

## RECENT BOOKS ON INTERNATIONAL LAW

EDITED BY RICHARD B. BILDER

### REVIEW ESSAY

#### THE EMERGENCE OF TRANSNATIONAL LABOR LAW

*Can Labor Standards Improve Under Globalization?* By Kimberly Ann Elliott and Richard B. Freeman. Washington, DC: Institute for International Economics, 2003. Pp. xii, 179. Index. \$25, paper.

*Labour Laws and Global Trade.* By Bob Hepple. Oxford; Portland, OR: Hart Publishing, 2005. Pp. xxiii, 302. Index. £30, cloth; £20, paper.

*Labour Rights as Human Rights.* Edited by Philip Alston. Oxford, New York: Oxford University Press, 2005. Pp. viii, 253. Index. \$110, £68, cloth; \$39.95, £22.50, paper.

There is a missing pillar in the architecture of global governance. Globalization has shifted the worldwide balance of power between labor and capital. The integration of world economies has dramatically expanded the labor force available to multinational firms, which has strengthened capital and reduced worker power.<sup>1</sup> Some workers benefit, but many do not.<sup>2</sup> International law recognizes the importance of labor rights. But the

<sup>1</sup> Labor economist Richard Freeman has pointed out that the integration of China, India, and the former Soviet bloc into the world economy doubled the number of workers in the world economic system, lowered the capital/labor ratio by over 50%, and shifted the balance of power in markets toward capital. Richard Freeman, *What Really Ails Europe (and America): The Doubling of the World Labor Force*, GLOBALIST, June 3, 2005, at <<http://www.theglobalist.com/DBWeb/printStoryId.aspx?StoryID=4542>>.

<sup>2</sup> Workers in countries like China and India may gain in wages and job opportunities, but not necessarily in collective labor power, whereas many workers in advanced countries and the older industrialized, developing countries may lose. See Freeman, *supra* note 1;

international mechanisms to protect rights and raise standards, never terribly robust, have proven inadequate in the face of global economic forces.

The institutions of the world order do a great deal to foster economic integration but relatively little to offset the negative effects of integration on workers. International agreements that guarantee free trade and that protect foreign investors and intellectual property have teeth, whereas those that protect labor standards are relatively weak—if they exist at all.

The authors of the books under review think the time has come to correct that situation. They think the legitimacy of the world order depends on the creation of a strong pillar of global protection that will enforce workers' rights and raise labor standards. They all agree on the basic goal, although they differ over specific methods and measures.

The history of labor law can be seen as an effort to use the power of the state to offset serious imbalances between labor and capital. This dynamic can be seen at both the domestic and international levels. We all know the story of the rise of domestic labor laws as countervailing power in Western economies: traditional labor law helped offset inequalities of bargaining power between labor and capital, protected workers against health and safety hazards at work, reduced the risk of economic dislocation, and protected fundamental rights such as the right to form trade unions and bargain collectively.

The creation of strong national labor codes was accompanied and supported by activity at the international level. Starting with the foundation of the International Labour Organization (ILO)

Nita Rudra, *Are Workers in the Developing World Winners or Losers in the Current Era of Globalization?* 40 STUD. COMP. INT'L DEV. 29 (2005).

and continuing through the era of “embedded liberalism” following World War II, international measures facilitated the creation of national institutions of countervailing power. These efforts led to the idea of an “international labor law.” In this “classic” phase of international labor law, the international community promoted countervailing power primarily through international support for robust domestic laws and institutions. The ILO sought to get member states to incorporate labor standards in their domestic legal systems. And the original Bretton Woods settlement was designed to ensure that such systems of countervailing power were not undermined by global economic shocks. National law did the regulatory work: international law and institutions helped nations create strong domestic systems and shielded them from international shocks.<sup>3</sup>

This system of international labor law worked reasonably well in the period following World War II to help protect rights and raise labor standards in advanced countries that had strong labor traditions and a commitment to a social market economy. It is less clear that it had much of an effect in developing countries. And by the 1980s—with the collapse of the original Bretton Woods system of embedded liberalism, the rapid pace of globalization, and the emergence of the neoliberal Washington Consensus—the system came under great stress.

