Book Reviews

Joel P. Trachtman. ***The International Law of Economic Migration. Toward the Fourth Freedom.*** Kalamazoo: W.E. Upjohn Institute for Employment Research, 2009. Pp. 416. Paperback. $25. ISBN: 9780880993487.

At the outset of the 21st century and most recently since the UN High Level Dialogue on Migration and Development of 2006, the conviction has emerged that 'migration, if managed carefully, can help to raise the living standards in poor countries' (at 7). In his new book *The International Law of Economic Migration*, Joel Trachtman analyses political economic constraints to counter forceful, but ill-founded, evidence against opening borders to migrant workers. The book achieves a quantum leap for labour migration research, as it starts its analysis where most books end theirs.

On the basis of a comprehensive, multidisciplinary literature review, the empirical evidence in support of liberalizing labour migration is summarized. Against the diagnosis that there is a 'lack of multilateral international legal rules regulating migration for economic purposes' (at 4), the book 'shows that a multilateral agreement on migration may be feasible and useful' (at 344). Rather than wrapping up the discussion with the by now quasi-customary call for bringing about 'win-win-win' solutions for the migrant, the host, and the source country, this book appendixes, an 'Illustrative Draft General Agreement on Migration'.

Labour migration, which is described as a 'parameter' for globalization's distributive challenges (at 10), has only recently become a 'site of explanations' for concerted international legal research.[1] One reason for the growing interest in this discipline may lie in the 'dual pressures of demographic imbalance and increasing wage disparities' (at 5) which have put economic migration at the forefront of national policy agendas, even if international legal responses have lagged behind. This 400-page anthology, which no trade lawyer 'may afford to miss',[2] closes an important gap in the literature. Existing works on international labour migration are for the most part edited volumes conducting either case studies into a specific migration corridor, country, or region, or else are projections of an ideal international migration regime. The rigorous bottom-up approach pursued by the book under review is different in the sense that it goes back to the fundamentals in economics, ethics, political economy prior to assessing the quality of international legal response. This thorough conceptualization allows the book to establish itself firmly, as well as the discipline of economic migration independently.

While there is an increasing amount of research on how to steer migration internationally, no work so far has approached the subject from an international trade law perspective.[3] That an eminent scholar of that discipline has ventured beyond areas traditionally associated with the 'trade . . . and linkage' conundrum points to the need for a fresh look at the horizons of international trade law. By adopting for the most part a comparative narrative, the book draws parallels for liberalizing labour migration from the history and

[1] C. Dauvergne, *Making People Illegal, What Globalization Means for Migration and Law* (2008), at. 166.

[2] Praise for *The International Law of Economic Migration* by Jagdish Bhagwati.

[3] See, e.g., two more recent works: A. Aleinikoff and V. Chetail (eds), *Migration and International Legal Norms* (2003); R. Cholewinski, R. Perruchoud, and E. MacDonald (eds), *International Migration Law: Developing Paradigms and Key Challenges* (2007).

process of freeing trade in goods and services. The book is unique in at least one other way: the terminological debate over who is in and who is out as a 'labour migrant' is avoided. Some could be tempted to voice criticism of the book's reluctance to engage with the reality of 'mixed migration'. Yet, precisely because it refrains from definitional parochialisms and their inherent ambiguities, the book emancipates the field of economic migration from what is often the stranglehold of international refugee and asylum law.

Based on the diagnosis that 'migration is', as the then Secretary General of UNCTAD Rubens Ricupero in 2001 observed, the 'missing link between globalization and development' (at 10), the book first undertakes an illuminating analysis of free migration's welfare-enhancing effects and explains why restricting economic migration is costly and inefficient. After reviewing the literature on what an 'optimal national immigration policy' (at 34) would look like, Part 1 uncovers the political constraints which need to be overcome for that purpose. When explaining why, despite evident global welfare gains, labour migration remains a heavily regulated province of national sovereignty the book draws from insights gleaned from earlier works on the political economy of international law more generally.[4] This theoretical background itself provides enough material for a coursebook. Part 2 then analyses the existing international legal framework for liberalizing and regulating international labour migration. Part 3 develops 'detailed conjectural proposals for new international legal rules in the field' (at 1).

