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### People are Not Bananas: How Immigration Differs from Trade

Jennifer Gordon

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PEOPLE ARE NOT BANANAS: HOW IMMIGRATION  
DIFFERS FROM TRADE

Jennifer Gordon\*

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INTRODUCTION

Classical economists have long argued that trade and labor migration are functionally the same.<sup>1</sup> When goods move freely across borders, they contend, each country can export what it produces more cheaply than other countries and import what other nations produce at a lower price. As a result, all participating countries realize economic gains. Likewise, the argu-

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<sup>1</sup> See *infra* notes 4–6 and accompanying text.

ment goes, global wealth is maximized when workers are free to sell their labor abroad for more than they could earn at home, but less than employers in their destination country would have to pay native workers.

Of late, some policymakers have drawn on these parallels in launching a call to expand migration as a form of global development policy.<sup>2</sup> Although there is much to say about this approach, I hold my fire until the end of this Essay. Instead, my primary purpose here is to explore the underlying asymmetry that economic theory obscures. There are similarities between the movement of people and the movement of goods, but the differences between the two are far more apparent. If labor migration and trade are so alike, why have many developed nations maintained high barriers to migration even as barriers to trade have fallen sharply? The contrast between the weak global patchwork governing the movement of people and the strong framework governing the movement of goods is another sign of those distinctions. Why has the United States aggressively pursued multilateral, regional, and bilateral agreements on trade while remaining stubbornly unilateral in its approach to labor migration?

This Essay addresses these questions, which surprisingly have received little attention in the law review literature.<sup>3</sup> I begin by mapping the current state of global governance of trade, investment, and immigration to make the divergence between these regulatory schemes clear. I sharpen the point by contrasting one kind of global regulation used in all three cases—bilateral agreements—to demonstrate the limited scope and enforceability of country-to-country accords on labor migration, where they exist at all, compared to those governing the flow of goods and capital.

To explain why the global structures regulating migration do not resemble those governing trade and investment, it is necessary to go beyond the consistent story of factor mobility told by economists. With regard to the more restrictive posture taken by destination countries regarding migration, although trade and migration have some parallel impacts, the flow of human beings has political, cultural, social, and economic effects that differ from the flow of money and goods, and these effects play out politically in developed nations in distinct ways. In addition, the distribution of the

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<sup>2</sup> See, e.g., WORLD BANK, GLOBAL ECONOMIC PROSPECTS 2006: ECONOMIC IMPLICATIONS OF REMITTANCES AND MIGRATION 25–26 (2005) [hereinafter GLOBAL ECONOMIC PROSPECTS 2006].

<sup>3</sup> Howard Chang has made the argument that immigration should be treated more like trade. See Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1153, 1232–44 (1997). Kevin Johnson has drawn attention to the disparate treatment of trade and immigration, see Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 965–70 (1994), and has used trade as an analogy to support his call for open borders, see Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 235–40 (2003). Recently, Jagdeep Bhandari has parsed the interrelationship between migration and trade policies. See Jagdeep S. Bhandari, *Migration and Trade Policies: Symmetry or Paradox?*, 6 J. INT'L BUS. & L. 17, 38–41 (2007). But as far as I know, the law review literature is devoid of efforts to explain the fundamental asymmetry in global structures.

wealth generated by migration appears to differ from that of wealth generated by trade or capital flows, with a greater portion of the economic gain going to the migrants and their countries of origin. This reduces the incentive for developed nations to advocate for increased migration. Furthermore, the fact that trade is reciprocal while migration is generally a one-way flow creates significant domestic political obstacles to the expansion of immigration in destination nations, and impedes the negotiation of migration issues between countries. With regard to the lower level of coordination that destination countries have pursued for migration, it is important to note that the benefits that developed nations receive through labor migration are, unlike the benefits of trade and foreign investment, almost always available through unilateral action rather than through negotiation with developing countries. These differences are reflected in the divergent paths that nations have taken to regulate trade, investment, and labor migration.

If this explanation of what developed countries stand to gain by resisting increased labor migration and rejecting regional or multilateral approaches to its coordination is persuasive, it raises the question of why they ever negotiate with developing nations on this front. I conclude by offering some thoughts in this regard and—more profoundly—by suggesting how we might better approach labor migration in order to maximize wealth and distributive justice on a global scale.

#### I. TRADE, IMMIGRATION, AND WEALTH MAXIMIZATION

From the perspective of classical economics, freer trade and freer movement of workers function in similar ways to increase global wealth. The explanation lies with the principle of wealth maximization in a context where countries have unequal endowments of resources, or “factors,” of production: land, labor, and capital. Under a regime allowing for the free movement of goods across borders, each country will export whatever its factor endowments allow it to produce at a lower cost than other goods, and will import whatever is most costly for it to produce.<sup>4</sup> All participating countries will gain economically as a result. Likewise, if migration barriers are removed between countries with substantially different wages, workers from low-pay nations will be permitted to find work in high-pay nations at a wage higher than they could earn at home, but lower than employers in the

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<sup>4</sup> This is Ricardo’s theory of comparative advantage. DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 80 (Everyman’s Library, 1911) (1817). Building on David Smith’s theory of absolute advantage, which posits that all countries are made better off by trade where they export the products that they can produce more cheaply than other nations and import those that are more expensive for them to produce, Ricardo argued that even where a country has no *absolute* advantage in production costs over other nations, all countries are better off where each trades the goods it can produce *relatively* cheaply for the goods that are more costly for it to produce. For an overview of the evolution of economic theories of trade, see MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 2–6 (3d ed. 2005)

high-wage country would have to pay native workers.<sup>5</sup> Global wealth will be maximized in this context as well.<sup>6</sup> Economists have also made analogous arguments about capital flows, an important point for the purposes of this Essay since the global regulation of foreign investment has developed along a path closer to trade than to immigration.<sup>7</sup> Foreign direct investment is the movement of capital to a country where it can generate a profit greater than that available in the investor's country. Classical economists argue that the greatest efficiencies are achieved when capital, like goods or labor, can flow freely to where it is most productive.<sup>8</sup>

This Essay focuses on the question of why the argument that trade, foreign investment, and labor migration are functionally the same does not appear to be reflected in the reality of global regulation of the mobility of goods, capital, and people. Over the past twenty years, countries have largely behaved as if the economists' wealth-maximizing theory about trade and investment were true. They have acted to increase their citizens' opportunities to buy and sell goods and invest (or receive investment of) capital across borders, largely through agreements negotiated with other nations. This is true both of relatively wealthy and relatively poor countries.

On the other hand, many wealthier immigrant-destination nations have behaved as if economists have gotten it wrong about labor migration, particularly migration involving low-skilled workers. They have often sought

<sup>5</sup> Labor migration is generally understood as an example of absolute rather than comparative advantage. See Timothy J. Hatton, *Should We Have a WTO for International Migration?*, ECON. POL'Y, Apr. 2007, at 339, 359, 364.

<sup>6</sup> See JOEL P. TRACHTMAN, *THE INTERNATIONAL LAW OF ECONOMIC MIGRATION* 36 (2009); Chang, *supra* note 3, at 1148–49; Michael J. Trebilcock, *The Law and Economics of Immigration Policy*, 5 AMER. L. & ECON. REV. 271, 275–76 (2003) (“[N]eoclassical economic theory suggests that an optimal immigration policy would be not to have one at all.”).

<sup>7</sup> See Magnus Blomström & Ari Kokko, *Regional Integration and Foreign Direct Investment* 2–3 (Nat'l Bureau of Econ. Research, Working Paper No. 6019, 1997).

<sup>8</sup> Nonetheless, calls for the liberalization of capital have not generated as much consensus as calls for freer trade. See JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 64–66 (2002); Benn Steil, *The End of National Currency*, 86 FOREIGN AFFAIRS 83, 83 (May/June 2007) (“Even such an impeccably credentialed pro-globalization economist as U.S. Federal Reserve Governor Frederic Mishkin has acknowledged that ‘opening up the financial system to foreign capital flows has led to some disastrous financial crises causing great pain, suffering, and even violence.’”). Jagdish Bhagwati, an ardent supporter of free trade, has likewise expressed concern about the negative impact of free capital flows. See JAGDISH BHAGWATI, *IN DEFENSE OF GLOBALIZATION* 202–07 (2004). The volatility that accompanies capital flows, caused in part by investor behavior that cannot be explained by rational actor models, endangers the stability of countries that have opened their doors to foreign investment to a greater extent than the flow of goods. See STIGLITZ, *supra*, at 67–73.

On the differences between trade, labor, and capital markets, see ASSAF RAZIN & EFRAIM SADKA, *LABOR, CAPITAL, AND FINANCE* 8 (2001) (explaining that markets in goods are less likely to deviate from classical assumptions of perfect competition with complete information and no distortions, while both labor and capital markets are “notorious for their imperfections,” which in the case of labor markets include unions, state regulation, incomplete information, and payroll taxes; and in the case of capital markets include moral hazards, herd behavior, and debt and bank runs).

to limit the movement of workers into their economies. And although the movement of people at first glance seems at least as likely as the movement of goods or capital to require global coordination, where destination countries have created temporary labor migration regimes they have largely done so unilaterally or bilaterally, rather than through the regional or multilateral arrangements long favored in the trade and investment contexts.<sup>9</sup> As a result, the regulation of migration differs from its trade and investment counterparts along two dimensions: it is more restrictive and it reflects a lower level of international coordination.<sup>10</sup>

A classical economist might seek to explain this apparent inconsistency by contending that wealthier countries' aggressive pursuit of free trade policies will obviate the need for more open migration. From a developed-country perspective, if a free trade regime allowed all jobs to be outsourced to where workers were cheaper, there would be no need for labor migration to serve the same ends. However, service industries and other locally-rooted work now make up the bulk of the U.S. economy.<sup>11</sup> Outsourcing of labor overseas is rarely a viable option in these contexts, and service industries have therefore led the call for more open labor migration in the United States.<sup>12</sup> From a developing-country perspective, economists have used the Heckscher-Ohlin-Samuelson model to argue that trade and labor migration substitute for each other.<sup>13</sup> Under this formulation, an increase in trade will

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<sup>9</sup> A few definitions are helpful at the outset. A bilateral agreement is one involving only two parties. A multilateral agreement is any accord involving three or more parties. Webster's New World College Dictionary Online, <http://www.yourdictionary.com/multilateral> (last visited Aug. 7, 2010). However, following common practice in the field of international law, I distinguish between "regional" agreements, which bind a set of geographically proximate countries, and "multilateral" agreements, to which a diverse array of countries without a geographical relationship are parties. Int'l Mar. Org., *Treaties: General*, [http://www.imo.org/InfoResource/mainframe.asp?topic\\_id=904&doc\\_id=4442](http://www.imo.org/InfoResource/mainframe.asp?topic_id=904&doc_id=4442) (last visited Aug. 7, 2010). I reserve the label of "global" or "international" for agreements that incorporate a large majority of the world's nations.

<sup>10</sup> It is important to note that the two dimensions do not necessarily correlate. In other words, it is possible to have a more open labor migration regime that is achieved unilaterally than one that is negotiated between states.

<sup>11</sup> According to the Bureau of Labor Statistics, in July of 2010 service and construction workers in the United States outnumbered manufacturing workers by a ratio of over 8 to 1. These calculations are based on government data. Press Release, Bureau of Labor Statistics, *The Employment Situation—July 2010*, at 28–30 (Aug. 6, 2010) available at <http://www.bls.gov/news.release/pdf/empst.pdf>.

<sup>12</sup> For example, although the Essential Worker Immigration Coalition (EWIC), the principal employer coalition lobbying for immigration reform in the United States in the mid-2000s, describes itself as "a coalition of businesses, trade associations, and other organizations from across the industry spectrum," EWIC, <http://www.ewic.org/> (last visited Aug. 7, 2010), service industries overwhelmingly dominate the EWIC's membership list, *see* EWIC, *Members*, [http://www.ewic.org/index.php?option=com\\_content&task=view&id=48](http://www.ewic.org/index.php?option=com_content&task=view&id=48) (last visited Aug. 7, 2010).

<sup>13</sup> RAZIN & SADKA, *supra* note 8, Chapter 2 ("Factor Mobility and Trade in Goods: Do They Substitute for Each Other?"); Bhandari, *supra* note 3, at 28–30. The argument begins with the classic Heckscher-Ohlin model, a refinement of Ricardo's theory, which states that countries will have a comparative advantage in the production of goods that use large amounts of their relatively abundant factors, and will specialize in the production of those goods, which as a result will lower their prices; they will trade them

lead poorer countries to specialize in a way that takes advantage of their abundant factor: unskilled labor. They will begin producing more labor-intensive goods, thus increasing employment opportunities for low-skilled workers and raising the wages that those workers can command. With more and better jobs available at home, the citizens of poorer countries will have less need to move abroad in search of work. Thus, the argument goes, freer trade will decrease the need for labor migration.

Throughout the 1980s and the 1990s, the argument that trade and migration were substitutes provided an important theoretical underlay to the United States' trade negotiations with immigrant-origin countries, particularly Mexico. The North American Free Trade Agreement (NAFTA) was explicitly promoted to the Mexican and U.S. public on the grounds that it would, in the words of Mexico's president at the time, permit Mexico "to export goods and not people."<sup>14</sup> In this way the economic theory provided an independent justification for the agreement beyond free trade, and also answered critics who said that a true economic integration agreement should address the movement of people as well as goods.<sup>15</sup>

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for goods produced with factors in which they are relatively scarce. TREBILCOCK & HOWSE, *supra* note 4, at 4. Samuelson extended the basic model to include the factor-price equalization theorem, which states that free trade will tend to equalize factor prices between countries. PETER J. BUCKLEY & MICHAEL E. BROOKE, *INTERNATIONAL BUSINESS STUDIES: AN OVERVIEW* 7 (1992).

When applied to the immigration context, as by Bhandari and others, the Hecksher–Ohlin–Samuelson framework would suggest that "International trade and migration are indeed complete substitutes, with regard to their effects upon relative wages in the two countries. Free trade alone erodes the incentives to migrate and free labor mobility alone would eliminate the basis for mutually profitable trade." Bhandari, *supra* note 3, at 30. Nonetheless, Bhandari acknowledges that the reality has proven considerably more complex, and that "the strong substitute relationship between trade and migration has not manifested itself." *Id.* at 28. Razin & Sadka note that "if the only difference between the two countries lies in their relative labor abundance, then commodity trade and labor (or capital) mobility are perfect substitutes." Assaf Razin & Efraim Sadka, *International Migration and International Trade*, in *HANDBOOK OF POPULATION AND FAMILY ECONOMICS* 851, 861 (1997). In *Labor, Capital, and Finance*, however, Razin and Sadka point out that where countries are technologically unequal, trade "does not necessarily equalize wages and may even widen the wage gap, thereby generating more incentives for labor mobility." RAZIN & SADKA, *supra* note 8, at 26.