Many of the authors in these books fear that this system has broken down completely and that a new approach is needed. They believe that in an era of globalization, the classic system of “international labor law,” while still necessary, is no longer sufficient to ensure that the world economic order is fair to workers. They think that globalization has made it harder to preserve strong domestic labor laws and institutions. They contend that the same world order that created the conditions for globalization and that benefited capital has failed to deal with the problems that globalization creates for labor. They think that this set of phenomena has undermined the legitimacy of the system and helped fuel antiglobalization backlash.

<sup>3</sup> For a discussion of this system, see my review of *Governance in a Globalizing World* (Joseph Nye and John Donahue, eds.) in this *Journal* (96 AJIL 748 (2003)).

These authors represent no single school of thought, ideology, or political position. They disagree on many key issues. But most agree that the nature of the problem of global justice for workers has changed since the end of the era of embedded liberalism. They reject extreme, neoliberal calls for the complete deregulation of labor markets. And to one degree or another, they share the view that a new international architecture is needed if the world order is to offer full support to workers as well as to capital.

## I. “CLASSIC” INTERNATIONAL LABOR LAW AND ITS DISCONTENTS

Any discussion of international law and labor must start with the ILO, as all these books do to one extent or another. What is new is that at least for Sir Bob Hepple (in *Labour Laws and Global Trade*), Kimberly Ann Elliot and Richard Freeman (in *Can Labor Standard Be Improved Under Globalization?*), and Philip Alston (in *Labour Rights as Human Rights*), along with some of the authors he has brought together, the discussion cannot stop with the ILO but must also look at the role of labor laws and standards at various levels.

The great achievement of the ILO was to create a corpus of international labor standards and to get many countries to accept these standards. Everyone agrees that such standard setting is still necessary. But they raise two questions: Is the ILO’s traditional method of standard setting effective in a globalized economy? Must other institutions supplement the actions of the ILO?

Hepple, one of the United Kingdom’s leading labor law scholars, thinks that the process needs to be changed and that the work of the ILO must be buttressed at several levels. He explains the logic of the ILO as follows: “the globalisation of rights involves the adoption of international labour standards . . . and their ratification and implementation by Member States who thereby undertake to submit to the ILO’s supervisory system” (*Labour Laws and Global Trade*, p. 35). The problems with this system, he says, are that the standards being adopted may not be appropriate for many of the countries most in need of help; many countries have resisted ratification; those that have ratified may not actually implement the rules that they

have nominally accepted; the supervisory machinery may not work well; and the ILO may not be able to bring about changes when it does find that countries are failing to implement its standards. He calls for improvements in the operation of the ILO, and draws our attention to the need to supplement ILO activities by action at many levels.

There is no question that the ILO is an essential part of any new architecture for international labor law. But the real importance of these books is that they go beyond the ILO to explore other elements seen as necessary for effective protection of workers' rights.

## II. THE EMERGENCE OF A TRANSNATIONAL VISION

Although there is no single, overriding theory that is shared by Hepple, Elliott and Feeeman, and Alston and his colleagues, one can tease out a set of shared assumptions by looking at the topics explored in their volumes. Following Hepple, we might call these assumptions, taken together, a "transnational" vision. Transnationalists like Hepple think that international labor law must sometimes have direct effect or otherwise be enforceable by some sort of hard sanctions. Whereas classic international labor law left the actual regulation of labor relations exclusively to domestic law, these authors see a need for enforceable standards at the regional level and possibly the global level as well. They also see the need for private standards and private enforcement. They see room to integrate hard and soft measures, public and private norms, and various levels of governance. They recognize that "transnational labor law" may have to embrace the activities of international financial institutions and various aspects of the international trade regime, including the WTO, regional trade pacts, and national trade law.<sup>4</sup>

<sup>4</sup> The author of this review counts himself among the transnationalists. For another description of the emerging transnational labor regime, see David M. Trubek & Lance Compa, *Trade Law, Labor, and Global Inequality*, in *LAW AND CLASS IN AMERICA* 217 (Paul D. Carrington & Trina Jones eds., 2006). See also David M. Trubek, Jim Mosher, & Jeffrey S. Rothstein, *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks*, 25 *L. & SOC. INQUIRY* 1187 (2000).

