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THE MOST-FAVOURED NATION PRINCIPLE,
EQUAL PROTECTION, AND MIGRATION POLICY

TOMER BROUDE*

1. INTRODUCTION

This short article discusses the theoretical interaction between the economically grounded most-favoured nation (MFN) treatment principle\(^1\) and the human-rights based concept of equal protection of migrants. In the multilateral law of international trade,\(^2\) MFN is an article of faith that lays a valid claim to having significantly contributed to the success of the trade-liberalizing and welfare-enhancing role of the General Agreement on Tariffs and Trade / World Trade Organization (GATT/WTO).\(^3\) Above and beyond its trade-related economic roles, when it applies to individuals of different nationalities, the logic of MFN also appears to generally conform to fundamental principles of equal protection of the law and non-discrimination under general human rights law.\(^4\) Since most international migration is economic in

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nature, and at the same time raises significant issues of human rights and global justice. would it not logically follow that migration policy should be subject to an MFN-type rule of non-discrimination? Such an MFN rule would require migration-receiving states to apply their immigration laws on equal terms towards all immigration, regardless of its origin. An MFN rule of this type does not generally apply today either to national migration policies or to international normative frameworks of immigration regulation. Its adoption should, however, be considered at least in theory, presenting an important potential overlap of mutual reinforcement between economic law and human rights law. Indeed, a recent path-breaking academic proposal for a multilateral “General Agreement on Labor Migration” (GALM), includes the following draft clause, clearly inspired by the MFN principle in Article I:1 GATT: “With respect to any measure covered by this Agreement, except as specifically provided in this Agreement, each Member shall accord immediately and unconditionally to citizens of any other Member treatment no less favorable than it accords to like citizens of any other country.”

Deriving from an entirely different rationale, the draft of the academic proposal for an International Migrants Bill of Rights (IMBR), debated in this symposium issue of the Georgetown Immigration Law Journal, includes the following text, clearly based upon the language of general international human rights instruments:

All migrants are equal before the law and are entitled to the equal protection of the law on the same basis as nationals of the State in which they reside. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as nationality, legal status, national or social origin.

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5. Among migrants, the “vast majority . . . move in search of better economic opportunities” while only 9.7% are considered ‘refugees.’ Int’l Org. for Migration [IOM], World Migration 2005: Costs and Benefits of International Migration, at 379, 381 (2005).


7. See “Illustrative Draft General Agreement on Labor Migration,” Appendix A, in Joel P. Trachtman, The International Law of Economic Migration: Toward the Fourth Freedom 351 (Upjohn, 2009) [hereinafter GALM], at Article 7.1. In the proposed GALM framework, states would make specific commitments on immigration, structured in a number of possible ways, generally related to the economic and labor capacity of the migrant (horizontally; by occupational title; by occupational group; by skill level or wealth level). See Article 5 GALM.

8. The IMBR is a project undertaken by faculty and students from Georgetown University Law Center, the Minerva Center for Human Rights at the Hebrew University of Jerusalem, and the American University in Cairo, researching gaps and needs in migrants rights for the purpose of preparing a draft document with commentary to be presented to governments and international organizations.

Both of these proposals make bold and positive statements on the desirability of applying MFN (or ‘equal protection’) in migration policy, although the precise scope and exact legal mechanics of such prospective application is uncertain and highly contingent on their particular interpretation and overarching context(s). The GALM would generally impose equal treatment towards immigrants at the pre-admission/entry stage (“at the border”), whereas the IMBR would generally impose equal treatment to immigrants already present in a destination state or possibly a transition state. What is clear, however, is that both principles of non-discrimination would reflect negatively on any national or international legal measure that permits differentiation between migrants of different national status. In this article, I will discuss some of the policy problems that an application of MFN and equal protection to migration policy should take account of, and raise some questions on the relationship between an economic migration-MFN and a rights-based principle of equal protection. Put relatively simply, the overarching question is this: To what extent should international law, as a normative matter, mandate the equal treatment of migrants, not in comparison to incumbents, but in relation with each other, i.e., with respect to migrants from other countries?