<sup>14</sup> Patricia Fernández-Kelly & Douglas S. Massey, *Borders for Whom? The Role of NAFTA in Mexico–U.S. Migration*, 610 *ANNALS AM. ACAD. POL. & SOC. SCI.* 98, 105 (2007) (citing LYUBA ZARSKY & KEVIN P. GALLAGHER, *AMERICAS PROGRAM, NAFTA, FOREIGN DIRECT INVESTMENT, AND SUSTAINABLE INDUSTRIAL DEVELOPMENT IN MEXICO* 1 (2004) (quoting President Carlos Salinas de Gortari)). On the selling of NAFTA on the grounds that it would reduce migration, see Jeff Faux, *How NAFTA Failed Mexico: Immigration Is Not a Development Policy*, *AM. PROSPECT*, July–Aug. 2003, at 35, available at [http://www.prospect.org/cs/articles?article=how\\_nafta\\_failed\\_mexico](http://www.prospect.org/cs/articles?article=how_nafta_failed_mexico); Manuel Roig-Franzia, *Behind the Debate: Propelled to Protect, Driven to Migrate*, *WASH. POST*, Apr. 17, 2006, at A1; Louis Uchitelle, *Nafta Should Have Stopped Illegal Immigration, Right?*, *N.Y. TIMES*, Feb. 18, 2007, Week in Review at 4.

<sup>15</sup> See, e.g., Dolores Acevedo & Thomas J. Espenshade, *Implications of a North American Free Trade Agreement for Mexican Migration into the United States*, 18 *POPULATION & DEV. REV.* 729, 731 (1992) ("[B]y eliminating protectionism within North America and by increasing foreign investment in Mexico, Mexico's structural adjustment program and NAFTA will help reduce Mexican migration to the United States."). For a similar argument in the Eastern–Western European context from the same era,

Fifteen years after NAFTA, however, it is beyond dispute that this model was inaccurate as a predictor of the impact of increased free trade on Mexico's migration patterns. Mexican migration levels to the United States rose sharply in the wake of NAFTA, and were sustained for over a decade.<sup>16</sup> Between 1990 and 2000, the population of foreign-born Mexicans in the United States more than doubled, from 4.3 million to 9.2 million,<sup>17</sup> peaking at 11.6 million in 2008.<sup>18</sup> The factors contributing to this outcome are complex, but can be briefly summarized as follows:<sup>19</sup> Foreign capital flowed quickly into Mexico after NAFTA. In agriculture, a mainstay of the Mexican economy, the result was the replacement of small-scale farmers with agribusiness conglomerates. A number of the farmers and farm workers displaced as a result of this shift migrated directly to the United States; others went to Mexican cities and to the growing export-production sector in search of work. When the Mexican economy was unable to produce enough good jobs to absorb these workers, many of them, too, continued northwards into the United States.<sup>20</sup>

In the wake of the discrediting of the theory that trade can be counted on as a ready substitute for migration, economists have increasingly turned to the argument that migration itself can be a powerful engine for wealth creation and therefore for development. They have argued that the potential gains from more open labor migration dwarf those from freer trade.<sup>21</sup> One

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see RAZIN & SADKA, *supra* note 8, at 25 ("International trade . . . can act as a substitute for migration. A free trade pact that ensures Eastern European countries access to the Western European market is the best single migration policy that could be put in place." (quoting RICHARD LAYARD, OLIVER BLANCHARD, RUDIGER DORNBUSCH & PAUL KRUGMAN, EAST-WEST MIGRATION 51 (1992))).

<sup>16</sup> JEFFREY S. PASSEL, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 4 (2006) ("The Mexican-born population in the United States, including both legal and unauthorized migrants, has grown by about 500,000 people a year for the past decade."); see also Uchitelle, *supra* note 14 (stating that in the early 1990s the Mexican-born population in the United States grew at less than 400,000 per year).

<sup>17</sup> Elizabeth Grieco, *The Foreign Born from Mexico in the United States*, MIGRATION INFORMATION SOURCE (October 1, 2003), <http://www.migrationinformation.org/usfocus/display.cfm?ID=163>.

<sup>18</sup> JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, MEXICAN IMMIGRANTS: HOW MANY COME? HOW MANY LEAVE? 6 fig. A-1 (2009), <http://pewhispanic.org/files/reports/112.pdf>.

<sup>19</sup> For nuanced explanations of how NAFTA failed to deliver the promised economic benefits to Mexico, see Bill Ong Hing, *Nafta, Globalization, and Mexican Migrants*, 5 J. L. ECON. & POL'Y 87, 97–102 (2009) Joseph E. Stiglitz, *The Broken Promise of Nafta*, N.Y. TIMES, Jan. 6, 2004, at A23; Raúl Delgado Wise & Humberto Márquez Covarrubias, The Mexico–United States Migratory System: Dilemmas of Regional Integration, Development, and Emigration 8, 11 (2006) (unpublished manuscript) (on file with author). For a very useful discussion of the interaction between NAFTA and other aspects of economic policy in Mexico that led to increased migration, see Chantal Thomas, *Migration and Social Regionalism: Labour Migration as an Unintended Consequence of Globalization in Mexico*, in SOCIAL REGIONALISM IN THE GLOBAL ECONOMY (Adelle Blackett & Christian Lévesque, eds.) (forthcoming 2010).

<sup>20</sup> See SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS 113–20 (1998); Uchitelle, *supra* note 14, at 3; Wise & Covarrubias, *supra* note 19, at 7–9, 11.

<sup>21</sup> See LANT PRITCHETT, LET THEIR PEOPLE COME 4 (2006); GLOBAL ECONOMIC PROSPECTS 2006, *supra* note 2, at 41; Hatton, *supra* note 5, at 345–46; Terrie L. Walmsley & L. Alan Winters, *Relaxing*



often-cited model predicts that a relatively small increase in world migration would generate \$52 billion more in world income than the removal of all remaining restrictions on trade in goods.<sup>22</sup> Meanwhile, the World Bank estimates that if developed countries permitted labor migration to increase their labor force by three percent, the global gains by 2025 would be \$356 billion.<sup>23</sup> Increasing low-skilled labor migration appears to deliver even greater gains than increasing high-skilled migration, because of greater wage differentials and the fact that its impact is felt across a larger number of sectors.<sup>24</sup> But this only sharpens the question with which this Essay opens: If freer trade and migration both have the power to increase global wealth, and if migration offers by far the greater global returns, then why does migration (and particularly low-wage migration) lag so far behind goods and capital in levels of permissible mobility and the degree of inter-country cooperation?

## II. COMPARING THE GLOBAL FRAMEWORKS FOR TRADE, INVESTMENT, AND IMMIGRATION

In the United States, the suggestion that immigration policy could or should be created through dialogue with origin countries is often met with puzzlement, if not outright disdain.<sup>25</sup> The last time the United States approached low-wage labor migration as a matter to be negotiated with a migrant-origin country was in the early years of the *Bracero* program, when the signing of an accord with Mexico brought more than four million Mexican guest workers into U.S. fields between 1942 and 1964.<sup>26</sup> Since then, with rare and minor exceptions, the U.S. government has set its labor immigration policy unilaterally.<sup>27</sup> While the United States regularly negotiates

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*the Restrictions on the Temporary Movement of Natural Persons: A Simulation Analysis*, 20 J. ECON. INTEGRATION 688, 690 (2005); Dani Rodrik, Comments at the Conference on Immigration Policy and the Welfare State 1 (June 23, 2001), *available at* [flash.lakeheadu.ca/~mshannon/Rodrik1.doc](http://flash.lakeheadu.ca/~mshannon/Rodrik1.doc). The comparison generally is between removing *all* remaining barriers to trade versus a relatively small increase in the flow of labor (as opposed to total openness, which generates estimates of enormous global gains but is politically infeasible). Hatton *supra* note 5, at 345–46.

<sup>22</sup> Walmsley & Winters, *supra* note 21, at 690.

<sup>23</sup> GLOBAL ECONOMIC PROSPECTS 2006, *supra* note 2, at 31. By contrast, Walmsley & Winters, making different assumptions about labor markets in developed countries, estimate that a three percent increase would result in world welfare rising by \$156 billion. Walmsley & Winters *supra* note 21, at 690.

<sup>24</sup> See Walmsley & Winters, *supra* note 21, at 690, 713, 723.

<sup>25</sup> See, e.g., Ruben Navarrette, Jr., *Official Blame Game Equally Popular on Either Side of U.S.–Mexico Border*, SAN JOSE MERCURY NEWS, Sept. 13, 2007.

<sup>26</sup> For overviews of the *Bracero* program, see generally KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (1992); ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* (1964).

<sup>27</sup> See Demetrios Papademetriou, *The Mexico Factor in US Immigration Reform*, MIGRATION INFORMATION SOURCE, Mar. 1, 2004, <http://www.migrationinformation.org/Feature/display.cfm?ID=210>. Days before 9/11, U.S. President George W. Bush met with Mexican President Vicente Fox to

bilateral and multilateral treaties on investment and trade, low-wage labor migration has been conspicuously absent from these agreements.<sup>28</sup> The peculiarity of the United States' and other major immigrant destination countries' unilateralism in immigration matters, and of the underdeveloped state of international immigration regimes generally, is perhaps best understood in comparison with its polar opposite: those nations' active pursuit of multilateralism in regimes governing free trade and the movement of capital around the globe.

### A. *The International Regulation of Trade and Investment*

1. *Trade.*—A complex web of rules and institutions regulate the movement of goods across national borders. At the broadest level, the World Trade Organization (WTO) offers a multilateral framework encompassing 153 of the world's nations—the majority of countries in the world, including all the major powers except Russia.<sup>29</sup> The WTO seeks to facilitate the free flow of goods between countries by lowering barriers to trade and resolving trade disputes where they arise.<sup>30</sup> The WTO's multilateral regime coexists with increasing numbers of regional accords that bind participating states to mutual commitments of preferential treatment in trade and, increasingly, to cooperation on other issues like investment, services, and national security. NAFTA, the Association of Southeast Asian Nations, and

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discuss a framework for Mexican-American migration. The events of 9/11 derailed that conversation, which has not resumed at the presidential level in the ensuing years. See Muzaffar Chishti, *Guest Workers in the House of Labor*, 13 NEW LAB. F. 67, 70–71 (2004); Alexandra Delano, *From "Shared Responsibility" to a Migration Agreement? The Limits for Cooperation in the Mexico–United States Case (2000–2008)*, INT'L MIGRATION, Sept. 2009, \*2–3, <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2435.2009.00572.x/pdf>. Ironically, one of the very few other situations in which the United States has engaged in negotiations with a foreign government over immigration (although not labor migration) policy is in the case of Cuba. See Associated Press, *Migration Talks with Cuba Put Off to February*, WASH. POST, Dec. 4, 2009, at A17.

<sup>28</sup> The United States relied on treaties to regulate migration in the nineteenth century. See Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L. J. 458 (2009). Since the *Bracero* agreement, however, it has negotiated no bilateral agreements related to low-wage workers. Highly skilled labor migration is only occasionally the subject of negotiations between the United States and other governments. In rare instances, the United States has included provisions for temporary professional migrants in treaties that are primarily about trade. Examples include the TN visa for certain Canadian and Mexican professionals created by NAFTA (TN is an acronym for "Treaty NAFTA"), see North American Free Trade Agreement, U.S.-Can.-Mex., ch. 16, Annex 1603, app. 1603.d.1., Dec. 17, 1992, Immigration and Nationality Act, 8 U.S.C.A. § 1182(e) (West 2009), and the set-aside of 1400 temporary visas for Chilean professional workers with employment offers under the Free Trade Agreement negotiated in 2003, see Kevin O'Neil, Kimberly Hamilton & Demetrios Papademetriou, *Migration in the Americas* 31 (2005), available at <http://www.gcim.org/attachements/RS1.pdf>.

<sup>29</sup> See *Members and Observers*, WORLD TRADE ORGANIZATION [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Aug. 8, 2010) (noting that the WTO had 153 members as of July 23, 2008, and listing current members with dates of membership).

<sup>30</sup> *What Is the World Trade Organization?*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm) (last visited Aug. 8, 2010).

the Andean Community are a few examples of such accords and associations among many. Almost a third of global trade now takes place under regional agreements.<sup>31</sup>

Finally, as multilateral negotiations on world trade have stalled,<sup>32</sup> bilateral free trade agreements (BFTAs) have emerged as a favored alternative. The number of bilateral trade agreements now numbers well over 200.<sup>33</sup> Negotiated directly between nations, BFTAs permit individual countries to grant each other preferential terms of trade.<sup>34</sup> Like regional arrangements but more limited in scope, bilateral accords generally require signatories to offer each other trade terms as favorable as those offered to any other nation (referred to as most favored nation status), and to grant “national treatment” to each other’s citizens with regard to trade opportunities, protecting the other signatories’ citizens as they protect their own.<sup>35</sup>

The growth in bilateral trade accords has been driven by economically powerful nations, such as the United States. As of 2007 the United States had concluded fifteen bilateral free trade agreements and had negotiations underway for nine more; the EU nations had concluded thirty-two with four more underway; Singapore had nine signed and twelve underway.<sup>36</sup> In this context, the United States has taken the lead in pursuing choice of forum clauses and in seeking to use bilateral agreements to press restrictive terms on its trading partners.<sup>37</sup>

<sup>31</sup> Chris Brummer, *The Ties that Bind? Regionalism, Commercial Treaties, and the Future of Global Economic Integration*, 60 VAND. L. REV. 1349, 1355 (2007).

<sup>32</sup> The Doha Development Round of the World Trade Organization began in 2001 and is currently stalled over a number of issues. Negotiations were scheduled to resume in 2010, but remained stalled as of August 2010, and hopes of an agreement are low. See Vikas Bajaj, *At Early Forum on Trade, Few Signs of Concessions*, N.Y. TIMES, Sept. 5, 2009, at B2; Sewell Chan, *Hurdles Deter Obama’s Pledge to Double Exports*, N.Y. TIMES, Aug. 2, 2010, at B1 (New York edition).]