The transnational vision of labor law differs from the ideas that animated earlier efforts at international regulation of labor. Previously, attention at the international level focused on the creation of a unitary set of standards embodied in formal international conventions and monitored by the ILO. By contrast, transnationalists have a pluralistic vision that embraces activities at many levels, includes private governance, and contains both binding, enforceable rules and softer principles and guidelines. It is important to understand that "transnational labor regulation" is a construct of the observer. There is no transnational code or regulatory body. Rather, transnationalists look at a wide range of separate endeavors and see in them an emerging system that both buttresses domestic laws and supplements ILO standard setting. Hepple, who deserves to be called the "dean of the transnationalists," defines transnational labor regulation as including "both *hard* and *soft* rules and procedures which apply across national boundaries . . . . They may be *unilateral* . . . *bilateral* . . . *regional* . . . or *multilateral* . . . . These rules may be directed at states, or corporations or individuals" (*Labour Laws and Global Trade*, p. 4).

The books selected for review are just a few of many that have appeared recently and that deal with some aspect of transnational labor law. Hepple's *Labour Laws and Global Trade* provides the most comprehensive map of transnational regulation produced to date. It sets forth a rationale for transnational labor regulation, explores the history of international efforts to support workers; looks at the role of the ILO, the European Union (EU), and other regional bodies; the trade regime; and extraterritoriality. Other books under review explore one or more of the key elements of the pluralistic system that Hepple and other transnationalists see emerging. In *Can Labor Standards Improve Under Globalization?*, economists Elliot and Freeman look primarily at the role of trade sanctions and corporate codes of conduct. *Labour Rights as Human Rights*, edited by human rights expert Alston, includes seven essays by well-known experts on the interface between workers' rights and internationally protected human rights.<sup>5</sup>

<sup>5</sup> A recent book, *Globalization and the Future of Labor Law*, edited by John R. Craig and S. Michael Lynk and containing numerous essays, covers many of the same

### III. DEBATES AMONG TRANSNATIONALISTS

Transnationalism has shifted the focus of debate over the future of international labor law, but it has not produced a consensus on what is necessary to make transnational labor regulation effective or how such a system might be brought into being. The literature reveals debates on numerous important issues, including:

1. Can higher labor standards promote growth and development?
2. Does globalization create a race to the bottom? How can it be avoided?
3. Is there a role for soft as well as hard law?
4. What role can regional bodies such as the EU and a future Free Trade Area of the Americas (FTAA) play?
5. What is the proper role for the trade regime?
6. What is the role for the ILO in the new economy?
7. What about the United Nations and regional human rights regimes?
8. Can private codes of conduct make a difference?
9. How effective is transborder labor advocacy? Can it be made more effective?<sup>6</sup>

Space does not permit me to discuss all these issues, and so I shall focus on a few topics that seem to be central in determining what needs to be done in order to weave the ILO into a transnational legal regime that has aspects of international, supranational, and domestic law.

#### *Labor Standards and Development*

A key element of the transnational vision is the view that labor standards can make a positive contribution to economic growth and development; if they do not, then international efforts to raise standards would not make sense. In *Can Labor Standards Improve Under Globalization?* Elliot and

topics as *Labour Laws and Global Trade* but was published too late to be included in this review. For a comprehensive collection of literature on globalization and labor, see the Web site Globalization and Labor Standards, <<http://www.laborstandards.org>>, organized by Katherine van Wetzel Stone of UCLA School of Law.

<sup>6</sup> For a discussion of all these issues, see Trubek & Compa, *supra* note 4.