In more detail, Part 1, the 'Normative Analysis of International Migration', succinctly summarizes the arguments why free migration is potentially pareto-efficient. Chapter 2 advances three reasons for why levels of liberalization for the movement of persons do not even come close to the depth and width to which foreign capital has been liberalized. First, the global welfare gains from economic migration have been unequally distributed within states and across nations. Secondly, and unlike for trade in goods and services, where safety valves and compensatory adjustment mechanisms have been built into the WTO covered agreements, there are no equivalent instruments yet to compensate the 'losers' of freer migration. Thirdly, migrants, unlike merchandise or services, may cross borders for non-market-induced reasons, such as to gain access to public services. Instead of enhancing the productivity in the destination state, this type of migration leads to global inefficiencies (at 70). If well-designed, the book argues, migration can actually be pareto-efficient if three conditions are fulfilled: structuring the pool of immigrants (balance between low and highly-skilled), granting compensatory adjustment to 'losers' of free migration, and, thirdly, requiring the 'poor' migrant source country to offer side payments or 'concessions', such as liberalization of investment and trade in high-value services. In this sense, the four modes of services supply envisaged by GATS are found to be the ideal bargaining ground to effectuate the type of cross-modal or sectoral trade-offs necessary to bring about more meaningful levels of liberalization of the free movement of persons in the so-called mode 4 of GATS (at 48, 71).

Worrying, in the book's view, is the trend towards stylizing remittances as a development tool. Remittances need to remain at levels equal to 17 per cent of migrants' income for those remaining behind and for the destination country to enjoy even 'modest aggregate gains' (at 54). Over-reliance on remittances carries the risk that the export competitiveness of countries of origin drops. Even if the bilateral programmes, currently in vogue for reducing the costs of transfers and encouraging the sustainable use of remittances, are constructive, they still constitute a measure of state interventionism into what in essence are private monies. In this context, policy-makers are urged to be more open about the fact that the main beneficiaries of

[4] J.P. Trachtman, *The Economic Structure of International Law* (2008); J.P. Trachtman (ed.), *International Law and Politics* (2008).

liberalized migration are the migrants themselves, whose average income is tripled by working abroad. If countries of origin are to enjoy the welfare-improving 'feedback effects' or 'development dividends of migration', such as remittances, skill-enhancing return migration, entrepreneurship, and the ability to absorb new technologies (at 58), 'managed migration programs designed jointly by origin and destination countries have to be put in place' (at 55). In calling for arrangements to manage migration, the book concurs with the prevailing scholarship, but offers more grounded arguments for why such arrangements should be multilateralized rather than left to bilateral or regional solutions.[5]

The current trend towards portraying temporary or circular migration as the panacea for the dual challenge of extralegal migration and brain drain is critically assessed. Advancing temporary migration may be useful to avoid political costs. However, portraying temporary migration as a steering tool for migration is found to be flawed for the following three reasons: the costs of transportation and rotation associated with temporary migration are high, while the duration of stay alone is no adequate compensatory adjustment for the domestic worker harmed by foreign competition. Secondly, any migrant is more likely to pursue permanence of stay rather than return (at 70–74). Thirdly, the temporariness *per se*, without flanking regulatory obligations, will fail to prevent irregular migration increasing in parallel with the liberalization of channels for lawful migration. To avoid the mistakes of the old guestworker agreements and pre-empt regularizations, destination and source countries of migrants will need to share responsibility for the challenges of temporary migration. One proposal which has repeatedly been made is for the destination country to require, in the context of a bilateral migration or economic partnership agreement, that the source country enforce 'regulatory obligations to guarantee for their citizens' timely and orderly return'.[6] Chapter 3 discusses the lessons on how to build pro-trade liberalization coalitions for goods and services and how to compensate the 'losers' from economic migration with a view to 'establishing a framework agreement that allows for states to agree on the structure of reciprocity' (at 345).