<sup>33</sup> Brummer, *supra* note 31, at 1363; Robert McMahon, *The Rise in Bilateral Free Trade Agreements*, COUNCIL ON FOREIGN RELATIONS, June 13, 2006, [http://www.cfr.org/publication/10890/rise\\_in\\_bilateral\\_free\\_trade\\_agreements.html](http://www.cfr.org/publication/10890/rise_in_bilateral_free_trade_agreements.html).

<sup>34</sup> A number of scholars have expressed the concern that BFTAs contravene the WTO principle of most favored nation status, which requires that all participating countries grant each other terms of trade that are equally advantageous. See, e.g., Sydney M. Cone, III, *The Promotion of Free-Trade Areas Viewed in Terms of Most-Favored-Nation Treatment and “Imperial Preference”*, 26 MICH. J. INT’L L. 563, 563–64 (2005).

<sup>35</sup> See Brummer, *supra* note 31, at 1355–56, 1363.

<sup>36</sup> *Id.* at 1364. India and Turkey also have many agreements. *Id.*

<sup>37</sup> See McMahon, *supra* note 33, at 3–4; Aziz Choudry, *Sleeping Beauty and Prince Charming: Bilateral Deals Are No Fairytale*, Z SPACE, June 14, 2003, <http://www.zmag.org/zspace/commentaries/1634>; Peter Drahos, *The Bilateral Web of Trade Dispute Settlement 3* (2006) (unpublished manuscript), <http://wage.wisc.edu/uploads/WTO%20Conference/drahos.pdf>; Bilaterals, US FTAS, <http://www.bilaterals.org/spip.php?rubrique55> (last visited Dec. 13, 2010).

For an example of a choice of forum clause in a trade agreement, see *NAFTA Chapter Twenty: Institutional Arrangements and Dispute Settlement Procedures, Article 2005: GATT Dispute Settlement*, NAFTA SECRETARIAT, available at <http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtplID=153#A2005> (last visited Aug. 8, 2010).

2. *Investment.*—Capital flows present a somewhat different picture. Because of the 1998 failure of efforts by wealthy nations to adopt a Multilateral Agreement on Investment within the Organization for Economic Cooperation and Development (OECD)<sup>38</sup> and the 2003 breakdown of similar attempts to include an investment accord in the Doha Round of WTO negotiations,<sup>39</sup> there is no international or multilateral scheme governing investment.<sup>40</sup> However, foreign investment is often addressed as a side issue in regional integration accords. Such agreements often encourage the flow of capital between member states and liberalize the terms on which investment between participating states takes place, although they rarely offer enforceable protections to foreign investors.<sup>41</sup> Increasingly, foreign direct investment is regulated via bilateral agreements. Well over two thousand bilateral investment treaties (BITs) have been signed in the past twenty years.<sup>42</sup> BITs now govern forty-three percent of all global foreign direct investment.<sup>43</sup> BITs protect the foreign investments that flow from wealthier countries to poorer ones from expropriation or other forms of conflict.<sup>44</sup> Through BITs, signatories guarantee each other most favored nation status and grant outside investments “national treatment.”<sup>45</sup> They establish the terms of compensation for expropriation, and set the forum for the settle-

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<sup>38</sup> See CHARAN DEVEREAUX, ROBERT Z. LAWRENCE & MICHAEL WATKINS, 1 CASE STUDIES IN US TRADE NEGOTIATION: MAKING THE RULES 135–39 (2006).

<sup>39</sup> See Stephen Young & Ana Teresa Tavares, *Multilateral Rules on FDI: Do We Need Them? Will We Get Them? A Developing Country Perspective*, 13 TRANSNAT’L CORPS. 1, 2–4 (2004).

<sup>40</sup> Zachary Elkins, Andrew T. Guzman & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 2008 U. ILL. L. REV. 265, 266. The WTO does provide limited protections to foreign investments in certain contexts. *From Bilaterals to a Multilateral Agreement?*, WTO, [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/brief\\_e/brief07\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief07_e.htm) (last visited Aug. 8, 2010).

<sup>41</sup> See Oliver Morrissey, *Investment Provisions in Regional Integration Agreements for Developing Countries* 5–6 (Ctr. for Research in Econ. Dev. and Int’l Trade, Research Paper No. 08/06, 2006), available at <http://www.nottingham.ac.uk/economics/credit/research/papers/CP0806.pdf>.

<sup>42</sup> Chris Brummer counts 2265 BITs signed between 1989 and 2007. Brummer, *supra* note 31, at 1363.

<sup>43</sup> THE PRINCETON ENCYCLOPEDIA OF THE WORLD ECONOMY 674 (Kenneth A. Reinert & Ramkishan S. Rajan et al., eds., 2009).

<sup>44</sup> BITs generally define “investment” broadly. See, e.g., Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639, 655 (1998) (quoting Model United States Bilateral Investment Treaty, which defines investments to include tangible, intangible, and intellectual property; licenses and permits; and financial assets such as stock). This represents an expansion of the earlier international standard on foreign investment represented in the Hull Rule, which only protected against expropriation in the form of the seizure of assets. *Id.* at 644–45, 655. The BIT rule renders any dispute between an investor and a host nation a matter of international law so long as it grows from an agreement negotiated between them. *Id.* at 655–56.

<sup>45</sup> See Brummer, *supra* note 31, at 1363; Guzman, *supra* note 44, at 654.

ment of disputes, giving the investor the right to invoke binding arbitration before an international body.<sup>46</sup>

Like bilateral trade accords, the use of BITs was initiated by developed nations. Although less-developed countries have more recently begun to sign accords with each other, developed countries remain active participants in shaping the substantive and procedural protections owed to foreign investors under such treaties.<sup>47</sup> For many years, less-developed countries took a collective position within the UN, the WTO, and elsewhere against internationally enforceable investment contracts and limits on expropriation.<sup>48</sup> Since the 1980s, however, such countries have proven eager to sign bilateral investment agreements with developed nations (and lately with each other), often agreeing to terms that contravene their prior statements.<sup>49</sup>

In the contexts of trade and investment, regional and bilateral agreements are widespread; in the context of trade, there is also a comprehensive multilateral regime. All of these arrangements are binding, in that they detail the fora in which disputes are to be decided and set out economic penalties to be imposed for breach.<sup>50</sup> Perhaps not surprisingly, the interaction

<sup>46</sup> See Elkins, Guzman & Simmons, *supra* note 40, at 276; Guzman, *supra* note 44, at 642–43, 654.

<sup>47</sup> See Guzman, *supra* note 44, at 654. In a later article, Guzman and two co-authors refine the point about the interaction between home (investor) nations and potential hosts, arguing that “home countries make take-it-or-leave-it offers to potential hosts,” while “the decision of whether and when to sign is, to a large extent, left to the host.” Elkins, Guzman & Simmons, *supra* note 40, at 276. This means that while BIT terms are largely determined by investor nations, signings cluster around the schedule and needs of host countries. *Id.*

Quite recently, capital has begun to flow more steadily from developing to developed countries. Developing nation investors have thus begun to call on the reciprocal protections of BITs, and developed countries have become concerned about the extent of the safeguards they once promoted so enthusiastically. As a result, the 2004 U.S. Model BIT was drafted with more limited definitions of “investment” and “expropriation” than in previous iterations, and in ongoing discussions about a new model BIT a number of U.S. commentators have argued for further restrictions on protections offered to foreign capital. 2004 U.S. MODEL BIT, available at <http://www.state.gov/documents/organization/117601.pdf>. I thank Julian Mortenson for alerting me to this development.

<sup>48</sup> See Guzman, *supra* note 44, at 642–43. Through the movement for a New International Economic Order, developing countries campaigned successfully at the United Nations in the 1970s for the abolition of the Hull Rule mandating “prompt, adequate, and effective” compensation for expropriation. *Id.* at 644–51. Instead, they advocated on national sovereignty grounds for a more lenient (and less enforceable) “appropriate compensation” standard. *Id.*

<sup>49</sup> Guzman and co-authors have argued that this reflects the fact that even though as a group less-developed nations would benefit from less stringent rules, their individual national financial interests lie in signaling their comparative attractiveness as host countries for foreign investment, which they do by agreeing to broad property protections. *Id.* at 643, 669–74; Elkins, Guzman & Simmons, *supra* note 40, at 266, 277.

<sup>50</sup> In the case of BITs, for example, the agreements establish dispute settlement mechanisms and impose a requirement of “prompt, adequate, and effective” compensation for breach. Guzman, *supra* note 44, at 657–58. Guzman argues that “one of the most interesting and potentially influential” aspects of BITs is their protection of contractual rights by “making any breach of an agreement between the host country and the investor a violation of an international treaty, . . . [thus] allow[ing] such agreements to be treated like contracts between private parties within a single country.” *Id.* at 655.

between the various levels of these regimes can be fraught with tension.<sup>51</sup> Nonetheless, these agreements are flourishing as countries seek out a variety of opportunities to maximize economic gains through investment and trade. The most powerful countries are generally engaged at every available level in negotiating trade and investment agreements, and the least powerful often wish to be so active. As of 2007, for example, the United States participated in the WTO, was a party to two regional arrangements, and had negotiated forty-eight BITs and fifteen BFTAs.<sup>52</sup>

### B. *The International Regulation of Labor Migration*

The limited global map of rules and institutions regulating the migration of workers across borders presents a stark contrast to the many international agreements governing trade and investment. First, labor migration is much more restricted than trade or foreign investment.<sup>53</sup> Second, the regulation of immigration is carried out with much less international coordination than the regulation of the flow of goods or capital. There is no binding international or multilateral mechanism for the negotiation of rules regarding economic migration, nor is one currently under serious contemplation. Although parties to a number of regional arrangements established for the purpose of economic cooperation are currently considering permitting freer movement of workers between member nations, the principal beneficiaries of such arrangements are highly skilled migrants. Only the EU has implemented a policy permitting free movement between member states for all workers. In the absence of other mechanisms governing low-wage labor migration, bilateral agreements are on the rise, although many are nonbinding, and they collectively regulate only a small percentage of the world's labor migration.

1. *The Absence of Multilateral Governance of Immigration.*—There are currently no global or multilateral regimes for the governance of immigration. The closest approximation can be found in the arena of refugee policy, where the United Nations High Commissioner on Refugees (UNHCR) intervenes with national governments to address refugee crises and coordinates efforts to resettle the nearly thirty-four million displaced

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<sup>51</sup> For an exploration of the tensions between bilateral agreements and the regional organizations, see Brummer, *supra* note 31, at 1368–71. For an analysis of the conflicts between regional organizations and the WTO, see, for example, Sungjoon Cho, *Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARV. INT'L L.J. 419 *passim* (2001); Sungjoon Cho, *Defragmenting World Trade*, 27 NW. J. INT'L L. & BUS. 39 (2006). For concerns about the interactions between BFTAs and the WTO regime, see McMahon, *supra* note 33, at 1, 4; Peter Drahos, Presentation at the Asian Regional Workshop on Bilateral FTAs (Aug. 26–28, 2005), available at <http://www.twinside.org.sg/title2/FTAs/DisputeResolution/DisputeResolutionAndFTAsPeterDrahos.ppt>.

<sup>52</sup> Brummer, *supra* note 31, at 1364.

<sup>53</sup> See Trebilcock, *supra* note 6, at 271–72.

people worldwide.<sup>54</sup> But the UNHCR has no mechanism to compel compliance with its interpretation of the 1951 UN Convention on Refugees, nor are its interpretations of international law binding.<sup>55</sup> Furthermore, a large majority of the world's nearly 200 million migrants<sup>56</sup> are not fleeing persecution or civil strife and thus do not fall within the UNHCR's mandate. Thus, most human movement across borders is left to individual states to handle unilaterally, bilaterally, or regionally as they wish.

Both scholars and policymakers of late have offered proposals for global approaches to coordinating immigration. Bimal Ghosh first made the case for a "New International Regime for Orderly Movements of People" in 2000.<sup>57</sup> Various other scholars have taken up his call, including most prominently Jagdish Bhagwati, who in 2003 posited the idea of a World Migration Organization modeled on the WTO.<sup>58</sup> In the policy arena, the UN-sponsored Global Commission on International Migration called in 2005 for the formation of a UN-based "Inter-agency Global Migration Facility" to "establish a comprehensive and coherent approach in the overall institutional response to international migration."<sup>59</sup> This proposal stops short of the full World Migration Organization model, but would nonetheless represent a step forward in the global governance of immigration. The UN General Assembly held its first High Level Dialogue on International Migration and Development in 2006, but the achievement of a formal structure to coordinate world migration remains elusive.

While formal governance structures remain absent at the international level, advisory mechanisms abound.<sup>60</sup> Other international entities that for-

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<sup>54</sup> *About Us*, UNITED NATIONS HIGH COMMISSION ON HUMAN RIGHTS, <http://www.unhcr.org/pages/49c3646c2.html> (last visited Aug. 8, 2010).

<sup>55</sup> See James C. Hathaway, *Who Should Watch Over Refugee Law?*, 14 FORCED MIGRATION REV. 23, 23–24 (2002).

<sup>56</sup> The 200 million figure only includes those outside their country for a year or more. GLOBAL COMM'N ON INT'L MIGRATION, MIGRATION IN AN INTERCONNECTED WORLD: NEW DIRECTIONS FOR ACTION 83 (2005), available at <http://www.gcim.org/en/finalreport.html> (last visited Aug. 8, 2010).

<sup>57</sup> See Bimal Ghosh, *Towards a New International Regime for Orderly Movements of People*, in MANAGING MIGRATION: TIME FOR A NEW INTERNATIONAL REGIME? 6 (Bimal Ghosh ed., 2000).

<sup>58</sup> See Jagdish Bhagwati, *Borders Beyond Control*, 82 FOREIGN AFF. 98, 101–04 (2003). But see Hatton, *supra* note 5, at 368–70 (questioning whether the parallels between trade and immigration are sufficiently strong to make a WTO model viable in the immigration context). For an overview of recent calls for a global entity to manage migration, see Antoine Pécoud & Paul de Guchteneire, *International Migration, Border Controls and Human Rights: Assessing the Relevance of a Right to Mobility*, 21 J. OF BORDERLANDS STUD. 69, 80 (2006).