Freeman assess the claim that higher labor standards might impede growth in developing countries by undermining their comparative advantage. They conclude that there is no support for this view and argue that enforcement of core labor standards, including the right to form unions and bargain collectively, can ensure that the fruits of globalization are spread more equitably. In *Labour Laws and Global Trade* Hepple makes an even stronger claim, positing that higher labor standards can increase productivity and thus actually speed up economic development. Finally, if one adopts the capabilities approach to development promoted by Amartya Sen (who is not represented in any of the volumes under review), one might argue, indeed, that recognition of core labor rights does not simply *lead* to development, it is *part* of development itself.<sup>7</sup>

#### *Is There a Race to the Bottom? The Impact of Globalization on Domestic Labor Codes*

While all transnationalists believe that globalization can weaken national labor laws, they disagree on the nature of the pressures and the extent of the erosion. For many authors, globalization is a direct threat because labor law thus defined increases the cost of production and thus undermines a nation's global competitiveness. Consequently, it is feared, countries with strong labor codes will be forced to weaken them, whereas those with weak codes will have no incentive to strengthen them. On this view, regulatory competition among states in a single market necessarily creates a "race to the bottom" in labor standards.

Hepple does not deny that regulatory competition is at work. But he does not think it necessarily leads to the lowering of labor standards. He lists several reasons why there is no "universal cause-and-effect relationship between globalisation and deregulation" (*Labour Laws and Global Trade*, p. 253). One is of special interest: his argument

<sup>7</sup> Sen's work (see, for example, AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999)) has led commentators to argue that human rights, including labor rights, should be considered to be part of development, not merely a means toward, or by-product of, development. For a discussion, see David M. Trubek & Alvaro Santos, *Introduction* to THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 1 (David M. Trubek & Alvaro Santos eds., 2006).

that regulatory competition might actually lead to the strengthening of labor standards. In particular, Hepple argues that labor law is not just a cost but can also be a spur to improved productivity. To the extent that labor law enhances national productivity, it actually increases global competitiveness. Nations with productivity-enhancing regulation facing global competition would want to maintain labor standards, not weaken them. For that reason, he argues, an open economy and regulatory competition need not necessarily lead to the much feared “race to the bottom.”

Another author who accepts the facts of regulatory competition but agrees that it need not lead to a race to the bottom is Simon Deakin. In his chapter (in Alston’s volume) “Social Rights in a Global Economy,” Deakin argues that regulatory competition can promote what he calls “reflexive harmonization,” a process by which competing states in a single market learn from each other the best way to promote welfare while remaining competitive. Deakin believes that the EU has found a way to foster reflexive harmonization and thus has avoided a race to the bottom in labor standards.

While these positive views are a welcome change from the gloom and doom of those who see nothing but an unstoppable race to the bottom, these views raise important questions. Deakin’s analysis rests on the assumption that EU member states want to find the optimal mix of welfare and competitiveness and that they are in a positive-sum game that is facilitated by EU institutions. But some see the situation very differently: they fear that it is a zero-sum game and that some member states are perfectly willing to trade off equity to secure investment. The growing tension between the new-accession countries of eastern Europe that seek to gain an advantage from lower standards, on the one hand, and most of the Eurozone countries, on the other, raises doubts about the strength of the kind of upward spiral that Deakin posits. And one would want more empirical evidence to support Hepple’s view that high standards are creating a comparative advantage for some countries.<sup>8</sup>

<sup>8</sup> The idea that labor law can increase, not decrease, competitiveness is offered as one reason why the much feared race to the bottom has not occurred. Hepple

### *Hard and Soft Law*

While there is no consensus among transnationalists on the seriousness of “race to the bottom” dynamics, all agree that they exist and that some form of transnational law is needed to protect basic rights and enforce minimal standards. Because national decision-makers will be presented with pressures to lower standards, something is needed above the national level that will constrain such tendencies. We might say that it is an axiom of the transnational vision that there must be some “hard law” that operates across national boundaries, at least for the purpose of setting and enforcing minimal standards. It is precisely the belief in the need for some transnational law with direct effect that marks the difference between classic international labor law and the emerging transnational vision.

