under circumstances of frequently repeated, or linked, interaction, over a long duration, where information about the compliance or failure of compliance of others is readily available.<sup>1</sup> This problem is analogous to other global public goods problems.

Formal law and formal organization are thus not *necessarily* required to achieve a different strategic equilibrium, but they are an important means by which states may self-consciously revise institutional dynamics. Formal law and organization provide a set of additional tools, accepted default rules, and additional linkages that may be quite valuable.

It is understood that states with certain political affinities, and with greater ethnic or socioeconomic homogeneity, are more likely to liberalize immigration vis-à-vis one another (Neumayer 2005, p. 18). Regionalism is likely to be a good proxy for cultural affinity, but there are certainly counterexamples—contexts in which there is great cultural or ethnic affinity despite geographic distance. In addition, regionalism may be a proxy for symmetry in terms of labor market structure. While asymmetry may provide greater welfare gains, it may also provide greater political obstacles.

States may choose to enter into bilateral agreements in order to liberalize their immigration policies. As described in Chapter 7, a number of states have entered into bilateral migration agreements, but these generally do not involve formal commitments to liberalize. Rather, they ordinarily involve management of such topics as recruitment, remittances, and return.

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: of MFN nondiscriminatory treatment (Ugur 2007). However, it is even possible to establish MFN rules that link treatment under separate bilateral or plurilateral 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 arrangements may be unsatisfactory for several reasons. First, as the number of bilateral labor market agreements increases, it is likely that states will grow increasingly concerned about their *relative* position, suggesting the utility of MFN-type obligations, or at least multilateral negotiations. Why will states be concerned about their *relative* position? To the extent that the negotiation is over a discrete quota, the *relative* position—the share of the quota allocated to the sending state—will determine market access. To the extent that the negotiation is over discriminatory taxes imposed by the destination state, which may be assimilated to a tariff, relative position will determine degree of market access, and the extent to which migration flows conform to actual comparative advantage in producing appropriate migrants, as opposed to the relative burden of discriminatory taxes.

Second, and along similar lines, 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. For example, the Philippines and Indonesia have entered into an agreement for a modest level of coordination of their emigration activities (Go 2007). Asian countries have already sought to coordinate their activities to protect their emigrants and maximize the beneficial effects for home countries through the Colombo Process.<sup>2</sup>

Third, with increasing competition to attract skilled workers, states may find themselves racing to the bottom in terms of their taxation or

other aspects of their treatment of skilled workers. (See the discussion of regulatory competition in Chapter 2.) “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” (OECD 2004, p. 27). In effect, with increasing competition for skilled migrants, competing destination states may wish to negotiate together to establish a cartel in order to retain their market power.

Fourth, while, as noted above, MFN does not require a multilateral agreement, if an MFN rule is desirable, it may be 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 United States and the UK to seek a multilateral trade agreement in the 1940s, resulting in the GATT. Even a multilateral agreement may be structured in such a way that it should be understood as a series of bilateral agreements. Much depends on the structure of the relationships and whether MFN treatment multilateralizes all concessions.

Fifth, 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. Bilateral arrangements will be more costly to implement than multilateral arrangements, and may be less transparent. 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.

Finally, it may be that a multilateral agreement would facilitate multilateral surveillance and enforcement action that would result in greater possibilities for compliance.

A third and intermediate option is regional or other plurilateral arrangements. I have discussed in Chapters 6 and 7 the fact that 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. The emergence of regional and

bilateral arrangements for migration might indeed be taken as evidence that migration is not, or at least is not yet, a global problem that requires global institutionalization. Another way of saying this is that the extent to which it is a global problem may be small compared to the costs of global institutionalization. It is possible that, due to greater economic homogeneity and lower travel costs, migration is more likely to be the subject of regional agreement *first* (Nielson 2003, pp. 93, 94), but it is entirely possible that multilateral arrangements for migration would also be desirable or would subsequently be desirable. That is, it may be that the experience of regional liberalization may break down resistance to further liberalization, thereby facilitating multilateral liberalization.

Thus, where and when it is valuable to engage in multilateral institutionalization, as in the WTO, states may determine to do so. 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 toward, multilateral agreement. Multilateral institutionalization can serve as a response to the question of MFN treatment raised above. It also provides a broader forum for engaging in negotiations, and perhaps for complex multiparty barter that increases the scope of possible 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 submultilateral 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. It is certainly plausible that some states would refrain from entering into a global migration agreement, and so it is reasonable to expect some type of plurilateral framework to emerge.

## the Need for Global Rules

There seem to be two main legitimate goals for international law. First, international law may be designed to increase welfare by overcoming bargaining problems in order to allow efficient cooperation, as suggested in Chapter 4 (Trachtman 1996). I focus on the welfare impact here.

Second, international law may serve an expressive function: an international legal commitment may help to legitimate or popularize a certain principle. While I do not dwell on this expressive function here, it may be that one of the important functions of an international legal regime for migration would be to begin an educational process that would help voters and governments to realize the legitimacy and benefits of a permissive regime for migration. This would also serve perhaps as a bulwark against demagoguery.

In this chapter, I seek to speculate regarding the design of a system that would improve the welfare of each member state: that would be Pareto-improving from at least a state-level aggregate standpoint.

So, what might an agreement among states to achieve an efficient equilibrium in migration 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, assuming that immigrants have access to these programs. 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. A move to global free migration would also be politically unthinkable in most wealthy states.

Furthermore, a simple move to free migration would lose the benefits of both gradualism and 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 eval-

uation by each state of its position, presumably based on a welfarist analysis.

As shown in Chapters 2 and 4, states are 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 WTO in the Doha Round, and it has been used in goods negotiations as well.

I show in Chapter 4 that there are circumstances where a wealthy 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, wealthy destination states would find it useful to exchange liberalization commitments in migration for liberalization commitments in other sectors by home states. These might include liberalization by poor home states in services, investment, or goods sectors, or it could involve other concessions.

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

Economists and developing countries have criticized the cross-sectoral “grand bargain” that concluded the Uruguay Round, on the ground that developing states took on obligations, especially in connection with intellectual property rights, that were costly to them. 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 on the whole made better off by tariff reduction, so policymakers could not err. Where all of the possible concessions are welfare-improving (at the level of the state), bargaining may be expected to result in benign outcomes (at least at the level of the state). While

the field of migration does not offer the same kind of “error-proof” negotiations, Chapter 2 shows that *worldwide* welfare is only likely to be diminished by migration that is either in error or excessively motivated by public welfare programs.

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. As shown in Chapter 4, rational governments may seek to maximize their support through such international legal restrictions providing for reciprocity. International legal commitments play a similar role in the trade context.

There may be circumstances in which surges of migration cause excessive adjustment costs. Therefore, commitments would ideally contain economically nuanced safeguards that would allow states to revise their commitments to the extent that the commitments actually seem to be causing recession, accentuating the adverse effects of recession, or causing other economic disruption.

As described in Chapter 4, whether the international migration setting is appropriately described in various real world contexts 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.

**iNter Na tio Nal Pu Blic Goo Ds a ND  
iNter Na tio Nal r e Gi Mes**

Hollifield (2000, p. 90) states that until recently there was little demand for international regimes in the area of migration policy. Low demand for institutionalization is synonymous with a transaction costs–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.<sup>3</sup>

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 if one state's use of it does not diminish its 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 would benefit 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 (Kaul et al. 2003). 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 we would expect this public good to be undersupplied—its supply is a collective action problem. Therefore, some institutional mechanism for cooperation may be indicated (not all collective action problems are worth solving—it depends on a comparison of the costs and the benefits of doing so).

In addition, if we understand human capital as a global public good, it also will be undersupplied (Straubhaar 2000, p. 128). As outlined above, another way to describe this problem is to generalize that each state wishes to attract or retain skilled workers, while many states wish 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 a Bhagwati tax, or through other mechanisms.

Migration can be understood as a global problem, and as a collective action problem, in another 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. This is why many bilateral migration agreements include provisions for home state cooperation in restraining illegal immigration to destination states.



The development dimension of migration may add yet a further public goods aspect. To the extent that migration is seen as a means to reduce poverty, these results may have some characteristics of 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 programs. Of course, to the extent that states have comparative or absolute advantages, it would seem appropriate to allow them to utilize these advantages.

So, for example, if the Philippines has an absolute advantage in semiskilled nursing care while the United States has an absolute disadvantage, it may be appropriate to ensure that semiskilled nurses from the Philippines may migrate to the United States. In order to induce the Philippines to make appropriate human capital investments, this regime should ensure that remittances, Bhagwati taxes, or compensatory payments reimburse 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 home state. This is not an endorsement of limitations on emigration. Rather, the point is that states will invest efficiently in human capital—and will invest more—if this public goods problem is resolved.

## **Mf N a ND Ne Gotia tio N Dy Na Mics r evi site D**

As discussed at the beginning of this chapter, 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 willing to work at the lowest price (all other things being equal) should migrate. Comparative advantage would be diminished if, in the EU context for example, a Greek worker were to move to France to accept a job where an otherwise equivalent Nigerian 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.

One of the main reasons for a global trade organization (i.e., the WTO) 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 measures equivalent to a tariff through discriminatory fees or taxes.

However, as discussed in Chapter 4, the home state may not have the same mercantilist perspective, wishing to increase outbound migration, as in connection with 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.

An MFN rule of negotiations would raise 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 GATT/WTO system, this problem has generally been addressed through

concerted negotiations, with careful examination of each state's concessions. In connection with GATS, at least for a period 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.

As described in Chapters 6 and 7, there already exist regional and bilateral migration arrangements that may conflict with MFN and with comparative advantage.

States that find it valuable for their citizens to migrate will desire at least MFN treatment. 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, using an agreement containing an MFN obligation, to form a cartel they may be able to extract superior liberalization commitments from destination states (Guzman 1998). In particular, they may be able to countervail the market power of destination states by forming a kind of "cartel" of home states—they may thus be able to reduce the use of market power by destination states.

One way to evaluate the choice between submultilateral liberalization of migration and multilateral liberalization is under the global cost-benefit analysis approach described by Jacob Viner (1950) in connection with goods as trade creation versus trade diversion. This analysis asks to what extent establishment of submultilateral liberalization increases global welfare through liberalization of submultilateral 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 (1993) has called the "dynamic" time-path issue. 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 (1991).

It would be possible to establish a multilateral agreement that would regulate submultilateral integration in order to prevent welfare-

reducing arrangements. This type of agreement would mimic the purpose of Article XXIV of GATT.