This article treats this question as a mixed question of economics and human rights. A definitive answer is not possible in the limited space of this article. The article will only provide some preliminary thoughts in this context, as follows. In the next section, I will examine the applicability of the basic economic and political rationales of trade-MFN to migration. In section three, I will raise some corollary human rights-based issues with respect to a broad equal protection and non-discrimination rule in migration policy. Some migrants in comparison to nationals of the host state, but it also suggests that migrants from different national origins should not be accorded differential treatment among each other.

10. It should be emphasized that the concept of migration-MFN as raised in Trachtman’s GALM, on one hand, and the concept of equal protection and non-discrimination in the IMBR, on the other hand, are clearly very different from each other, in their goals, scope and potential application. Indeed, there is no full overlap between them. However, they will be discussed here together because of their similar promotion of equality among migrants, which makes them potential “multi-sourced equivalent norms” in international law, in that they point in the same prescriptive direction. See generally MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW (Tomer Broude & Yuval Shany eds., forthcoming 2011).

11. But the GALM MFN would apply to all measures covered by the agreement, which are “measures . . . affecting labor migration, including without limitation immigration,” see GALM, supra note 7, art. 2, which may include “behind the border” measures. It would also require ‘national treatment’ in “behind the border” measures, with respect to foreigners admitted under a state’s specific commitments, see GALM, supra note 7, art. 11, and this treatment would generally be extended on an MFN basis.

12. See IMBR, supra note 9, art. 1(1): “The term ‘migrant’ in this Declaration means a person present within the territory of a State of which he or she is not a citizen or national.” Compare with Articles 1(2) and 2(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, according to which the ICMW (including the equal protection clauses of Articles 1(1), 18 and 25) applies to migrant workers during “the entire migration process,” including preparation for migration and return to their state of origin. G.A. Res. 45/158 U.S. Doc. A/Res/45/158 (Dec. 18, 1990).
general conclusions follow.

2. **MFN AND EQUAL PROTECTION IN MIGRATION POLICY FROM AN ECONOMIC PERSPECTIVE**

From an economic perspective, the evaluation of MFN in migration policy is guided by utilitarian considerations. Overall, the liberalization of migration is considered welfare-enhancing, and it has been suggested that a migration-MFN rule could promote this liberalization, as it has in trade in goods. Would a migration-MFN serve the same objectives as trade-MFN, and as effectively?

In international trade law, MFN serves at least two purposes; one is purely economic, the other relates to political economy. First, the equal treatment of imports of different origin—of goods, or services—is expected to prevent the welfare-reducing effects of ‘trade diversion’. Trade diversion occurs when differential treatment of goods from different sources discriminates against goods from more efficient exporters and in favor of less efficient ones. In other words, discrimination between exporting markets may diminish, or even erase, the welfare benefits of more open trade exchanges, whereas MFN ‘levels the playing field’, ensuring the proper functioning of market forces between foreign competitors.

Second, MFN is expected to facilitate the reduction of barriers to international trade by encouraging states to make trade concessions. MFN ensures that market access concessions received through reciprocal negotiations are not bypassed or eroded by subsequent agreements with competing markets. This is presumed to increase the willingness of politicians to make trade concessions.

Moreover, in trade, MFN can create the so-called ‘free rider’ problem, because states that did not contribute to liberalization by making market access concessions in a particular sector will nonetheless benefit from the MFN level of concessions granted to those states who did. This problem, however, is mitigated in the multilateral context, in which the reciprocal negotiation process generally ensures that all states contribute to overall liberalization. As a result, MFN amplifies the liberalizing effect of market access concessions by extending them to all potential beneficiaries.