Part 2 on the 'existing international law of migration, labour migration, and trade in services', describes in Chapter 5 the customary minimal standards and multilateral treaty law (ILO Conventions and the UN Convention on Migrant Workers' Human Rights) on anti-discrimination in admission and post-admission of migrant workers, expulsion, and the right to emigrate and return to one's own country. This is followed by an entire chapter devoted to the free movement of workers within the EU and the Europeanization of EU Member States' immigration laws via the Schengen *acquis*. Chapter 7 offers a sampling of other bilateral, regional, and plurilateral arrangements, with a clear focus on free trade areas and customs unions. Flagship bilateral, non-trade migration management agreements, such as the Ecuador–Spain cooperation agreement on migration of 2001, which heralded the renewal of bilateral migration agreements in Europe, are not discussed. However, an in-depth account of mode 4 of GATS and its Annex on the Temporary Movement of Natural Persons in Chapter 8 rounds off the picture of the norms on economic migration. It would have been desirable to offer some more

[5] Amin and Mattoo, 'Does Temporary Migration have to be permanent?', World Bank Policy Research Working Paper (Mar. 2005); Chanda, 'Mobility of Less-Skilled Workers under Bilateral Agreements: Lessons for the GATS', 43 *J World Trade* (2009) 479; Friedman and Zafar Ahmed, 'Ensuring Temporariness: Mechanisms to Incentivise Return Migration in the context of GATS Mode 4 and Least Developed Country Interests', Global Economic Issues Publication, Quaker UN Office, Geneva (June 2008).

[6] Castles, 'Guestworkers in Europe: A Resurrection?', 40 *Int'l Migration Rev* (2006) 741.

examples from FTAs or bilateral agreements to illustrate current regulatory efforts to manage the risks associated with economic migration, including irregular entry, overstays, brain drain, downward pressure on wages, recognition of qualifications, and brain waste. Coincidentally, the structure of Part 2 mirrors the dichotomy between migrant rights' protection and liberalizing barriers to human mobility. This split within the international law on migration, which others have described as 'being a challenge to both fronts',[7] is potentially damaging for migrants, as their rights to entry, stay, and non-discriminatory treatment are being disassociated from questions of labour market access. The split within the international law on economic migration may also hamper further efforts at liberalizing economic migration, since regulatory issues fall between the two domains into something of a jurisdictional vacuum. At this point, the book could have pursued the question whether nation states intentionally seek to divide the international law on migration so as more effectively to maintain sovereignty over immigration issues. In this context, Part 2 could have made use of the lessons drawn from the political economy of migration developed in Chapter 3 to explore how 'a framework agreement that allows for states to agree on the structure of reciprocity, to allow sending states to share in the benefits of liberalization through a Bhagwati tax or other mechanism, to make side payments through linkage to other issues areas of liberalization, and to make side payments through immigration fees, . . . would minimize the transaction costs—for states to negotiate optimal arrangements' (at 345). In a more pragmatic vein, Part 2 points to the importance of, first and foremost, 'defragmenting' the dichotomy between protecting migrants' rights and the liberalization of market access (at 338).

One of the main challenges facing any analysis of contemporary migration law is to free the legal treatment of economic migration from its conflicted relationship with refugee law. This is one challenge the book under review has effortlessly overcome. From the way the book is organized, however, it would have benefited from portraying the Global Commission on International Migration (GCIM), the Berne Initiative and its ensuing International Agenda for Migration Management (IAMM), the UN High Level Dialogue on Migration and Development, IOM, ILO, WTO, and the Global Migration Group in Part 2, rather than in the introduction. Such a placement would have laid the accent on the output and its normativity rather than on the institutions as organizational entities. It would have further allowed the author better to contrast the emerging soft international law of economic migration with the normatively more powerful instruments of refugee law, such as *non-refoulement*. Even so, the book succeeds in releasing the law of economic migration from its fixated sideline existence as a subject either of international economic law or of human rights protection.