<sup>59</sup> GLOBAL COMM'N ON INT'L MIGRATION, *supra* note 56, at 77; see also *id.* at 73–78 (for the overall call). The GCIM was brought into existence for eighteen months and concluded in 2005. The UN initiated the Global Migration Group in response to the GCIM's recommendation. *Background*, GLOBAL MIGRATION GROUP, <http://www.globalmigrationgroup.org/background.htm> (last visited Aug. 8, 2010).

<sup>60</sup> A growing number of international organizations advise governments on migration policy, including the International Organization for Migration (IOM) outside of the UN system. For an overview of the IOM's work advising governments with regard to temporary labor migration, see *Labour Migration*, IOM, <http://www.iom.int/jahia/page706.html> (last visited Aug. 8, 2010). To a lesser extent (although

merly saw immigration issues as outside their purview are beginning to address them. These include the World Bank, which addresses remittances and development, and the WTO, which facilitated negotiations for the GATS Mode 4 protocol governing the supply of services across borders.<sup>61</sup> A range of fora have emerged to develop migration guidelines and assess effective practices.<sup>62</sup> Finally, new venues that enable the world's governments to discuss and debate migration issues directly with each other are emerging.<sup>63</sup> None of these multilateral bodies or processes, however, has produced a single accord binding participating governments.

2. *Limited Regional Governance of Labor Migration.*—Increasingly, geographically proximate states that have entered into trade agreements are extending those relationships to encompass other aspects of economic and political integration, including investment, security, border issues, and the provision of services, as well as labor migration. With the exception of the EU,<sup>64</sup> however, none of these regional accords permits workers at all skill

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increasing of late), the UN's International Labor Organization (ILO) and other UN agencies have also become involved in immigration issues. For an overview of international agencies within and outside the UN that have become involved in immigration issues, see GLOBAL COMM'N ON INT'L MIGRATION, *supra* note 56, at 72–75.

<sup>61</sup> See GLOBAL COMM'N ON INT'L MIGRATION, *SUPRA* note 56, at 72–75. The provisions in the WTO-administered General Agreement in Trade and Services (GATS) Relating to the Movement of Natural Persons (GATS Mode 4) exclusively facilitate the temporary movement of service suppliers across borders. They explicitly exclude those traveling under this framework from access to the labor market and from a right to permanent immigration. Sungjoon Cho, *Development by Moving People: Unearthing the Development Potential of a GATS Visa*, in DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM 457, 463–64 (Chantal Thomas & Joel P. Trachtman eds., 2009).

<sup>62</sup> These include the IOM's International Dialogue on Migration, the Hague Process on Refugees and Migration, and the Berne Initiative's International Agenda for Migration Management. See THE BERNE INITIATIVE, INTERNATIONAL AGENDA FOR MIGRATION MANAGEMENT 6–8 (2004), available at <http://www.unhcr.org/refworld/pdfid/46949e762.pdf>. These processes at times involve civil society groups and the private sector as well as international organizations and states. For a description of a number of these initiatives, see TRACHTMAN, *supra* note 6, at 15–23.

<sup>63</sup> For example, since 2007 the Global Forum on Migration and Development has begun to convene destination and origin governments annually for discussion of “best practices” regarding labor migration. See Global Forum on Migration and Development Athens 2009, <http://www.gfmd2009.org/205/section.aspx/355> (last visited Aug. 8, 2010).

<sup>64</sup> Free movement of workers within the EU also encompasses citizens of the countries in the European Economic Area (EEA), including Iceland, Liechtenstein, and Norway, and citizens of the countries in the European Free Trade Association (EFTA), including Switzerland. EUROPEAN ECONOMIC AREA, COORDINATION UNIT, EUROPEAN ECONOMIC AREA: FACT SHEET 4, [http://www.llv.li/pdf-llv-sewr-ewr-kurzinformation\\_englisch.pdf](http://www.llv.li/pdf-llv-sewr-ewr-kurzinformation_englisch.pdf) (last visited Aug. 8, 2010).

Australia and New Zealand permit the free movement of each other's nationals to live and work in either country. The Australia-New Zealand Closer Economic Relations Treaty Agreement (ANZCERTA, commonly referred to as CER) is a trade agreement, with the right of free movement established separately under the Trans-Tasman Travel Arrangement. Because CER only involves two countries, it offers less insight into a discussion of full regional mobility. See *The Australia New Zealand and Closer Economic Relations (CER) Trade Agreement: 1983–2003 Background*, NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS & TRADE, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/0--Trade-archive/0--Trade-agreements/Australia/0-trade-agreement.php> (last visited Aug. 8, 2010).



levels from any one signatory state to work without restriction and with full rights in other signatory states.

Since the EU was founded in 1957, it has permitted citizens of member states to work in any other member state for an unlimited period of time, with the same workplace rights as nationals.<sup>65</sup> Historically, as new member states are admitted, existing member states have been permitted to limit labor market access to citizens of the newly admitted states for a period of time, customarily seven years. The EU's enlargement in 2004 and 2007 to include ten central and eastern European countries has followed this pattern.<sup>66</sup> Eventually, though, all EU member states will be incorporated in the free movement regime. The EU's commitment to the free movement of workers between member states is the equivalent of national treatment in the trade and investment setting.

Outside the EU, a number of regional accords have created mechanisms to facilitate more open movement of high-skilled workers between signatory states. Under such accords, the movement of low-skilled workers is typically either forbidden, or channeled through temporary worker programs that are time-limited, often restricted by industry and which permit a partial array of rights compared to those of native workers. These policies are consistent with a worldwide trend of increasing openness to skilled labor migration while increasing restrictions on the movement of unskilled workers.<sup>67</sup> The Caribbean Community, for example, allows virtually unrestricted movement by university graduates and professionals between member states but does not permit migration by low-wage workers.<sup>68</sup> On a more limited scale, NAFTA created a temporary visa that permits a small subset of highly skilled workers to move temporarily for work among the

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<sup>65</sup> See Treaty Establishing the European Community, art. 48 (as in effect in 1957) (now art. 39), Mar. 25, 1957, 2006 O.J. (C 321) 57. For a description of the elements of free movement of workers in the EU, see *Free Movement of Workers*, EUROPEAN COMM'N, <http://ec.europa.eu/social/main.jsp?catId=458&langId=en> (last visited Aug. 8, 2010). A citizen of any EU member state is permitted to enter any other member state without a visa and remain for up to six months. She can stay longer as long as she is employed or self-employed, a student, a family member of an EU national in one of the qualifying categories, or—if none of those things—able to demonstrate that she does not need social benefits or health insurance. See EUROPEAN COMM'N, *FREE MOVEMENT FOR WORKERS*, [http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_3.2.2.pdf](http://www.europarl.europa.eu/ftu/pdf/en/FTU_3.2.2.pdf) (last visited Aug. 8, 2010).

<sup>66</sup> Cyprus and Malta were also admitted to the EU in 2004, essentially without restrictions on the movement of their nationals. *Enlargement—Transitional Provisions*, EUROPEAN COMM'N, <http://ec.europa.eu/social/main.jsp?catId=466&langId=en> (last visited Dec. 16, 2009).

<sup>67</sup> See ASIAN DEV. BANK, *ASIAN DEVELOPMENT: OUTLOOK 2008*, at 77, 89 [hereinafter *ASIAN DEVELOPMENT OUTLOOK*].

<sup>68</sup> *Protocol II: Establishment, Services, Capital (Protocol Amending the Treaty Establishing the Caribbean Community)*, CARIBBEAN COMMUNITY SECRETARIAT (July 1, 1997), [http://caricom.org/jsp/secretariat/legal\\_instruments/protocolII.jsp?menu=secretariat](http://caricom.org/jsp/secretariat/legal_instruments/protocolII.jsp?menu=secretariat).

United States, Canada, and Mexico.<sup>69</sup> NAFTA, however, makes no provision for low-wage labor migration.<sup>70</sup>

A few regional organizations have indicated an intent to eventually permit movement of low-wage as well as professional workers among member states. The Economic Community of West African States promises a reciprocal right of “establishment” (i.e., the right to carry out economic activities, including work) to citizens of its fifteen signatory nations, although that promise has not been realized.<sup>71</sup> The Common Market for Eastern and Southern Africa’s (COMESA) Protocol on the Free Movement of Persons is still aspirational, but if implemented it will progressively remove all obstacles to private sector labor mobility among COMESA’s nineteen member countries.<sup>72</sup> The Andean Community in Latin America, including Peru, Ecuador, Colombia, Bolivia, and Venezuela, is moving toward regional labor mobility for a defined set of people, including temporary agricultural workers.<sup>73</sup>

With the exception of the EU, what is notable about the list of nations contemplating a more open approach to low-wage labor migration on a regional basis is the almost complete absence of the world’s major migrant destination countries. The United States, the Gulf states, and Asian countries such as Japan and South Korea, for example, have indicated no plans to negotiate regional relationships with the countries that represent their primary sources of low-wage immigrants. EU member states, meanwhile, have shown no inclination to open labor migration opportunities to low-wage workers from non-EU countries, such as the African nations. Indeed, the growth in the EU’s inner circle has been accompanied by increasingly restrictive policies toward nationals from non-EU countries.<sup>74</sup>

<sup>69</sup> See NAFTA, *supra* note 28.

<sup>70</sup> See Fernández-Kelly & Massey, *supra* note 14, at 99.

<sup>71</sup> Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence, and Establishment, pt. 2, art. 2, ECOWAS, <http://www.comm.ecowas.int/sec/index.php?id=ap010579&lang=en> (last visited Aug. 8, 2010). On difficulties with implementation, see DILIP RATHA & WILLIAM SHAW, WORLD BANK, SOUTH–SOUTH MIGRATION AND REMITTANCES 13 box 1 (2007), available at <http://siteresources.worldbank.org/INTPROSPECTS/Resources/South-SouthmigrationJan192006.pdf> (last visited Aug. 8, 2010).

<sup>72</sup> See Common Market for Eastern and Southern Africa Treaty, ch. 28, art. 164, [http://about.comesa.int/attachments/149\\_090505\\_COMESA\\_Treaty.pdf](http://about.comesa.int/attachments/149_090505_COMESA_Treaty.pdf). On difficulties with implementation, see RATHA & SHAW, *supra* note 71, at 13 box 1.

<sup>73</sup> Although the agricultural program is for temporary workers, it offers social and labor protections that are superior to many guest worker programs. See Decision 545: Andean Labor Migration Instrument, COMUNIDAD ANDINA (June 25, 2003), <http://www.comunidadandina.org/ingles/normativa/D545e.htm>; O’Neil, Hamilton & Papademetriou, *supra* note 28, at 32.

At a less-binding level, a number of regional consultative processes have begun to discuss regional labor mobility as well. Examples include the Colombo Process in Asia; the Puebla Process in North and Central America; the Abu Dhabi Dialogue, and the Migration Dialogue for Southern Africa (MIDSA). INT’L ORG. FOR MIGRATION, WORLD MIGRATION 2008, at 8 [hereinafter WORLD MIGRATION 2008].

<sup>74</sup> See, e.g., Christopher Werth, *Marketplace: UK Toughens Laws on Immigration* (American Public Media radio broadcast Aug. 6, 2009), available at <http://marketplace.publicradio.org/display/web/2009/>

### 3. *Weak but Growing Bilateral Governance of Labor Migration.*—

Although bilateral labor migration accords have recently re-emerged on the global stage, such agreements have long existed as a mechanism to govern the flow of temporary labor migrants between nations. In the wake of World War II, for example, Italy signed agreements with Belgium, the Netherlands, the United Kingdom, and France, promising to provide those countries with guest workers.<sup>75</sup> After a lull from the 1970s through most of the 1990s, the negotiation of such accords has been on the rise over the past decade.<sup>76</sup> In 2004, a survey of the thirty countries that make up the OECD found 176 bilateral accords governing temporary labor recruitment.<sup>77</sup> Until recently, when enlargement guaranteed a consistent supply of workers from new EU member states, EU nations were particularly active among the OECD nations in negotiating bilateral labor migration agreements.<sup>78</sup> Latin American countries have signed more than 140 such agreements.<sup>79</sup> Asian-Pacific and Middle Eastern countries have also begun to negotiate bilateral agreements about temporary labor migration.<sup>80</sup>

Major origin countries often have multiple agreements. The Philippines has bilateral labor migration agreements with at least fourteen of the nations to which it sends its migrants.<sup>81</sup> Destination countries may reach accords with a range of partners as well. Spain, for example, has temporary labor migration agreements with eight of the countries that make up its immigrant population.<sup>82</sup> Despite their growing numbers, the existing agreements regulate only a small percentage of total labor migration between countries around the world.<sup>83</sup> And in most destination countries that nego-

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08/06/pm-uk-immigration/.

<sup>75</sup> See ORG. FOR ECON. COOP. AND DEV., *MIGRATION FOR EMPLOYMENT: BILATERAL AGREEMENTS AT A CROSSROADS* 222 tbl.1.A.1 (2004) (table of bilateral labour agreements signed by OECD member countries) [hereinafter *MIGRATION FOR EMPLOYMENT*].

<sup>76</sup> See Daniela Bobeva & Jean-Pierre Garson, *Overview of Bilateral Agreements and Other Forms of Labour Recruitment*, in *MIGRATION FOR EMPLOYMENT*, *supra* note 75, at 11–12.

<sup>77</sup> *Id.* at 12. For a list of OECD countries, see *Ratification of the Convention on the OECD*, OECD, [http://www.oecd.org/document/1/0,3343,en\\_2649\\_201185\\_1889402\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/1/0,3343,en_2649_201185_1889402_1_1_1_1,00.html) (last visited Aug. 8, 2010).

<sup>78</sup> See *MIGRATION FOR EMPLOYMENT*, *supra* note 75, 222 tbl.1.A.1. Many of the EU accords were with Eastern and Central European countries, and they have been or soon will be obviated by the free movement guarantees that accompanied enlargement. See Bobeva & Garson, *supra* note 76, at 26.

<sup>79</sup> O'Neil, Hamilton & Papademetriou, *supra* note 28, at 32–33.

<sup>80</sup> See *ASIAN DEVELOPMENT OUTLOOK*, *supra* note 67, at 89–90; Bobeva & Garson, *supra* note 76, at 11–12.