Are these considerations valid with respect to migration policy? Applying the economic logic of international trade regulation to migration, an analogy

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16. See Schwartz & Sykes, supra note 3, at 46 (explaining that MFN does not only constrain trade discrimination but shapes the bargaining process in the WTO).
is drawn between the price of foreign goods and the labor cost of migrants. Hence, one can argue that “individuals willing to work at the lowest price (all other things being equal) should migrate,” and migration-MFN would clearly facilitate this by enabling international cost comparisons. It must be noted, however, that this approach somewhat understates the complexity of the economic factors that drive migration. Trade diversion is a problem in aggregate welfare terms primarily when it distorts comparative advantage, rather than absolute advantage (as reflected by the lowest price). Yet it is sometimes posited that migration flows are based on absolute advantage, not comparative advantage. The idea that laborers whose work is nominally cheaper should migrate conforms to this. However, the cheapest global source of labor might not be the most efficient one, just as the cheapest goods might not be the most efficiently produced ones. Comparative advantage is based on opportunity costs, not absolute costs. In terms of welfare maximization, those who should migrate are not those whose labor is cheapest, but rather those for whom the opportunity cost of migration is lowest. But what is the opportunity cost of migration? How does the comparative advantage that exists when there is little labor mobility relate to the comparative advantage of labor migrants under conditions of labor mobility liberalization? Clearly, these are labor/migration economics issues that must be further investigated.

Nevertheless, at this level of abstraction, MFN at entry would seem to be the most efficient general rule. If migration is guided by comparative advantage, this is surely the case. If, however, it is guided by absolute advantage, it would still be the most efficient rule insofar as a systemic divergence of absolute advantage from comparative advantage is not identified. Thus, an economic perspective would support a general rule of migration-MFN, both at the national and international levels of regulation. There are, however, at least two economic complications to this conclusion.

First, migrants, as opposed to consumable goods, have to face the costs and conditions of living in destination countries. These costs are in part determined by measures applied “behind the border,” such as healthcare, education and social security coverage. If such measures are extended to migrants from different sources on a discriminatory basis, the purposes served by MFN at entry might be undermined. Thus, from an economic perspective, it would appear that applying MFN at entry would not be sufficient to achieve efficient migration if it were not supported by MFN ‘behind the border,’ i.e., equal treatment of migrants among themselves after admission. This is something that the IMBR equal protection clause can provide, making it complementary to an economic MFN principle.

Second, and this is a crucial caveat, a national treatment principle applied ‘behind the border,’ granting immigrants rights equal to those of residents of

17. Trachtman, supra note 7, at 282.
18. Id. at 45.
the receiving state, can quite simply cancel out or at least distort the economic benefits of MFN ‘at the border.’ So far we have considered migration’s efficiencies as based on the relative cost of labor, whose effects are preserved by MFN treatment ‘at the border.’ However, a non-discrimination rule of a national treatment nature, such as one that requires all immigrants to be paid a minimum or equal wage at destination state levels, or receive social benefits that are equal to those of incumbents, could erase the advantages of lower-cost migrant labor, viewed not only from the supply side, but also in aggregate welfare terms. Employers in the destination state will be indifferent to the migrants’ origin because they would all have to be compensated at the same level (assuming, as is likely, that minimum wages apply). Whether economic migration is guided by absolute or comparative advantage, this could wipe out economic differences between migrants from different source countries, and opportunities for migration, or rather, efficient migration, would be reduced. Paradoxically, then, national treatment can revive the ‘migration diversion’ avoided by MFN by reducing gaps between the absolute costs or opportunity costs of migrants from different sources.\footnote{A distinction may be drawn, in this respect, between discrimination that deters immigration (such as a tax on migrant labor), and discrimination that encourages it (such as a rule whereby migrants may be remunerated at home state levels). See Tomer Broude, \textit{A Minimal Liberal Defense of (Some) Discrimination in Migration Regulation}, Hebrew U. Int’l Law Res. Paper No. 24-09, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1513530.}

Consequently, while the economic logic of MFN appears to generally hold with respect to immigration, important caveats apply. Most importantly, a policy conflict can emerge between two rules of non-discrimination that might otherwise have been considered complementary: MFN and national treatment. This would occur whether national treatment were achieved through an economic migration regime like the GALM, or through a rights-based instrument like the IMBR (or the International Convention on the Protection of the Rights of All Migrant Workers and Their Families). This does not mean, in itself, that a national treatment rule is not morally or otherwise justifiable, but only that the relationship between the applicable scope of MFN and national treatment within ideals of equal protection among immigrants must be carefully considered.

