

SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW – PART III

IS MIGRATION A COHERENT FIELD OF INTERNATIONAL LAW? THE EXAMPLE OF LABOR MIGRATION

*Joel P. Trachtman**

A critical characteristic of migration is that it involves people in all their complexity, and with all their complex needs. Therefore, migration, perhaps more than any other field of international law, is difficult to separate as a body of law from human rights, trade, taxation, investment, health, security, etc. In this brief essay, I will describe two critical, and distinct, linkages that prevent us from cabining migration as a separate field. Both arise in the area of labor migration. Indeed, it is through [linkage with other fields](#) of international law, such as trade and investment, that states could establish international legal commitments to liberalize migration.¹

The first is a pragmatic linkage between labor migration and other dimensions of economic globalization: movement of goods, services, and money. The pragmatic linkage is in the potential for reciprocal exchange of concessions between governments, in which a wealthy country may admit more immigrants from poorer countries in exchange for the poorer countries' liberalizing in connection with their imports of goods or services, or their permission for foreign investment. I explain below why linkage *within* migration is insufficient to support liberalization of immigration in wealthy states. There is also little reason to link labor migration to other forms of migration, other than to capitalize on relevant expertise.

The second arises directly from the humanity of migrants and is the question of the human rights of immigrants, including a right against discrimination in the destination country. The “rights versus numbers” tradeoff that may exist in some contexts prevents the law of migration from being considered separately from the law of human rights.

Pragmatic Linkage: Diffuse Reciprocity

Of course, it is premature to discuss linkage in the context of labor migration, because, outside the European Union and a few other regional arrangements, states have rarely made international legal commitments to accept immigrants. Even the World Trade Organization's General Agreement on Trade in Services (GATS), which includes an Annex on Movement of Natural Persons, contains few commitments that actually required states to change their existing policies, and formally excludes immigration from its coverage.²

* *Professor of International Law, The Fletcher School of Law and Diplomacy.*

¹ JOEL P. TRACHTMAN, [THE INTERNATIONAL LAW OF ECONOMIC MIGRATION: TOWARD THE FOURTH FREEDOM](#) (2009).

² International legal commitments to accept immigrants should be distinguished from the growing number of bilateral agreements aimed at managing migration with respect to such issues as recruitment practices, remittances, and return. While these agreements govern the terms of migration, they do not obligate destination states to accept particular levels of migration. *See, e.g.,* Jaya Ramji-Nogales, [Undocumented Immigrants and the Failures of Universal Individualism](#), 47 VAND. J. TRANSNAT'L L. 699, 752–54 (2014).

However, discussion of linkage is motivated by the fact that liberalization of migration, even in relatively small amounts, can enhance world welfare by very large amounts, exceeding the enhanced world welfare that would be produced by total liberalization of trade in goods and services. These increases in welfare arise from enormous increases in productivity that migrants from developing to developed countries achieve, evidenced by large wage differentials between developing and developed countries. Individuals will [seek opportunities](#) to move because by moving, they may increase their productivity, and thereby their purchasing power-adjusted earnings, by a very substantial amount.³ Furthermore, demographic change will result in [increasing demand](#) for certain types of labor in the developed world.⁴

The distributive problem from the standpoint of important constituencies in both destination states and home states is that most of the increased welfare stays in the hands of the migrants. This problem is compounded by the political problem that citizens of wealthy states fear that increased immigration will either reduce wages or jobs, disproportionately absorb state funds for public services and transfer payments, or both. On the first, there is [little evidence](#) that immigration, at least in the amounts we have seen in the past, has a significant effect on wages generally.⁵ Those likely to be hurt, if any, are prior immigrants, or the lowest skilled. But others will be helped, and the gains to the migrant are enormous: the average migrant worldwide triples his or her income.

But while the destination country is likely to gain in general, and will gain substantially from immigration of highly skilled immigrants, there is strong [political opposition](#). “If there is a universal truth about immigration policy, it is that residents of industrialized states would prefer to see lower levels of immigration.”⁶ “The same domestic institutions that serve to make the political system more open and inclusive vis-à-vis voters also serve to make the country’s external labor policy less open and more exclusive.”⁷ Nevertheless, [Bearce and Hart](#) find moderately *increasing* liberalization among wealthy countries from 1996-2012.⁸ On the other hand, the more recent rise in populism has been associated with opposition to immigration.