<sup>81</sup> Dovelyn Rannveig Agunias, *Managing Temporary Migration: Lessons from the Philippine Model*, *MIGRATION POLICY INST., INSIGHT*, Oct. 2008, at 1, 33, available at [http://www.migrationpolicy.org/pubs/Insight\\_POEA\\_Oct07.pdf](http://www.migrationpolicy.org/pubs/Insight_POEA_Oct07.pdf).

<sup>82</sup> EDUARDO GERONIMI, LORENZO CACHÓN & EZEQUIEL TEXIDÓ, *OFICINA INTERNACIONAL DEL TRABAJO, ACUERDOS BILATERALES DE MIGRACIÓN DE MANO DE OBRA: ESTUDIO DE CASOS [BILATERAL LABOR MIGRATION AGREEMENTS: CASE STUDIES]* 16, 23, 95, 125 (2004), available at <http://www.ilo.org/public/english/protection/migrant/download/imp/imp66s.pdf>.

<sup>83</sup> See Bobeva & Garson, *supra* note 76, at 12, 22.

tiate such agreements, they serve as a supplement to rather than a comprehensive replacement for the domestically legislated migration regime.<sup>84</sup> A number of major migrant destination countries—including the United States and many of the Gulf states—have no bilateral labor migration agreements (BLMAs) at all.

BLMAs governing low-wage workers almost exclusively establish guest-worker-like programs that tie migrants to a particular employer for a limited period of time, rather than establishing regimes permitting the free movement of workers between two countries. These agreements may take a number of forms, although two are most common: the nonbinding Memorandum of Understanding (MOU), and the binding bilateral treaty or accord.<sup>85</sup> Agreements vary widely in scope, terms, and level of specificity.<sup>86</sup> Most accords, however, require a destination country to accept a certain number of temporary labor migrants from a particular origin country. Often, the agreement sets out the sector in which those migrants will labor, most commonly agriculture, construction, and domestic work. Some agreements are quite general; others establish detailed rules governing the recruitment process, the length of time migrants are permitted to remain, and the procedures for their return. BLMAs rarely include provisions regarding procedures to be followed in case either party breaches the agreement, or require use of a particular tribunal or process to settle disputes.<sup>87</sup>

Increasingly, BLMAs are incorporating a role for or regulating the behavior of nongovernmental actors, including recruitment firms, employers' associations, civil society organizations, and unions. Recently, some bilateral agreements have begun to include model contracts or statements regarding minimum workplace standards in response to pressure from migrants' rights advocates and from origin countries responding to domestic political outcry about the treatment of migrants abroad. A few agreements now incorporate programs to inform migrants of their rights, while a small minority create special claims and enforcement mechanisms for those

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<sup>84</sup> See Martine Durand, *Conclusions*, in *MIGRATION FOR EMPLOYMENT*, *supra* note 75, at 217–19.

<sup>85</sup> See Bobeva & Garson, *supra* note 76, at 11–15.

<sup>86</sup> Bilateral agreements tend to be more detailed, more binding, and more action-oriented than MOUs. *Id.*

<sup>87</sup> See, for example, the following provisions from an MOU between Indonesia and Malaysia:

Any difference or dispute between the Parties arising out of the interpretation of implementation or application of the provisions of this Memorandum of Understanding shall be settled amicably through consultation or negotiation between the Parties through diplomatic channels without reference to any third party.

Each Party reserves the right for reasons of national interest, public order or public health to suspend temporarily, either in whole or in part, the implementation of this Memorandum of Understanding. Such suspension will be effective immediately upon issuance of the written notification to the other Party through diplomatic channels.

Memorandum of Understanding between the Government of the Republic of Indonesia and the Government of Malaysia on Co-Operation on Immigration Matters, Indon.–Malay., arts. 7 & 9, Aug. 8, 2002, available at [http://untreaty.un.org/unts/144078\\_158780/6/7/13783.pdf](http://untreaty.un.org/unts/144078_158780/6/7/13783.pdf).

rights. These provisions, however, have largely gone unheeded in practice.<sup>88</sup>

### III. SHARPENING THE CONTRAST: THE DIFFERENCE BETWEEN BILATERAL AGREEMENTS ON TRADE AND INVESTMENT VS. IMMIGRATION

It is clear, then, that developed countries approach trade and investment very differently than they approach labor migration, in terms of both the level of openness and the degree of inter-country cooperation that they see as optimal. This contrast is sharpened by a direct comparison between the comprehensiveness, protectiveness, and enforceability of the agreements that developed countries make with developing country partners in each context.

Bilateral investment and trade agreements are far more comprehensive in their coverage than those governing migration. Investment and trade accords are usually broad in scope, regulating most or all movement of capital and goods between the signatory countries. Bilateral labor migration agreements, by contrast, are often quite narrow, setting the terms of movement only for a special (frequently numerically limited) class of migrants, while other migration between the signatory countries continues outside of the terms of the agreement.<sup>89</sup>

Bilateral trade and investment treaties also offer far stronger and more enforceable protections to the owners of mobile goods and capital than bilateral labor migration treaties offer to the owners of labor (i.e., migrant workers). As described in Part II.A, bilateral free trade and investment accords carry heavy penalties for violations, set out procedures to be followed in case of disagreements, and usually incorporate dispute resolution mechanisms or assign disputes to special tribunals. BLMAs, by contrast, usually guarantee migrants minimal protections, if their rights are mentioned at all. Although a number of newer BLMAs do set out specific rights for migrants traveling under the agreement, and some experiment with new mechanisms for the protection of migrant workers, BLMAs rarely include enforcement mechanisms and are often written as nonbinding MOUs.

In assessing the strength of the protections offered in these agreements, it is telling to look at how they interact with domestic law in the signatory countries. Trade and investment agreements routinely supersede related national laws.<sup>90</sup> For example, investment accords that guarantee foreign in-

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<sup>88</sup> See Jennifer Gordon, *Towards Transnational Labor Citizenship: Restructuring Labor Migration to Reinforce Workers' Rights* 13–15 (Univ. of Cal.-Berkeley Warren Inst., Policy Paper, 2009), available at [http://www.law.berkeley.edu/files/Gordon\\_Transnatl\\_Labor\\_Final.pdf](http://www.law.berkeley.edu/files/Gordon_Transnatl_Labor_Final.pdf) [hereinafter Gordon, *Restructuring Labor Migration*].

<sup>89</sup> I have found no satisfactory measure of how much of total world labor migration is regulated through bilateral agreements as opposed to unilateral domestic law or regional accords.

<sup>90</sup> See Guzman, *supra* note 44, at 654–58, for the extent of protections offered to investors under the

vestors national treatment generally override domestic laws mandating that foreign firms (but not native ones) get a certain percentage of their inputs from within the host country. By contrast, typical labor migration accords merely supplement domestic laws with regard to the rights of migrants. For example, South Korea's BLMAs with six Asian countries are negotiated within the terms of South Korea's existing Employment Permit system, rather than overriding that law.<sup>91</sup>

The trade and investment norm of stronger bilateral accords and weaker regional and multilateral agreements is reversed for migration agreements. Bilateral agreements on investment and trade are typically stronger than regional agreements on investment and trade in that they require more openness to outside capital and goods in host nations and tie the hands of domestic actors who would put conditions on investment or restrict trade to a greater extent.<sup>92</sup> Bilateral labor migration agreements present the opposite picture: they require less openness to labor mobility than their regional counterparts, and they permit host nations to limit the rights of migrants to a greater extent than existing or proposed regional labor mobility agreements allow.

Finally, it is worth noting a difference in the area of uniformity. Bilateral labor migration agreements are often negotiated in secret. Their contents, and at times even the fact of their existence, are frequently not made public.<sup>93</sup> When it is possible to obtain copies, it is evident that the concluded labor migration agreements vary widely in their terms, unlike investment agreements (and to a lesser extent trade agreements) which largely echo each other's terms and language.<sup>94</sup>

The results of the comparison are consistent. Bilateral agreements on investment and trade are stronger than those governing labor migration along every dimension: trade agreements are more comprehensive and require more openness; are more likely to supplant domestic law and exceed

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model BIT, including multiple provisions that override domestic laws. He concludes that the typical BIT renders "[v]irtually any dispute between host and investor . . . a matter of international law." *Id.* at 655–56.

<sup>91</sup> See ASIAN DEVELOPMENT OUTLOOK, *supra* note 67, at 90.

<sup>92</sup> See *supra* note 37 and accompanying text (describing efforts by the United States and other developed nations to use bilateral agreements to achieve an agenda that has been stymied by the WTO's multilateral forum).

<sup>93</sup> See, e.g., DEV. RESEARCH CTR. ON MIGRATION, GLOBALISATION & POVERTY, MIGRATION PARTNERSHIPS 1 (2008), available at [http://www.migrationdrc.org/news/reports/bmds/session6/Migration\\_Partnerships.pdf](http://www.migrationdrc.org/news/reports/bmds/session6/Migration_Partnerships.pdf) (last visited Aug. 8, 2010) (referring to Egypt and Morocco, the report states that "[a]lthough both countries have signed diplomatic agreements regarding labour migration with a number of host countries, these agreements have often been based on private understandings which are not made public").

<sup>94</sup> Although the terms of BFTAs vary, they have in common a guarantee of most favored nation treatment, and a commitment to eradicate tariffs and other barriers to the import of the goods of signatory nations. See Elkins, Guzman & Simmons, *supra* note 40, at 274–77; Guzman, *supra* note 44, at 654.

the protections of regional or multilateral agreements; and are more protective, binding, and enforceable than labor migration agreements.<sup>95</sup>

#### IV. WHY DOES IMMIGRATION LAG BEHIND TRADE AND INVESTMENT IN GLOBAL COORDINATION?

If economists' models predict that free trade, foreign investment, and immigration will behave so similarly in terms of maximizing global wealth, what accounts for the weak global regulation of immigration as opposed to the highly developed global mechanisms regulating trade and investment? The simplest of responses points to *realpolitik*: trade and investment are arenas where most nations are aggressively seeking new relationships on favorable terms, while immigration is an area where developed countries display considerable ambivalence in the face of developing nations' great interest.<sup>96</sup> But this answer begs the fundamental question: if immigration offers even greater efficiency gains than trade,<sup>97</sup> why are developed nations so reluctant to permit greater openness, and to pursue that goal in coordination with developing countries? In Part I, I noted and rejected an explanation rooted in classical economics: that the difference is accounted for by the fact that trade and migration are substitutes for each other.<sup>98</sup> In this Part, I argue instead that labor mobility is fundamentally different from the mobility of goods or capital in several ways, each of which contributes either to wealthier nations' reluctance to permit greater global movement of workers, or to their distaste for multilateral structures governing labor migration, or both.

Before beginning, however, a reiteration of the parallels between kinds of factor mobility is in order. In the classical economic lineup, trade and migration appear to produce a similar set of winners and losers. In the trade setting, if a U.S.-based commercial baker imports flour from abroad, the

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<sup>95</sup> To note these differences is not to dismiss the importance of the re-emergence of bilateral agreements over the past two decades as a mechanism for governing labor migration. Precisely because of the fact that some countries are taking their first modern steps away from unilateral governance of migration through these agreements, and that even countries that have long had a bilateral approach appear to be using such agreements as ways to experiment with different approaches to labor migration, I suspect that there is a great deal that could be learned through close quantitative and qualitative analysis of recent accords.

<sup>96</sup> This Essay gives short shrift to the complex, ambivalent, and varied perspectives of *developing* countries on migration, not by any means because they lack importance, but because they do not shed much light on the question that occupies this Essay, to wit, why developed nations have responded in such disparate ways to the movement of goods and people across borders.

<sup>97</sup> See *supra* note 21 and accompanying text.

<sup>98</sup> There are two variations of this argument: the outsourcing claim (trade will render immigration unnecessary because the jobs will move to where the workers are) and the wage equalization claim (trade will render immigration unnecessary because it will raise wages and increase employment opportunities in less-developed countries). The first has proven untrue because large numbers of jobs in developed countries are locally rooted. The second effect has failed to materialize in a number of cases, as the wave of migration unleashed by NAFTA illustrates. See *supra* notes 16–20 and accompanying text.

foreign firm selling the flour benefits from higher prices than it could command in its domestic market. The U.S. baker benefits from cheaper flour. Consumers benefit from the lower prices of the crackers the baker produces. The losers are U.S.-based flour producers, whose prices fall as a result of competition with foreign producers, and their workers, who lose jobs (although as consumers, they also benefit to a very small degree from cheaper crackers). In the immigration context, if a U.S.-based tomato canning firm uses immigrant workers on its production line in the United States, the immigrant benefits from higher wages than she could earn at home. The U.S. firm benefits from cheaper labor. Consumers benefit from the lower prices of the canned tomatoes. And the losers are the group of workers in the United States who compete with migrants for jobs; their wages fall because of the increased labor supply (although they, too, benefit a tiny bit from the decreased cost of the product).

Furthermore (and not surprisingly, given the similarities just noted), many of the charges levied against the importation of goods and the importation of labor echo each other. Trade is criticized for displacing workers from jobs in the importing country, and for replacing traditional products and practices with foreign ones, threatening national cultures.<sup>99</sup> Immigration, too, is criticized for displacing native workers, and for the social and cultural shifts that it engenders.<sup>100</sup> As Timothy Hatton has noted, “Across a broad range of countries attitudes are on balance against both imports and immigration, and the same types of people are against imports as are against immigration.”<sup>101</sup>

And yet, the domestic politics of most developed countries have eventually yielded to the opening of trade despite these distributional and cultural concerns, while continuing to pose an obstacle to the liberalization of labor migration on the same grounds. In the international arena, this split translates into the two contrasts I have noted. Developed countries emphatically support increased trade abroad, while advocating and adopting restrictions on immigration. And developed countries pursue negotiations over trade in bilateral, regional, and multilateral settings, while preferring unilateralism or limited forms of bilateralism to govern migration. With the

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<sup>99</sup> For a critique of free trade’s cultural effects, see Maude Barlow, *The Global Monoculture*, EARTH ISLAND J., Autumn 2001, at 32. For a critique of free trade’s impact on workers, see Byron Dorgan & Sherrod Brown, Op-Ed., *How Free Trade Hurts*, WASH. POST, Dec. 23, 2006, at A21.