Moving on to the political economy aspect of MFN—the encouragement of liberalizing concessions—this appears \textit{prima facie} to be irrelevant in the migration context, with some qualifications. While all states are concerned with export promotion and competitiveness in goods and services, and do not wish to see their market access conditions undercut by others, few are concerned with the competitiveness of their emigrants in the same way. In fact, for some labor-exporting states, non-discrimination rules that deter migration might actually reduce their absolute advantages and hence their ‘market share’ of migration. In other cases, MFN might increase emigration.
in high-skilled sectors, heightening concerns of brain drain. Trachtman is correct that “citizens hoping to migrate may criticize their governments for failing to obtain equal treatment with other home states,”20 but it is less than clear why such criticism should mobilize governmental action, since those who wish to migrate would generally be a lost political constituency, as a matter of public policy, even if their particular interests were served.

On the migration-receiving side, experience shows that states have an aversion against unconditional MFN commitments in migration;21 this is not just a question of preserving particular communitarian preferences based, inter alia, on language or common backgrounds, but an apparent overall objection to constraining the flexibility of national immigration policy through standards of MFN at the threshold of entry or admission. The asymmetrical nature of migration flows22 means that receiving states have little to gain, and sending states little to offer, in terms of reciprocal concessions on access to labor markets, that might have benefited from MFN under reciprocity.

In sum, the transfer of the economic and political rationales of MFN from trade in goods to migration is not a smooth one. MFN at entry, as well as rights-based equal protection, make economic sense, but only as part of a broader regulatory scheme that would relate to potentially discordant economic effects of unequal treatment among immigrants after entry, and the concept of national treatment, whether rights-based or derived from economic principles.

3. **The Scope of MFN and Equal Protection from a Human Rights Perspective**

The above discussion has generally likened an economic migration-MFN (as in the GALM) to rights-based principles of equal protection and non-discrimination (as in the IMBR). We have even seen that the rights-based approach may serve as a complement or even as a substitute for an economic principle (as far as post-admission, “behind the border” MFN treatment is concerned). However, it should be clear that the economic MFN principle under discussion, and the rights-based principle of non-discrimination, would be guided by very different goals, and might therefore also operate differently. An economic migration-MFN would be concerned chiefly with eliminating those instances of discrimination between migrants that have an impact on the competitive conditions of labor migration. In contrast, the

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20. Trachtman, supra note 7, at 282.
22. See Timothy J. Hatton, *Should We Have a WTO for International Migration?*, 22 ECON. POL’y 339, 359 (2007) (explaining that international migration is strongly characterized by asymmetry between developed, migration-receiving countries, and developing, migration-sending countries).
principle of equal protection and non-discrimination is concerned with eradicating differential treatment of migrants that violates their human right to equality. These concepts will not necessarily overlap; the first is utilitarian, the second is deontological (even though it has an impact on utility). At times, the economic protection will be broader and more effective than the rights-based one, and at other times the opposite may be the case.

For example, the economic MFN might frown upon an immigration system that applies different visa formalities towards prospective migrants from different states, because it might technically impede immigration from economically efficient sources. Yet the same differential treatment might not constitute a significant problem, if any, from a human rights perspective. Conversely, to give an extreme example, economic MFN might not see anything fundamentally wrong with a national law enforcement policy that applies strictly toward immigrants of a particular racial background, so long as it does not distort competition in the labor market. A rights-based rule would, however, see it as a severe problem. Furthermore, we have noted that governments in immigration-receiving states may have political and economic motivations to avoid making a migration-MFN commitment, as many of them have done in trade in goods. These may also constitute reasons for governments to refrain from making effective yet broad commitments on equal protection and non-discrimination in the area of migrant rights.