One strategy to counter this opposition, and unlock substantial welfare gains, is to bring to bear strong countervailing interests, based on destination state lobbies that can benefit from reciprocal action by the immigrants’ home states.

Now, here is the wrinkle: migration is a “one-way street.” Within migration, there is little room for reciprocity. This is because people in wealthy states are more productive, and better paid, in the wealthy state than they would be in the poor state. Wealthy states are wealthy because they have the capital, infrastructure, education, and institutions to make their workers more productive. Linkage in the form of reciprocal exchange between states, through the exchange of *different* kinds of policy commitments, may be the only way to unlock the substantial

³ Branko Milanovic, *Global Inequality of Opportunity: How Much of Our Income Is Determined by Where We Live?*, 97 REV. ECON & STATS. 452 (2015).

⁴ Hans Fehr, et al., *The Role of Immigration in Dealing with the Developed World’s Demographic Transition*, 26 (Nat’l Bureau of Economic Research Working Paper No. 10512, 2004) (arguing that immigration growth can only solve demographic problems in the developed world if it is concentrated in high-skilled workers from the developing world). For recent news stories, see Greg Ip, *Trump’s Hard Line on Immigration Collides With U.S. Demographics*, WALL ST. J. (Feb. 22, 2017); Jonathan Soble, *Japan Limited Immigration; Now it’s Short of Workers*, N.Y. TIMES (Feb. 10, 2017).

⁵ For a useful review, see Matthew Yglesias, *The Case for Immigration*, VOX (Apr. 3, 2017).

⁶ Marc R. Rosenblum & Wayne A. Cornelius, *Dimensions of Immigration Policy*, in THE OXFORD HANDBOOK OF THE POLITICS OF INTERNATIONAL MIGRATION 245, 246 (Marc R. Rosenblum & Daniel L. Tichenor eds., 2012).

⁷ David H. Bearce & Andrew H. Hart, *International Labor Mobility and the Variety of Democratic Political Institutions*, 71 INT’L ORG. 65, 67 (2017); see also Giovanni Facchini & Anna Maria Mayda, *The Political Economy of Immigration Policy*, (UNDP Human Development Research Paper 2009/3, 2009).

⁸ Bearce & Hart, [supra note 7](#).

welfare increment that liberalization of migration can produce. Reciprocal exchange of diverse commitments through international law may play a useful role in facilitating support for the liberalization of migration, despite opposition under autarky.

The role of international law is thus to provide mechanisms by which one state may reciprocally induce another to take the former state's interests into account in decision-making. The role of international law is to mobilize previously inactive constituencies through reciprocity to modify the otherwise applicable domestic political equilibrium. This has certainly been the case with trade liberalization. International legal commitments allow states, through the give and take of negotiations and through the exchange or pooling of authority implicit in international law, to achieve this state of affairs as closely as possible. States have responded with international legal rules that can mobilize additional constituencies, and precipitate new political coalitions.

Without such reciprocity, liberalization of migration is unlikely to be sufficiently realized, and global welfare will be suboptimal.

Rights Versus Numbers

Where productivity is significantly greater in wealthy countries, some modification of payoffs is likely to be necessary in order to realize the global benefits of migration. For wealthy destination states, such as the United States, the European Union, Canada, and Australia, their attractiveness to immigrants gives rise to market power, in the sense that supply of immigration opportunities is limited, demand for immigration opportunities is high, and the governments of the destination states have sovereign control of entry. Do these leading destination states use their market power to extract welfare gains from immigration? Consider the following possibilities.