<sup>100</sup> For an attack on immigration for its impact on culture, see SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY (2004); for a critique of immigration for its economic impact, see George J. Borjas, *Globalization and Immigration*, in GLOBALIZATION: WHAT’S NEW 77, 84, 86–90 (Michael Weinstein ed., 2005); and for an attack that mixes both elements, see MARK KRIKORIAN, THE NEW CASE AGAINST IMMIGRATION: BOTH LEGAL AND ILLEGAL (2008).

<sup>101</sup> Hatton, *supra* note 5, at 353. Greenaway and Nelson argue that in the United States, trade policy (seen as national and economic) is set via “group politics” while immigration policy (seen as local and social) is set via “democratic politics.” *Id.* at 359 (citing D. Greenaway & D. Nelson, *The Distinct Political Economies of Trade and Migration Policy Through the Window of Endogenous Policy Models*, in LABOR MOBILITY AND THE WORLD ECONOMY 25 (Fodders & Langhammer eds., 2006)).



exception of the European Union, regionalism is reserved for a few accords on high-skilled labor migration; multilateralism is unknown.

I explain these divergences as follows. First, labor migration involves human beings, who behave differently than goods. This behavioral difference elicits a different sort of reaction to their arrival, which in turn shapes a different set of domestic political forces and incentives. Second, developed nations perceive immigration as having a lower payoff than trade, in part because trade is largely a reciprocal process, while labor migration is mostly a one-way street. Both factors reduce the (perceived) economic gains from immigration and make immigration a more difficult political issue in developed countries. Finally, while wealthy nations cannot achieve free trade and protections for mobile capital without the cooperation of less-developed countries, they *can* in almost all cases fill their needs for labor migrants through unilateral action. Cooperation is only attractive when it brings destination countries more than they could achieve on their own.

#### A. *People Have Different Impacts than Goods and Capital*

Despite the similarities noted above, the arrival of migrants from other countries affects the economy and culture of the destination country differently than does an inflow of trade or capital. Unlike imported computers or cars, human beings put down roots, meet partners, have children, send for family members left behind, and create networks that change recruitment patterns for the jobs where they work. Human beings often speak languages, practice religions, and have cultural beliefs that differ from those of the communities they enter. They consume resources. They get sick and require medical care, have children who enter schools, and go through periods when they can't work and need support. Where they are entitled to access social welfare systems, their needs can put a strain on government coffers.<sup>102</sup> Humans can make compelling arguments that they are entitled to rights. And eventually, unlike foreign goods and the companies that make them, foreign humans—or their children—vote.<sup>103</sup> As a result, immigration generates a more complex set of anxieties and political reactions in immigrant-destination countries than do inflows of either goods or capital.

Political contention over immigration in destination countries is rooted in concerns over cultural change, competition in the labor market, and the burden newcomers who need schooling, housing, medical treatment, and other costly benefits place on society. Trade, of course, is contentious too. But in terms of organized politics, those groups interested in free trade have

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<sup>102</sup> Access to public benefits changes the equation: the easier it is to access public benefits, the greater the concerns about immigration. For an article that seeks entirely to explain the trade-immigration differential in such terms, see Dietmar Wellisch & Uwe Walz, *Why Do Rich Countries Prefer Free Trade Over Free Migration? The Role of the Modern Welfare State*, 42 EUR. ECON. REV. 1595 (1998).

<sup>103</sup> See Hatton, *supra* note 5, at 373.

been more successful in moving their agenda through the political process than those interested in more open migration.<sup>104</sup> This in part reflects the fact that those who most favor, and most stand to benefit from, more open immigration—migrants and their families—are less likely to be able to vote. Consumers receive lower prices for services as a result of immigration, but they may not identify those prices as a benefit of immigration, and in any case their primary identity is unlikely to be as a “consumer,” but rather as a worker or community member who may see immigration as otherwise harmful. In any case, consumers are too diffuse a constituency, with each profiting to too small a degree, to be likely to organize as an effective pro-immigration lobby. Dani Rodrik has argued that others who support liberalized immigration policy, such as employers of low-wage workers, have trouble organizing and identifying themselves as beneficiaries *ex ante*, and thus are not in a position to be effective proponents in the political process.<sup>105</sup> While the role of employer associations such as the Essential Worker Immigration Coalition in advocating for new guest worker programs in the mid-2000s<sup>106</sup> would seem to demonstrate otherwise, the fact that firms were not able to overcome political opposition speaks to the suspicion with which they are viewed as spokespeople for a pro-immigrant position.

*B. The Overall Economic Gains from Labor Migration Are Distributed Differently than the Gains from Trade*

The balance sheet from trade looks different from a developed country’s perspective than the balance sheet from immigration. This is true in two related regards: the net gain in *national* wealth generated by greater openness appears to be greater for trade than for immigration, and—more speculatively—the relative distribution between developed and developing countries of the increase in *global* wealth may favor developed countries more in the case of trade than in the case of immigration.

There is a near consensus view among economists that the fiscal impact of trade is a strong net positive from the perspective of all participating countries.<sup>107</sup> Economists acknowledge that there are distributional losers

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<sup>104</sup> See Eytan Meyers, *Multilateral Cooperation in International Labor Migration* 6 (Ctr. for Comparative Immigration Studies, Working Paper 61, 2002), available at <http://escholarship.org/uc/item/4zv454f5#page-1>. Hatton notes, however, that “public opinion is not very much more hostile to letting in more immigrants than it is to letting in more imports.” See Hatton, *supra* note 5, at 346–55, 373.

<sup>105</sup> See Rodrik, *supra* note 21, at 2 (“It is only after the worker has a specific job that the firm in which he is employed develops a direct stake in keeping him in the country.”).

<sup>106</sup> See *supra* note 12. The EWIC calls for increased temporary migration programs to fill jobs “that most Americans take for granted but won’t do themselves.” EWIC, 5 MYTHS REGARDING IMMIGRANTS AND COMPREHENSIVE IMMIGRATION REFORM IN THE U.S., <http://www.clca.us/immigration/moreinfo/Docs/1.pdf> (last visited Aug. 8, 2010).

<sup>107</sup> See Robert Driskill, *Deconstructing the Argument for Free Trade* 1–2 (Feb. 2007) (unpublished

within countries, but there has been little debate about the fundamental point that national wealth increases through trade.<sup>108</sup> In the case of immigration, the debate among economists about the fiscal impact on destination countries is much more vigorous, although the weight of evidence appears to be settling on a view that the overall financial impact of in-migration to developed nations is a (small) net positive, or at least not meaningfully negative.<sup>109</sup> The more vibrant debate remains with regard to the distributional impact on those who compete directly with immigrants for jobs.<sup>110</sup> Although their claims are contested, economists such as George Borjas have argued that the small overall net positive impact of immigration is outweighed by a large negative impact on the distributional losers.<sup>111</sup> The additional costs detailed above that are associated with the arrival of human beings instead of goods makes the analysis more complicated and renders the net gains for destination countries slimmer than those that can be achieved through trade.<sup>112</sup>

On a global level, the assertion that open migration, like open trade, maximizes wealth says nothing about the distributional issue of who gets the increased income. With regard to trade, academic economists have long promoted the theory that the benefits of free trade flow at least equally to developing countries and their citizens (and possibly principally to them), and that free trade is a key engine for development.<sup>113</sup> This message has

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manuscript), available at <http://www.vanderbilt.edu/econ/faculty/Driskill/DeconstructingfreetradeAug27a2007.pdf>.

<sup>108</sup> See *id.*, *passim*. Driskill takes on the near consensus among economists on this point, asking, “What does it mean for a change in economic circumstances to be ‘good for the nation as a whole’, even when some members of that nation are hurt by the change?” *Id.* at 2. He argues that economists would do better to stay away from pronouncements about the net effects of trade, which are “above their pay grade,” and instead to concentrate on elaborating the trade-offs. *Id.* at 20

<sup>109</sup> For overviews of the literature, see, for example, Julie Murray, Jeanne Batalova & Michael Fix, *The Impact of Immigration on Native Workers: A Fresh Look at the Evidence*, 18 MIGRATION POL’Y INST. INSIGHT 1, 7 (2006); Trebilcock, *supra* note 6, at 277–80; Steven Raphael & Lucas Ronconi, *The Effects of Labor Market Competition with Immigrants on the Wages and Employment of Natives* 23 (Jan. 2007) (unpublished manuscript), available at [http://irle.berkeley.edu/cwed/ronconi/immigration\\_existing\\_research.pdf](http://irle.berkeley.edu/cwed/ronconi/immigration_existing_research.pdf).

<sup>110</sup> See Murray, Batalova & Fix, *supra* note 109, at 3–5.

<sup>111</sup> See, e.g., George J. Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market*, 118 Q.J. ECON. 1335, 1370 (2003); George J. Borjas, *Increasing the Supply of Labor Through Immigration: Measuring the Impact on Native-Born Workers*, Background, CTR. FOR IMMIGRATION STUDIES, May 2004, at 1, available at <http://www.cis.org/articles/2004/back504.pdf>. But see David Card, *Is the New Immigration Really So Bad?* (Nat’l Bureau of Econ. Research, Working Paper No. 11547, 2005) (contesting Borjas’s claims); see also David Card, *Immigrant Inflows, Native Outflows, and the Local Labor Market Impacts of Higher Immigration*, 19 J. LAB. ECON. 22, 57–58 (2001) (arguing that immigration inflows have only a modest effect on the wages of native workers in high immigration areas).

<sup>112</sup> See Borjas, *supra* note 100, at 78.

<sup>113</sup> For summaries of the arguments, see William R. Cline, *Doha and Development*, 84 FOREIGN AFF. 67 (2005); David Dollar & Aart Kraay, *Spreading the Wealth*, 81 FOREIGN AFF. 120 (2002); for a more complex assessment and overview, see Jeffrey D. Sachs & Andrew Warner, *Economic Reform and*

been amplified in the policy world, most powerfully through the World Bank and the World Trade Organization, as well as the Office of the U.S. Trade Representative and similar organs.<sup>114</sup> Free trade as actually practiced, however, has imposed significant conditions on developing nations.<sup>115</sup> It has also resulted in the massive displacement of rural workers in parts of the developing world.<sup>116</sup> As a result, although trade has been an important contributor to the economic rise of some developing nations, in other places it has significantly underperformed as a poverty-reduction strategy.<sup>117</sup> Meanwhile, the transnational corporations that reap vast profits from trade are overwhelmingly headquartered in developed countries. Wealthy nations such as the United States have been able to insist on continuing subsidies for domestic industries such as agriculture and ongoing trade barriers, while prohibiting their less developed trading partners from acting in equivalent ways. In this way, wealthy nations have benefitted financially from imposing conditions on weaker nations.<sup>118</sup> The current structure of free trade assures that developed nations will continue to benefit significantly.<sup>119</sup>

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*the Process of Global Integration*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 1995, at 2 (“The power of trade to promote economic convergence is perhaps the most venerable tenet of classical and neoclassical economics.”).

<sup>114</sup> See WORLD BANK, *GLOBAL ECONOMIC PROSPECTS 2002: MAKING TRADE WORK FOR THE WORLD’S POOR*, at xii–xiv (2002); Office of the U.S. Trade Representative, *Trade Facts: The Benefits of Trade for Developing Countries* (July 2008), available at [http://www.ustr.gov/sites/default/files/uploads/factsheets/2008/asset\\_upload\\_file226\\_15014.pdf](http://www.ustr.gov/sites/default/files/uploads/factsheets/2008/asset_upload_file226_15014.pdf).

<sup>115</sup> For a review of trade conditions imposed through multilateral, regional, and bilateral trade agreements, concluding that free trade as currently practiced impairs the development of many poor countries, and further that agreements negotiated by the United States leave poorer nations with the least room to promote development and growth, see Rachel Denae Thrasher & Kevin Gallagher, *21st Century Trade Agreements: Implications for Long-Run Development Policy* 47 & *passim* (Frederick S. Pardee Ctr. for the Study of the Longer-Range Future, The Pardee Papers No. 2, 2008), available at <http://www.ase.tufts.edu/gdae/Pubs/rp/KGPardeePolSpaceSep08.pdf>.

One example of a condition on trade that will impose billions of dollars in costs on developing nations is the TRIPS provisions in the WTO, which require that developing nations pay royalties and licensing fees to comply with patent and copyright protections. “The World Bank’s estimates indicate that the cost of TRIPS to developing countries is likely to be comparable to any gains they might receive from trade liberalization.” Mark Weisbrot & Dean Baker, *The Relative Impact of Trade Liberalization on Developing Countries* 137 (Ctr. for Econ. & Pol’y Research, 2002), reprinted in *THE DEVELOPMENT IMPERATIVE: TOWARD A PEOPLE-CENTERED APPROACH* 135, 137 (Eric Hershberg & Christy Thornton eds., 2005).

<sup>116</sup> For a description of this effect in the context of NAFTA, see *supra* notes 19–20 and accompanying text.

<sup>117</sup> For an overview of the conditions under which trade is likely to succeed (or fail) as a poverty-reduction strategy, see Chantal Thomas, *Poverty Reduction, Trade, and Rights*, 18 AM. U. INT’L L. REV. 1399, 1401–15 (2003). On the ways that developing countries that have experienced growth through trade have not always followed free trade orthodoxy, see Thrasher & Gallagher, *supra* note 115, at 7–11.

<sup>118</sup> See STIGLITZ, *supra* note 8, at 6–7, 61–62; Chantal Thomas, *Democratic Governance, Distributive Justice and Development*, in *DISTRIBUTIVE JUSTICE AND INTERNATIONAL ECONOMIC LAW* (Chi Carmody, Frank Garcia & John Linarelli eds., forthcoming) (manuscript at 7–8, on file with author); Thrasher & Gallagher, *supra* note 115, at 47 & *passim*.

<sup>119</sup> See STIGLITZ, *supra* note 8, at 7.

By contrast—assuming economists are correct in asserting that the global wealth-maximizing benefits of increased labor mobility dwarf those to be had from more open trade—it appears that the largest share of those benefits go to origin nations and to migrants themselves, particularly with regard to low-skilled migrants.<sup>120</sup> From a macro perspective, economists who have modeled increased labor migration have found that the most dramatic increase in income from freer movement of low-skilled workers would flow to origin nations, particularly to migrants and their families.<sup>121</sup> Actors in destination country economies also stand to gain through more open movement of workers across borders, both through profit to firms that hire those workers at reduced wages, and through the consumers who are able to purchase services and some goods at lower prices.<sup>122</sup> In a world driven by economic theory, the net economic gain to be had through immigration *should* be sufficient to drive developed countries' interests in pursuing it, even if migrants and origin countries are relatively larger beneficiaries. But from the perspective of the domestic politics of destination countries, the gains do not appear to be large or certain enough to overcome the reluctance caused by the social, cultural, and distributional concerns identified above, or the political obstacles imposed by the lack of reciprocity I note in the following section.