The question therefore arises, what would/should the scope of a migration-MFN principle or equal protection rule be from a human rights perspective? This is first and foremost a question of human rights, although it interacts with economic and political interests. It may be broken up into two stages: pre-entry and post-entry.

During pre-entry, the question is whether, and to what degree, would a rights-based equal protection and non-discrimination rule (as between migrants of different sources) constrain the capacity of governments to make policy distinctions based on migrants’ origin in their immigration admission policies? If, for example, a state passes a law that restricts immigration from origins that can be characterized on an ethnic basis, or on the basis of religion, would it be acceptable from a human rights perspective? Notably,


24. However, such discriminatory treatment may have distinct economic effects, such as when race-based enforcement impacts on the ability of migrants to work. See, e.g., Kevin R. Johnson, *Driver’s Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 Nev. L.J. 213 (2004).

25. And indeed, just as developed states have avoided making commitments in the WTO’s GATS Mode 4, that would apply on an MFN basis, they have avoided adopting the rights-based ICMW—no industrialized states have adopted it to date—that includes relatively strong non-discrimination language.
the IMBR and its commentary do not make a definitive statement in this respect. To begin with, the definition of “Migrant” in Article 1 IMBR excludes prospective immigrants still present in their home state. This means that a national immigration measure that excluded or reduced immigration from states of a particular predominant ethnicity or religion might not even be regulated by the IMBR. If the IMBR seeks to achieve equal treatment in admission on a human rights basis, why should it be limited on such a geographical basis? Furthermore, equality under IMBR Article 2(1) is limited to equal “protection.” Admission as an immigrant provides much more than “protection”; does Article 2(1) nevertheless apply to admission? Article 2(2) provides a partial, unsatisfactory answer: Distinctions in the regulation of admission are “permissible” pursuant to a “legitimate aim” with an “objective justification,” and subject to “reasonable proportionality.” This language is far too malleable; and in any case, how can the clause permit what has not been expressly prohibited? The IMBR’s equal protection clause, although heavily laden with the language of human rights, leaves us with little policy guidance in this respect.

Somewhat counter-intuitively, an economic migration-MFN rule might actually provide a clearer basis—and even a higher standard—of equal treatment and non-discrimination at entry. The question of equality at admission would shift from the vagueness of reasonableness and objectivity to an economic standard of “likeness.” The GALM, for example, refers to “like citizens.”26 While the “likeness” standard is not free of difficulty, to say the least, even when it applies to goods27 or services,28 in the immigration context, arbitrary racial or denominational distinctions between prospective immigrants would be difficult to justify as a matter of economic law, rather than human rights law.

After entry, a different question arises. Would it be legitimate for a state to grant immigrants from one source a better set of rights than it grants immigrants from another source? For example, a receiving state might grant immigrants from one sending state full social security rights, but refuse those same rights to immigrants from another sending state. It might wish to do so unilaterally, to encourage immigration from a particular source, or to improve the conditions of a segment of its immigrant population; or it might do so as an obligation in a bilateral or regional immigration agreement. Such discrimination might not be precluded under an economic arrangement like

26. Art. 7.1 GALM, Trachtman, supra note 7.
27. The “likeness” of products is one of the most intractable of issues in international trade. See generally Won-mog Choi, “LIKE PRODUCTS” IN INTERNATIONAL TRADE LAW: TOWARDS A CONSISTENT GATT/WTO JURISPRUDENCE (2003).
the GALM, especially if it were covered by an accepted exception to MFN.\textsuperscript{29} Under the IMBR, however, the acceptability of such discrimination is doubtful. An expansive reading of IMBR Article 2 would have it cover all legal rights. A restricted reading would limit non-discrimination to the core concept of “equal protection,” that is, to the effective access to and shielding of the rule of law. In between, “equal protection” might apply only to enumerated rights specifically covered by international human rights instruments and guarantee their respect only to their minimal recognized degree.

