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Introduction: The Discipline of International Economic Law at a Crossroads

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Abstract:

Old certainties are melting away. An era has drawn to a close. The foundations of the global economic system are rapidly changing. The opening of intellectual horizons that has come in the wake of these epochal shifts calls for a fundamental rethinking of the main functions and tasks of international economic law (IEL) as a disciplinary project. It also calls for a new explanation of international law's systemic potential, power, and effectivity in the context of contemporary global governance. How does international law influence the workings of international economic governance? What are the main ways in which it can impact on the course of global economic affairs? Drawing on the traditions of legal realism, Marxism, and classical law-and-economics, this essay outlines a four-fold theory of IEL's regulatory effectivity: IEL as a price-setting mechanism, IEL as a mechanism for the structuring of opportunities, IEL as a mechanism of ideological legitimation, and IEL as a mechanism of disciplining and interpellation. The goal of this theoretical project is to promote an intellectual recalibration of IEL's disciplinary ambit along fundamentally functionalist lines: the discipline of IEL should study everything that pertains to how the effective legal realities of global economic governance are set up, how they operate, and how they are produced. The dreariness of the *déjà vu* one feels when looking at the traditional IEL scholarship would have probably felt a lot more tolerable had we somehow been able to muster the sense that the endless reproduction of the established paradigm might eventually lead to something tangibly good and positive in the external world outside the narrow plane of our disciplinary debates. But by and large, we know, that is simply not true. And so the question inevitably arises: if all of that which we have got used to doing as a scholarly community is still getting us nowhere better than where we have been before, why not try doing something different?

1. The End of an Era: Ideology and Hysteria in the European Public Discourse

An era has come to an end. The foundations of the global economic system have shifted. The reign of neoliberal economics, we are told, has drawn to a close. The mindless worship of the markets has stopped, and the old Thatcherite mantra that there is no alternative no longer seems like a self-fulfilling prophecy. With most of the world's advanced economies repeatedly sliding in and out of recession and Biblical-scale famines once again becoming a realistic prospect across various parts of the global South, the old certainties of New Finance Capitalism – the Hardt-and-Negrian world of borderless politics, omniscient markets, postnational global efficiencies, and the endless cycle of fluid self-reinvention – are quickly melting away. Even the *Financial Times* commentariat have started to acknowledge as much.¹

¹ See, e.g., Authors (2018); Sandbu (2017); Beattie (2009); Beffa and Ragot (2008); Wolf (2008).

Dusk has descended over the global economic order, and Minerva's owl once again has taken to flight. And what a view opens before its eyes as it rises now over Europe. Whichever corner of the European Union it may turn to, a wave of unstoppable moral panic seems to be spreading across the continent's public spaces and the 'thinking classes' that populate them. A scent of hysteria hangs heavy in the air: the new European order that was so painstakingly forged in the aftermath of the 2003 Treaty of Accession is falling apart.

Proudly liberal in its self-declared identity, unabashedly supranational in its political aspirations, the new Europe of the early 2000s – the Europe of 'freedom, security, and justice without internal frontiers', of 'pluralism, non-discrimination, tolerance', and a 'social market economy' – has come under attack, viciously ambushed by the forces of reactionary anti-internationalism and the far right.

Brexit,² Salvini's League,³ the *Alternative für Deutschland*,⁴ the Polish judiciary crisis⁵ – wherever one looks, one sees the same disturbing signs. Virulent nationalism, far-right populism, nativism, and xenophobia are on the rise everywhere. The basic pattern is not hard to make out: the target of the attack is not limited to the idea of a supranational Europe. Brexit and the *Front National* may have been the harbingers of this new mini dark age, but the 'Make America Great Again' crowds and the US-China tariff war are hardly a symptom of a purely European malady. The trend we are witnessing has a much wider geopolitical and ideological footprint. What is coming under attack here, basically, we are informed, is the *very idea of the Liberal World Order* and the accompanying promise of a non-partisan politics of the universal progress for all: human rights, multiculturalism, a free global economy, an open society.⁶

The narrative tropes are familiar, even if the tone sometimes is not.⁷ Dystopianism is the genre *du jour*. Between Trump's travel ban⁸ and Orban's 'border fence',⁹ between the rise of Scott Morrison in Australia and Jair Bolsonaro in Brazil, the return into government of the Austrian Freedom Party,¹⁰ and the growing frenzy surrounding the US attacks on the World Trade Organization,¹¹ the picture painted by this newly emergent discourse of hysteria is that of an all-encompassing, march-of-history-interrupting global crisis. Globalisation has been suspended. The project of Enlightenment and modernity itself have been put on hold. Less than a generation ago, in 2000, the electoral success of the Freedom Party and its subsequent entry into the Austrian government coalition triggered a wave of loud international protests.¹² In 2018, there was barely a blip: the notion of a right-wing party gaining significant government presence in a European state seems to have been utterly normalised. Matteo Salvini is now the deputy prime minister of Italy. Marine Le Pen reached the second round of presidential elections in France. Geert Wilders's *Partij voor de Vrijheid* is the second largest party in the Dutch parliament.

² See O'Rourke (2019); Ramiro Troitiño et al. (2018); Sampson (2017), p. 163.

³ See Schumacher (2018); Stille (2018).

⁴ See Amann et al. (2018); Schumacher (2017).

⁵ See Hegedüs (2019); Byrne et al (2018); Zalan (2018); Robins-Early (2018).

⁶ See Szewczyk (2019), p. 33; Barber (2019); Jones (2018); El-Erian (2018).

⁷ Cf. Moyn and Priestland (2017): 'Since Donald Trump's election, the United States has been gripped by tyrannophobia. Conspiracies against democracy are everywhere; truth is under siege; totalitarianism is making a comeback; "resistance" is the last refuge of citizens.'

⁸ See Liptak (2017).

⁹ See Saeed (2017).

¹⁰ See Atkins and Khan (2017); Riegert (2017).

¹¹ See Payosova et al. (2018); Baynes (2018).

¹² See Burchill (2001), p. 79.

The conclusion is impossible to miss: '[t]he dominoes are toppling, one after another',¹³ fascism and nativism are going international.¹⁴

To be sure, this spreading pattern of 'backlash against the silent revolution'¹⁵ of liberal globalization in each case appears to have a whole raft of local driving factors. But the ideological forms through which it is expressed clearly seem to enjoy a universal appeal. Xenophobia and nationalism today are unquestionably global trends; the same also goes for autocratic populism.¹⁶ The historical process whose apparent cresting we are witnessing, we are told, in short, is one of a truly epochal and world-historic significance. Once again, the international community – humanity, the world at large – is approaching a global inflection point. And, once again, like so many times before, the future of the world – 'obviously' – will be decided by what happens in 'Europe'.

Seen from this angle, the logic of this newly emerging narrative complex seems as old as the liberal political tradition itself. If moral hysteria is what it looks like from the front, knee-jerk Eurocentricity certainly seems to be its most important defining theme from the back. Rather than being diagnosed as the product of, say, interrupted decolonization, an aftershock of the end of the Cold War, or a historically unparalleled combination of badly managed post-industrial economic transition, heavily neoliberalized statecraft, and supranational technocratism unique to the west European context, the steady sliding of European societies into the dark vortex of reactionary nativism, xenophobia, and right-wing populism is consistently presented as History's grave final warning for the world as a whole: a sign of the impending arrival of the Fascist International. It is not just the 'new Europe' project that has come under threat, but the idea of Progress itself. The implications seem unmistakable. The stakes could not be higher, the danger could not be more obvious. The dividing lines are – and definitely ought to be if they aren't – hardening, and everyone, especially the 'thinking classes', must choose now their side. The days of self-indulgent contrarianism are over.

Everything hangs together now: democracy, human rights, the rule of law, the single market, due process, green economics, free trade, property rights, labour rights, the 'ever closer union'. To save the Enlightenment values of freedom, equality, and justice, we must defend each and all of these ideological monuments of the liberal world order as one single package. To protect human rights, one must defend the single market. To protect the environment, one must strengthen the 'ever closer union'. Tariff wars are a threat to multiculturalism and democracy. Economic nationalism is the gateway to authoritarianism. Fascist nativism always walks hand in hand with trade protectionism. Attacks on international judicial institutions are an assault on the very idea of freedom and the due process of law.

And thus, without any fuss or unnecessary haste, a remarkable feat of grandiose ideological programming is performed right in front of our eyes. A neat sleight-of-hand by any standard of appreciation. Even if it is not very original in terms of its design – its basic formula is closely modelled on that of Roland Barthes's 'Operation Margarine'¹⁷ – it is truly efficient in its execution.

Remember how 'Operation Margarine' works:

¹³ See Riebert (2017).

¹⁴ See Shafak (2019).

¹⁵ See Norris and Inglehart (2019).

¹⁶ See Mounk and Foa (2018).

¹⁷ See Barthes (2000), p. 41.

It is a kind of homeopathy: one cures doubts about the [Established Order] by the very ills of the [Established Order]. One inoculates the public with a contingent evil to prevent or cure an essential one. ... A little 'confessed' evil saves one from acknowledging a lot of hidden evil.

One can trace in advertising a narrative pattern which clearly shows the working of this new vaccine. It is found in the publicity of Astra magazine. The episode always begins with a cry of indignation against margarine: 'A mousse? Made with margarine? Unthinkable!' 'Margarine? Your uncle will be furious!' And then one's eyes are opened, one's conscience becomes more pliable, and margarine is a delicious food, tasty, digestible, economical, useful in all circumstances. The moral at the end is well known: 'Here you are, rid of a prejudice which cost you dearly!'