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<sup>120</sup> See Walmsley & Winters, *supra* note 21, at 690 (“In general, developing countries gain most from the increase in quotas, with higher gains from the increase in quotas on unskilled labour than on skilled labour.”); GLOBAL ECONOMIC PROSPECTS 2006, *supra* note 2, at 31, 41. High-skilled labor migrants offer significant benefits to destination countries. See Neeraj Kaushal & Michael Fix, *The Contributions of High-Skilled Immigrants*, MIGRATION POLICY INST., INSIGHT, July 2006, at 1, 1–2, available at [http://www.migrationpolicy.org/ITFIAF/TF16\\_Kaushal.pdf](http://www.migrationpolicy.org/ITFIAF/TF16_Kaushal.pdf); TRACHTMAN, *supra* note 6, at 48–50. While high-skilled emigration can still deliver remittance income and other financial benefits to origin countries, it raises concerns about the drain of the limited pool of skilled workers in those countries, and has potentially serious long-term negative impacts on those countries' economies and future growth. See Walmsley & Winters, *supra* note 21, at 713. Contesting this claim, see Trebilcock, *supra* note 6, at 282–84.

<sup>121</sup> See Hatton, *supra* note 5, at 360 (“[T]he largest gains from migration accrue to the migrants themselves.”); TRACHTMAN, *supra* note 6, at 48; Walmsley & Winters, *supra* note 21, at 723; ASIAN DEVELOPMENT OUTLOOK, *supra* note 67, at 77, 84, 90–92; GLOBAL ECONOMIC PROSPECTS 2006, *supra* note 2, at 34–38; Dani Rodrik, *Feasible Globalizations* 19–21 (KSG Working Paper Series RWP02-029, July 2002), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=349021](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=349021).

It is important to note that migration entails serious—indeed often devastating—costs for migrants and for the countries, communities, and families that they leave behind. For an overview of some of these costs from the Mexican perspective, see NUEVAS TENDENCIAS Y DESAFÍOS DE LA MIGRACION INTERNACIONAL MEXICO–ESTADOS UNIDOS [NEW TRENDS AND CHALLENGES OF INTERNATIONAL MEXICO–UNITED STATES MIGRATION] (Raúl Delgado Wise & Margarita Favela eds., 2004). Also, to say that global migration results in an increase in global wealth, a good proportion of which goes to migrants, is not to say that it is the only way to achieve this end or to endorse it as a solution to the world's problems or as a road to sustainable development.

<sup>122</sup> See *supra* discussion Part IV (introductory portion).

### C. *Trade Is Reciprocal, Immigration Is Not*

A key difference between trade and migration is that trade tends to be reciprocal, involving both imports and exports, while the flow of workers usually goes one way only. While in a pure importation scenario a developed country might weigh the downsides to trade in ways similar to the disadvantages of immigration, trade is rarely (and in the case of developed nations, never) a one-way street. From the perspective of developed nations, however, labor migration *is* nearly a pure importation scenario, because large numbers of citizens of wealthier states do not seek opportunities to migrate for work to less developed countries.<sup>123</sup>

In the trade context, economists argue that the gains to be had from importation are considerable even in the absence of a reciprocal deal; as a result they call for the unilateral abandonment of tariffs.<sup>124</sup> But politically, this has proven unacceptable. Indeed, the usual political argument in favor of trade relies almost exclusively on the benefits of export: trade will open up new markets for domestically produced products.<sup>125</sup> This argument, which treats imports as a necessary evil, is not available in the case of labor migration. In the immigration context, although economists would still argue that unilateral abandonment of restrictions would be beneficial, the quid pro quo that sells trade is missing. This becomes an obstacle in the domestic politics of immigration in developed countries.

### D. *Wealthier Nations Have Unilateral Alternatives to Negotiating with Origin Nations over Labor Migration*

A final way that the global movement of capital and goods differs from the movement of people is that the free flow of investment and trade requires cooperation between less and more developed countries, while wealthier nations can obtain all of the labor they want (and more) through unilateral action. For capital mobility, firms in wealthier nations are reluctant to assume the risks of making investments in less-developed countries without assurances that they will be safe from burdensome requirements regarding sourcing and sales, protected from expropriation, and granted all the privileges accorded to national firms and investors—all of which require guarantees from the capital-receiving nation. For trade, firms in wealthier nations want unfettered access to developing markets, and their governments recognize that they must negotiate with the governments of the less-developed countries to receive the freedom from tariffs that they seek.

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<sup>123</sup> See Hatton, *supra* note 5, at 364–67.

<sup>124</sup> See Paul Krugman, *What Should Trade Negotiators Negotiate About?*, 35 J. ECON. LITERATURE 113, 113 (1997).

<sup>125</sup> See Hatton, *supra* note 5, at 366–67; Krugman, *supra* note 124, at 113.

In the case of labor migration, however, developed country governments can legislate whatever sort of immigration program they desire without engaging any developing countries at all. The imbalance between the absolute number of would-be migrant job-seekers around the world and the number of migrants that developed countries are willing to admit is so great that developed countries have little fear that their labor needs will suffer if one or more origin countries declines to participate in a unilaterally implemented program. Furthermore, when a developed country unilaterally creates a temporary migration program open to migrants from all countries, it can avoid the foreign relations pitfalls of appearing to favor one developing nation over others.<sup>126</sup>

Timothy Hatton has argued that the lack of reciprocity in the immigration context, discussed above, accounts for developed countries' preference for unilateral action.<sup>127</sup> Hatton notes that destination and origin countries typically have asymmetrical and opposing goals: destination countries seek to limit immigration, and origin countries seek more opportunities for their citizens to find work abroad.<sup>128</sup> Because of the vast global wage gap and the oversupply of worldwide low-wage workers relative to worldwide available jobs, negotiating to expand labor migration is likely to be of far less interest to developed countries than to their developing counterparts.<sup>129</sup> Hatton asks whether origin countries might have something else to offer that might bring destination countries to the table, such as regional coordination around trade, but finds it unlikely that such agreements would bring the poorest and the richest countries into relationships with each other.<sup>130</sup>

Yet reciprocity alone appears inadequate as an explanatory framework for the weakness of inter-country cooperation without an understanding of the power dynamics among the countries and of the more powerful country's capacity to achieve its goals through unilateral action. Reciprocity is an incomplete justification in the first case because accords are rarely perfectly symmetrical: even in the case of trade flows, while both country A and country B want access to each other's markets for the sale of goods, the benefits are likely to be differentially distributed. In addition, future interests need to be taken into account: although capital flow, like labor migration, is not usually characterized by mirror image reciprocity (ordinarily, Country A has more investors with capital, and Country B is more interested in capital inflows), it is unquestionable true that developing countries

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<sup>126</sup> See WORLD MIGRATION 2008, *supra* note 73, at 380–83. Most destination nations that negotiate BLMAs do so as a supplement to unilaterally adopted legislation governing permanent and temporary immigration. It is important to note, though, that there are countries such as Spain and Canada (and indeed much of the EU prior to enlargement) that appear to use BLMAs as the primary way to address their temporary labor migration needs.

<sup>127</sup> See Hatton, *supra* note 5, at 364–68.

<sup>128</sup> *Id.*

<sup>129</sup> See Meyers, *supra* note 104, at 6.

<sup>130</sup> See Hatton, *supra* note 5, at 370–72.

and their wealthy nationals have long anticipated seeking, and increasingly do pursue, investment opportunities abroad.

I believe the disparity is more fully explained by asking whether the flow in question requires a high degree of inter-country cooperation to achieve what the more powerful country wants from the exchange, or whether it has alternative means to reach the same end. In this broader view of trade and capital flows, wealthier countries need something from their poorer counterparts in order to achieve their goals, but they do not have recourse to a unilateral option. Firms in wealthy Country A want access to poorer Country B's markets for their exports, but cannot achieve this goal unless Country A negotiates with Country B and gets Country B to lower its tariffs. Wealthy Country A's investors seek investment opportunities abroad, but in order to proceed they require that their government obtain guarantees from Country B that their investments will be safe from expropriation. In each of these cases, there is *both* the genuine possibility of reciprocity *and* the lack of a unilateral alternative: Country B, although the weaker party, also desires access to Country A's markets and investment opportunities, and is in a position to demand reciprocal guarantees from Country A because Country A has no choice but to negotiate with Country B in order to realize Country A's goals. In the labor migration context, both factors are absent. There is little clamor from workers within wealthy Country A for opportunities to work in less developed countries. And to the extent that Country A wants more foreign workers, it can achieve this goal unilaterally by creating a labor migration program that suits its own needs. It neither seeks reciprocal privileges from origin countries nor, given the large number of countries eager for remittance income, must it negotiate for the cooperation of specific countries to fill its labor needs.

#### V. IF IMMIGRATION IS SO DIFFERENT, WHY IS THE NUMBER OF BILATERAL LABOR MIGRATION AGREEMENTS GROWING?

Taken together, the reasons destination nations are reluctant to bargain over low-wage labor migration are so persuasive that they raise the question of why a destination country would ever agree to such an accord. If destination nations will negotiate with origin nations over temporary labor migration only when they can do better through collaboration than they can through unilateral regulation, the real mystery is why bilateral migration deals are struck at all. What do destination countries want that makes bargaining over labor migration desirable?

One answer is that, in exchange for migration agreements, developed countries can receive concessions on other matters, unrelated to migration. Social scientists such as Timothy Hatton and Eytan Meyers have suggested that destination nations are most likely to consider free movement agreements that encompass low-wage workers when they are tied to other forms



of regional economic integration—especially where such integration assures destination nations access to the markets of origin nations for trade and investment purposes.<sup>131</sup> Indeed, Meyers points out, “all multilateral agreements on the free movement of unskilled labor are an integral part of regional integration schemes. All such agreements, either on unskilled or skilled labor, are also linked to free trade agreements.”<sup>132</sup> Yet only the EU nations have achieved a regional arrangement that encompasses all forms of labor migration without restrictions by skill level. EU integration is a longstanding, unique, and complex phenomenon, and cannot be easily replicated in other regions.<sup>133</sup>

Bilateral labor agreements are generally independent of agreements on trade and other forms of economic integration,<sup>134</sup> so they require a different explanation. The most obvious goal of destination nations in signing bilateral migration agreements is to meet labor needs without addressing the issues of immigrant integration or citizenship that a permanent immigration program raises. This is particularly true for low-wage jobs that “natives won’t do,” classically agricultural or seasonal labor; and in high-skilled fields where there are structural native labor shortages. What remains perplexing, however, is why destination countries would prefer bilaterally negotiated agreements for implementing a temporary labor program instead of a unilateral alternative.<sup>135</sup>

The most commonly floated possibility is that bilateral accords allow destination nations to enlist the cooperation of origin countries in controlling illegal migration.<sup>136</sup> In the past fifteen years, some destination coun-

<sup>131</sup> See Hatton, *supra* note 5, at 366–72; Meyers, *supra* note 104, at 17–18.

<sup>132</sup> Meyers, *supra* note 104, at 4; *see also id.* at 21 (“Regional integration schemes are especially unlikely to encompass the free movement of unskilled labor when (a) the degree of economic development among countries is highly asymmetrical, and (b) when the country of destination is already the uncontested regional hegemon, and does not require access to the markets of the countries of origin.”).

<sup>133</sup> The creation of a free movement regime among European nations is historically contingent and path-dependent, and therefore difficult to use as a model to predict how other nations might ultimately reach a similar result. Nonetheless, once the EU fully implements open labor migration within its borders, its experience will have important lessons to offer to future regional migration agreements in other places. I will be exploring the EU’s post-enlargement experience with low-wage labor migration in a future article.

<sup>134</sup> For discussion of numerous bilateral labor migration agreements with no link to trade, *see* INT’L ORG. FOR MIGRATION, *LABOUR MIGRATION IN ASIA* 85–86 (2003).

<sup>135</sup> There is little domestic pressure in most destination countries to negotiate such programs with origin countries instead of creating them independently. Because such programs tend to be politically unpopular in destination countries, there is little demand for them in general, other than from firms seeking cheaper labor.

<sup>136</sup> *See* Bobeva & Garson, *supra* note 76, at 7, 16; Jesús Fernández-Huertas Moraga, *A General Model of Bilateral Migration Agreements* 16 (Sept. 29, 2008) (unpublished manuscript), *available at* <http://pareto.uab.es/wp/2008/75508.pdf> (arguing that destination countries permit legal migration in exchange for the origin country’s cooperation in controlling migration at the border); Francisco Javier Moreno, *The Evolution Of Immigration Policies in Spain: Between External Constraints and Domestic Demand for Unskilled Labour* 25 (Univ. of Barcelona, Working Paper No. 2004/211, 2004), *available at*

tries have begun to use BLMAs as a framework through which to negotiate a “shared responsibility” approach to migration with origin nations. In exchange for the legal admittance of some migrants, they enlist origin countries in the monitoring of emigration from the origin country, commit origin countries to patrol shared borders, and bind them to take back their nationals who are deported as unauthorized migrants from the destination country. For example, a recent agreement between Spain and Morocco requires Morocco to police unauthorized migrants from other African countries passing through its borders on their way north, rendering Morocco a “buffer zone” between Europe and the poorer countries to the south.<sup>137</sup> This explanation accords with a worldwide trend toward the “management” of migration through cooperation between origin and destination countries.<sup>138</sup> At the same time, few BLMAs appear to be structured in this way.