The IMBR Commentary follows the expansive reading. It refers to the limiting terms “actual and effective protection of law,” but then broadly states that “legislation itself should not be discriminatory,” citing General Comment 18 of the UN Human Rights Committee.\textsuperscript{30} This General Comment, although clearly of immediate relevance to civil and political rights, argues that the right to equality enshrined in Article 26 of the International Covenant on Civil and Political Rights (ICCPR), and echoed by IMBR Article 2, is an “autonomous right” that “prohibits discrimination in law or in fact in any field regulated and protected by public authorities.”\textsuperscript{31} This suggests that equality is a virtually absolute principle that applies to all legal rights. However, in the international law of economic, social and cultural rights—the realm in which policy-driven discrimination between immigrants of different sources would be most prevalent—it is recognized that non-discrimination, as an obligation, is contingent on the existence of enumerated substantive rights and should not be understood as “an autonomous right to be free from discrimination.”\textsuperscript{32} The International Covenant on Economic, Social and Cultural Rights (ICESCR) itself lacks an equivalent to ICCPR Article 26, and its own equal protection clause (ICESCR Article 2, which is similar in its specificity to ICCPR Article 2\textsuperscript{33}) refers only to equality in the “rights enunciated” in the ICESCR. The IMBR commentary may therefore be too definite and overly expansive in its application of the right to equality, both in relation to other human rights instruments and to the need for flexibility in economic migration policy.

The policy implications are significant. A strict, rights-based requirement of equality in economic and social rights could deprive states of important tools for the regulation of migration at the state and international levels, including steps aimed at encouraging migration that may have important effects on development and poverty reduction in the least privileged states in

\textsuperscript{29} See, e.g., Art. 8 GALM.
\textsuperscript{31} Id. para. 12.
\textsuperscript{33} ICCPR Article 2 refers to “rights recognized” in the International Covenant on Civil and Political Rights.
the international system. This would be an unnecessary expression of what has been called the liberal immigration paradox: Liberal constituencies in rich countries might be open to immigration from poor countries, but they are also wedded to the idea of egalitarianism; yet, setting the standard of (local) equality too high means that migration is precluded, and global inequality perpetuated. The immigration paradox would seem to apply to equality between different sources of immigration as well as to equality between immigrants and incumbents: Formal equality (albeit much qualified, so long as borders are not truly open) might be considered more important than the encouragement of welfare-enhancing migration.

4. Conclusions

The discriminatory treatment of immigrants can be repugnant; there is no question of that. With respect to such inequalities, the IMBR’s equal protection clause, if adopted by states as either ‘soft’ or ‘hard’ law, would no doubt bolster existing international human rights law and migration law. What would remain unclear in both legal and policy terms is the extent to which equal treatment between immigrants of different sources should be pursued with respect to rights that dovetail with legitimate economic and social policy measures. The above discussion has shown that there are distinct interactions between human rights in migration, on one hand, and economic regulation of migration, on the other hand. While this article has not provided any definite answers to these questions, it has at least demonstrated how international economic and regulatory disciplines are intertwined with human rights principles. In this field, as in other areas, an economic approach (e.g., a migration-MFN rule) may at times complement, and be complemented by, a rights-based approach (i.e., an “equal protection” clause).

On the merits, we have seen how these interactions can expose a central problem in migration policy, namely, the tension between global equality and local equality. Strict requirements of equality can impact the willingness of states and constituencies to allow immigration, which in turn can reduce global inequities. Equal protection and economic migration-MFN should not be drafted too sweepingly, lest they throw the baby of migration liberalization out with the bathwater of protecting vulnerable migrants from abusive discrimination.