It is in the same way that the Established Order relieves you of your progressive prejudices. The Army and absolute values? It is unthinkable: look at its vexations, its strictness, [the] blindness of its chiefs. The Church, infallible? Alas, it is very doubtful: look at its bigots, its powerless priests, its murderous conformism. And then 'common sense' makes its reckoning: *what is this trifling dross of Order, compared with its advantages?* ... What does it matter, after all, if margarine is just fat, when it goes further than butter, and costs less? *What does it matter, after all, if Order is a little brutal or a little blind, when it allows us to live cheaply?*¹⁸

The narrative of ideological hysteria follows the same broad pattern. This project of the 'new Europe', it tells us – its underlying political economy, its institutional architecture and self-serving bureaucratic elites – is certainly not beyond reproach. It has many faults and shortcomings, no doubt. But now is not really the time to get too loud criticizing it: just look at who is waiting in the wings, whom you will be aiding and abetting if you press on with undermining the legitimacy of the 'new Europe'. Would it not be preferable if all the progressive forces united and closed their ranks, at least temporarily, until they defeated the common enemy? (What does it matter, after all, if the rule by direct effect is not exactly a paragon of democracy and the institutional mechanics of Schengen is compatible with so much brutality towards the refugees crossing the Mediterranean – what does it matter, 'when it allows us to live cheaply?')

The sub-surface messaging seems as remarkable for its simplicity as for its cynical opportunism. As the very notion of rejecting the established status quo is made de facto synonymous with supporting the forces of the far right, *classical liberal ideals* such as equality, workers' rights, and due process are surreptitiously lumped together with a whole host of *neoliberal governance structures*, from the Schengen common travel area to the Stability and Growth Pact, so that the long-established ideological credentials of the former can help cross-subsidize the legitimacy deficits of the latter. As the differences between the two orders of phenomena are thus repeatedly flattened out and erased, *the act of defending the political economy of the European integration project* somehow inevitably becomes the *practical stand-in for the broader programme of 'fighting fascism', 'resisting autocracy', and 'stopping xenophobia'*.

The results are unmistakable. On the one hand, the criticism of any one aspect of the established European political order can now be effortlessly deflected by pointing towards the unquestionable anti-parochialism of its institutions and their animating ethos. On the other hand, any legitimacy deficits perceived in its underlying political economy can as easily now be

¹⁸ See Barthes (2000), p. 41-42

cross-subsidized by the formulaic invocation of its lofty commitments to the values of human rights, justice, equality, and solidarity. The creation of a fake monolith aesthetics – the notion that one can enjoy the ‘good’ parts of the new Europe project only if one accepts the existing ‘package’ in its entirety – helps induce an enduring sense of loyalty that appears to be at the same time perfectly cynical and entirely effective.¹⁹

In an intellectual framework where a vocal opposition to the ideology of liberal globalisation can only come from the forces of the far right, the centre-right longer needs to fear any challenges from the left, since it now carries the brief for the very idea of Freedom itself: to fail to march in defence of the ever-closer union is to mark oneself as an enemy of history and progress. As the moral hysteria fuelled by this pseudo-Manichaeic worldview transforms itself into a stark Us vs. Them-style mentality, the ideological toll on the scholarly communities engaged in the discussion of the related issues inevitably grows. It takes an increasing measure of boldness and recklessness to attempt to break free from the terms of the dominant discourse by insisting on one’s *right not to accept the fake monolith narrative*. And yet it is precisely this right that so many generations of legal scholars before us have fought so hard to secure.

The process of lucid legal thought always starts with an act of resistance: a commitment to bracketing out of moral panics and the rejection of lazy generalities. There may not be such a thing as the royal road to truth, but the advancement of knowledge, in law, (still) always begins with the unqualified insistence on the right to scepticism and the duty of analytical clarity.

The acceptance of fake monoliths is a bad habit in any line of scholarly inquiry, all the more so in the field of international law. The culture of intellectual hysteria induced in the European public discourse by the rise of far-right populist forces and their declared aversion towards various international structures should not be allowed to cloud our sense of judgement as to the self-evident automaticity, let alone structural irreversibility, of the apparent causal connection between them. As we transition from the plane of political journalism and think-tank spin narratives into that of critically conscious legal analysis, the first question we should be asking is not how much of our loyalty the established liberal world order and its class structures deserve now they have come under such a sustained attack, but what exactly the economic, political, and historical legitimacy of this order is otherwise and what exactly, therefore, we may be missing the opportunity to challenge and discuss if we agree, out of panic and fear, not to raise this sort of questions anymore.

The end of the European liberal model and its ‘social market economy’, like that of new finance capitalism, may or may not be coming soon, and it may or may not be coming at the hands of right-wing populism. But even if it is happening, it certainly does not mean that as international law scholars we should now automatically join in idealizing it and romanticizing its brutal and cynical realities. Lest the intellectual status of our discipline is thus irreversibly compromised, neither the established European order, nor the broader liberal globalist paradigm of which it has become such a prominent representation, should be getting any kind of hall pass in the space of our critical reflections.

2. Between the Threat and the Promise: The Opening of the Intellectual Horizons and the Inevitability of the Historical Turn

¹⁹ See Sloterdijk (1987), pp.3-8.

The greatest lucidity in theoretical thought, as Hegel has argued, comes usually after the respective historical period has reached its logical endpoint and the dominant worldview of the epoch can no longer stifle the spirit of critical inquiry.²⁰ No moment can be as rewarding – but also fraught with peril – for the critical mind as that which comes at the end of an era.

The Established Order's attempt to induce loyalty by cultivating a politics of 'enlightened false consciousness'²¹ is not an accident. It is a sign of a certain kind of historical transformation. The push for the consolidation of fake monolith-style theoretical aesthetics in the plane of public discourse today is proceeding so fiercely precisely because in the plane of sustained scholarly inquiry this cause, to a large extent, has long been lost.

Across an ever-broadening range of disciplinary fields, the terms of intellectual debate no longer seem accountable to the ideological needs and demands of the post-Cold War liberal international order. Though hardly linear in its progression, this trend of theoretical loosening of the established paradigm has certainly reached the field of international legal studies. Old barriers that for nearly a century had international legal thought corralled in the narrow quarters of the voluntarist positivist tradition have been progressively disintegrating over the course of the last thirty years.²² Where previously one would have found only a handful of stale ideas repeated mechanically from one context to another, dozens of new approaches and theories have now emerged, blossoming boldly, dazzling the incredulous onlooker with their bright, fresh colours. Having first arisen in other fields of international legal studies, this culture of intellectual pluralism in recent years has also arrived on the shores of international economic law (IEL). From analytical Marxism to Polanyian institutionalism, from postcolonial criticism to empirical jurisprudence, global value chain analysis to Foucauldian historiography, countless new schools and sources of inspiration are now forcing their entry into IEL studies.²³

How should one react to this trend? It is a popular convention of liberal historicism to approach such kind of developments with a certain sense of enthusiasm. After all, what could be more deserving of approval and celebration than the long overdue opening of intellectual horizons? The dissolution of a stale orthodoxy is the archetypal example of what in the liberal worldview would count as a moment of emancipation and redemption. The most elementary logic of liberal dramaturgy makes it inevitable that the only admissible reaction to such a process should be one of excitement and enthusiasm. But, as Eric Hobsbawm reminds us, the demands of drama and reality rarely are the same.²⁴ Not everything that happens following the dissolution of an orthodoxy or the fall of a dogma will be experienced by the respective community as an unquestionable good.

For every scholar, living at the end of an era inevitably comes at a price. The loosening of the disciplinary canon can bring intellectual exhilaration. But it can also be highly disorientating. The awakening of the critical spirit which the weakening of the orthodoxy invites often brings in its wake an ethics of relentless iconoclasm, a culture that valorises intellectual contrarianism and insists on challenging every established idea, every received wisdom, every common assumption as a matter of principle. But as the process of questioning accelerates and spreads, the programme of ruthless self-reflection can easily morph into an ideology of radical doubt, and in

²⁰ See Hegel (2008), p. 85 (89).

²¹ See Sloterdijk (1987), p. 5.

²² For further background, see Rasulov (2012), p. 151.

²³ For further discussion, see Haskell and Rasulov (2018), p. 243. An important element of this process of theoretical opening is reflected in the fact that a growing body of scholarship about IEL is now produced by non-lawyers and scholars whose primary disciplinary training is in another field. See, e.g., Slobodian (2018); Moudud (2018), p. 289.

²⁴ See Hobsbawm (1997), p. 354.

the field of academic knowledge-production doubting everything can be a very expensive luxury. If a community of scholars starts doubting every belief and assumption it has inherited from its predecessors, how far will it be able to get on in formulating its own research agenda?

How much will it slow us down in terms of our ability to advanced our inquiries, to reason and communicate with one another, to test hypotheses and formulate conclusions if we can no longer take for granted any of the shared frames of reference that passed on to us from our disciplinary predecessors? If we can no longer rely on any previously established truth tests, how confident can we be in our ability to distinguish knowledge from delusion, reality from fantasy, sense from non-sense, valuable insight and sound policy from raw prejudice? When old certainties no longer apply, one always runs the risk of discovering that far too many new truths seem to be correct all at once.²⁵ Confusion, cacophony, disorientation, deafening white noise, the inevitability of having to put up with countless potential charlatans and impostors – the theoretical and psychological price of living through a period of rapidly cascading paradigm breakdowns is certainly not insignificant.