In Part 3, 'Negotiating Global Disciplines on Migration', the book makes a clear call for a multilateral agreement on migration which does not necessarily have to be the WTO GATS. Chapter 9 controversially claims that the natural propensity is to regulate migration internationally, rather than via bilateral channels. Thus, the book situates itself in the continuing debate on the role and effectiveness of non-trade, bilateral migration agreements. In our view, the book is correct to point to the Colombo process among select Asian countries as evidence that 'increasing competition for migration access to wealthy markets in developing countries, is leading these to coordinate their activities' (at 274). The book makes a valid point that destination countries, facing a race to the bottom over migrant taxation

[7] Dauvergne, *supra* note 1, at 5: '[i]t has proven extraordinarily difficult to meaningfully extend human rights norms to those with an "illegal" status. Similarly, economic discourse has made very little space for extralegal migrants, despite compelling evidence that they provide vital support to prosperous economies.'

and readmission quotas, may seek regional and eventually multilateral solutions. However, altogether dismissing bilateral agreements as a migration steering tool may be too harsh a move. One wonders whether it is rather the duality of trade agreements and bilateral migration agreements, which divides over skill levels, which diminishes the efficiency and coherence of international migration management.

The book could have referred to the metaphor of 'comparing apples and oranges' used by some trade scholars to show that the rationales of the two treaty types differ markedly.[8] Bilateral migration agreements admit low-skilled workers for non-economic reasons, namely to provide potential irregular migrants with a lawful alternative for entry and stay. Free trade agreements, for their part, liberalize the temporary movement of service suppliers in a concerted global hunt for talent, and thus are driven by purely economic motives. Consequently, proclaiming that bilateral and regional agreements are 'pathfinders' to or 'substitutes' for a future multilateral agreement on labour migration may be somewhat misleading (at 276). Nonetheless, some bilateral non-trade agreements have broken new ground over mode 4 of GATS in terms of establishing mechanisms to facilitate migrant selection, training, and hiring procedures. Chapter 9 is right to highlight that the emergence of regional and bilateral arrangements might indeed be taken as evidence that migration is not, or at least is not yet, a global problem which requires global institutionalization (at 276).

Chapter 10, 'Towards Specific Global Disciplines', consequently argues that free migration, much like free trade, is a global public good, the risks (overstaying workers) and gains of which are unequally distributed (brain drain), a fact which calls for international coordination. It is thus claimed that the narrower definition of free migration, and not the broader one of human capital, qualifies as a global public good. However, the book identifies a collective action problem, which amounts to an unequal supply of that global public good. Only if the international community agrees to eliminate the barriers to labour markets and to ensure that remittances, taxes, or other types of adjustment payments can flow back to the labour-sending country could the global public good of free migration contribute to reducing poverty (at 279–281). Others have found that labour migration is a club good. The reality may lie somewhere in between, and it must be differentiated according to the level of migrants' skills and the legality of their stays. Highly skilled labour is a scarce resource and a production factor for which states compete against each other. This fact implies that, unlike low-skilled migration, high-skilled migration should be likened to a global private good, which is rivalrous and exclusive.[9] Low-skilled migrant labour is abundant and states do not rival one another to get hold of it. Thus, it is a global public good also for the reason that the development dividends from labour migration are higher for low-skilled workers.

Wherever appropriate, the book draws analogies to the liberalization of international trade in goods and services. However, there are the following limits to the comparison with trade liberalization, which the book underlines: first, welfare gains accrue mostly to the migrants themselves (at 52) and not to destination or source countries.

[8] Nielson, 'Labor Mobility in Regional Trade Agreements', in A. Mattoo and A. Carzaniga (eds), *Moving People to Deliver Services* (2003), at 93–95; Carzaniga, 'A Warmer Welcome? Access for Natural Persons under preferential Trade agreements', in J.A. Marchetti and M. Roy (eds), *Opening Markets for Trade in Services Countries and Sectors in Bilateral and WTO Negotiations* (2009), at 500.

[9] D. Kapur and J. McHale, *Give Us Your Best and Your Brightest, The Global Hunt for Talent and Its Impact on the Developing World* (2005).

Secondly, a reciprocal exchange of interests is more difficult to achieve for labour migration than it is for trade in goods and services. Thirdly, migration of low-skilled workers into rich countries can displace or destroy the jobs of native low-skilled workers without net fiscal transfers accruing to these non-immigrant populations (at 342). To protect liberalism from destruction by those who lose by finding solutions 'to compensate through regulatory intervention' (at 290) guides Trachtman's conceptualization of 'embedded liberalism' which runs throughout the book.