- First, states with market power may exert their power to accept only highly skilled immigrants—those who will make a positive contribution to the economy generally and to the government budget. Insofar as this may harm the origin state, we can interpret brain drain—movement of educated persons from poor origin states to wealthy destination states—as a negative externality imposed by the destination state on the origin state.
- Second, it is also possible that destination states could use their market power to impose migration fees, insurance premiums, discriminatory [taxes](#), or other burdens on immigrants, or to deny immigrants' rights to public benefits that are available to natives, causing immigrants to give up some of the surplus from migration that they might otherwise capture.⁹ Considering the U.S. relationship with Mexican or other unauthorized immigrants, it may be that denial of public services or public transfer payment benefits could be understood as an exercise of market power. Of course, unauthorized immigrants are more likely to suffer from this type of “discrimination.” Under U.S. law, unauthorized immigrants are [denied](#) certain public benefits.¹⁰ So, a preference for unauthorized immigration could be explained by reference to the fact that unauthorized immigrants can more readily be subjected to discrimination.
- Third, states with market power in this context may exert that power by accepting migrants and denying the origin state of the migrants the ability to tax those migrants—declining to cooperate in enforcing a Bhagwati tax—a tax on emigrants imposed by the origin state. By doing so, the destination state may impose a negative externality on the origin state.¹¹

⁹ Sam Bucovetsky, *Efficient Migration and Income Tax Competition*, 5 J. PUB. FIN. THEORY 249 (2003).

¹⁰ Tara Watson, *Do Undocumented Immigrants Overuse Government Benefits*, ECONOFACT (Mar. 28, 2017).

¹¹ The fact that the origin 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.

Migration fees or other burdens on migrants would provide disincentives for migration, in a way that reduces global welfare. Selective immigration policies may also reduce global welfare.

Indeed, it may be that the core rationale for states to cooperate in this area is simply to increase volumes of migration, and thereby enhance global welfare. This is directly analogous to the [volume of trade theory-based rationale](#) for international trade agreements.¹² Under the terms of trade theory, which is an extension of “optimal tariff theory,” states with market power are able to extract a part of the trade surplus from exporters by imposing an “optimal” tariff. This reduces volume of trade, but increases the welfare of states with market power, provided that other states do not also impose optimal tariffs. Thus, extending this concept to migration, states may only agree to increase international migration, and thereby increase global welfare, if they are able to distribute the gains so as to make liberalization a superior alternative for states with market power, compared to the exercise of that power to extract gains.

Note, however, that unlike in the trade context, the origin state is not necessarily directly harmed by the destination state’s exercise of market power. Because the primary beneficiary of migration is the departing emigrant, the origin state does not feel the full welfare loss caused by the destination state exercise of market power, and so may not be motivated to negotiate to protect its emigrants. On the other hand, origin states that tax their emigrants, or that benefit from remittances or return migration, or that are under domestic political pressure to provide opportunities for emigration to wealthy states or to enhance employment opportunities for those remaining, may identify destination state exercises of market power in this manner as conferring negative policy externalities on the origin state.

The possibility of destination state exercise of market power gives rise to the question of whether, from the standpoint of the destination state, there is an “optimal tariff” in the form of either a migration fee or a reduction of rights to public services and transfer payments that can maximize destination state welfare. In case of a reduction of rights, there may be a [tradeoff](#) between mobility and rights: mobility could be increased in a way that increases global welfare if migrants are willing to accept diminished rights.¹³

Is this type of exercise of market power empirically validated? Observing the EU internal system, or the U.S. internal system of free movement, we would have to concede that there is no tradeoff: the European Union and United States internally generally provide both greater numbers of internal movers and greater rights. Furthermore, as [Peter Spiro](#) documents, for *authorized* immigrants to the United States, for example, there is little tradeoff.¹⁴ [Yasemin Soysal](#) also shows that for certain Northwest European states, “the recent guestworker experience reflects a time when national citizenship is losing ground to a more universal model of membership anchored in deterritorialized notions of persons’ rights.”¹⁵

Of course, we may contrast these examples with the seemingly contrary examples of U.S. treatment of unauthorized immigrants, and treatment of guest workers by states like Qatar or Saudi Arabia, which have increased their numbers of migrants at the same time that they have denied significant citizenship rights to migrants. Thus, in the general international system considered separately, there is some evidence of a trade-off between “numbers and rights” in connection with unilateral national decision-making.

[Glen Weyl](#) highlights the immigration policies of the Gulf Cooperation Council states, including Saudi Arabia, Qatar, Oman, Bahrain, the United Arab Emirates, and Kuwait.¹⁶ While these states admit large numbers of

¹² KYLE BAGWELL & ROBERT STAIGER, [THE ECONOMICS OF THE WORLD TRADING SYSTEM](#) (2002).