One way in which international law scholars have been able to deal with this sort of challenges in recent times has been by executing what has come to be known as the ‘turn to history’. The more confused, disorientated, and anxious about its traditional truths, values, and assumptions the given sub-field or segment of the international legal discipline would become, the more its members have tended to turn their attention to the study of its past.²⁶

Though it may seem otherwise at the first glance, there is nothing simple or trivial about this particular theoretical strategy, of course. The kind of history which international lawyers have tended to write differs very significantly from the kind of history that is typically produced by professional historians. The scale of the differences not infrequently has led to conflict: the latter typically disparage the former as arrogant impostors who lack even the basic grasp of the ‘historical method’, the former in turn frequently dismiss the latter for being legal fetishists who have no clue what the law really is and how the legal universe actually works.²⁷ Which side one chooses to support in this struggle, in the end, is probably irrelevant. Though it can have the most immediate implications for one’s career prospects, in the more abstract sense, neither side can really win. In the postmodern age, there can be no winners or losers in the battle for the ‘truth’. No single way of interacting with the past can any more be considered superior. Every discipline gets the ‘method’ it deserves. Neither the lawyers, nor the historians get to have the final say over how the enterprise of international legal historiography ought to be constructed. ‘Lawyers’ legal history’ has as much of a right to our attention as the legal history produced by trained historians.²⁸

What is more, even within each disciplinary field, it seems impossible now to find any grounds on which to establish a system of theoretical hierarchy: every school and tradition – the positivists as much as the crits, the reactionaries as much as the progressives, the postcolonials as much as the liberals – has as much of a right to develop its own sense of historiography and its own culture of history-writing as its rivals and competitors. In this, international law hardly seems all that different from academic history. What does separate the two fields, however, are the practical consequences that attach to this regime of methodological relativism. Unlike in academic history, in international law the rise of this culture of epistemological entitlement to date has almost invariably resulted in the strategic deployment of history (as a genre of scholarly

²⁵ See Ball (2007), p. 7.

²⁶ See Lesaffer (2007), p. 27 (29).

²⁷ For further discussion, see Vadi (2017), p. 311; Koskenniemi (2013), p. 215; Lesaffer (2007), p. 27.

²⁸ Not all historians disagree with this view, of course. See, for example, Kalman (1997), p. 87 (114-117).

inquiry) for the purpose of *intra-disciplinary ideological programming*, that is to say, for the production of ‘coded’ rhetorical interventions aimed for the most part at overcoming the loss of whatever sense of normative certainty the international legal discipline may have previously had or seemed to work towards acquiring.

History as the continuation of ideology by other means: there is a certain parallel here with Grant Gilmore’s portrayal of the first wave of historical turns in modern legal academia, the one that, as he saw it, began in the late 1950s, roughly around the same time that the ‘age of anxiety’ started reaching its apogee. ‘During periods of apparent social dissolution’, writes Gilmore, ‘the traditionalists, the true believers, the defenders of the status quo, turn to the past with an interest quite as obsessive as that of the radicals, the reformers, and the revolutionaries.’²⁹ But while both mostly look to history only in the ‘attempt to find out what went wrong’, the former mostly just want to ‘pro[ve] that, once upon a time, things were as we should like them to be’, ‘[t]heir message is: turn back and all will be well’, while the latter are mainly preoccupied with finding something that would equip them better for their upcoming struggles, an insight that ‘may help us cope with our obscure past [as well as our] unknown future’.³⁰

Not every generation develops the same structure of disciplinary politics. The world of American legal thought of the early 1970s that Gilmore wrote about is far removed from the world of international legal scholarship of the late 2010s. And yet one can certainly make out a pattern very similar to the one Gilmore traced forming across different fields of international legal scholarship today: from international humanitarian law³¹ and the law of international human rights³² to the law of treaties³³ and the law of international organisations³⁴ and tribunals.³⁵ The recent explosion of interest in the history of IEL and the variety of competing IEL histories this explosion has produced,³⁶ in this context, only goes to show how far the field of IEL scholarship has now been integrated into the wider complex of the contemporary international law discourse.

History-as-the-continuation-of-ideology and the turn-to-history-as-an-extension-of-intra-disciplinary-politics offer a very powerful analytical framework through which to approach the question of historical turns. But it is certainly not the only interpretative hypothesis one can propose in this context. Like every historical event, the turn to history in modern international law can be given more than one possible explanation. Rather than focusing on the internal condition of the discipline, a different way of understanding its appearance, for example, would be to view it as a slightly delayed symptom of the radical cultural disenchantment suffered by the transnational ideological intelligentsias in the aftermath of the end of the Cold War. The increasing awareness of the wholesale break towards the past that had been effected at the level of world-historic processes, on this reading of things, would have triggered a corresponding sense of general cultural disorientation and thus a greater opening at the level of common theoretical practices and the associated protocols of disciplinary knowledge-production. The emergence of a considerable body of writing dedicated to questions of international legal history, in this context, would only be a natural consequence of this process. Looking from this perspective,³⁷ it would be the inevitable breakdown of the early post-Cold-War liberal-modernist

²⁹ Gilmore (1977), p. 102.

³⁰ Ibid.

³¹ See, e.g., Mantilla (2017), p. 483; Alexander (2015), p. 109; Megret (2006), p. 265.

³² See, e.g., Martinez (2012); Moyn (2010).

³³ See, e.g., Bowman and Kritsiotis (2018); Craven (2007).

³⁴ See, e.g., Sinclair (2018), p. 841; Van Den Meersche (2018), p. 168.

³⁵ See, e.g., Fitzmaurice and Tams (2013).

³⁶ See, among others, St John (2018); Howse (2016), p. 9; Miles (2013); Clavin (2013); Lang (2011).

³⁷ See Koskeniemi (2004), p. 61.

culture built around the narratives of universal cosmopolitanism and uninterrupted historical progress that ultimately compelled the new generation of international legal scholars to *have* to start thinking, writing, and speaking in ways that were fundamentally different from those of their predecessors. It would be that event also which would have put on them the pressure to execute the turn to history and to start trying to find out more about their discipline's roots and origins. For, if the course of human history can no longer be assumed to proceed along a single uninterrupted line leading steadily from savagery to civilization, prejudice to reason, conflict to cooperation, nationalism to cosmopolitanism – then what *else* might the discipline have got wrong about its past?

3. New Voices, New Perspectives

As important as historically oriented modes of inquiry have become in recent years, the idea of the historical turn certainly does not exhaust the full potential of what theoretical heterodoxy can become, especially not in contemporary IEL. A powerful counterbalancing tendency has started to develop in recent years across different segments of IEL scholarship. Driven less by the desire to reclaim IEL's hidden legacies and forgotten origins than by the hope of uncovering its current complexities and mapping out its future potentialities, what lies at its core are the *questions of critical imagination and alternative futures*. What shape, what content, what kind of political orientation should the IEL regime and its institutional basis be given? As the old frameworks give way to new structures, what sort of new questions, concerns, and interdisciplinary influences should be brought to the table in IEL scholarship?

The essays collected in this volume speak, with various degrees of directness, to both of these tendencies: the historical turn as well as the new programmatic-thought project. Each of them, in a certain sense, can be understood as a product of both of these genres of inquiry. Intellectually, this volume finds its origins in a series of conversations that had first started in the summer of 2009, at the Brown International Advanced Research Institute (BIARI), in Providence, Rhode Island, and continued subsequently, with brief intermissions, across different countries, conference settings, and joint writing projects. The institutional circuit across which these conversations have travelled at different times has included the Harvard Institute of Global Law and Policy (IGLP), the University of Glasgow, Manchester University, and the University of Durham. Each of these settings and the encounters that took place in them and on their margins has left its impact on the volume. There is a large contingent of IGLP alumni among the volume's contributors, and both the Glasgow and the Durham clusters have left a visible trace on this project's composition as well. Of the 11 contributing authors, three – Konstantina Tzouvala, Nicolas Perrone, and John Haskell – at various points have studied or taught at Durham; another three – Athene Richford, Alexandre Belle, and Akbar Rasulov – have taught or studied at Glasgow; five – Michael Fakhri, Tzouvala, Perrone, Haskell, and Rasulov – are IGLP alumni; three – Fakhri, Haskell, and Rasulov – have also been part of the BIARI programme.

Every collective project, ultimately, can be seen as a product of its participants' personal ambitions and aspirations. But it is also a reflection of their respective life trajectories. The scholars included in this volume come from a wide variety of national, educational, ideological, and theoretical backgrounds. This is not just a group of European and North American academics, interdisciplinarian legal historians, or Harvard-trained postmodernists setting out to deliver the 'crit' take on IEL. What the reader will find in these pages, rather, is a collective enterprise that is a lot more ambitious and complex than any of these concepts. Our national backgrounds span Greece, Canada, Colombia, Lebanon, Benin, the UK, Turkey, Belgium, the

US, and Uzbekistan. Our theoretical affiliations and disciplinary sensibilities include institutional economics, doctrinal positivism, empirical legal studies, Marxism, modern money theory, legal realism, postcolonial historiography, and discourse theory. Some of us have been educated in Western Europe and the United States, others received their academic and professional training primarily in the Global South. Some of us have studied mostly under traditional, black-letter-law teachers, others under the leading 'crit' scholars. Some of us have received all their training in law, others also hold degrees in fields as far removed from law as biology and anthropology. All of us, in different ways, have been involved in academia, yet many of us also draw on our experience in the worlds of practice, activism, and policy consultancy across numerous different contexts and jurisdictions.