In consequence, the book calls for compensatory adjustment mechanisms. Through tax charges, source countries could 'recapture the value of public education' (at 299). For its part, the host country could offer tax credits or exemptions on foreign source income through a double taxation agreement. Taxation is less intrusive when it comes to making outbound migration unattractive than the historically-laden exit fees. However, both these skill retention tools may infringe upon the human right to leave any country, including one's own (Article 13(2) of the Universal Declaration on Human Rights and Article 12 of the ICCPR). By levying tariff-like immigration taxes, destination countries can compensate domestic workers suffering from wage competition against incoming foreign workers. The US Trade Adjustment Assistance Program is cited as an example which could be extended to cover not only those workers who lose their jobs due to imports of goods, but also those who become unemployed due to offshoring of services or immigration (at 301). Rather than multilaterally harmonizing such adjustment mechanisms, the author encourages regulatory competition over immigration fees, tax credits, or exemptions (at 300–304). The suggested migration steering tools, with the exception of the immigration fee, operate *ex post*. The accent is thus put on 'remedial' rather than on anticipatory risk mitigation mechanisms. This difference in paradigm separates US immigration policy formulation from that in place in the EU, its Member States, and Schengen-associated countries, like Switzerland or Norway.

By exploring new frontiers in research, policy formulation, and international negotiations, the book makes an important, evidence-based call for 'zero-cost' migration. It challenges the international trade scholar to be more nuanced in the analysis of the welfare effects of economic migration. While global welfare gains from migration are said to double those of liberalizing trade in goods, they remain unfairly distributed within states and across nations. With the appropriate compensatory adjustment mechanisms and the prospect of a multilateral bargaining space for reciprocal exchanges in the WTO, barriers to free migration could be sensibly reduced and gains more equitably shared. For this to happen, however, diplomatic resources, which are today 'devoted to international trade negotiations, despite considerably smaller expected returns' (at 50) must be reallocated to labour migration. In sum, states have promises to keep and the international community some way to go before demand and migrant supply can meet.[10]

In sum, *The International Law of Economic Migration* makes a highly valuable addition to any migration researcher's library. With his newest book, Trachtman has proven once again that he fully masters the interdisciplinary methodology, beyond the mere rhetoric of integrated disciplines. By assessing the quality of legal response against the background of distributive ethics, political economic constraints, and welfare gains, this book persuasively merges welfare analysis of migration with a survey of the international legal norms. Given the book's title, the legal framework for discussing the various treaties in place for managing migration could have been developed in more detail perhaps. The book instead puts

[10] Taking up Trachtman's thread of Robert Frost citations introducing the topic.

the accent on the political economy of liberalizing economic migration. Beyond exposing the trade scholar to a new trade . . . and linkage, the book encourages migration and development experts to act upon the political necessity for multilateralizing bilateral best practices. Policy makers are called upon to develop some appreciation for the successful process of tariffication in GATT/WTO law, which could be replicated to some extent for liberalizing labour migration. The book clearly sides with those propagating a new international migration order and disapproves of bilateralism as a tool for steering economic migration.[11] Yet, it does so in a most carefully crafted manner, based on a vast and truly interdisciplinary literature review of the cost-benefit analysis of migration which in itself proves a treasure trove for scholars interested in migration.

Marion Panizzon
Assistant Professor of International Law,
University of Bern, Switzerland
Email: marion.panizzon@wti.org
doi: 10.1093/ejil/chq033

[11] Hollifield, 'Migration and the "New" International Order: The Missing Regime', in B. Ghosh (ed.), *Managing Migration, Time for a New International Regime* (2000 reprinted 2003), at 75; Ghosh, 'Towards a New International Regime for Orderly Movements of People (NIROMP)', in *ibid.*, at 7; Koslowski, 'Global Mobility and the Quest for an International Migration Regime', in J. Chamie and L. Dall'Oglio (eds), *International Migration and Development Continuing the Dialogue: Legal and Policy Perspectives* (2008).