Thus, as in the case of goods and services trade, there may be some need to allow submultilateral integration as a departure from MFN requirements. The EU is an example of such integration. Of course, the EU is also inconsistent with the MFN requirements of GATT and GATS, 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 Politics and Institutional Linkage**

It is not appropriate to consider migration negotiations as stand-alone negotiations, isolated from other international issues. As suggested in Chapters 2 and 4, there may be circumstances in which beneficial cross-sectoral reciprocal arrangements may improve aggregate welfare as well as state welfare.

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 presumably 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 monetary payments in exchange for substantive concessions, barter will continue. In barter economies, the greater the breadth of subject matters available, the greater the possibilities for making a deal.

As an example of linkage as a political fact, consider the linkage between trade and intellectual property rights. This political linkage evolved into an institutional linkage. The United States sought enhanced

protection under domestic intellectual property laws of other states for its intellectual property-dependent industries. It achieved this goal at the end of the Uruguay Round of trade negotiations with the signing of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). This agreement was the product of political linkage: in the famous so-called Grand Bargain, the United States, the EC, and others exchanged concessions in agriculture and textiles for concessions in intellectual property protection and services trade. Political linkage was transformed into institutional linkage in the form of the TRIPS, within the broader context of the WTO.

TRIPS is an archetypical, and advanced, case history of linkage. We may view TRIPS as a possible precedent for migration. In fact, Mode 4 of GATS already demonstrates the degree of natural linkage between migration and trade in services, and even more narrowly between mode 3 commercial presence and mode 4 movement of natural persons. The question is whether political, legal, and/or institutional linkage would allow states to make and enforce broader welfare-improving agreements.

Of course, it is by no means clear that the WTO should be accorded responsibility to address international migration law issues (see Chapter 11). However, broader organizations may offer economies of scale and scope. On the other hand, broader organizations could reduce the domain of possibly beneficial interorganizational competition (Trachtman 2002b). 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 UN, or perhaps the WTO. Linkage can be established either between organizations or within an organization. We live in a world of path dependence: given that the WTO 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 WTO context may provide an advantage over negotiations in a separate multilateral migration agreement, IOM, ILO, or another functional context: the greater possibility of linked package 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 (Guzman 2003; Ryan 1998). 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” (Buchanan and Tullock 1962, p. 153). 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, Lowell, and Taylor (2000, p. 156) suggest that because host 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 host country provide “special trade rights, investment and other preferred treatments” as a device to secure compliance through threats of withdrawal. Depending on the structure of such incentives, they may require amendments to existing WTO law, and so some formal linkage may be necessary.

Similarly, these types of benefits could be linked to efforts to assist in preventing unauthorized immigration (see Chapter 4). Martin, Lowell, and Taylor 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” (pp. 157–158). Furthermore, restriction 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” (p. 158). For more on the relationship between trade and investment, see Chapter 2.

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

### **Brain Drain versus Low-skill Influx**

As discussed in Chapters 2 and 4, states may have two different stances with respect to skills. First, from a Heckscher-Ohlin perspective, states in which unskilled workers are scarce would generally be expected to welcome unskilled workers, despite the opposition of competing workers. Where states vary and develop preferences as predicted under Heckscher-Ohlin, there is room for welfare-improving agreements. This would provide a motivation for negotiations.

However, it may appear that many skill-abundant countries are uninterested in encouraging migration from unskilled-abundant countries. Under some circumstances, both skilled and unskilled workers may flow toward the high-skilled country—the wealthy country. Thus, as discussed in Chapter 4, there may be little to bargain over: the game type that may describe the migration game in this context is a “bully” game. However, it is possible, through linkage, to identify a broader set of feasible bargaining solutions.

### **Taxation and the Mobile Factor**

It is surprising that states do not engage in more frequent disputes regarding jurisdiction to tax. As discussed in Chapters 2 and 4, a Bhagwati tax may be useful to redress certain distributive problems that may arise in connection with immigration, to the extent that the brain drain may confer harm on the home state. It may also redress certain allocative problems in connection with the ability of a state to capture the returns from its investment in human capital. This seems 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 collecting taxes. 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, that provides relative market power to the mobile factor.

Bucovetsky (2003) evaluates the strategic characteristics of a setting in which high-skilled workers initially resident in a low-productivity home state wish to migrate to a particular high-productivity destination state. The voters in that destination state would be motivated to improve their own positions 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. Moreover, it assumes an inability to discriminate in taxation between migrants and native-born workers.

If countries were to seek to cooperate, one equilibrium solution might involve an agreement to share the tax base, with or without discrimination to the disadvantage of migrants. 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.

## **ad just Me Nt**

As suggested in Chapters 2, 3, and 4, adjustment will be a critical part of any regime for liberalized migration. A core question is whether the adjustment mechanism is internal to states or is international.

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 semiskilled 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 United States 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.

As suggested in Chapter 2, 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.

The simplest adjustment mechanism is gradualism. In connection with trade in goods, GATT and now the WTO have served to phase in liberalization, and have been complemented by various national and perhaps international schemes for adjustment. GATT, which should be understood at its inception in 1947 as a framework agreement, has been successful in allowing states to negotiate liberalization selectively and gradually. GATS 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. Further, it should be recalled that the experience in Europe of migration after removal of formal barriers has been underwhelming in the sense that citizens of less wealthy member states of the EU have not migrated in great numbers to wealthier states (Ugur 2007, p. 83).

In addition to negotiation over time, another form of gradualism entails the use of prenegotiated 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 EU.

A second alternative, often combined with a degree of gradualism, is adjustment assistance in the form of transfer payments, outplacement, or training. The U.S. Trade Adjustment Assistance program is one example. That program currently only extends to workers who lose their jobs due to imports of goods, and not due to offshoring of services or immigration.

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 nonpecuniary 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 international “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.

Polanyi (1944) and Ruggie (1982) believe that states must regulate the distribution of gains from trade in order to avoid political discontent, and, ultimately, a “backlash” that would destroy the liberal system. While Polanyi and Ruggie address distributive issues arising from trade, those arising from migration are comparable.

In Ruggie’s interpretation, individual states must cushion the domestic “losers” from the loss of wages, livelihoods, and investments that results from liberalization—Ruggie extends Polanyi’s approach to relate free international trade to a domestic welfare state. The embedded liberalism “bargain,” in short, is one in which the state takes care of its own through regulatory intervention in order to maintain its political ability to liberalize. But, importantly, embedded liberalism calls for national regulatory intervention, not global regulatory intervention. Its call for redistribution is state-centered, and limited by domestic politics and budgetary capacity.

Further, it is important to recognize that global liberalism embedded within a domestic welfare state is not quite analogous to the system described by Polanyi (Ruggie 2002). Polanyi saw the need for society-wide regulatory intervention to make adjustments in connection with a society-wide market. The true analog in connection with global markets is global regulatory intervention—a global welfare state. Thus, if the scope of the market is to some degree global, then it would seem appropriate that the scope of regulatory intervention in the market would need to be roughly commensurately global (Trubek 2002). After all, what would be the purpose of artificially constraining the possible

funding for adjustment, or of other redistributive regulation, to sources within a particular geographic segment of the market?

It is important to recognize, with Polanyi's original work and Ruggie's extension, that the regulation that they are concerned with is best understood as implicitly redistributive. The point is not necessarily to provide a certain quality of regulation, but to provide a certain quality of life. It may be that labor regulation, health regulation, environmental regulation, and others are the best means to do this under particular circumstances.

But, as Kaplow and Shavell (2000, 1994) have pointed out, if redistribution is the goal, then taxation and explicit redistribution are the most efficient means, subject to what we might call political transaction costs. That is, there may be circumstances in which regulation is used to redistribute because direct redistribution will be too difficult in political terms. This technique, of course, has its ethical and practical problems. But it has even greater problems in the global setting, where these regulatory policies are dependent on different national economic, legal, and political systems and cultures. Suppression of differences in order to embed liberalism may be too costly in terms of legitimate regulatory diversity. Moreover, the scope for transnational externalization—for transnational redistribution—may be too greatly constrained by a requirement to act through regulatory means.

So, a true 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.

Once extended in this way—in terms of both geographic reach and redistributive scope—the embedded liberalism idea seems to have more in common with the cosmopolitan ethical perspective described in Chapter 3. Of course, its motivations are not based on ethics but on prudent self-interest: the embedded liberalism concept suggests that in order to protect liberalism from destruction by those who lose, it is necessary to compensate them through regulatory intervention. One way in which the Rawlsian difference principle and Polanyi's embedded liberalism can be merged is through recognition that, to some extent,

each of us lives in a “real” veil of ignorance. That is, over time, we are uncertain to which group we will belong—whether we will be among the lucky few who hold wealth, or among the poorest wraiths. Under these circumstances, the difference principle is simply a hypothetical constitutional arrangement that we might actually enter into under uncertainty (Brennan and Buchanan 1985; Buchanan and Tullock 1962; Mueller 1996).

The embedded liberalism concept calls for redistribution in order to forestall a backlash. The backlash may be a simple move toward demagoguery and nativism in destination states, with ugly or inefficient effects. With respect to sending states, on a very speculative and perhaps even a counterfactual level, we can at least imagine a relationship between poverty and terrorism along these lines. Does global apartheid result in frustration, anger, and violence, either domestically or internationally? Is the rise of terrorism a kind of backlash against an insufficiently embedded global liberalism? Is the correct response to embed liberalism in a regulatory regime?

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 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 some wealthier states have domestic institutions capable of facilitating redistribution, others do not, and 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, as discussed in Chapters 4 and 10, allowing home developing countries to at least avoid conferring uncompensated benefits on wealthier states, would be a step toward this type of redistribution.

### **safe Guar Ds**

As discussed in Chapter 4, 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 GATT 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, trade 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 (Horn and Mavroidis 2003). 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.

One quasi-economic explanation of safeguards law is Corden's "conservative social welfare function" (1974, p. 107). "The [conservative social welfare function] embodies Corden's notion that 'any significant absolute reductions in real incomes of any significant section of the community should be avoided'" (Deardorff 1987). This early concept is consistent with modern behavioral economics insights regarding individual preferences to avoid risks of loss in favor of obtaining risks of gain. It is also consistent with a pragmatic political approach to significant disruptions in incomes.