There is not a single mould that all of us can be easily fitted into, and that, in a certain sense, is also an integral part of this project's basic design and methodological wager. When the old truths no longer ring true and the new truths have not yet established themselves, more than one vision deserves to be explored, more than one theory deserves to be tried out.

4. IEL's Impact on the Global Economic Arena: International Law and the Production of Global Governance

How do the different essays collected in these pages relate to one another and to the wider field of contemporary IEL scholarship? One way to go about answering this question would be by drawing on the idea of *legal studies as the study of regulatory effectivities*.

When we say that IEL regulates a certain issue or subject, what exactly do we have in mind by that? What are the actual functions that IEL performs from the standpoint of its relationship with global governance? The answers given to these questions in the critical legal tradition can generally be divided into four parts.³⁸ To understand better the underlying objectives and theoretical aspirations of the nine essays that follow, it may be useful to review each of them. But, first, what exactly should one understand by the concept of regulatory effectivity?

4.1. The theory of Regulatory Effectivity: A Functionalist Recalibration of IEL's Disciplinary Ambit

The general idea here, to a large extent, can be seen as an extension of the broader tradition of Law-and-Society.³⁹ The theory behind it has two main parts. The first part focuses on the concept of the *regulatory effect* defined broadly as that state of affairs which occurs in the respective segment of the socio-economic intercourse – in this case, what one might call international economic relations (IER) – as a result of it being subjected to sustained normative and institutional ordering. The idea that the process of ordering is supposed to be 'sustained' signals here the notion that the orderly pattern which thus emerges is meant to be both effective and relatively lasting. What we are looking at is a continuous process, not a one-off momentary act. The second part of the theory is a direct corollary of the first: the task of IEL as a field of

³⁸ For further discussion, see Rasulov (2008), p. 243 (290-4).

³⁹ For a general background to the Law-and-Society tradition, see Feenan (2013); Cotterrell (2002), p. 632.

study is to study everything that contributes to this ‘process of ordering’, i.e. to the achievement of the regulatory effect in the field of IER.⁴⁰

Note the two soft spots in the proposed definition: (i) what constitutes ‘effective’ ordering, ultimately, is always a matter of empirical judgement, i.e. a product of *some* kind of *social* convention; and (ii) what counts as the field of IER is left here essentially undefined – once again, at least at the initial stage of the inquiry, one will have to do here with some kind of social convention, rather than a deductively established mental construct.⁴¹ A different way of putting this would be to say that, compared to, say, legal formalism or voluntarist positivism, the basic methodology implied under this model of inquiry cannot be considered ‘scientifically rigorous’. Its theoretical matrix, in other words, does not have the same degree of analytical clarity or formal self-sufficiency that one would typically expect from a *scientifically-inclined investigative project*.

In most of modern sciences, as the French philosopher Louis Althusser remarks, one of the main ‘constitutional rules’ of knowledge-production is the idea of self-validating theoretical protocols:

sciences ... have no need for verification from [any] *external* practices to declare the knowledges they produce to be ‘true’ ... No mathematician in the world waits until physics has *verified* a theorem to declare it proved ...: the truth of his theorem is a hundred per cent provided by criteria purely *internal* to the practice of mathematical proof, ... i.e. by the forms required by existing mathematical scientificity.⁴²

By contrast, the whole of the Law-and-Society tradition is premised rather explicitly on a distinctly open-ended approach to the verification of knowledge: the truth and falsehood of all our ideas about the law – the right and wrong in legal policy, the correct and incorrect in legal reform – can only be assessed in reference to criteria *outside* the immediate plane of the legal doctrine and institutions.

One way of grasping the implications this fact has had on the development of the Law-and-Society methodology would be to recall the argument proposed by some of its earliest and most effective expositors, the so-called legal realists. Epistemologically, the most important difference between legal formalism and legal realism, the realists argued, lies in the fact that the latter by and large subscribes to a *functionalist epistemology*. When law’s internal story of itself can no longer be taken at its face value, went the argument, the only way in which we could stabilise our frame of reference when studying legal events, discourses, and concepts would be to anchor it in some form of functional evaluation: the ‘true reality’ of every investigated object can be judged from the way it functions in the given respective context. ‘A thing is what it does’.⁴³ The meaning of any given legal construct can be ascertained in the light of its practical consequences. A court is a standing institution that settles disputes by means of judgments, while following strictly defined procedures and observing precedent: whatever its official designation may be otherwise, if an institution meets these criteria, it is a court.⁴⁴ A legal right is an entitlement enforceable by an

⁴⁰ One can also think of this way of approaching the study of IEL as an extension of a much older socio-legal tradition, the so-called ‘social control theory’. See Gurvitch (1942), pp. 23-30.

⁴¹ Word like ‘empirical’ and ‘conventional’ do a lot of work here. One person’s ‘conventional judgment’, of course, is another person’s ‘entirely arbitrary opinion’. Logically, it has to be accepted, there is not much we can do about that. No amount of analytical rigour or theoretical precision can protect us against the fundamental arbitrariness of our starting definitions. The most we can do is acknowledge this fact and accept its implications pragmatically.

⁴² Althusser (1970), p. 11 (59) (emphasis in the original).

⁴³ See Cohen (1935), p. 809 (826).

⁴⁴ See Arnold (1932), p. 617 (624-631).

effective remedy: a right that cannot be vindicated in the case of its breach is not a real right.⁴⁵ A legal duty is a social encumbrance the observance of which is backed up by an effective penalty: a duty the non-performance of which does not attract any sanctions for the duty-bearer is not a real duty.⁴⁶ A penalty is whatever causes disagreeable material consequences: any legal measure that results in the material deterioration of a subject's purchasing power, regardless of whether or not its imposition was officially justified in reference to some kind of transgression or moral shortcoming on the part of the said subject, is tantamount to a legal sanction: subjection to a tax or a no-fault duty to compensate can produce the exact same 'experience of punishment' as subjection to a criminal fine, exposure to civil liability, or the extinguishment of the legal capacity to alienate.⁴⁷

Taking cue from the realist demystification of the standard doctrinal categories, the basic starting assumption of the theory of regulatory effectivity can, thus, be defined as a form of *conceptual functionalism*. The meaning of every concept – including that of law – has to be sought in the basic social consequences associated with it. The main social consequence which is traditionally associated with the idea of 'lawness' in modern usage is the ability of the given system of normative and institutional structures to induce a state of *regulation* within the given segment of the social intercourse.⁴⁸

Proceeding from this angle, it does not then very much matter whether or not those particular normative and institutional structures one is looking at would meet the standard legal positivist or formalist criteria. What matters is whether the practical consequences which these structures give rise to, empirically, include the production of regulatory effect in the respective segment one is interested in understanding. It does not matter which particular structures, mechanisms, or regimes are being put to work: so long as the state of regulatory effect is being created, that is all that matters.

Put in these terms, the general theoretical framework underpinning the concept of regulatory effectivity, one might say, is starting to look very similar to Legal Pluralism.⁴⁹ Be that as it may, this fact, ultimately, is neither here nor there. Appeals to abstract labels can never resolve a concrete case. On some basic level, every international lawyer, even Hans Kelsen, could be described as a legal pluralist.⁵⁰ One would need to say a lot more about the theory of regulatory effectivity than just that it is a species of legal pluralism to explain its full methodological implications. So, with a view to clarifying precisely this issue, let us note now the following three points: (1) To suggest that we should approach the study of IEL by studying the patterns of its regulatory effectivity is to argue, first of all, that we must start our inquiry into IEL by *mapping out* all the different ways and mechanisms through which a state of regulatory effect, i.e. a condition of sustained, effective, and orderly patterning, can be created in the field of IER, through the use of normative and institutional structures and materials. (2) A different way of putting this would be to say that all those *normative and institutional structures and materials* (the studies object) which *empirically* (the question of intellectual orientation) have been shown to *trigger or contribute* (the extent of causality) to the production of the state of *international economic regulation* (the investigated consequence) should, ultimately, deserve our attention as IEL scholars. (3) Note the

⁴⁵ See, e.g., Llewellyn (1930), pp. 82-83.

⁴⁶ See, e.g., Holmes (1897), p. 457 (458); Corbin (1924), p. 501 (515-6).

⁴⁷ See, e.g., Hale (1935), p. 149 (159-163, 168-170, 176-179).

⁴⁸ Cf. Timasheff (1939), p. 23-24: 'Law is a social force. Its social function is that of imposing norms of conduct or patterns of social behaviour on the individual will, and the aim of jurisprudence is to study these norms.'

⁴⁹ On legal pluralism, see, generally, Merry (1988), p. 869; Tamanaha (2000), p. 296.