¹³ MARTIN RUHS, [THE PRICE OF RIGHTS: REGULATING INTERNATIONAL LABOR MIGRATION](#) (2013); see also Martin Ruhs, [Rethinking International Legal Standards for the Protection of Migrant Workers: The Case for a “Core Rights” Approach](#), 111 AJIL UNBOUND 172 (2017).

¹⁴ PETER J. SPIRO, [BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION](#) (2008).

¹⁵ YASEMIN NUHOĞLU SOYSAL, [LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE](#) (1994).

¹⁶ E. Glen Weyl, [The Openness-Equality Trade-Off in Global Redistribution](#), ECON. J. (forthcoming).

immigrant workers, those workers are generally not admitted to citizenship and are accorded a level of rights significantly lower than that enjoyed by citizens. [Martin Ruhs](#) observes more broadly that “in most high-income countries, the majority of migrant workers are admitted and employed under [temporary migration programs] that in one way or another restrict migrants’ rights.”¹⁷ We may understand the eleven million unauthorized immigrants in the United States in the same way.

This is consistent with the idea that wealthy destination countries would exercise market power in order to extract a portion of the increased welfare that immigrants achieve upon immigration to those countries. They have generally not done so by charging migration fees, but instead by reducing access to formal citizenship, transfer programs, and other beneficial programs. Ruhs finds that restrictions on immigrant rights are greater in the case of low-skilled workers than in the case of high-skilled workers, who presumably have greater market power.

In a sense, these wealthy destination states are able to exercise market power, despite their need for workers, because of competition among the workers for greater incomes. This circumstance is similar to the circumstance of un-unionized workers in a domestic setting competing for work by accepting lower wages, and lower labor rights, than they could obtain by organizing. If the potential migrants, organized through their origin countries in blocs of labor exporting states, exercised countervailing bargaining power, it might be possible for them to achieve a superior blend of rights and numbers.

Recall that one of the ways in which immigration may harm wealthy states is through the fiscal channel: net drawing from the welfare system of positive rights. To the extent that the host state fears positive rights-driven migration, or to the extent that the host state simply wishes to extract from immigrants some of the welfare gains resulting from migration, consideration may be given to responding to these motivations through a more efficient, and less ethically troublesome, migration fee or special tax. This is because it may feel inhumane to provide lesser positive rights to a selected group of individuals working and living in close proximity, but also because the individual migrants may underestimate their need for these positive rights and thereby make the migration decision in a way that is harmful to them. For similar reasons, most societies do not allow their citizens to give up positive rights in exchange for monetary payments.

Reduction of rights available to immigrants is likely to reduce the volume of migration, reducing global welfare. Therefore, as in the trade context, it is worthwhile to search for means to compensate destination states without reducing migration. For example, a monetary side payment from the poor origin state to the wealthy destination state would have the effect of allowing the efficient level of migration, although it would be normatively unappealing and politically unlikely. There are several possible alternative forms of side-payment from origin states to destination states. These include the following:

- [Charges](#) unilaterally applied to migrants by the destination state, to allow the destination state to capture a greater portion of the surplus.¹⁸ While this mechanism would also reduce global welfare by deterring a portion of migration, and may be unattractively discriminatory, it may be more attractive than rights reduction.
- International agreement to benefit the destination state within the field of migration.
- International agreement to benefit the destination state beyond the field of migration, such as in trade liberalization, investment liberalization, or other regulatory cooperation.

¹⁷ RUHS, [supra note 13](#), at 24.

¹⁸ See Anu Bradford, [Sharing the Risks and Rewards of Economic Migration](#), 80 CHI. L. REV. 29 (2013).

Conclusion

No field of law, or international law, can be separated from others. But migration is especially linked to other areas. I have argued above that neither its negotiation, nor its establishment as a set of legal rules, nor its implementation, can be separated from other areas of globalization, or from human rights. Liberalization of labor migration is a source of great potential wealth, but can only take place on the basis of complex linkage with other fields of international cooperation. Scholars will need to engage with other areas of international law and policy in order to comprehend international migration.