But it would be a mistake to think that transnationalists embrace only “hard” or enforceable transnational standards. Quite the contrary; many also see a need for “soft” or nonbinding norms, as can be seen most clearly in Hepple’s discussion of the EU’s Open Method of Coordination (OMC). The OMC is a complex system that uses nonbinding guidelines, collective goal-setting, exchange of best practices, benchmarking, data dissemination, and multilateral surveillance to bring about improvements in employment and working conditions, to combat social exclusion, and to reform social-protection systems.<sup>9</sup> Hepple sees the OMC

argues that some countries have used strong labor regulation as part of a complex system of economic coordination that gives them a comparative advantage in certain areas of world trade. His specific reference is to the coordinated market economies (CMEs) of Japan and northern Europe. He writes that “in CMEs . . . governments should be less sympathetic to deregulation because this threatens their country’s comparative institutional advantage from regulatory regimes that that support non-market methods of coordination” (*Labour Laws and Global Trade*, p. 252). At a time when many of the so-called CME economies are suffering from low growth and high unemployment, and pressure is building in many key countries to weaken various aspects of CME labor law, including worker participation, lifetime job security, and national-level bargaining, it is not so clear that these countries are as immune from the pressures of globalization on their labor regimes as Hepple suggests.

<sup>9</sup> For a description of the OMC, see James S. Mosher & David M. Trubek, *EU Social Policy and the European*

as a promising way to deal with issues where the diversity of national systems may make moves toward uniformity difficult, if not impossible. He describes it as “an innovative approach that has the advantage of recognizing national autonomy while seeking a convergence of objectives” (*Labour Laws and Global Trade*, pp. 248–49). But he makes clear that such soft measures are not sufficient and are no substitute for the hard law needed to protect basic rights.

### *Regional Labor Standards*

Most proponents of transnational labor law look to regional arrangements as a cornerstone of an effective transnational regime. The movement toward greater regional economic integration can both increase demand for transnational law and facilitate efforts to construct such systems. When nations agree to remove barriers to cross-border economic transactions, they increase the risk of a race to the bottom, thus highlighting the need for regional standards. And the negotiations over regional economic integration create a diplomatic and political context in which to raise such issues.

Additionally, regions seem to be well suited for the transnational operation of both hard and soft law. To the extent that soft law mechanisms rely on both shared normative commitments and perceptions of interdependence, they are more likely to work in specific regions of the world where differences are not too great and interdependence substantial. Such regions are also more likely to be sources of hard law to constrain nations. Transnational hard law can arise only if nations directly or indirectly consent to being bound, and nations may be more likely to delegate some degree of sovereignty to smaller and more cohesive regional bodies than to the United Nations or any of its agencies.

It is thus no surprise that Hepple devotes two full chapters to the EU and that four of the seven

chapters in Alston’s volume look at the EU and other regional arrangements. Hepple thinks that the EU has developed a salutary mix of hard and soft measures to protect workers’ rights. These measures include directives that require member states to introduce minimum standards into national law, a social dialogue that allows employers and unions to make binding arrangements concerning a range of issues, a nonbinding system of coordination (the OMC), and a Charter of Fundamental Rights that, while not itself binding, can affect how binding norms are interpreted.

It would be wrong to infer, however, that there is agreement among transnationalists on the proper scope for regional intervention or that anyone thinks that the EU is a perfect system. For example, whereas Deakin thinks that the current, decentralized system in the EU works well to raise overall standards by stimulating national reform, Ann Davies (in her chapter “Should the EU Have the Power to Set Minimum Standards for Collective Labour Rights in the Member States?” in Alston’s volume) believes that because the EU lacks power to enforce collective labor rights, there is a serious risk that rights to form unions, bargain collectively, and strike may be eroded by regulatory competition. To offset this risk, she argues, the EU should be given competence to regulate in this area.