⁵⁰ See, generally, Kelsen (1953) p. 1 (13-32) (acknowledging the simultaneous co-existence of multiple species of legal orders, with international law identified as a 'primitive legal system' and national legal orders as 'more developed' legal systems).

qualification that attaches to the word ‘empirically’ here. The reference to the need for an empirical determination of the proposed causal linkages between the studied objects and the investigated consequence should not be read as an advocacy of the so-called ‘empiricist approach’ to legal studies or an endorsement of what in recent years has come to be known as the ‘empirical turn in international law scholarship’.⁵¹ Its aspiration to popularise the idea of empirical legal studies aside, the vast majority of this body of scholarship to date has shown itself to be as backward-looking and formalist in its construction of international law’s normative and institutional materials as the voluntarist positivism of the yesteryear and thus has nothing of value to contribute to the functionalist investigation of IEL’s regulatory effectivity.

To study all normative and institutional structures that help induce and maintain a state of regulation in the international political economy – stated in such terms, the main theoretical task of IEL as a field of disciplinary inquiry acquires a rather different philosophical complexion from anything that one would usually encounter in mainstream IEL textbooks.⁵² In the first place, there is, of course, the obvious epistemological change in the structure of the disciplinary enterprise. In the second place, there is also the radical change in the ontological status of the investigated real-world phenomenon.

What does IEL as a real-world phenomenon today look like from the standpoint of a functionalist theoretical orientation? As a variety of recent studies seem to indicate, in the present historical conjuncture, the state of regulatory effect in IER tends to be achieved and sustained as much through the mobilisation of institutionally-centralised, formal normative programming dynamics as through the use of institutionally diffuse, informal processes of spontaneous norm-convergence; as much through the conclusion of international treaties as through the establishment of transnational certification programmes; as much through the work of supranational judicial bodies as through the imposition of lending conditionalities; ‘hard law’ instruments as much as ‘soft governance’ mechanisms; centralised top-down systems coordinated by international intergovernmental organizations (IGOs) as much as ‘transnational private regulation’ and the implementational practices of national bureaucracies.⁵³ What is more, as an increasing body of evidence suggests, over the last half-century it has, in fact, been precisely the latter bunch – the ostensibly ‘soft’, informal mechanisms of coordination, harmonization, and convergence – that have done most of the heavy-lifting in terms of supplying the project of international economic governance with its most significant breakthrough opportunities.⁵⁴ As Errol Meidinger shows, for example, one only needs to take the briefest look at a field such as international forestry regulation to see the full scale of this process of continuous displacement of traditional IGO-driven models of international governance by new hybrid regulatory mechanisms that eclectically combine various elements of industry self-certification and civil society monitoring.⁵⁵ Both the former and the latter seem to place the exact same kind of emphasis on the idea of *producing governance through rules*, notes Meidinger. But where the former, by and large, seems to have failed to deliver any meaningful regulatory impact, the latter has proved itself a remarkable success.⁵⁶

And yet old habits die hard. Whenever international lawyers come together and start thinking about international law and its role in the *production of governance* – i.e. the processes of regulating,

⁵¹ See Shaffer and Ginsburg (2012), p. 1; Franck (2008), p. 767.

⁵² See, e.g., Ascensio (2018); Lowenfeld (2008).

⁵³ For further background on the studies of transnational private regulation and related topics, see Scott et al (2011), p.1. On the importance of studying the implementational practices of national bureaucracies, see also Greer and Martín de Almagro Iniesta (2014), p. 361.

⁵⁴ See Tarullo (1999), p. 105 (108-9).

⁵⁵ See Meidinger (2007), p. 121 (122-6).

⁵⁶ Ibid., p. 122-3.

bringing order, directing the course of international political and economic relations – the first thing that typically comes to their mind has nothing to do with these functionalist, quasi-sociological images of institutionally diffuse, hybrid, rhizomatic processes. It is the classical Austinian idea of enforceable formal permissions and prohibitions that dominates their collective theoretical consciousness. Above and beyond everything else, in the common imaginary of the international legal profession, the concept of law is still very much understood in terms of its *licensing and price-setting mechanics*. And it is with this idea, therefore, that the theory of IEL's regulatory effectivity, if only for reasons of intra-disciplinary cultural politics, ought to start.

4.2. IEL as a Price-Setting Mechanism

Every legal regime can essentially be understood as a mechanism of social price-setting:⁵⁷ this is a classical law-and-economics insight, though in its main contours it can be traced all the way back to Oliver Wendell Holmes and his Austinian-style command theory of law and the resultant idea of the 'bad man's view of the law'.⁵⁸

The concept of law as a price-setting mechanisms implies a certain set of deeper theoretical presumptions. In a nutshell, law frames and directs the course of social events, but, ontologically, it remains external to them, just like prices, being numerical manifestations of the exchange-value, remain at all times ontologically distinct from the respective commodities that are traded in the market. When the legal system decides to suppress or curtail a certain act or type of conduct – e.g. trespassing on other people's property or breaking a contractual promise – it imposes on the respective class of legal subjects a *compulsory charge* that they will have to pay if they intend to engage in that type of activity. Those who cannot afford the cost of this charge will cease engaging in that kind of conduct. Those who can, may continue. Even then, however, most of them will still likely try to decrease the volume and frequency of the respective activities: deterrence, fundamentally, is a relative phenomenon – it tends to affect even those whom it does not stop completely.⁵⁹ The stricter the intended prohibition, the heavier, in principle, ought to be the corresponding penalty that the legal system should attach to the respective conduct. The heavier the penalty and the more likely its enforcement in practice, the heavier will be the 'price burden' imposed on the given community of actors. Since the pricing mechanism works according to the law of supply and demand, the heavier is the price burden imposed on a certain type of activity, the more powerful will be the prohibitive effect produced by that particular part of the legal regime.⁶⁰

If higher prices result in lower activity, lower prices ideally should lead to higher activity. To induce an 'expansion' in a given type of social activity or to encourage more subjects to take it up, the legal system can ease the price burden imposed on the respective community of actors either by eliminating all penalties attaching to a particular act or kind of conduct or by guaranteeing a legal reward for engaging in it. One of the most common ways to achieve the latter objective is by assigning the respective category of legal subjects additional *rights* and by backing these rights with practically effective *remedies*. If prohibitions, duties, and liabilities are the functional equivalent of government-charged prices; permissions, rights, and remedies are the equivalent of government subsidies. When the legal system grants us protection against the

⁵⁷ See further Mercuro and Medema (1997), p. 21-24.

⁵⁸ See Holmes (1897), p. 457 (459-61).

⁵⁹ This is a very old insight, even among international lawyers. For a classical illustration of this kind of argument in an international law context, see Henkin (1971), p. 544 (544).

⁶⁰ See further Hale (1935), p. 149.

conduct of others, it essentially signals to us its willingness to subsidize our expenses in what concerns (i) taking the necessary precautions to ensure that the particular conduct in question never takes place; and (ii) fighting the negative consequences of that conduct when that conduct does actually take place. Note the distinction between the two scenarios. In the first case, the law makes it easier for us to deal with the situation *ex ante*. On the one hand – because what constitutes a protection given to us also works as a prohibition issued to others – the law’s engagement with our situation in this way lowers the likelihood of what for us would be an undesirable turn of events, by incentivizing our legally defined counterparts to help us prevent those events from occurring. On the other hand, the law’s engagement with our situation in this way also relieves the price burden imposed on us in our ordinary course of business, since now we no longer will need to do as much as we otherwise might have had to, in order to prevent the deleterious events in question from occurring so as to ensure the protection of our interests. Metaphorically, one might say, every time the legal system grants us enforceable rights, it is as if the law had agreed to cover our *insurance costs* against a certain turn of events while also taking care of all the related administrative costs, so that we would not need to get distracted and could focus instead on what is important to us otherwise.

In the second case, by contrast, the law’s subsidizing effect operates primarily in the *ex post* dimension. What the legal system basically does for us here is it issues us with a promise that we would not be left alone if the kind of events it promised it would protect us against do, in fact, take place. Again, the insurance metaphor can be very helpful here: when the insured-against conduct of others does eventually take place, the legal system, by virtue of granting us appropriately calibrated rights and a system of remedies to enforce them, will provide us with the necessary means to acquire the *appropriate compensation* it promised it would give us.

Looking from this angle, what lies at the source of IEL’s regulatory effectivity according to this understanding – the primary reason why IEL is so useful in the production of governance – comes down, ultimately, to the fact that every legal regime operates, essentially, as a system of licensing, pricing, and subsidisation of politically and economically relevant conduct, that is actualised through the instrumentality of rules and the accompanying institutional forms and processes.⁶¹ Or, to put it slightly differently, the reason why we ought to study legal rules is that by doing so we can find out all the respective prices and subsidies that will apply in each specific context in that sub-field of IER that interests us. The reason why we study the corresponding institutional forms and processes, accordingly, is in order to find out how these prices and subsidies are likely going to be charged and paid out in practice by the respective communities of legal subjects.