Deardorff extends Corden's analysis, suggesting that safeguards may serve as a technique by which to compensate persons injured by trade liberalization. In this sense, safeguards may be consistent with embedded liberalism. However, Sykes (2005, p. 18) suggests that protection arising from safeguards is an "extremely costly and clumsy device for compensating the 'losers' from trade liberalization."

The best way to understand safeguards measures is as a facility for politically efficient breach. The leading work in this area is Sykes (1991). Under this explanation, liberalization commitments are understood as "contractual" commitments made by governments at particular points in time. At those points in time, governments are not able to predict accurately the competitive effects of their liberalization commitments. However, governments recognize that, for political reasons (as suggested by Corden), "any significant absolute reductions in real incomes of any significant section of the community should be avoided." Under uncertainty, governments include the escape clause in order to provide the possibility for derogation from commitments, with com-

pensation to harmed states. This type of facility is known in domestic legal analysis as a facility for efficient breach. Interestingly, the efficiency is measured, according to this analysis, in political welfare of governments rather than in public interest welfare of citizens.

Sykes's argument is predicated on the assumption that declining domestic industries have made sunk investments, and that these sunk investments serve to deter domestic entry. At the same time, foreign exporters have less at stake, especially as they are assumed to be efficient and therefore profitable. Sykes does not assume that domestic persons have greater political influence than foreign exporters, but this may also affect political decisions.

Bagwell and Staiger (2005) suggest that politically efficient breach may be permitted, but that it must be constrained in order to induce member states to exercise restraint in their use of the facility for breach. And so, for Bagwell and Staiger, it is critical that the Safeguards Agreement, applicable to goods, restricts the repeated use of safeguards measures.

## **Legal Limits and Natural Limits**

As discussed in Chapter 2, migration is a function of supply and demand, which in turn depends on relative conditions in the home country and in the destination country. As also discussed in Chapter 2, migration may result in convergence of incomes and standards of living. Thus, migration, if it is not artificially constrained, is a self-equilibrating process, tending toward an equilibrium. The earlier equilibrium is disrupted by natural, technological, or demographic shocks, as well as institutional shocks such as a change in law.

Migration is thus a self-limiting process, although social transfers and other factors may affect the point of limitation (O'Rourke 2004, pp. 12–13). Given these natural limits, it is worth considering the question of the utility and scope of formal limits. In the late nineteenth century, emigration from poor countries followed an inverted U-shaped life cycle, rising sharply and then declining (Hatton and Williamson 1998).

As home country incomes tended to converge with destination country incomes, emigration rates declined.

Furthermore, it might be argued that legal limits are counterproductive and unnecessary, at least according to a welfare economics perspective. On the other hand, to the extent that emigration may overshoot an efficient equilibrium due to information problems, collective action problems, or other market failures, legal limits may be useful from a welfare economics perspective in order to dampen the swings toward emigration. As is well understood, legal limits may also become necessary from a political perspective.

### **Notes**

1. For an extended analysis, see Norman and Trachtman (2005).
2. See <http://www.colomboprocess.org>.
3. Forced migration and refugee management has a somewhat different structure (Hollifield 2000)



# 10

## Toward Specific Global Disciplines to Promote Migration

Of course, it is not possible in this academic work to elaborate a complete and acceptable set of rules for international migration. However, in order for negotiators representing states to build a set of rules, it is necessary first to establish a taxonomy of rules, and to understand the function and benefits or detriments of each rule. Such a taxonomy will promote negotiations by states based on their individual circumstances. So, the main function of this work is as an exercise in institutional imagination, to help focus policy planning and negotiations. Indeed, my main argument is that a framework agreement is appropriate in order to facilitate negotiations, through which states may discover appropriate commitments and rules.

As discussed in Chapter 4, the core political economy functions of an international agreement on migration will differ for individual states, and even for individual sectors or occupations. But that chapter argues that there would likely be circumstances where states would find it useful to reach agreements on liberalization of migration. The core functions described would include the type of framework agreement structure described in Chapter 4, including the ability for states to make commitments in particular fields, arrangements for cooperation on any Bhagwati-type taxes and immigration fees, and safeguards arrangements, would be appropriate. However, certain other provisions are also important in a subsidiary sense.

As discussed in Chapter 9, it is not clear that a multilateral agreement is necessary or optimal in this area. However, there are a number of arguments in favor of a multilateral agreement, which, if flexible enough, can encompass bilateral, regional, and plurilateral subagreements.

So the description here, and in Appendix A, of a possible basis for a multilateral agreement is not intended to preempt 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 an illustrative

sample of the types of provisions that might be considered for inclusion in an international agreement on migration.

While the World Bank Independent Evaluation Group (2006, p. 76) is of course correct to emphasize, as others do, that individuals are not goods, and that the types of disciplines developed in the area of trade in goods are not necessarily appropriate for application to movement of persons, this argument proves too much. No one would suggest simply adding “nurses” to the GATT tariff schedules, or even to the GATS Mode 4 schedules of commitments, and consider the problem of liberalization of migration resolved. Yet this does not mean that greater international legal commitments, and more nuanced institutional capacities and commitments dealing with the complexities of migration, are not desirable or feasible. The purpose of this work is to examine the desirability and feasibility of these types of commitments.

### **Prohibition of Restrictions on Emigration**

A national welfarist (as opposed to a global welfarist) analysis might support some restrictions on emigration 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 and magnitude of reduction of welfare depends on a number of factors, and it may be difficult for governments to determine in advance which types and amounts of emigration will be welfare reducing. After all, 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, and so on.

On the other hand, human rights considerations argue in favor of full rights to emigrate. Furthermore, as discussed in Chapter 2, full rights to emigrate may promote beneficial regulatory or fiscal competition. Finally, as discussed in Chapter 5, the right to emigrate may already be protected by international human rights law.

Finally, we must recognize that emigration fees along the lines discussed below are associated with abuses by Nazi Germany and the former Soviet Bloc. So, any proposal of emigration fees must be structured in a way that is sensitive to the human rights ramifications of these fees. Perhaps states should not have unconstrained discretion to set these fees. Rather, some independent means of evaluating the state's contribution to the earning power of the emigrant, along with broadly available financing arrangements, might allow emigration fees to satisfy both human rights concerns and concerns for the public finances of the home state.

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. As we saw in Chapter 4, 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 in Chapter 4, one possible solution is to require compensation to those who lose—in this case, those remaining behind—from those who gain: the migrants.

In order to prevent welfare losses to home states, it may be appropriate, as discussed in Chapter 2, to allow home states to impose 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 as a condition for emigration, but they 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 the arrangements for collection, the cheaper and more available the financing. 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 a taxation structure that would have a substantively similar effect: “Young persons who could gain greatly from immigration may have limited capital and be unable to fund themselves; they would be better served by an arrangement in which they pay an extra amount in future income taxes, in the same manner that young Australians may borrow for higher education and then repay with additions to future income taxes” (Freeman 2006, p. 165).

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. This type of credit could be allocated or depreciated over a number of years. Of course, a credit or deduction for education charges is just one way to “apportion” the tax base relating to migrants. See the discussion of possible formula apportionment in Chapter 9.

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,
- 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, allocated over a period of time.<sup>1</sup>

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

## Quo Ta S ver Su S Tariff S ver Su S a uc Tione D a cce SS

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, as discussed in Chapter 4, 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.

One way to analyze the difference between a quota or quality requirement on the one hand and a fee on the other is by 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 immigration taxes, emulating the transformation that took place in the Uruguay Round to “tariffy” quotas on agricultural products. 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. Finally, tariffication allows the state to capture a portion of the surplus, and perhaps apply it to fund adjustment.

This structure could be combined with a home state exit fee structure as discussed above, with joint enforcement between the host state and the home state. Under this combined mechanism, both states 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. While these fees would deter some migration, the home state and host state would presumably have a joint incentive to set the fee at a level that allows efficient migration.

Thus, the same system of charges would permit the home state to internalize a portion of the benefits from allowing their high-skilled workers to migrate, and allow the host state to impose a charge on un-

skilled immigrants that would either compensate the host state for the adjustment, fiscal, or administrative costs it incurs in relation to their entry, or deter their entry (Hatton and Williamson 2005). The magnitude of these fees, and their apportionment between home and destination states, could be subject to negotiation. One role for international law or organization in this setting would be to establish principles for apportionment, and perhaps an independent mechanism for apportionment.

These fees could be paid as lump sums, or could be charged over time through domestic tax systems or other collection mechanisms.<sup>2</sup> As suggested above, it would be very important to efficiency to establish a mechanism to facilitate financing of these fees over time in order to allow payment from future earnings. There would be no need to harmonize fees among destination states, as some destination states might be more interested in attracting unskilled workers, while others may be less interested in attracting or retaining skilled workers. Uniformity of fees would tend to suppress the operation of regulatory competition, although it may promote the operation of comparative advantage.

Destination states may wish to distinguish between entrants to their labor markets who arrive without a job and those who are recruited or already employed. They may also wish to distinguish between service workers and manufacturing workers, and between different types of skills. Different fees might apply to different types of workers.

Another way to set the migration fee, which would be even more sensitive to market conditions, may be to hold an auction (Simon 1987). From time to time, different commentators have suggested auction structures for entry visas: "Since 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" (Clarke 1994). 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 (Collie 2007, p. 11). This is based on the assumption that the auction and redistribution system is structured such that the native workers in the destination country gain, the migrant workers gain, and the workers that remain in the home country gain. "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” (p. 11).

Under the mechanism described above, the auction would in effect be conducted by the home and host states jointly, or at least it would allow the migrant to pay a single charge. One complicating factor would be the fact that potential migrants from multiple countries should be allowed to bid in the same auction, in order to allocate the right to immigrate efficiently.

On the other hand, destination states may be concerned about their ability to absorb migrants, and may desire to have a “safeguard” capacity to bar immigrants in case of unexpected labor market disruption or other economic or political problems. I deal with this “safeguard” issue in policy terms in Chapter 9, and in more technical terms below.

## **Taxation**

I have already discussed home state taxation in connection with migration fees. 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 financial competition, insofar as migrants would be subject to a minimum tax equal to their home state’s tax, regardless of their residence. Therefore, subject to the discussion above of migration fees in order to address brain drain, it would seem appropriate to provide an exclusion from home state taxation for migrants, with respect to income sourced in their host state.

Furthermore, subject to the above discussion of migration fees, host states should not otherwise 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 approach would direct all protection and externality internalization into the migration fee.

As discussed in Chapter 2, 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 in Chapter 9, and in order to avoid an inefficient regulatory competition, it may be appropriate to coordinate with respect to taxation.