At the same time, no one has any illusions that the EU, whatever its limits, is a model that will be easy to follow in the rest of the world. This comes through clearly in Charnovitz’s analysis (in his chapter “The Labor Dimension of the Emerging Free Trade Area of the Americas” in Alston’s volume) of prospects for labor provisions in any future agreement to create an FTAA. His chapter includes an analysis of why nations may need to cooperate in the labor area, as well as a detailed history of international efforts to protect workers in the Americas from the nineteenth century down through the NAFTA labor side agreement and the recent bilateral trade agreements signed between the United States and several Latin American nations.

Charnovitz’s chapter is designed to support recommendations for the labor dimensions of a future FTAA. These recommendations are startling not in their boldness, but in their *modesty*. Charnovitz sees no prospect for hard law at the

*Employment Strategy*, 41 J. COMMON MKT. STUD. 63 (2003). A comprehensive review of research on the OMC can be found in Jonathan Zeitlin, *The Open Method of Coordination in Action: Theoretical Promise, Empirical Realities, Reform Strategy*, in THE OPEN METHOD OF COORDINATION IN ACTION: THE EUROPEAN EMPLOYMENT AND SOCIAL INCLUSION STRATEGIES 447 (Jonathan Zeitlin & Philippe Pochet eds., 2005).

Western Hemisphere level, and he rejects as a sham the current, soft law system that operates under the NAFTA side agreement. This system is based on the use of diplomatic methods to encourage each country to enforce its own existing labor law. Although some think that the system can make a difference,<sup>10</sup> Charnovitz thinks that as long as the only enforcement is through soft methods and diplomatic channels, it is worthless.

Bowing to what he sees as current political realities, Charnovitz limits his proposals for the FTAA to measures that would enhance the ability of consumers to boycott goods produced under substandard conditions; provide compensation to workers displaced by trade; allow unions to operate in Export Processing Zones; and protect migrant workers. This set of recommendations falls far short of even the limited steps taken within the EU. If Charnovitz's pessimism about prospects in the Western Hemisphere is correct, one must wonder whether Europe is a model for any other part of the world or if regionalism has much of a future outside the EU.

### *The Search for Sanctions and the Role of the Trade Regime*

Transnationalists agree on the need for some way to enforce the labor standards established at the regional or global level. Strong domestic labor laws, with effective enforcement, may be necessary, but they are not sufficient. Transnational law must also be enforceable. The search for an effective enforcement method has led transnationalists to look at the possible role of the trade regime in enforcing labor standards.

In the EU there are numerous methods to ensure that member states enforce standards agreed at the regional level. They include the ability of the European Commission to seek sanctions against member states that fail to transpose directives. Outside Europe, such mechanisms are limited and rely heavily on monitoring and voluntary compliance. Although in principle the ILO has the power to order sanctions if a country fails to carry out the recommendations of the Commission of

Inquiry, this power has been used only once in the organization's history (in a case involving forced labor in Myanmar).<sup>11</sup>

Currently, the trade regime does include some sanctions, but they are limited in scope and effect. The NAFTA side agreement provides sanctions for a limited number of labor law violations. And under the Generalized System of Preferences, the United States and EU may, to a limited degree, condition preferential tariffs for less-developed countries on adherence to core labor standards. Otherwise, however, transnational labor law, outside the EU, relies today primarily on "soft law" international conventions that are subject only to monitoring, not sanctions.

As a result, attention has turned to the WTO as a possible source of sanctions. Some transnationalists, including several of the authors in the volumes under review, have explored the feasibility and desirability of linking WTO trade concessions to labor standards. The WTO already allows importing countries to ban the import of good made by prison labor. Some labor advocates have proposed expanding this provision to include a "social clause" that would allow countries to ban goods produced in countries that fail to enforce internationally recognized labor standards.<sup>12</sup>

Hepple and also Elliot and Freeman assess the desirability of such a provision. Recognizing the problems involved in bringing labor issues into the trade regime, they approach the question with caution. They agree that any use of the social clause should be based on cooperation between the WTO and the ILO, with the ILO providing the expertise needed to assess whether serious labor violations exist. Elliot and Freeman propose a carefully targeted set of sanctions that would allow

<sup>11</sup> The case is described in detail in Maupin's chapter in *Labour Rights as Human Rights*. It is not clear how much independent impact can be attributed to the ILO's actions since the countries that imposed sanctions had done so before the organization acted.