Rules create rights and duties. Institutions provide remedies and ensure the realisation of liabilities. Bring these two ideas together and what emerges is the basic theory of *IEL as a mechanism of IER pricing* where the process of governance is essentially equated with the idea of regulating the global marketplace of IER-relevant activity. By assigning rights and duties and distributing remedies and liabilities, IEL influences the relative costliness of different IER-relevant activities and types of behaviour. Presuming the respective community of legal subjects tends to respond to these price-manipulations in a more or less rational manner, across a sufficiently long timescale this enables IEL to change the relative prevalence of the various

⁶¹ And vice versa: every regime that puts in place a system of licensing, pricing, and subsidisation of politically and economically relevant conduct, from the functionalist point of view, deserves the attention of legal scholars. Every regime that puts in place such a system in the context of the international political economy deserves the attention of IEL scholars.

forms and patterns of conduct and thus reshape the structure and substance of the international political economy.⁶²

4.3. IEL as a Mechanism for the Structuring of Opportunities

As legal realists have taught us, side by side with its ability to increase or lower the relative costs associated with particular types of conduct, the legal system can also shape its subjects' conduct by *changing the structure of their strategic alternatives*, that is to say, by delimiting the number of 'alternative life situations' they can explore if they decide they do not like the one they are stuck in at the moment. For example, when the law made it difficult for women to inherit their parents' property or to obtain well-paid employment, it increased the pressure on them to marry while also limiting their ability to divorce their husbands. When the laws on inheritance and employment discrimination changed, life outside marriage became a much more economically realistic proposition for a greater number of women. By limiting or expanding the range of 'exit opportunities' made available to us under the given scenario, the law can, thus, induce us to 'move' our lives in different directions and to adopt different trajectories of life choices.

The difference between the price-setting and the opportunity-structuring functions may not seem very obvious at first, but, essentially, it all comes down to the following point: in the first case, the legal system seeks to influence what sort of conduct the given legal subject is likely going to resort to when they find themselves entering a certain social relationship – what sort of things they may do to other people inhabiting that social context. A good illustration here would be the legal regime that governs the conduct of employment disputes: by regulating what sort of activities the parties to an employment dispute may engage in – strikes, picketing, blacklisting, summary dismissal, sabotage, etc. – and under what procedural and institutional conditions – balloting, non-violent action, police presence, criminal prosecution, etc. – the law can influence how the employers and the workers are likely going to act towards another one when bargaining over wages. In the second case, by contrast, rather than addressing what each of the parties can actually do to the other parties under the given social scenario, the legal system 'enters the conversation' by influencing the relative availability and desirability of alternative social opportunities (exit opportunities) each of the parties would be able to pursue if it decides that its prospects under the current scenario are not sufficiently satisfactory and it does not like the idea of escalating the conflict.⁶³ Going back to the employment dispute example, though it may seem on the face of it that it is only that part of the legal system which actually addresses the conduct of labour relations that directly influences the relationship between workers and their employers, in fact, many other segments of the legal regime can also exert a very significant impact: from substantive criminal law and the law of delict (which can become especially relevant in cases of sabotage action, lying-in, and worker occupation) to the rules and institutions which affect the relative likelihood and plausibility of switching employers or finding an alternative course of employment (this would cover laws relating to the enforceability of non-compete clauses and the stringency of professional licensing requirements in the so-called regulated professions), to the rules and institutions that affect the relative dangers and risks of going self-employed or abandoning any form of employment altogether (this would include laws and regimes regulating access to unemployment and housing benefits as well as healthcare). And, of course, as Duncan Kennedy has shown, what holds true for employment disputes, *mutatis mutandis*, also holds true for *all other types of competitive-cooperative social scenarios*,⁶⁴ including, crucially, those covered by IEL:

⁶² See Kennedy (1997), p. 59.

⁶³ See Kennedy (1993), p. 87.

⁶⁴ See Kennedy (1993), p. 100.

international tariff negotiations, investment protection, food security, trade embargoes, sovereign debt restructuration, loan surveillance, etc.

4.4. IEL as an Ideological Mechanism

In addition to its price-setting and opportunities-structuring functions, every legal regime also produces a regulatory effect by *working the levers of ideological legitimisation and normalisation*. This is a classical Law-and-Society argument: the law can change the subjects' behavioural predispositions not only by modifying the costs associated with different types of conduct they are likely to engage in, but also by influencing their general sense of normative orientation, i.e. by shaping their ideas about what is right and wrong, legitimate and illegitimate, normal and abnormal.⁶⁵

Seen in this light, even those legal regimes that do not, on the surface of it, institute practically enforceable rights-and-duties structures (framework conventions, model laws, United Nations General Assembly resolutions, etc.) or that have at their core hopelessly vague normative constructs (e.g. most treaties in the field of international environmental law)⁶⁶ can still produce a significant regulatory impact. From the formally irrelevant preambular paragraphs and *obiter dicta* to utopian policy proposals that have never been realised in practice, to 'purely academic' scholarly debates and writings – there is a lot more to regulatorily operative material in modern international law than what usually meets the positivist or the legal-realist eye. Legitimation and normalisation are processes that take place in the plane of *legal consciousness*, and the contents of legal consciousness in modern IEL can be affected by many different forms of legal discourse.

4.5. IEL as a Mechanism of Disciplining and Interpellation

In addition to highlighting the ideological function of the law, the Law-and-Society tradition also teaches us that the legal system can achieve a regulatorily significant impact by producing '*disciplining*' and '*subjectivizing*' effects. By putting in place a specific system of institutionalised processes and routines as well as a corresponding system of discursive modes, protocols of reasoning, and structures of knowledge-production, the legal system can discipline, i.e. 'train' the respective class of legal subjects that are compelled to take part in these processes and routines, discourses and knowledge structures, to adopt a certain mode of comportment, a certain pattern of self-expression, or a certain style of being-in-the-world.⁶⁷ By doing that, over a long enough time line, the law can induce that class of subjects to drift towards a certain range of social and political positions, to learn to inhabit certain roles, to become accustomed to a particular set of postures, habits, and behavioural templates, and, thus, ultimately, to develop a certain practice of self-realisation. Put differently, not only does the law work on all those whom it reaches *didactically* – by shaping their sense of what is right and wrong, legitimate and illegitimate – it also works on them *interpellatively* – by moulding their psychologies and their identities as social and political actors.⁶⁸

Take, for example, the law of foreign investment protection. Even the briefest look at this body of law and the various bodies of practices and discourse that have emerged around it in recent

⁶⁵ See Kennedy (1997), p. 59. See also Rasulov (2008), p. 243 (291).

⁶⁶ See Szekely (1997), p. 234.

⁶⁷ See Foucault (1995).

⁶⁸ On the concept of interpellation, see further Althusser (1971), p. 170-83.

years can reveal the highly peculiar and far-reaching disciplining and subjectivizing effects it has had on various categories of actors it has come in contact with: host states, cross-border investors, investment arbitrators, legal scholars. The patterns of interpellation vary from case to case, but the basic logic has a clearly recognisable shape. Through the various practices and discursive rituals – of treaty drafting, of dispute resolution, even of academic scholarship – IEL and the various discourses surrounding it have consistently encouraged: (i) cross-border investors to understand themselves as fundamentally benevolent and vulnerable subjects; (ii) host states to view themselves as inherently exploitative and typically aggressive entities; (iii) investment arbitrators to view their professional activities as a form of public service and an inherently neutral political practice. Furthermore, IEL its discourses have also trained the *international law profession* to regard all cross-border investment as a universally beneficial activity and to take it as a given that the strengthening of the investor-state dispute settlement (ISDS) system forms an indispensable structural precondition of its preservation; to imagine its own role in all of this as being that of a loyal guardian and a wise expert; to experience itself, in other words, as a community of neutral umpires and ‘private dispute resolvers’, ‘the identifiers and advocates of the progressive development of the international rule of law’ and the ‘seekers of universal rules’.⁶⁹ IEL and its discourses have never trained cross-border investors to view themselves as potential tax avoiders, vicious exploiters, or rapacious asset-strippers; to experience the sweetheart deals they demand from host governments as the undermining of their regulatory sovereignty and a corruption of democratic politics; to recognise the insistence of their home states on the conclusion of bilateral investment treaties that give such deals international enforceability as cynical complicity in the reproduction of neo-colonial subjugation. Even less so have they taught the international law profession to think of itself as the self-serving obfuscator of political realities; the white-washer and enabler of tax avoidance, exploitation, and asset-stripping; the corruptor of democracy; the assassin of economic self-determination; or the facilitator of neo-colonial subjugation. Imagine how things would have been different if it was that kind of interpellative dynamics that issued from modern-day IEL discourse and institutions.

4.6. The Theory of Regulatory Effectivity as an Instrument of Critical Inquiry

How different would IEL’s governance impact – its regulatory effect on the international political economy – be if our attention in discussing what needs to shift and change in the international political economy in addition to IEL’s price-setting function also focused on IEL’s ideological signalling, its interpellative power, its disciplining and opportunity-structuring dynamics?

Take, again, the question of interpellation. Most conversations about IEL reform even today tend to start and end at the level of black-letter law and its contents. Little attention is paid to IEL’s power to mould and shape the personalities of those who work with it as their intellectual toolbox, their platform, their medium. As every first-year law student knows, though, it is not the law, ultimately, that applies itself in practice but the legal professionals who work with it. What good does it really do if in talking about the reform of the IEL regime we never address this point? A recent report from the Corporate Europe Observatory and the Transnational Institute entitled ‘Profiting from Injustice’ highlights the fact that, as of 2012, a group of fifteen individuals had been responsible for more than 55% of all known international investment arbitrations ever.⁷⁰ What good would the infusion of a greater human rights awareness into investment arbitration, or the transition from the arbitration model of ISDS to the permanent

⁶⁹ See Mills (2011), p. 101-4.