### **Conclusions: From the Migration Liberalization Process to a Positive List Approach**

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 immigration is beneficial as it is to assume that an open door policy is beneficial. It is also equally as ignorant to assume that no international legal commitments in this field are feasible or desirable as it is to assume that a comprehensive set of multilateral obligations is feasible and desirable. Moreover, even under uncertainty, given the context of the generally beneficial effects of liberalization, the principle of conservatism would counsel not 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 GATS 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. The alternative, a negative list approach, entails preliminary acceptance of a comprehensive commitment to liberalize, and then negotiation 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 toward liberalization. However, the positive list approach has been used so far in services negotiations at the WTO (with some criticism), and at least up until the 1979 Tokyo Round, in effect was the dominant approach to reduction of tariffs. Since the 1940s, states in the GATT and WTO have debated whether to have across-the-board tariff reductions, with exceptions, or to simply negotiate on a product-by-product basis. Those states have most often used product-by-product negotiations.

A positive list approach seems to provide more power and possibility for lobbying either for or against liberalization in particular sectors: stronger sectoral lobbies may achieve their goals more readily with a positive list approach. A positive list approach may help to overcome a collective action problem among industries that might otherwise lack sufficient motivation to lobby for liberalization. Therefore, a positive list may be more politically feasible and may facilitate beneficial gradualism. It also may provide an opportunity to increase liberalization after experience and information are 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 (ISCO), maintained by the ILO, is already available and serves both as a model for national classifications as well as to facilitate communications among countries and analysts. The ILO describes the ISCO 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. (ILO 2007a)

ISCO operates at several levels of specificity, as reflected in Appendix A. It will be up to states to determine at what level of specificity to allow and make commitments. In the WTO legal system, there have already been a number of disputes regarding classification including in connection with the distinction between data processing machines and telecommunications 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.

### **Temporary and Permanent**

Individual migrants may wish to remain in a destination state temporarily, indefinitely, or permanently. Most of them would prefer to have a choice. From an economic standpoint, despite arguments that home states may avoid the harmful effects of brain drain through regimes of temporary migration, individual choice would seem to be most congruent with efficiency in this context. 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. As discussed in Chapter 2, artificial limitations might reduce the possibility of efficient migration. So, restriction of migration to allow only temporary migration seems like a second-best technique for protecting home states from brain drain, compared to the type of migration fee discussed above. A migration fee is the less migration-restrictive alternative, and is likely to be the less welfare-reducing alternative, as a means to remedy brain drain.

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.

## **iLLe Ga L iMMiGra Tion**

Some states might propose that as a *quid pro quo* in exchange for formal liberalization, sending states would be required to take appropriate measures to reduce illegal immigration. As illegal immigration is otherwise less desirable than legal immigration, all else equal, formal liberalization along the lines proposed here should naturally reduce the incentive to engage in illegal immigration. On the other hand, migration fees would provide a financial incentive to evade the formal system. It may even be that migration fees, collected through the tax system, would increase incentives for illegal immigrants to remain in the underground economy. More research may be required, and particular situations may require special treatment, for example, where costs of illegal migration are relatively low, and benefits of increased wages are relatively high, such as at the U.S.-Mexico border.

The WTO legal system, particularly in connection with the TRIPS agreement, has some experience in mandating domestic regulation on behalf of trading partners.

## **DiScri Mina Tion (M fn )**

As suggested in Chapter 9, a general MFN requirement should be evaluated for inclusion in any international migration agreement in order to reduce state discretion to discriminate among origin states.

Most-favored-nation treatment compares the treatment of different foreigners. In the past, states have used origin state-specific quotas and rules as proxies for ethnicity, likely skills, wealth, and perhaps other criteria. However it is possible to address these criteria directly, to the extent that they are acceptable as criteria, and then apply restrictions and rules on an MFN basis. So, while ethnicity would often be an illegitimate factor, and may raise human rights issues if applied as a criterion for admission (see Chapter 5), other factors may be acceptable.<sup>3</sup> Destination states would be permitted to establish qualitative and/or quantitative restrictions.

Hatton (2007, p. 364) argues that most countries already unilaterally operate in a nondiscriminatory fashion regarding migration. However, there are a number of counterexamples, including recent FTAs between the United States and Mexico, Canada, Australia, Chile, and Singapore (see Chapter 7). There are many bilateral labor agreements and other regional agreements that are structurally inconsistent with a principle of multilateral MFN (see Panizzon 2008).

As noted in Chapter 9, a strict MFN rule could provide incentives to “free ride” in liberalization negotiations. 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 a strict 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.

So, for example, if the Philippines determined that its welfare would be improved by emigration of its nurses to Japan, due to remittances or otherwise, while Japan also determined that its welfare would be improved by the same activity, they might determine not to charge any migration fees. On the other hand, assume for a moment that South Africa has a shortage of nurses and spent great amounts to train its nurses. Under these circumstances, South Africa and Japan might determine to charge a migration fee. No other discrimination would be permitted.

### **Exceptions to MFN**

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 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. Such an exception would be similar to those already existing in WTO law with respect to regional integration.

### **DiScri Mina Tion ( n a Tiona L Trea TMen T)**

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

In this section, I am discussing 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: to ensure that states do not defect from their liberalization commitments by discriminatory treatment “inside the border.”

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 could be addressed in positive list-based negotiations in connection with migration.

As the World Bank Independent Evaluation Group (2006, p. 74) points out, minimum wage laws and social insurance schemes set a floor on the price of labor. But there may still be scope for competition above the floor, or utility in establishing rules of nondiscrimination. Nondiscrimination by virtue of governmental measures would be an appropriate rule; it is uncertain whether private discrimination needs to be

addressed in connection with an economic migration treaty, as opposed to national law or a human rights treaty.

Although Hatton (2007) 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. 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 made such commitments, but later wished to renege, denial of national treatment would be a primary avenue for defection (p. 364). National treatment obligations in an international migration agreement would have the effect of ensuring that protectionist measures are confined to those actually negotiated.

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

## **r e G u L a T i o n   a n d   L i c e n s i n g**

It is well understood, both in the EU context (Chapter 6) and in the GATS context (Chapter 8), that both discriminatory and even nondiscriminatory 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 may serve important prudential purposes, 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 (Trachtman 2003c, 2007).

As described in Chapters 6 and 8, EU and GATS 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 GATS facility for future agreements might be appropriate, rather than a detailed work program toward harmonization and mutual recognition, as in the EU.

It is important in this context 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.

#### **a cco MPanyin G fa MiLy Me Mber S**

Denial of entry for members of a migrant's close family may serve as a substantial deterrent to migration—as an additional barrier to migration. There does not appear to be a specific customary or conventional international law right to family unity, or family reunification, in this context. 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 state's parties shall ensure that a child shall not be separated from his or her parents against their will, it does not specifically require states 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. But conditioning migration on a parent's willingness to separate from his or her children may be an effective barrier to migration. And so, it would seem appropriate for any agreement on international migration to address this issue.

In order to make effective the right to bring family members, 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 (Clarke 1994).

### **a cce SS of iMMiGran TS To Pub Lic Ser vice S**

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 nonuse 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 (2003) proposes using an insurance arrangement to provide for coverage, while providing that the destination state does not bear the cost. He proposes that migrants be required to obtain private insurance to cover possible drawings on noncontributory social programs during a specified period after entry. The programs addressed would include welfare payments and public noncontributory pensions. Trebilcock would not deny immigrants coverage under public education and health care. He 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 and may be structured to be more specific to particular immigrants. 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 restrictive alternative to skill, age, or other criteria designed as proxies for an acceptable level of 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 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 in terms of social welfare programs. 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.

### **Social Security and Health Insurance Continuity**

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 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 EU has developed appropriate systems for providing continuous coverage and 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, National Service, and Draft Obligations**

States have often been reluctant to grant citizenship to immigrants. Difficulty in achieving citizenship may be seen by potential immigrants

as a disincentive to migration: the longer it takes and the more difficult it is to become an equal member of society, the less attractive migration will be. One potential solution is to negotiate a uniform, or a scheduled nonuniform, maximum period of residence prior to eligibility for citizenship. At some point, states must recognize, with Max Frisch, that they have imported not just workers, but men and women who deserve the same status, rights, and 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. On the other hand, a maximum period prior to citizenship may have the perverse effect of inducing 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 requiring them also to contribute 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 state sharing increased. This would provide a rough way to establish a level playing field and avoid cumulative requirements for service.

### **Transparency and Regular Procedures**

As migration is a “retail” individual decision, unlike much of international trade in goods and services, transparency of rights, obligations, and procedures is critical. Efficient migration depends on good information. States should undertake to provide effectively useful information about conditions and procedures so that potential migrants can make accurate decisions. This would include complete, integrated, and understandable publication of all measures affecting migrants. States should also agree to administer their rules in a reasonable and impartial manner.

## **Loyalty, Demagoguery, and Public Relations**

As discussed in Chapter 4, there are significant tendencies in destination states 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 themselves 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 they understand that this fee ensures that immigrants do not burden the domestic public welfare system, and that 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, especially focused on the destination states, to promote understanding of the benefits of liberalized migration.

## **Safe Guarantees and Compensation**

Immigration flows may respond to a number of causal factors and may be difficult to predict. Alternatively, states may have trouble predicting the effects on domestic employment markets, or they may have trouble predicting jobs growth. So, to the extent that states make meaningful commitments that are not otherwise limited, there may be a rationale for a safeguards-type mechanism to allow contingent protection against inflows, as discussed in Chapter 9. If a compensation system were thought useful, requiring the state utilizing the safeguard to compensate the states that relied on the liberalization commitment, 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 United States regarding the econometric analysis of the impact of increased flows of immigrants on the welfare of domestic workers.

### **forced Migration and “reverse Safeguards”**

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. These types of events have often caused surges of emigration (Hatton and Williamson 2005, p. 213). 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 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.

### **n a Tiona L Securi Ty an D c ri Mina LiTy**

Immigration raises critical issues from a national security standpoint (Fisher, Martin, and Schoenholtz 2003). Each state will reserve the right to qualify its commitments by reference to national security concerns. Within the WTO agreements, this type of exception qualifies

virtually all commitments, and is expressed as to goods in Article XXI of GATT.<sup>4</sup> 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.

In addition, states will generally wish to restrict entry by criminals who may pose a threat of criminal conduct. If states did not have the power to restrict entry, malevolent sorting processes might occur, and criminals might tend to congregate and exercise power in particular states.