<sup>12</sup> Robert Howse, a well-known trade law scholar, and Makau Mutua, a human rights expert, have argued that the WTO could allow such bans under existing law. See Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (Int'l Ctr. for Human Rights & Democracy Policy Paper, 2000), at <<http://www.ichrdd.ca/publications>>. Many observers feel, however, that an amendment would be required to legalize such actions.

<sup>10</sup> See, e.g., Lance Compa, *NAFTA's Labor Side Agreement and International Labor Solidarity*, in PLACE, SPACE AND THE NEW LABOUR INTERNATIONALISMS 147 (Peter Waterman & Jane Wills eds., 2001).

countries to close their markets in cases of egregious violations of labor rights as demonstrated by evidence produced by the ILO. In such cases, sanctions could be used only against imports from the sector in which violations occurred—and not against all imports from the offending nation.

Hepple stresses the importance of WTO-ILO collaboration but does not favor the use of trade sanctions, even the kind of carefully focused sanctioning proposed by Elliot and Freeman. Hepple discusses the trade/labor nexus at length but shies away from proposing the kind of linkage involved in the social clause and supported by Elliot and Freeman. Indeed, early on in the book he states: "It will be argued that the reconciliation of global trade and labour rights will not come from relocating labor law within the sphere of international trade law. . . . Instead, efforts should be directed at shaping the many new strands of transnational labour regulation that are emerging . . ." (*Labour Laws and Global Trade*, p. 3). For that reason, he wants to keep the two regimes separate. The only exception would be in cases where a nation's violation of fundamental rights is so egregious that it should not be allowed into either the ILO or the WTO at all. If the ILO determines that a country's record is so bad that it should be treated as a pariah, then it should be denied membership in both organizations and thus any rights in the trade regime. But he implies that once admitted, nations should not be subject to any further trade sanctions.

#### *Other Issues Discussed*

These books survey several other issues, including the role of private codes of conduct, the recent reforms in the ILO, the relationship between labor rights and other fundamental rights, the extraterritorial role of national laws, and unilateral use of trade sanctions to affect labor conditions in other countries. The several authors provide useful, up-to-date information on each of these topics. Taken together, these discussions illuminate the complexity of the relationship between globalization and labor, and enhance our understanding of the multiple venues in which work must be done if we are to construct a system of transnational labor law.

#### IV. ANOTHER DIMENSION THAT NEEDS ANALYSIS

While these volumes touch on most of the issues presented by the idea of transnational labor law, little attention is given to how we might get from here to there. Much more is said about what elements are needed to make such a system work than about how the system might be constructed. The books do identify some of the key actors that would have to cooperate in order to create a working system. We are told what national governments, supranational regimes, international organizations, transnational corporations, nongovernmental organizations (NGOs), and consumer groups would have to do in order to make transnational labor law into a robust counterweight to globalization. But there is little discussion of the obstacles to reaching this goal and little analysis of what would motivate the various actors to take on these roles.<sup>13</sup>

To be sure, none of the authors set out to deal with those issues. But it will be important to deal with them in the future. If the transnational vision is to prevail, more thought needs to be given to strategies and agencies for change. This will involve studies of unions, transnational NGOs, and political parties, as well as governments, organizations, and legal institutions.<sup>14</sup> Although these volumes stop short of this type of analysis, they will be very helpful to scholars and advocates who seek to put some of these ideas into practice.