Another explanation relates to ease of experimentation. Although we ordinarily think of unilateral action by a government as simpler to achieve than a bilateral negotiation, this may not always be true. Because BLMAs have no enforcement provisions and therefore impose no formal consequences for suspension or violations, they may be perceived by destination governments as low-cost commitments that are easier to create and abandon than unilateral programs that require legislative action.<sup>139</sup> The numbers of migrants admitted under BLMAs tend to be small relative to total labor migration, and the agreements are often barely publicized, so destination nations may view these agreements as an opportunity for below-the-radar experimentation with different ways to structure the flow of immigrants. BLMAs provide a low-profile forum for destination nations to offer new rights or impose new restrictions, incorporate new actors such as civil so-

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[http://www.march.es/ceacs/publicaciones/working/archivos/2004\\_211.pdf](http://www.march.es/ceacs/publicaciones/working/archivos/2004_211.pdf); Marion Panizzon, *Bilateral Migration Agreements and the GATS: Sharing Responsibility Versus Reciprocity* 25–27 (Soc’y of Int. Econ. Law, Working Paper No. 44/08, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1156842](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156842) (arguing for the principle of “shared responsibility,” under which governments facing a high influx of undocumented migrants open routes to legal migration through bilateral migration agreements, in order to enlist origin countries in the process of curbing illegal migration).

<sup>137</sup> See Moreno, *supra* note 136, at 25 (noting that in 1992 Spain negotiated a bilateral agreement with Morocco, through which Spain granted Moroccans certain migration privileges and in exchange required Morocco to agree to control unauthorized migrants passing through Morocco from other African countries).

<sup>138</sup> See ASIAN DEVELOPMENT OUTLOOK, *supra* note 67, at 89–90; INT’L ORG. FOR MIGRATION, INTERNATIONAL MIGRATION AND DEVELOPMENT: PERSPECTIVES AND EXPERIENCES OF THE INTERNATIONAL ORGANIZATION FOR MIGRATION 22 (2006); GLOBAL ECONOMIC PROSPECTS 2006, *supra* note 2, at 70–75.

<sup>139</sup> Although formal sanctions are not the only ones available in international relations, origin countries seem particularly reluctant to make waves through informal diplomatic channels for the violation of labor migration agreements. See Gordon, *Restructuring Labor Migration*, *supra* note 88, at 17. For an example of this reluctance in action, see the description of the Philippine government’s reaction to the abuse of Filipino migrant workers in Brunei in ROBYN RODRIGUEZ, MIGRANTS FOR EXPORT: HOW THE PHILIPPINE STATE BROKERS LABOR TO THE WORLD (forthcoming 2010) (manuscript at ch. 6, on file with author).

ciety organizations into the migration process, or collaborate with origin governments in new ways. This has been particularly evident in the context of the enforcement of workplace rights for migrants.<sup>140</sup>

Finally, BLMAs may allow destination countries to advance certain historical or political relationships, or cultural goals.<sup>141</sup> This is reflected in cases where destination countries sign agreements with former colonies that are geographically remote rather than with potential migration partners nearby.<sup>142</sup> While BLMAs can unquestionably serve meaningful political and foreign relations ends, as well as less weighty cultural purposes, under such circumstances migration becomes a secondary issue.<sup>143</sup> The question this raises is whether bilateral agreements on migration negotiated under an overwhelming imbalance of power, and signed to promote non-migration goals, will result in a rational or distributionally just mechanism for governing the movement of workers across borders.

### CONCLUSION

This Essay has sought to explain the gap between the global regulation of labor migration and that of trade and capital flows. This is a question of first impression in the legal literature and one that has received scant attention elsewhere. And yet the analytical demands of that task pale beside the normative challenge of setting out an alternative.

A number of policymakers—including the World Bank—have recently sought to extend into the policy realm the theoretical insight that trade and labor migration function similarly. They have argued that labor migration, like trade, is an important engine for the development of poor countries.<sup>144</sup> These advocates for “migration as development” argue that the global bene-

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<sup>140</sup> See Gordon, *Restructuring Labor Migration*, *supra* note 88, at 13–15.

<sup>141</sup> See Bobeva & Garson, *supra* note 76, at 15; PHILIP MARTIN, MANOLO ABELLA & CHRISTIANE KUPTSCH, *MANAGING LABOR MIGRATION IN THE TWENTY-FIRST CENTURY* 97–98 (2006); Meyers, *supra* note 104, at 20–21 (arguing that destination countries agree to the free regional movement of workers in exchange for trade access to developing markets. A broader example of this phenomenon lies in the origins of the EU, which was founded in the wake of World War II in order to bind European countries together economically to prevent future world wars pitting European nations against each other. The negotiation of free movement of workers between EU countries was a secondary outgrowth of this impulse, rather than an independent motivating force.

<sup>142</sup> Examples include Spain’s pursuit of agreements with its former South American colonies, including Colombia, the Dominican Republic, and Ecuador, *see* Moreno, *supra* note 136, at 24, and France’s accord with Algeria, *see* Henri de Lary, *Bilateral Labour Agreements Concluded by France, in MIGRATION FOR EMPLOYMENT*, *supra* note 75, at 43, 46.

<sup>143</sup> While BLMAs could, in theory, serve meaningful foreign relations goals (such as averting wars or significantly enhancing national security), I am not aware of a BLMA negotiated with such a weighty end as its foremost purpose. By contrast, regional agreements such as the EU are more likely to be able to make credible claims that the migration they permit is an essential, if secondary, part of a larger political package. *See supra* discussion note 141.

<sup>144</sup> *See supra* notes 120–121 and accompanying text.

fits of more liberal labor migration policies would dwarf all other forms of foreign aid.<sup>145</sup>

The “migration as development” perspective understates labor migration’s considerable costs.<sup>146</sup> Migration has a high price for migrants themselves, both in financial and deeply human terms, as they uproot themselves from their families and undertake a dangerous journey. Children are separated from parents for months, years, or a lifetime. Migrants’ communities of origin are depleted and their home countries lose the brain power and spark of some of their most talented and determined residents. Migration can have social costs for the country migrants arrive in and distributional costs for the workers they compete with there. On an empirical level, a number of policy experts have challenged the assertion that the vast flow of remittances to origin countries has resulted in meaningful development, instead noting that the bulk of the money appears to flow to consumption and to construction projects of limited impact and utility.<sup>147</sup> A final concern is that remittance income and the relief it provides from underemployment and other economic pressures has allowed the governments of both developing countries and developed countries to avoid investing in long-term sustainable economic growth in poor countries, so that the choice not to migrate will be a realistic option for more people.<sup>148</sup>

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<sup>145</sup> The OECD nations gave a total of nearly \$119.8 billion in direct aid to developing nations in 2008, a significant increase over previous years. Press Release, OECD, Development Aid at Its Highest Level Ever in 2008 (Mar. 30, 2009), available at [http://www.oecd.org/document/35/0,3343,en\\_2649\\_34487\\_42458595\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/35/0,3343,en_2649_34487_42458595_1_1_1_1,00.html). This is still considerably less than the predictions for the benefits to be had from either liberalized trade or liberalized migration. See *supra* notes 22–23 and accompanying text; see also Bob Hamilton & John Whalley, *Efficiency and Distributional Implications of Global Restrictions on Labour Mobility*, 14 J. DEV. ECON. 61, 74 (1984) (arguing that the “dramatic [positive] effects on worldwide equality which are possible from modifying immigration restrictions . . . are much larger, for instance, than those likely from increases in aid flows to Lima target levels”). For the World Bank’s argument that migration and, in particular, migrant remittances are a key driver of development, see GLOBAL ECONOMIC PROSPECTS 2006, *supra* note 2, at 117–29.

<sup>146</sup> For a summary of the arguments on both sides in the migration and development debate, see Alejandro Portes, *Migration and Development: Reconciling Opposite Views*, 32 ETHNIC AND RACIAL STUD. 5 (2009).

<sup>147</sup> In an overview of the literature on remittances and development, Hein de Haas concludes that “[m]igration and remittances, if anything, are an investment in social security by households and families. However, migration and remittances are too limited in scale and too fragmented to remove more general development constraints.” Hein de Haas, *Remittances, Migration, and Social Development: A Conceptual Review of the Literature* 27 (United Nations Research Inst. for Soc. Dev., Programme Paper No. 34, 2007), available at [http://www.unicef.org/socialpolicy/files/Remittances\\_Migration\\_and\\_social\\_Development.pdf](http://www.unicef.org/socialpolicy/files/Remittances_Migration_and_social_Development.pdf).

<sup>148</sup> On the relationship between sustained economic growth and the slowing or cessation of out-migration, see Douglas S. Massey, *Patterns and Processes of International Migration in the 21st Century*, 17–18, 27 (June 2003) (unpublished manuscript), available at <http://pum.princeton.edu/pumconference/papers/1-Massey.pdf>.

The “right to not migrate,” coupled with a call for sustainable development, has become a rallying cry for activists in immigrant origin countries. See, e.g., David Bacon, *The Right to Stay Home—Derecho de No Migrar*, NEW AM. MEDIA NEWS REPORT, July 09, 2008, <http://>

Migration, then, may not be the best road to development. But in the extraordinarily unequal and highly mobile world in which we live, for the foreseeable future some movement of people in search of work is inevitable. The real question is not whether the costs outweigh the benefits, but whether and how we can structure the flow to minimize the losses and fairly distribute the global gains. In that regard, a top-down approach might be to bring the movement of workers within the WTO framework, or to create a parallel “WMO.”<sup>149</sup> Jagdish Bhagwati, who originally proposed the creation of a World Migration Organization on the WTO model, has argued that such an institution could coordinate the diffusion of “best practice” immigration policies and induce restrictionist countries to permit greater openness.<sup>150</sup> A locally rooted, transnationally coordinated model that I have proposed elsewhere, called Transnational Labor Citizenship, offers a more bottom-up response to these concerns.<sup>151</sup> Transnational Labor Citizenship would link the right to migrate for work to a commitment by migrants and governments to enforce baseline workplace standards in destination countries, and would create cross-border networks of migrants and their organizations to further the goal of ensuring that both migrants and native workers labor under decent conditions.

In addition, although it arose from unique circumstances and its model cannot be cloned, we have a great deal to learn from the EU—the only regional arrangement in the world that permits unrestricted freedom of movement for work among its member states at all skill levels,<sup>152</sup> despite wage disparities as high as sixteen to one between its wealthiest and poorest member nations, more than twice that of the United States and Mexico.<sup>153</sup>

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[news.newamericamedia.org/news/view\\_article.html?article\\_id=66a8eccf43428bfe3542bfc7ddfb19ff](http://news.newamericamedia.org/news/view_article.html?article_id=66a8eccf43428bfe3542bfc7ddfb19ff).

<sup>149</sup> Bhagwati, *supra* note 58. For further consideration of the WMO possibility, see Hatton, *supra* note 5, at 368–73, and TRACHTMAN, *supra* note 6, at 325–29.

<sup>150</sup> Bhagwati, *supra* note 58, at 104.

<sup>151</sup> See Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007); Jennifer Gordon, Op-Ed., *Workers Without Borders*, N.Y. TIMES, Mar. 10, 2009, at A27.

<sup>152</sup> Although original member states are currently able to apply transitional restrictions on the labor mobility of nationals from EU member states admitted in 2004 and 2007, those restrictions expire seven years after admission, at which point full labor mobility becomes the rule. See *Free Movement of Workers*, EUROPEAN COMM’N, <http://ec.europa.eu/social/main.jsp?catId=458&langId=en> (last visited Aug. 8, 2010).

<sup>153</sup> This disparity is important to note in response to critics who claim that the EU is a grouping of developed nations, and has little to say to efforts to bring developed and less-developed countries into a freer migration relationship. Although measures vary, by most estimates the wage gap between the poorest and wealthiest EU countries is greater than the disparity in earnings between the U.S. and Mexico. Hamish McRae, *EU Enlargement May Prove to Be Better for Some than for Others*, INDEP., Aug. 7, 2003, at 20 (noting that “[t]he average pay in the biggest three accession countries by population, Poland, Hungary and the Czech Republic, is just 13 per cent of UK levels,” representing a wage ratio of between 1:7 and 1:8). According to Eurostat, the statistical office of the EU, in 2006, just prior to accession in 2007, hourly labor costs in Romania were at a 1:10 ratio and in Bulgaria at a 1:16 ratio compared to those in the UK. My calculations are based on Eurostat table, Hourly Labour Costs, <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tps00173&plugin>

The EU's approach to immigration is far from a panacea. There has been resistance to the implementation of more open labor migration from citizens of the longer-standing EU countries in the wake of enlargement, and the global recession has limited work opportunities in the more developed EU countries even as it has increased migration pressures in the less-developed new Member States.<sup>154</sup> It is of particular concern that the EU's treatment of migrants from outside of Europe is increasingly harsh and dissonant with the justice principles it has sought to apply within its boundaries. For all of its limitations and complications, the post-enlargement EU regime nonetheless represents a natural experiment with a labor migration framework that offers full mobility and equal rights in a context of significant wage disparities between origin and destination countries.<sup>155</sup> Within its borders, the EU's treatment of trade, investment, and labor migration offers a vision of regional coordination that is both coherent and closer to fair than anything else yet implemented.

There is a fundamental inconsistency in the differentiated way that the world's powerful nations seek to govern the flow of money, goods, and people across borders. Millions of people have responded to that inconsistency by migrating illegally, creating a crisis of undocumented immigration in almost every developed nation around the globe. This Essay has sought to highlight this puzzle from an economic perspective and to explain it in terms of international and domestic politics. The next step is to respond to those political realities with solutions that recognize the inevitability of ongoing global labor migration in years to come, and seek to address the concerns standing in the way of greater regional cooperation and openness.

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=1 (last visited Aug. 8, 2010). The wage differential between the United States and Mexico is often estimated at 17%, or approximately 1:6. *See, e.g.*, JUS SEMPER GLOBAL ALLIANCE, MEXICO'S WAGE GAP CHARTS 8 (Dec. 2008), <http://www.jussemper.org/Resources/Labour%20Resources/WGC/Resources/WagegapsMex2006.pdf>. Important differences still remain, however, notably the greater racial and ethnic homogeneity between EU countries as compared to the United States and Mexico.

<sup>154</sup> *See* DEMETRIOS G. PAPADEMETRIOU, MADELEINE SUMPTION & WILL SOMERVILLE, MIGRATION POLICY INST., MIGRATION AND THE ECONOMIC DOWNTURN: WHAT TO EXPECT IN THE EUROPEAN UNION 2–6 (2009), [http://www.migrationpolicy.org/transatlantic/EU\\_Recession\\_backgrounder.pdf](http://www.migrationpolicy.org/transatlantic/EU_Recession_backgrounder.pdf).

<sup>155</sup> I will explore the EU's labor migration regime and the lessons it offers for the redesign of global and U.S. labor migration in a future article.