### **Health Exceptions**

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 WTO Agreement on Sanitary and Phytosanitary Measures may be a useful reference as states determine how to address this issue.

### **Cultural Integrity, Irredentism, and Ethnic Conflict**

As discussed in Chapters 3 and 4, 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 (Ghosh 2000, p. 17). However, in a world of increased multilateral liberalization of migration, ethnic exceptions may seem more and more suspect.

### n o t e s

1. Under U.S. law, for example, certain education loan payments by certain taxpayers (subject to a cap on gross income) are eligible for a deduction. However, under current law, only loans paid for expenses at a limited number of foreign educational institutions qualify for deductibility.
2. For a suggestion regarding modifications to the international tax principle of residence-based taxation, see Straubhaar (2000, pp. 132–133). Straubhaar recommends “a fixed lump-sum entrance fee to be paid by every person wishing to immigrate, collected at the country of residence, and shared in equal proportions by sending and destination countries could be a first idea to follow.”
3. Some states may view religion (as opposed to ethnicity) as a critical criterion.
4. Article XXI of GATT has not been applied in WTO dispute settlement (WTO 1986). For scholarly commentary, see for example, Schloemann and Ohlhoff (1999). See also Article XIV of GATS (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).

# 11

## Organizational Structures

Should the ILO have been the fourth Bretton Woods institution, alongside IMF, the World Bank, and GATT? After World War I, France, Italy, Japan, and Poland argued unsuccessfully that the ILO should regulate migration (James 2001). 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. Chapters 2, 3, 4, 9, and 10 have addressed this issue. 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, enforce, and develop—a multilateral agreement on migration. An international organization may house adjudication or be a forum for decision making. Of course, the type of international organization that will be useful, the desirable structure, and the type of functions that it would perform, are dependent upon the type of international legal rules that are determined to be desirable.

Chapters 6, 7, and 8, which describe the role of the EU, other regional or bilateral organizations, and the WTO, 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, making of new rules other than by treaty, surveillance, dispute settlement, and punishment. And, of course, at least four important multilateral organizations already address economic migration, in at least some dimensions: 1) the IOM, 2) the ILO, 3) the United Nations Conference on Trade and Development (UNCTAD), and 4) the WTO.

This chapter addresses four main questions:

- 1) Assuming that international law would be useful in the field of international economic migration, would an international organization be useful, compared to the alternatives?

- 2) What organizational features and governance arrangements would be appropriate for an organization dealing with international economic migration?
- 3) Would the IOM, ILO, UNCTAD, or WTO serve usefully as the international organization principally charged with responsibility for international economic migration?
- 4) How should different organizations addressing varying facets of international economic migration coordinate their activities?

### **Would an International Organization be Useful?**

Not all international law requires an organization. Much, if not most, international law lacks a secretariat, dispute settlement, decision making, surveillance, and other organizational functions. While Chapters 2, 3, 4, 9, and 10 suggest that 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.

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 (Trachtman 1997). 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 regarding economic migration, transaction costs arise from two main sources. First, they are occasioned by the cost of establishing mechanisms to promote cooperation and 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 effected through legal rules, 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 (Williamson 1985). 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 perhaps 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.<sup>1</sup> In this example, an asset specific investment is one that can only realize its full value in the context of continued relations with another party.

Williamson (1985, p. 42) 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.”

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 experiences 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 reestablish 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 reestablishment of the restrictions.

Furthermore, to the extent that migration barriers are initially 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. It may be attractive for some states to defect, knowing that other states are unable to retaliate.

Williamson (1985) sees transaction costs economizing as the main purpose of vertical integration—of formation of organizations. Verti-

cal 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 general international law, there are fewer institutional and legal structures to complete contracts. First, there is not a complete body of law that can be applied to supply missing terms to incomplete treaties. Second, there is no dispute resolution tribunal with mandatory jurisdiction. 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 contracts in order to avoid opportunism: to complete the contemplated transaction as intended. The higher the magnitude of asset specificity, the greater the incentives for opportunism and 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.

## HOW SHOULD an International Organization Address Migration? Should it be designed?

As described earlier in this work, 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 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 *ex post* complete 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, with a somewhat different domain, 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, 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 autointerpretation. This declarative role can have important informal effects, and these 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 settle-

ment 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) (Bhagwati 2003). 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 treaty obligations, including perhaps the following:

- Purposes. These 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.
- 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 GATT/WTO 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 WTO, 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 WTO'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 in destination states. If the antiglobalization backlash has been significant with respect to goods, it may become even 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 EU, the OECD,

the WTO, 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 ILO's tripartite governance structure may also facilitate transparency and the perception of legitimacy between employers as well as workers (Charnovitz 2003a).

- Substantive expertise and experience. A WMO might contain experience in economic negotiations, including analytical capabilities that could support negotiations and dispute settlement, expertise in the human side of migration, including the capacity of societies to absorb migrants, expertise in labor market conditions and dynamics, expertise in tax policy, expertise in human rights, and 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 GATT in 1947 did not contain a specific mandate along these lines, GATT, and now the WTO, 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 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 EU, so we know that such majority vot-

ing is not categorically impossible. After more experience of increased liberalization, and greater commitments for liberalization, states may determine that some matters could be addressed through majority voting. A number of different decision-making structures are possible. One would have the composition of delegates to the WMO take a tripartite structure, similar to the ILO, where representatives of states, employers, and workers are integrated into the decision-making process (Charnovitz 2003a).

- Dispute settlement. As discussed above, this 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 WTO 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 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. They 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 under the relevant treaty, and 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 noncompliance.
- **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. As noted in Chapter 9, this does not necessarily mean that the organization must have other responsibilities, but under some transaction cost circumstances, a broad set of responsibilities will facilitate barter.

## **WHat SHOuld be t He rOle Of t He IOM, ILO, and Wt O?**

Now that we have defined some of the functions of a WMO, we can begin to assess whether a new organization is necessary or appropriate, or whether one or more of the existing organizations could best take up these responsibilities. However, the list of functions provided in the prior section is not definitive, nor is it 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 OECD, UNCTAD, and perhaps the IOM, while the IOM, ILO, UNCTAD, WTO, or a WMO could perform other functions. Or, dispute settlement for individuals, if they are to have private rights of action, could be assigned to a specialized organization such as 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 WTO, 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 WTO, plus migration liberalization.

Indeed, there are no “ideal” answers to these questions, only practical choices to be made based on multiple criteria. I begin by describing the present functions of the IOM, ILO, and WTO.

### **t he IOM**

The IOM 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 IOM when it was founded in 1951” (United Nations High Commissioner for Human Rights 2003).

Article 1(1)(e) of the IOM 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 IOM 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 IOM does not seem to include the establishment of international legal commitments for admission of migrants. Of course, this is by no means an insuperable barrier: in the same instrument by which states entered into a multilateral agreement to liberalize migration within the context of the IOM, they could modify the IOM constitution to permit this activity. Furthermore, as a matter of interpretation, the fact that the IOM recognizes that admission is within domestic jurisdiction does not mean that states cannot make international legal commitments to constrain their authority over admission.

However, the IOM has no particular history or institutional commitment to liberalization of migration. The IOM 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.

## **t he ILO**

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

The ILO 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 connections. 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 poverty is work” (International Labour Organization 2007a). Yet, surprisingly, the ILO does not today seem to see facilitation of liberalization of migration in order to make work available as one of its “fields of action.” Article 10 of the ILO 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 ILO, calls for the provision . . . of facilities for . . . the transfer of labour, including migration for employment and settlement . . .”

In 2004, the ILO adopted a multilateral framework on labor migration as part of a plan to manage labor migration better. However, none of the activities planned under this framework seem aimed at liberalizing migration. In 2004, the ILO adopted a plan of action with respect to migration, which includes as one component the development of a nonbinding multilateral framework for a rights-based approach to labor migration.

The ILO has produced a number of treaties, mostly addressing issues relating to the conditions of work. However, the rate of ratification of ILO treaties which relate to migration for employment as well as the suppression of illegal employment and trafficking of labor has been low (Charnovitz 2003a). The ILO 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 ILO also has some salient governance features. As noted above, one of the intriguing and attractive features of the ILO 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. This tripartite structure and its potential to “catalyz(e) new international norms on worker mobility” has been noted by Charnovitz (2003a), who has also recommended that any WMO should consider adopting this structure “to enable the formation of stronger constituencies for lessening barriers to migration.”

## the WTO

The WTO, formed in 1995, addresses trade in goods, trade in services, and intellectual property rights. Unlike the ILO and the IOM, the WTO's main function is to facilitate and service national commitments, mostly in the area of liberalization of trade in goods and services. The WTO 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 WTO has a very highly articulated system of mandatory dispute settlement, which is used often.

As discussed in Chapter 8, the WTO'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 WTO 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 WTO, as discussed above and in Chapter 9, such cross-concessions might be facilitated by inclusion of these subject matters in a single organization.

## COHerent Ce and t He r eg I Me C OMplex f Or Interna t IOnal l ab Or M Igra t IOn

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 IOM, ILO, and WTO, 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 significantly broader activities in this field. As Ghosh (2007, p. 111) suggests, "the fragmented institutional set-up

inhibits a comprehensive and coherent policy approach to the multi-dimensional problem of migration management.”

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, have 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.

As noted in Chapter 1, the Global Migration Group was established in order to provide coherence in migration policy. Indeed, the Global Commission on International Migration report suggested the establishment of an interorganizational 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.

## **WHICH Organ Iza t IO?**

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 WTO is the premier organization for negotiations over international liberalization of goods and services. Cross-concessions would be facilitated, the WTO'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 OECD, UNCTAD, IOM, and ILO 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 ILO 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 ILO has little experience in the kinds of distributive negotiations that have been the subject matter of the WTO.

None of the other existing agencies seem 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.

#### **n o t e**

1. Klein, Crawford, and Alchian (1978) consider asset specificity only one explanation of vertical integration. Coase (2000) has challenged the factual accuracy of this example. However, the example is useful as a parable, regardless of its veracity.





# 12

## Conclusion

In geologic time, the period during which migration has been restricted has been quite short. As noted at the outset of this study, migration has served throughout time as a mechanism of human betterment (Chanda 2007).

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. So, a proposal to reduce restrictions on migration must be understood as subversive of sovereignty. Perhaps the most important way in which liberalization of migration is subversive of sovereignty is by breaking the sovereign-subject relationship once and for all, making it clear that governments exist to serve citizens and not the other way around. As discussed in Chapter 2, individual mobility may also provide a welcome competitive discipline on governments, although there are circumstances under which mobility could induce an inefficient competition.