#### V. CONCLUSION

Taken together, the three volumes discussed in this review, as well as many other recent books dealing with these issues, suggest that both labor lawyers and international lawyers have realized that globalization demands a new approach to international action on behalf of workers. None of the three books under discussion here covers all the issues, although Hepple comes closest in this

<sup>13</sup> The primary exceptions are Elliott and Freeman's positive assessment of the effects of consumer advocacy and Charnovitz's very negative reading of prospects for a strong labor dimension in the FTAA.

<sup>14</sup> For one discussion of transnational labor advocacy by unions and NGOs, see Trubek et al., *supra* note 4.

regard. None has the final word on any of the contested questions. All are better at describing what should be done than explaining how to get it done. But they map the elements that would be needed to construct an effective international architecture for workers' rights, and they outline the agenda for future work in this field.

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### BOOK REVIEWS

*International Organizations as Law-Makers.* By José E. Alvarez. Oxford, New York: Oxford University Press, 2005. Pp. xlvi, 660. Index. \$150, £85, cloth; \$55, £29.99, paper.

The phenomenon of international organizations (IOs) and the changes that they may have made in the fabric of international law and relations continue to fascinate international lawyers and policymakers. Whether the phenomenon is evidence of a move toward a more organized system of "world governance," at the expense of the authority and relevance of states, and whether these organizations have taken on a life of their own irrespective of the wishes and commands of states, have been the subject of vigorous debates. In *International Organizations as Law-Makers*, José Alvarez's likening of the uncertainties and dilemmas of modern states over IOs to those of Dr. Frankenstein to his monster in Mary Shelley's novel,<sup>1</sup> seems apt. The monster aroused the fear of the villagers, and IOs may have a similar effect on the global village. But fear distorts judgment. A more realistic and less fanciful examination of the effect of the growing number of IOs that seem to have increasing regulatory and enforcement capabilities is in order. José Alvarez has provided international lawyers with such an examination.

Alvarez takes the view that the literature on IOs and their impact on international law, which he reviews extensively in the book, is replete with

half-truths, at most of which he takes careful aim. He looks at the place of IOs in international law from the perspectives of different jurisprudential schools, and points out the limitations of each (chapter 1). He is critical of what he calls "idealistic" international lawyers who can see only "good" in IOs insofar as they obviate and replace unilateralism. He is equally critical of those who try to apply positivist legal theory to multilateral institutions, and also of the "realists" who see the power plays by states through IOs as an additional exercise of unilateralism.

The book's title, *International Organizations as Law-Makers*, scarcely does justice to the much broader areas of IO impact that Alvarez addresses. He takes a very broad definition of IOs. In addition to intergovernmental organizations with political and parliamentary bodies, his definition includes standing international courts such the International Court of Justice (ICJ), International Criminal Court, dispute settlement bodies of the World Trade Organization (WTO), international ad hoc criminal tribunals, and monitoring bodies.

It has long been recognized that the age of states as the only major and relevant players in international law and politics has passed. Alvarez recognizes that fact and the reality that many nonstate actors play significant roles in making and implementing international law. They include not only international intergovernmental organizations in their various forms, but also nongovernmental organizations (NGOs) and other organized interest groups in commerce, science, labor, consumer affairs, and so on. Yet within that wide-angled lens, the book intentionally takes a narrow focus, examining a select number of IOs with a global reach, and specifically with regard to three broad areas of endeavor, each of which constitutes a separate part of the book (and which will be used here as a way of organizing the review): (I) international institutional law; (II) treaty making under the auspices of these IOs; and (III) institutionalized dispute settlement. Each of the three parts comprises several chapters. In Alvarez's view these three categories are especially relevant to how the world governs itself. He sets out to prove that IOs have transformed the process by which international norms are produced, the identities of those who produce such norms, and the content of much of general international law itself. He further sets out

\* This essay draws heavily on Trubek & Compa, *Trade Law, Labor, and Global Inequality*, *supra* note 4. I am indebted to Lance Compa for many of the ideas developed in this essay and for helpful comments on an earlier draft.

<sup>1</sup> MARY SHELLEY, *FRANKENSTEIN* (1818).