⁷⁰ See Eberhardt and Olivet (2012), p. 38

court model, or a switch from a pro-ISDS default to a pro-Calvo doctrine approach do for international investment law's relationship with democratic governance if the people who are left in charge of operating the international investment regime do not change or if the next generation of 'super-arbitrators' still go on to view themselves as nothing more than neutral umpires incapable of ever being complicit in exploitation and oppression?

Some fifteen years ago David Kennedy remarked that:

[t]he call for multilateralism, the call for human rights to chase political or economic decisions, the call for institutional reform and renewal are components of what [international lawyers posing as] experts ... offer[] as they [go on to] govern [righteously. They are] not alternatives to the governance of experts.⁷¹

And yet, of course, international law

need not be on the side of the consolidation of [righteous, self-lionising] expertise. ... We could imagine an international law which sought to disenchant its speakers from their own expert authority rather than to offer them the promise that theirs was the last, best, [most] humanitarian position available.⁷²

Given the focus of his publications at the time, most of Kennedy's interlocutors at that point viewed his appeal as mostly targeting the international human rights community. But there is, of course, no reason to think it does not apply to the IEL profession as well.

The position taken by the authors collected in this volume certainly leans in favour of this argument. The theory of the fourfold structure of law's regulatory effectivity outlined above can help structure our understanding of the general range of theoretical possibilities that are open before contemporary IEL scholarship. It can also shine a useful light on how exactly the broader collective project pursued in these pages differs from most of contemporary IEL literature.

5. Against the Orthodoxy: A Legal-Theoretical Synopsis of the Present Volume

The vast majority of IEL scholarship to date has tended to focus its theoretical attention on the first of the four mechanisms of producing the regulatory effect: *IEL's power to change the relative 'prices'* of the different forms of internationally relevant conduct – typically that of states and public international organisations. The resulting pattern has been to construct the basic idea of IEL as field of disciplinary inquiry in the form of a loose combination of black-letter-law summaries and modestly consequentialist reflections about the law's impact on the micro-level structures of national incentives.⁷³ A much less significant segment of the literature, by comparison, has been dedicated to investigating the *ideological dimension of IEL's institutional regimes and discursive conventions*.⁷⁴ An even smaller body of writings have taken up as their object *the relationship between IEL and the structuring of national, regional, and global economic alternatives*. Most of these scholarly projects have tended to limit themselves to exploring the relatively narrow sub-

⁷¹ Kennedy (2003), p. 915 (916).

⁷² Ibid., pp. 916-917.

⁷³ For typical illustrations, see Williams and Foote (2011), p.42; Ming Du (2010), p. 1077; Mavroidis (2008).

⁷⁴ For typical illustrations, see Brabazon (2017); Krever (2011), p. 287; Santos (2006), p. 253.

field of dispute settlement mechanics and the closely connected debates about forum- and treaty-shopping, the risks of fragmentation, and the purported advantages and disadvantages of bilateralism and multilateralism.⁷⁵ By far the least amount of progress, both in terms of the quality of insight and the general volume of reflection, has been made with regard to the *disciplining and interpellatory* functions of IEL. Only very rudimentary discussions have been had on this front so far. Virtually, the only line of serious sustained inquiry that has emerged in this context over the last two decades has been limited to the issue of the so-called regulatory chill and the ‘good governance’-style impact of discrete international trade and investment standards in the context of municipal legal reforms.⁷⁶

The sense of implicit theoretical hierarchy is unmistakable. So also is the underlying message as to what sort of *problématique* the discipline of IEL studies, ideally, ought to address, and, by extension, who exactly it is thus meant to appeal to in terms of its ultimate target audience.

Looking from this perspective, one way of understanding this volume would be to think of it as an attempt to subvert the established disciplinary orthodoxy and the theoretical hierarchy of genres that underpins it. Our aim in these pages is to produce, by explicit theoretical argument as well as by practical illustration, an entirely different kind of internal theoretical balance, a new sense of intellectual mission, if you will, for the discipline of IEL studies. Against the dominant tendency to foreground the price-setting function of IEL, the essays collected in these pages have sought to focus the reader’s attention on other modalities of IEL’s regulatory effectivity.

The volume opens with two critical essays that explicitly aim to contest and displace the traditional narratives adopted within the discipline about the historical origins of the contemporary IEL universe. The first essay, by Konstantina Tzouvala, focuses on the emergence of the modern law of international investment; the second, by Michael Fakhri, on the history of international trade law. Departing from the conventional accounts that link the evolution of the modern law of international investment to the rise of the Anglo-American tradition of neoliberal economics, Tzouvala proposes to re-ground our understanding of the contemporary global investment regime’s organic character in the ideological legacy of neoliberalism’s far lesser known predecessor, the German tradition of *ordo-liberal* thought. For all the undoubted influence of the Anglo-American neoliberal tradition, in the end, Tzouvala argues, it is still the basic *ordo-liberal* models of law’s ideal relationship with the economy that govern the contemporary investment lawyers’ collective imaginary, their reflexive assumptions about the ultimate limits of regulatory sovereignty and the ‘correct’ ways to strike the balance between the national and the international, the political and the economic, the legal and the democratic elements in global economic governance. Recognising this fact is an important stepping stone in laying the foundations for any forward-looking IEL reform.

The main object of Fakhri’s essay is the relationship between international trade law and the question of food security. Tracing the long and complex evolution of the debates about food, agriculture, and the so-called broader societal values, Fakhri invites us to reimagine the project of international trade law as a multi-vectoral, multi-platform, internally contradictory process that, contrary to the received wisdom, has never been driven solely by the simple ideology of trade liberalization or centred primarily around the GATT/WTO institutional axis. The alternative account Fakhri proposes presents a much richer and more complex picture. His is a story of international trade law as an *ideological product* of three closely related but philosophically still quite

⁷⁵ For typical illustrations, see Paparinskis (2008), p.264; Binder (2013), p. 71; Marboe (2013), p.229; Pauwelyn (2003). But see also Maggio (2017).

⁷⁶ See Van Den Meersche (2018), p.168; Tienhaara (2011), p. 606; Vranes (2009), p. 953; Schneiderman (2008); Chimni (2004), p.1.

distinct global policy objectives – market stabilization, trade liberalisation, and food security – and an *institutional system* that involves, in addition to the GATT/WTO, also a whole host of other global and regional regimes and platforms from the international commodities agreements to the United Nations Food and Agriculture Organization, and the United Nations Conference on Trade and Development (UNCTAD). Focusing our attention on the repetitive character of global food crises and the WTO's heretofore mostly unacknowledged complicity in the emergence of the new global 'corporate food regime', Fakhri's analysis enables us to recast some of the most central questions in the ongoing debate about the ultimate aim and course of IEL reform in a radically novel form.

That the need for such a reconceptualization is urgent and pressing, becomes all the more evident when we turn to the essay that comes immediately after. The central theme in Athene Richford's study of the politics of discursive framing is the complex role the structures of legal imagination constructed by various tropes and narrative devices play in the WTO legal regime. Tracing the ideological patterns behind some of the most common interpretative strategies used in the contemporary WTO practice to their origins in the late nineteenth-century machinery of colonial legal discourses, Richford's argument seeks to bring to the surface not only the deeper structures and mechanisms of legitimation, obfuscation, and distraction that are used in present-day IEL but also the broader conditions of their theoretical and cultural possibility. Central among these, she argues, are the governance implications such structures and mechanisms raise not only for the institutional articulation of the contemporary global economy but also for the various segments of the IEL profession: lawyers, experts, WTO judges, as well as all the other different actors, agents, and operators in the invisible economy of IEL knowledge-production. In a direct echo of Kennedy's appeal for the universal disenchantment of the discipline's traditions of self-representation, Richford's essay calls for a careful but comprehensive debunking of the below-the-surface political biases of the mainstream IEL discourse and its ethos of pseudo-objectivism.

The theme of IEL's politics also features quite prominently in Nicolas Perrone's essay. What we should look at when we look for the politics of international law, however, is given a radically different interpretation here. It is not so much the discursive setup and the basic structures of legal imagination underpinning contemporary IEL, but the disciplining effects and the distributive impacts of IEL's black-letter regimes and institutions that attract Perrone's attention. In what undoubtedly represents the most normatively-oriented contribution to the present volume, Perrone's essay sets out simultaneously to expose a series of doctrinal blind spots and in-built prejudices inscribed within the contemporary international investment regime and the accompanying body of scholarly literature as well as to outline, on the basis of a political economy critique, a fundamentally different complex of normative values and goals on the basis of which the law of foreign investment protection ought to be reformed going forward. Unlike with Fakhri and Tzouvala's forays into programmatic scholarship, this is a classical 'looking for new first principles' kind of exercise. Like them, however, he opens his argument by reminding his readership of the colossal stakes that are disposed of by international investment law. The uncritical embedding of the neoliberal economic model within the international investment regime has led to a massive redistribution of the practical decision-making powers from the host states to the foreign investor community, conditioning the former increasingly to abandon their political and economic responsibilities to their citizens while at the same time enabling and emboldening the latter to assume the mantle of global economic governance. The disjunction between the dynamics of power and responsibility and the accompanying institutional circuits, argues Perrone, is growing increasingly unsustainable. How ought this situation to be addressed? Perrone's answer begins with the idea of reclaiming the imaginative potential behind contemporary IEL. We should review our traditional assumptions about IEL's political role:

even without explicitly mandating this course of events, the international investment regime can often impel the developing states to make all manner of wrong economic choices by simply foreclosing certain regulatory options and narrowing the field of policy alternatives otherwise available to them. To start correcting the disastrous consequences this can lead to in practice, notes Perrone, requires us to rethink our entire conception of international investment law. To succeed with such a project of theoretical reconstruction, one must, however, find first a suitable point of analytical departure. The answer which Perrone proposes to give to this challenge comes from the legal realist-inspired tradition of property law theory and the closely related progressivist ideology of localism and economic democracy.