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, there is consensus among economists 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 practi-

cal reasons, and for ethical reasons, it seems appropriate to establish a framework for gradual negotiation of liberalization in this field.

People are not commodities. This work has attempted to give this fact due respect, and to suggest how, nevertheless, international legal commitments to allow people to migrate are legitimate and appropriate. But it is a challenge to avoid commodification of people. Nuanced international legal commitments, written with the whole person in mind, and with sympathy and humanity, are needed. It is a challenge to international law to defragment its thinking enough to merge the more defined economic concerns with the no less valid concerns of humanity. There really is no choice, as Max Frisch meant when he said, “We imported workers and got men instead” (Borjas 2007).

There is today no multilateral system for liberalization of economic migration. While there are human rights norms that protect the right of exit, and regional systems for liberalization of migration such as the European Union, there is no general system for commitment to labor market access. And yet, the economic welfare that could be unlocked by such a system, especially to the extent that it allows poor people to move to places where they could be more productive, is enormous. The development potential for sending states is also substantial. This book examines the political barriers to unlocking welfare, and at the same time unlocking the “global apartheid” in which poor people are prevented from leaving places that keep them poor. This book proposes legal mechanisms that can assist states in consensually diminishing these political barriers.

It is indeed true that people are not commodities, and it will not do simply to apply existing trade rules to the movement of people. People involve complex needs and social connections, making movement delicate and challenging. And yet, many people wish to move, and there are good ethical and economic reasons to promote this movement.

What are the factors suggesting unmet demand to move? First, wage rate disparities are very large. They are much larger than the differences in prices of goods that provide the motivation for trade. Second, demographic decline in wealthy countries, combined with demographic surge in poor countries, suggests the bilateral need for migration. For example, as to the United States, the Pew Research Center has recently stated 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 percent of the increase will be due to immigrants arriving from 2005 to 2050 and their U.S.-born descendants . . . .”<sup>1</sup>

Empirical studies of factor mobility, and estimates prepared by Winters et al. (2002) and by the World Bank Independent Evaluation Group (2006), seem to confirm that there are very large potential returns from increased liberalization. These potential returns substantially exceed the potential 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. Destination states are benefited by migration to the extent that the migration responds to relative scarcity 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 (1997) 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. 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 are likely to gain.

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 nonimmigrant 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.” “For low-skilled immigration . . . this does not appear to be the case” (Hanson 2007, p. 21). Third, the destination state will experience the costs of administering an immigration system.

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 services they receive, are as large as possible” (Hanson 2007, p. 4). 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” (Hanson 2007, p. 14). So it is not strange, as Hanson (2007) explains, that in the United States, 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.

One of the critical issues that liberalization of migration will have to face is the fact that much of the desire to migrate involves migration from poor countries to advanced countries. Richard Freeman (2006, p. 161) suggests that “one plausible explanation is that countries differ in technology (Markusen 1983; Markusen and Svensson 1985). 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 (Gierking and Mutti 1983).”

It is possible that destination states may under some circumstances lose from immigration of unskilled workers, while origin states may

gain. Emigration of low-skilled workers can increase wages and reduce unemployment and underemployment of poor workers in the home country. O'Rourke finds that wages rose in emigration countries during the late nineteenth and early twentieth centuries, converging with countries of immigration, and that "emigration was an important source of living standard convergence for [emigration countries]" (O'Rourke 2004, p. 7). Taylor and Williamson (1997, p. 27) find that international real wage dispersion declined by 28 percent from 1870 to 1910, but that without the mass migrations of this period, wage dispersion would have increased by 7 percent. Migration explains about 70 percent of living standards convergence during this period. O'Rourke concludes that "emigration 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" (O'Rourke 2004, p. 9; Williamson 2002).

Emigration of low-skilled workers has usually been beneficial to developing countries, contributing to poverty alleviation (World Bank Independent Evaluation Group 2006, p. 64). However, recent studies of Albania, Bangladesh, and Sri Lanka show no discernible wage improvements, despite large-scale emigration (Lucas 2004). Much will depend on remittances, return migration, and facilitation of investment by virtue of emigration. While the effects of brain drain are uncertain, it is possible that poor states could be harmed by emigration of skilled workers.

Although 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 improvements 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 types of concessions.

I focus here on the implications of economically self-interested behavior by voters and lobbyists, rather than important issues of irredentism, demagoguery, and security.

Between wealthy states, there is little need for international agreements regarding migration. First, there is little demand to migrate, because wages and productivity are relatively homogeneous. Second, wealthy states already autonomously allow immigration of skilled workers from other wealthy states, and unskilled workers have little reason to move. While there is little need for such an agreement, and the welfare payoff would be low, there is little reason not to provide commitments and clarification of market access for labor.

The more interesting case is migration between poor and rich countries. Here, the potential welfare gains are very large. However, there are three substantial political problems:

- 1) The welfare gains accrue largely to the migrants themselves. The implication of this fact is that neither the home country nor the destination country has strong incentives for liberalization.
- 2) There is little room for reciprocal agreements within the field of migration, because migration between poor and rich countries is a “one-way street.” That is, generally speaking, there is little demand by rich country citizens to migrate to poor countries. This is because the differences in productivity that give rise to the incentive to migrate from poor to rich countries also give rise to strong disincentives to migrate from rich to poor countries.
- 3) There is concern, although there is no consensus among economists on the empirics, that migration of low-skilled workers into wealthy countries reduces the jobs and employment of native low-skilled workers in wealthy countries.

And yet, the political economy of migration is different from the political economy of trade, because producers are generally interested in liberalization of immigration by their own state.

Let us focus on the political problems of liberalizing migration between poor and wealthy states. If productivity differences were not great, it would be possible that reciprocal international agreements for liberalization could assist in forming a proliberalization coalition between producers and potential emigrants who seek openness in other states. If productivity differences are great, it may be more difficult

to form proliberalization coalitions. However, one way to do so is to provide for other concessions by poor states to wealthy states, perhaps along the lines of liberalization of investment or high-value services. This type of reciprocation would be benevolent, with both parts of the bargain improving the welfare of poor states. To the extent that unskilled or other classes of workers are hurt in wealthy states, the wealthy states may need to provide adjustment mechanisms to procure support. Another possible inducement for a proliberalization reciprocal agreement might be the alternative strategy that destination state capital can pursue, through use of outsourcing or through employment of illegal workers. From the standpoint of destination state labor, it may be that legal immigration is a superior outcome compared to outsourcing or illegal immigration.

One of the political problems with migration is that most of the benefits accrue to the migrants themselves. Economists often support temporary migration in order to guard against potential adverse effects of brain drain. However, a more attractive option in order to prevent adverse effects of brain drain, and to increase political support of liberalization in the home state, is to support the home state's efforts to recapture its investment in high-skilled emigrants through the ability to charge a tax on some portion of the emigrant's income. Furthermore, to the extent that immigration may harm certain classes of workers in the destination state, or may impose undue pressures on welfare or transfer programs, it may be appropriate to allow some level of discriminatory taxation of migrants by the destination state. These tax arrangements may assist in inducing the development of proliberalization coalitions.

In Chapters 9 and 10, 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: 1) the value of the home state contribution to human capital of the migrant, and 2) 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 produc-

tive 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 egalitarianism as to resources (Dworkin 1981). Of course, application of this type of redistribution only to migrants might be improperly limited, and might have the result of distorting migration.

Of course the form of any agreement, and the structure of any organization, to address international economic migration will result, if at all, from an extensive domestic and international political give-and-take that this book cannot reflect. Rather, this book should be understood as a suggestion to commence the give-and-take: as an indication that this is a path to greater welfare worthy of exploration. And yet, I thought it useful to set out as an appendix a speculated form of agreement. This is intended not as something that states should enter into, but more as an example or checklist of the types of things that may be worthy of consideration. It is by no means complete and does not purport to reflect the preferences and concerns that must be reflected: only the political process of negotiation can do that. The main concern of this book has been to show that a multilateral agreement on migration may be feasible and useful. The actual shape of such an agreement will depend on a number of parameters that are unknown at this time, and upon the dynamics of negotiation.

This book's analysis suggests that different states will have different strategic positions, that different economic sectors within these states will have different strategic positions, and even that different occupational groups will have different strategic positions. Thus, it is clearly impossible to specify a single arrangement for international cooperation, or even to predict whether international cooperation will occur.

However, we know that in the aggregate, liberalization is expected to provide increased surplus, and, assuming that there are mechanisms that can be devised to overcome the strategic problems that may exist between different domestic constituencies, and between different states, and that the increased surplus exceeds the cost of its capture, we would expect states to move to do so. This book is an exercise in institutional imagination intended first to evaluate whether the surplus may exceed the cost of its capture, and how states may move to capture it. That they



have not made these moves generally thus far does not mean that such moves are not available: it would be difficult to argue that the international legal system as we see it is already efficient. Some may argue that capital markets, with their clear pricing, narrow profit motives, and numerous transactions, are already efficient, and that therefore, new transactions cannot result in profits. However, the international legal system is far less efficient, so we may expect that new transactions—of the nature described above—could make the parties better off.

In order to move forward, it will be necessary to analyze different states, different sectors within states, and different occupations within those sectors, in order to understand the strategic position of each. Then, once we know what game is being played, we can evaluate which international legal rules, if any, are useful in order to allow for the maximum net payoffs. It is by establishing a framework agreement, and engaging in negotiations, that states will be able to evaluate and reveal whether there are useful transactions that may be effected.

A framework agreement that allows for states to agree on the structure of reciprocity, to allow sending states to share in the benefits of liberalization through a Bhagwati tax or other mechanism, to make side payments through linkage to other areas of liberalization, and to make side payments through immigration fees, would establish an appropriate institutional framework—would minimize the transaction costs—for states to negotiate optimal arrangements. While such a framework agreement might best be legally binding, it is possible that it might alternatively be best kept informal. In international law, the distinction may have only subtle behavioral implications.

Assuming that liberalization of migration is potentially Pareto efficient, it may be that states are unable to achieve the efficient liberalization unless a move is made toward actual Pareto efficiency: toward compensation of states and individuals that are otherwise made worse off.

The national political economy of international migration as developed in Chapter 4 is complex, and mediates imperfectly the welfare considerations developed in Chapter 2, and mediates even more imperfectly the ethical considerations developed in Chapter 3. However, even an imprecise assessment of the interplay of interest and power yields insights into the possibility that international legal rules may play a role

in committing other states to act, in order to support domestic coalitions that will support liberalization.

### **Note**

1. Jeffrey Passel, D'Vera Cohn, U.S. Population Projections 2005–2050 (February 11, 2008), available at <http://pewsocialtrends.org/pubs/703/population-projections-united-states>.

# Appendix A

## Illustrative Draft General Agreement on Labor Migration

This illustrative draft agreement is provided merely to indicate the types of provisions that might be negotiated by states if they were to determine to enter into a multilateral “General Agreement on Labor Migration.” Its provisions should be understood more as a checklist of issues to consider than as a recommendation as to how issues should be resolved. Furthermore, there are many additional issues that states will wish to consider as they approach such an agreement. Finally, this illustrative draft agreement does not contain provisions creating or specifying the design of an organization in which to house the agreement.

### 1. Preamble

1.1. Recognizing the growing importance of migration for the growth and development of the world economy;

1.2. Wishing to establish a multilateral framework of principles and rules for migration with a view to the expansion of migration under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all home states and destination states and the development of developing countries;

1.3. Desiring the early achievement of progressively higher levels of liberalization of migration through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;

1.4. Recognizing the right of Members to regulate, and to introduce new regulations, on the health standards applicable to immigrants, the security standards applicable to immigrants, and the qualifications of professions and skilled work within their territories;

1.5. Desiring to facilitate the reduction of poverty and the development of developing countries;

1.6. Taking particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development, trade, and financial needs

Hereby agree as follows:

## PART I SCOPE AND DEFINITIONS

2. Scope. This Agreement applies to measures by member states affecting labor migration, including without limitation immigration.

### 3. Definition

3.1. For the purposes of this Agreement, labor migration is defined as the physical departure of a citizen of one Member from that Member, the travel of such citizen to a destination Member, and the admission and residence of such citizen in the destination Member, for the purpose of seeking or taking up any type of labor.

3.2. For the purposes of this Agreement:

3.2.1. “measures by Members” means measures taken by:

3.2.1.1. central, regional, or local governments and authorities; and

3.2.1.2. nongovernmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities;

3.2.2. In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and nongovernmental bodies within its territory.

## PART II GENERAL OBLIGATIONS AND DISCIPLINES

### 4. Transparency

4.1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements to which a Member is a signatory pertaining to or affecting labor migration shall also be published.

4.2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made publicly available otherwise.

4.3. Each Member shall promptly and at least annually inform the Council for Migration of the introduction of any new, or any changes to existing, laws, regulations, or administrative guidelines which significantly affect migration covered by its specific commitments under this Agreement.

4.4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member

shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within one year from the date of entry into force of this Agreement. Appropriate flexibility with respect to the time limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.

4.5. Any Member may notify to the Council for Migration any measure, taken by any other Member, which it considers affects the operation of this Agreement.

4.6. Nothing in this Agreement shall require any Member to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

#### 5. Labor Market Access Commitments

5.1. Each Member shall set out in a schedule appended to this Agreement the specific commitments it undertakes under this Agreement.

5.1.1. Commitments shall be structured in any of the following ways:

5.1.1.1. Horizontal Commitments. Horizontal commitments relate to all immigrants.

5.1.1.2. Occupational Title Commitments. Vertical occupational title commitments relate to immigrants who are categorized within a particular occupational title. Wherever possible, each Member shall utilize the International Standard Classification of Occupations 2008, as in force on the date hereof (“ISCO 2008”), as a basis for its occupational title commitments. Each Member shall publish a set of definitions of each occupational title, showing how its definitions differ from the relevant ISCO 2008 definitions.

5.1.1.3. Occupational Group Commitments. Vertical occupational group commitments relate to immigrants who are categorized within a particular occupational group. Wherever possible, each Member shall utilize the ISCO 2008, as a basis for its occupational group commitments. Each Member shall publish a set of definitions of each occupational group, showing how its definitions differ from the relevant ISCO 2008 definitions.

5.1.1.4. Skill Level Commitments. Skill level commitments relate to immigrants who are categorized within a particular skill level group. Wherever possible, each Member shall utilize the ISCO 2008 skill level group definitions, as a basis for its skill level commitments. Each Member shall publish a set of definitions of each skill level, showing how its definitions differ from the relevant ISCO 2008 definitions.

5.1.1.5. **Wealth Level Commitments.** Wealth level commitments relate to the net worth of the individual immigrant or family of immigrants, and shall be specified in the Schedule of Commitments in terms of a monetary amount, as well as a statement as to evidentiary requirements required to be met in order to qualify under these commitments.

5.1.2. With respect to each commitment undertaken, each Schedule shall specify:

5.1.2.1. distinctions, where desired, between those who already have accepted a job offer in the destination Member, and those who wish to enter the labor market of the destination Member;

5.1.2.2. terms, limitations, and conditions on access;

5.1.2.3. conditions and limitations on national treatment;

5.1.2.4. undertakings relating to additional commitments;

5.1.2.5. where appropriate, the time frame for implementation of such commitments;

5.1.2.6. the date of entry into force of such commitments.

5.1.3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

5.2. With respect to labor market access, including the issuance of a visa (if necessary) and entry, each Member shall accord citizens of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule

5.3. Quota for entry. A Member may specify within their schedules as to a specific classification of immigrant such quotas or other numerical limit on entry as such Member shall determine.

5.4. Immigration fee or discriminatory tax. Members may specify within their Schedules as to a specific classification of immigrant, from a specific home Member, that such immigrants shall be subject to an immigration fee, or an income tax that may be greater or less than that ordinarily applicable to citizens or residents. To the extent that the tax is greater than that ordinarily applicable to citizens, the collecting Member shall, as specified in its Schedule, either (i) apply the proceeds in a manner reasonably designed to provide adjustment assistance to citizens or residents who have experienced economic dislocation due to immigration, and shall notify the Council for Migration annually of the details of such application, or (ii) transfer the proceeds representing the excess of the applied tax over that ordinarily applicable to citizens to the home Member in respect of the subject immigrant.

5.5. Restrictions on term of residence, if any. A Member may specify within its Schedule as to a specific classification of immigrant such temporal or other limitations on the term of residence of such immigrant as such Member shall determine.

5.6. Entry of family members. A Member may specify within its Schedules as to a specific classification of immigrant such provisions relating to permission for entry of family members and national treatment of family members as such Member may determine; provided, however, that any immigrant who resides or is expected to reside in the territory of a Member for a period greater than one year shall be permitted to be accompanied by such immigrant's spouse or domestic partner, children, or parents.

5.7. Members may negotiate commitments with respect to measures affecting immigration, including those regarding qualifications or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

6. Prohibition of other Quantitative or Economic Restrictions, Including Labor Market Certification Arrangements.

6.1. Other than the types of restrictions permitted to be included in Members' Schedules pursuant to Article 5, Members shall apply no quantitative restrictions on immigrants.

6.2. "Quantitative restrictions" include not only quotas but also, without limitation, labor market certification requirements, competitive needs tests, minimum wages (other than generally applicable minimum wages applied without discrimination by nationality), or other similar labor market condition-based restrictions or conditions on entry.

#### 7. MFN in Entry

7.1. With respect to any measure covered by this Agreement, except as specifically provided in this Agreement, each Member shall accord immediately and unconditionally to citizens of any other Member treatment no less favorable than that it accords to like citizens of any other country.

7.2. Where a Member maintains a quota on immigration, such quota shall be allocated among home countries. The Member applying the restrictions may seek agreement with all other Members having a substantial interest with respect to the allocation of shares in the quota. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest shares based upon the proportions of immigrants supplied by such Members during a previous representative period, due account being taken of any special factors which may have affected or may be affecting immigration.

7.3. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article 7 Exemptions.

7.4. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate short-term migration limited to contiguous frontier zones.

## 8. MFN Exceptions for Existing Arrangements, Including Bilateral Labor Agreements

8.1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing labor migration between or among the parties to such an agreement, provided that such an agreement:

8.1.1. provides for substantial liberalization of immigration restrictions in both high-skilled and low-skilled occupations,

8.1.2. has substantial occupational coverage, and

8.1.3. provides for the absence or elimination of substantially all discrimination, in the sense of Article 11, between or among the parties, in the occupations covered under subparagraphs 1 and 2, through:

8.1.3.1. elimination of existing discriminatory measures, and/or

8.1.3.2. prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame, except for measures permitted under Article 11 and exceptional provisions of this Agreement.

8.2. In evaluating whether the conditions under paragraph 1 are met, consideration may be given to the relationship of the agreement to a wider process of labor integration or trade liberalization among the countries concerned.

8.3. Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided regarding the conditions set out in paragraph 1, particularly with reference to subparagraph 3 thereof, in accordance with the level of development of the countries concerned, both overall and in individual occupations.

8.4. Any agreement referred to in paragraph 1 shall be designed to facilitate migration between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to migration within the respective sectors or subsectors compared to the level applicable prior to such an agreement.

8.5. Members that are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Migration. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article.

8.6. Members that are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time frame shall report periodically to the Council for Migration on its implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary.



8.7. Based on the reports of the working parties referred to in subparagraphs 5 and 6, the Council may make recommendations to the parties as it deems appropriate.

#### 9. Prohibition of Restrictions on Emigration.

9.1. Members shall not take any measures to restrict or hinder emigration by their citizens and residents.

9.2. The obligations of Members under paragraph 1 shall be subject to exceptions as appropriate on reasonable grounds of protection of national or international public health, national security, and public policy, provided that these exceptions comply with international human rights law.

#### 10. Emigration Tax

10.1. Notwithstanding any other provision of this Agreement, and notwithstanding any provision in any tax treaty or other treaty in force between Members, home state Members may continue to tax their citizens after emigration to any destination state Member.

10.2. Any tax imposed pursuant to paragraph 1 shall be limited to an amount calculated as specified in the Schedule of Article 10 Taxes of the relevant Member. The relevant Member may reduce the tax specified on such Schedule at any time.

10.3. Any tax imposed pursuant to paragraph 1 shall give rise to a deduction or to a credit under the tax regime of the destination state Member as and to the extent specified in the Schedule of Commitments of the destination Member.

10.4. The destination state Member shall provide full assistance to the home state Member in connection with the collection and enforcement of any tax imposed under paragraph 1.

#### 11. National Treatment

11.1. In the sectors inscribed in its Schedule, and subject to any conditions or qualifications set out therein or elsewhere in this Agreement, each Member shall accord to citizens of any other Member, in respect of all measures affecting immigration, the right to work after entry, and the conditions of work after entry, treatment no less favorable than that it accords to its own like citizens.<sup>1</sup>

11.2. Notwithstanding paragraph 1 of this Article, the treatment a Member accords to citizens of the other Member may be different from the treatment the Member accords to its persons, provided that:

11.2.1. the difference in treatment is no greater than that necessary for prudential, fiduciary, health and safety, or consumer protection reasons; and

11.2.2. such different treatment is equivalent in effect to the treatment accorded by the Member to its ordinary residents for such reasons.

11.3. The Member proposing or according different treatment under paragraph 2 shall have the burden of establishing that such treatment is consistent with that paragraph.

11.4. No provision of this Article shall be construed as imposing obligations or conferring rights upon either Member with respect to government procurement or subsidies.

11.5. Labor organization. Where membership in a labor organization is available to citizens, Members shall ensure that such labor organization admits immigrants under conditions and circumstances that are no less favorable than those that the labor organization accords to citizens of the Member. Any clause of a collective agreement or individual agreement concerning eligibility for employment, remuneration, or other conditions of work shall be null and void insofar as it provides for discrimination against nationals of other Members.

11.6. Military service. No migrant under this Agreement shall be obligated to serve in the military service of the destination state, unless and until such individual becomes a citizen of such destination state.

11.7. Notwithstanding any other provision of this Agreement, no Member shall have any obligation under this Agreement to accord to any person the right to vote in political elections, to admit any person to elective or appointive public office, or to allow any person to enlist in its military, police, or other security services.

12. Public services. In addition to the obligations provided under Article 11.1, Members shall ensure that immigrants have equal access to public services provided to citizens, including public education, public health services, public housing, police and fire protection services, social work services, and other public services.

13. Coordination of Social Security. In order to provide freedom of movement for workers and self-employed persons, the Members shall, in the field of social security, secure, as provided for in Annex 13, for workers and self-employed persons and their dependants, in particular:

13.1. aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

13.2. payment of benefits to persons resident in the territories of Members.

14. Professional Qualifications, Licensing, and Recognition

14.1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting immigration and authorization to work are administered in a reasonable, objective, and impartial manner.

14.2. Each Member shall maintain or institute as soon as practicable judicial, arbitral, or administrative tribunals or procedures which provide, at the request of an affected person, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting migration. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

14.3. The provisions of paragraph 2 shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

14.4. Where authorization is required for the practice of an occupation on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.

14.5. With a view to ensuring that measures relating to qualification requirements and procedures and licensing requirements do not constitute unnecessary barriers to immigration, the Council for Migration shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

14.5.1. based on objective and transparent criteria, such as competence and the ability to practice the occupation;

14.5.2. not more burdensome than necessary to ensure the quality of the practice of the occupation and to achieve other relevant public policy goals;

14.5.3. in the case of licensing procedures, not in themselves a restriction on immigration.

14.6. In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 5, the Member shall not apply licensing and qualification requirements that nullify or impair such specific commitments in a manner which

14.6.1. does not comply with the criteria outlined in subparagraphs 14.5.1, 14.5.2, or 14.5.3; and

14.6.2. could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made

14.7. In determining whether a Member is in conformity with the obligation under paragraph 6, account shall be taken of international standards of relevant international organizations applied by that Member.<sup>2</sup>

14.8. In sectors where specific commitments regarding professional occupations are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.

15. Recognition.

15.1. For the purposes of the fulfillment, in whole or in part, of its standards or criteria for the authorization, licensing, or certification of practitioners of specific occupations, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certification granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

15.2. A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.

15.3. A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing, or certification of practitioners of specific occupations, or a disguised restriction on migration

15.4. Each Member shall:

15.4.1. within 12 months from the date on which this Agreement takes effect for it, inform the Council for Migration of its existing recognition measures and state whether such measures are based on agreements or arrangements of the type referred to in paragraph 1;

15.4.2. promptly inform the Council for Migration as far in advance as possible of the opening of negotiations on an agreement or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase;

15.4.3. promptly inform the Council for Migration when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.

16. Permission for Remittances in Host State and Home State. Members shall not prohibit or inhibit the freedom of migrants to transfer funds earned by their work, subject to the observance of applicable law relating to regulation of

money laundering, taxation, or judicial orders, or other reasonable regulatory purposes.

#### 17. Economic Safeguards

17.1. In the event of a labor market disturbance that a Member has determined, pursuant to the provisions below, seriously threatens or causes serious injury to that Member's affected citizens' standard of living in a particular labor market of that Member (the "relevant labor market"), that Member may, as a safeguard measure, temporarily derogate from the relevant liberalization commitments specified in its Schedule, to the extent and for such time as may be necessary to prevent or remedy such injury. Under no circumstances shall such temporary exception be applied for longer than six months. Any Member taking such measure shall communicate the circumstance and the period of the exception to the Secretariat, which shall notify the other Members.

17.2. Safeguard measures shall be applied by restricting entry of new immigrants in accordance with the most-favored nation principles of Articles 7 and 8 of this Agreement.

17.3. Safeguard measures shall not be applied in any way to affect the position of immigrants who arrived prior to the determination specified in paragraph 1. Nor shall any form of expulsion be applied in connection with immigrants who immigrate pursuant to this Agreement.

17.4. A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article 4. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which employers, workers, and other interested parties may present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

17.5. For the purposes of this Agreement:

17.5.1. "serious injury" shall be understood to mean a significant overall impairment in the position of workers in a relevant labor market;

17.5.2. "threat of serious injury" shall be understood to mean serious injury that is clearly imminent. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture, or remote possibility;

17.5.3. in determining injury or threat thereof, a "relevant labor market" shall be understood to mean the workers as a whole who are directly competi-

tive with one another such that the entry into the market of additional workers has a direct and significant effect on the wages of incumbent workers.

17.6. In the investigation to determine whether a labor market disturbance has caused or is threatening to cause serious injury to affected citizens' standard of living in a relevant labor market of a Member under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that labor market. The determination referred to in subparagraph 1 shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of a causal link between a labor market disturbance in the relevant labor market and serious injury or threat thereof. When factors other than the labor market disturbance are causing injury to the relevant labor market at the same time, such injury shall not be attributed to the labor market disturbance. The competent authorities shall publish promptly a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

17.7. Any safeguards measure taken under this Article shall be accompanied, within six months, by a program of adjustment assistance undertaken by the Member taking the safeguards measure. Such program of adjustment assistance shall be sufficient to ensure that the significant overall impairment in the position of workers in the relevant labor market is ameliorated.

17.8. A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of immigration below the level of a recent period which shall be the average of immigration in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.

17.9. In cases in which a quota is allocated among home countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest shares based upon the proportions of immigrants supplied by such Members during a previous representative period, due account being taken of any special factors which may have affected or may be affecting immigration.

#### 18. Public Policy and Public Security Exceptions

18.1. Subject to the provisions of this Article, Members may derogate from their commitments under this Agreement, on grounds of public policy or public security. These grounds shall not be invoked to serve economic ends.

18.2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned.

18.3. The personal conduct of the individual concerned must represent a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

18.4. In order to ascertain whether the person concerned represents a danger for public policy or public security, the host Member may, should it consider this essential, request the home Member and, if need be, other Members, to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member consulted shall give its reply within two months.

#### 19. Public Health Exceptions

19.1. Members retain the right to take action in order to protect national and international public health, pursuant to the provisions of this Article.

19.2. The only diseases justifying derogations from the commitments undertaken pursuant to this Agreement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organization and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member.

19.3. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory of the host Member.

19.4. Where there are serious indications that it is necessary, Members may, within three months of the date of arrival, require immigrants to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 2. Such medical examinations may not be required as a matter of routine.

20. Right of Return. The home Member of any person who has left any destination state for any reason, including without limitation if such person has been expelled on grounds of public policy, public security, or public health, shall allow that person to return at any time from another Member and to re-enter its territory without any formality even if the nationality of the holder is in dispute.

#### 21. Protection Against Expulsion

21.1. Before taking an expulsion decision on grounds of public policy or public security, the host Member shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state

of health, family and economic situation, social and cultural integration into the host Member, and the extent of his/her links with the country of origin.

21.2. The host Member may not take an expulsion decision against persons who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

21.3. An expulsion decision may not be taken except if the decision is based on imperative grounds of public security, as defined by Member, if they:

21.3.1. have resided in the host Member for the previous 10 years; or

21.3.2. are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

22. Cooperation in Reduction of Unauthorized Migration. Members shall exercise their best efforts to cooperate with other Members in discouraging and preventing unauthorized migration.

23. Progressive Liberalization.

23.1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of this Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of barriers to migration. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

23.2. The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for liberalization in line with their development situation and, when making access to their markets available to foreign persons, attaching to such access conditions aimed at achieving their development objectives.

23.3. For each round, negotiating guidelines and procedures shall be established. For the purposes of establishing such guidelines, the Secretariat shall carry out an assessment of migration in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including its development objectives.

23.4. The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral, or multilateral negotiations directed toward increasing the general level of specific commitments undertaken by Members under this Agreement.



24. Loyalty. Member governments shall refrain from disparaging the labor market, cultural, political, or ethnic effects or contributions of immigrants. Member governments shall ensure that any official analyses of labor market conditions follow sound social scientific methods of establishing causal relationships.

25. Relationship to International Human Rights and Labor Rights Treaties.

25.1. Except as specifically provided in their Schedules, Members shall comply with the Migration for Employment Convention of 1949 (No. 97), including Optional Annex 1 thereof, the Migrant Workers (Supplementary Provisions) Convention of 1975 (No. 143), and the International Convention on the Protection of the Rights of All Migrant Workers and Their Families.

25.2. With respect to migrants, Members shall comply with the International Covenant on Civil and Political Rights.

25.3. [other human rights and labor rights instruments to be listed]

26. Relationship to Other Treaties

26.1. Relationship to International Tax Treaties

26.2. Relationship to International Investment Treaties

26.3. Relationship to International Trade Treaties

27. Secretariat and Funding [to be provided]

28. Decision-Making [to be provided]

28.1. The Committee on Migration

29. Dispute Settlement [to be provided]

30. Final Provisions [to be provided]

## Notes

1. Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the individual.
2. The term “relevant international organizations” refers to international bodies whose membership is open to the relevant bodies of at least all Members.



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