The disciplining effects of international investment law on the developing states is a subject that is also explored in the following essay. 'How does international investment law influence the behaviour of host states?' is a question that can be given many different interpretations. The approach taken by Mavluda Sattorova, Mustafa Erkan, and Ohiocheoya Omiunu has been to look at it through the prism of micro-level legal sociology. To what extent does an average government official in a developing state tend normally to be aware of the actual content of their state's current international investment obligations? How do national-level judges and government bureaucrats adjust to the demands of the global within the local? What sort of agency do they recognize they can enjoy in this process? Drawing on a variety of qualitative empirical methodologies, Sattorova, Erkan, and Omiunu use the opportunity presented by this line of opening questions to set up the stage for a series of far-reaching critical reflections broadly mapping across the third and fourth dimension of regulatory effectivity, the ideological and the interpellative functions of IEL. Turning away from the more familiar (for investment lawyers) regions of Latin America and Eastern Europe, they have chosen as their focal points the three respective countries with which each of them is most directly familiar: Uzbekistan, Turkey, and Nigeria. How do international investment standards actually tend to be internalized by rank-and-file government technocrats in these countries? Do officials working for different departments tend to exhibit different degrees of international legal awareness? What role does their history of previous exposure to investment arbitration play in this? How helpful in this context are the standard predictive models developed in the traditional accounts of IEL as a mechanism of inducing good governance? What about the traditional account of regulatory chill? The answers which Sattorova, Erkan, and Omiunu give to these questions in the essay they contributed to this volume offer an interesting mix of surprise and predictability. And while, in the end, as they note, the findings suggested by the selected case-studies most probably reflect only the specific historical conditions of the three chosen countries, there certainly seems to be more than enough room to draw a whole range of hypotheses, not least about the complex role played by the local traditions of bureaucracy and institutional cultures that the more mainstream accounts of investment law's regulatory impact routinely ignore and conceal.

The theme of institutional cultures also plays an important role in Alexandre Belle's essay. On its surface, the topic of Belle's contribution to this volume seems rather straightforward: recent developments in the field of sovereign debt restructuring. For a long time, the most important controversy occupying this part of IEL has tended to mirror the main debates at the heart of the law of state immunity: what ought to be the conditions under which international law should provide redress to aggrieved private creditors against defaulting sovereign debtors? Should the international community recognise the prerogative of sovereign governments to determine the limits of their commercial legal obligations? Should it protect the reliance expectations of private actors? If so, subject to what conditions and through the use of which institutional mechanisms? Should international law insist on the observance of some form of due process standard? Should it encourage the use of arbitration or classical diplomatic protection mechanisms? Or at least that would be the standard line of inquiry one would expect to follow before the problem of

sovereign debt restructuring had been posed to an international tribunal whose primary mandate lay not in the field of international economic governance, but in *international human rights*. In the case of *Mamatras and others v. Greece*,⁷⁷ writes Belle, the issue of sovereign debt for the very first time in international legal history came to be litigated through the channels of the European human rights system. Faced with the question of how to qualify the decision of the Greek government to alter at the height of the Greek financial crisis the terms of repayment for some of its sovereign bonds, the European Court of Human Rights (ECtHR), seized by a claim brought by a minority of aggrieved bond-holders, entered the field of sovereign debt litigation armed with a distinctly unusual doctrinal arsenal and normative and institutional programmes. On the one hand, as a human rights court, the ECtHR's first and most important institutional obligation is to uphold the rule of human rights law. At the most immediate level, this would seem to imply its principal remit is to approach every problem raised before it solely through the lens of the relevant international human rights provisions, in this case, the bond-holders' right to property. At the same time, the devastating impact an overly formalistic reading of the bond-holders' right to holdout against the government's restructuring proposals would have had on the ability of the Greek government to look after the interests of the most vulnerable segments of the Greek society also seemed clear and undeniable. What ought the Court to do in such circumstances? The solution eventually worked out by the ECtHR, explains Belle, turned out to be as ingenious as it was novel and progressive, and the effects it has had on IEL as a field of regulatory activity can be most clearly seen when we look at it through the lens of its function as a mechanism of the structuring of opportunities. Drawing on a variety of doctrinal materials and cross-cutting general legal principles, the ECtHR approached the question of Greece's interference with the creditors' property interests by drawing on the classical private law theories of proportionality, abuse of rights, and reasonable behaviour. What it has got out of these theories, however, has been the formulation of a new guiding standard: the so-called principle of the prudent and circumspect investment. The resulting precedent, notes Belle, not only now stands in contrast to a considerable body of previous international case-law. It has also expanded the basic structure of strategic alternatives made available under international law to debtor governments, while at the same time marking an important new opening in the global policy debate about the general principles of sovereign debt restructuring by lending a significant amount of support to some of the recent initiatives undertaken by the UN General Assembly and the UNCTAD.

The essay that comes after Belle's – 'Doing Things with Political Economy (as a Public International Law Academic)' – is one of the two authored by the volume's editors. Its aim is essentially to retell the story of the emergence of the modern system of European governance. Rather than choosing as his main explanatory categories the categories of war, technological progress, or nationalism, John Haskell proposes to rethink the logic of this process through the lens of international law's relationship with political economy. What comes out of this exploration very much resembles an exercise in historiography *à la mode longue durée*, except that philosophically Haskell's main influences here go quite beyond the standard *Annales* framework. Not only a product of reading Braudel, Haskell's account of the long history of contemporary European governance draws its theoretical inspiration from Karl Polanyi, the various stripes of neo-Marxism, Schmitt, Foucault, and, though he never names him explicitly, also Hobbes. All throughout this, Haskell's underlying background concern is to understand the disciplining and interpellative effects of this historical tendency to treat governance as a species of political economy on the international law profession.

⁷⁷ *Mamatras and others v Greece* [2016] European Court of Human Rights 63066/14.

A different take on the theme of IEL's interpellative power is offered in Maria Tzanakopoulou's essay. Joining the IEL debate from a comparative law perspective, Tzanakopoulou's study seeks to examine the limits of the constitutive powers of the European Monetary Union (EMU) from the standpoint of its capacity to bring into existence an entirely novel category of political collectivity: the 'European people' of a distinctly Frankfurter vintage. In its most basic contours, Tzanakopoulou's argument boils down to the proposition that transnational currency unions, such as the EMU, cannot really perform a constitutive function other than at the level of the always-already transnationalised capitalist elites, that is to say, not only can they not interpellate into being a truly democratic political entity but the social reality of their interpellative predisposition also has a strongly pronounced class bias. This framing of the argument is deserving of attention at least for two different reasons. In the first place, it helps highlight the fact that the reach of the regulatory effect that international economic regimes such as the EMU can exercise over the international political space goes far beyond the question of how they allow states and governments to act vis-à-vis one another, what sort of policies they permit them to adopt and follow, and what kind of strategic opportunities they leave them with at the end of the day in terms of their domestic political sovereignty. In the second place, Tzanakopoulou's treatment of the vocabulary of constitutionalism highlights an important theoretical opening. The use to which she proposes to put this vocabulary in the IEL context not only indicates the possibility of re-embedding the comparative constitutionalist discourse in the broader tradition of left-leaning socio-theoretical inquiry. It also offers a much welcome corrective to the common trend that has developed in IEL in recent years to interpret the idea of constitutionalism in the international political economy solely through the lens of normative hierarchies, highlighting, for instance, the fact that various IEL regimes, thanks to the implied assumption of international law's normative superiority over national law, often exhibit a tendency of 'precommitt[ing] future generations to certain, predetermined norms and institutional forms', 'limit[ing] governmental capacity in constitution-like ways.'⁷⁸

6. The Discipline of IEL at a Crossroads: The Turn to Difference as a Wager

The past is a different country, they say. But it is not so different that a study of it can't serve the purpose of de-naturalising and de-universalizing our experience of the present. One way to understand the function of all the different historical exercises undertaken in this volume would be to view them as an attempt not so much to reclaim the memory of origins unduly forgotten as to displace some of the more popular assumptions about the 'proper limits' of IEL – its basic 'jurisdiction' as a discipline – and through that to change our view of the general malleability of the respective institutional and normative realities. The road to knowing that things can change always starts with the knowledge that at the very least they have been different once.

In a democratic society, argues Herbert Marcuse, the established universe of thought and action must always remain 'a fact to be questioned': interrogated, evaluated, and, ultimately, judged in terms of its biases, prejudices, and inbuilt tendencies towards 'truth and falsehood.' Neither the concept of truth, nor the idea of falsehood, he adds immediately, is given to us a priori: how we understand them always changes through history, 'and their objectivity is historical' too.⁷⁹ To know the limits of what is true and false for any given segment of social reality – be it the scholarly consensus as to the proper limits of a disciplinary field, the cultural consensus of the European ideological intelligentsias about the inherent progressiveness of the new Europe project, or the political consensus of the transnational technocratic elites as to the relationship between global business and local communities – requires *a clear understanding of its most immediate*

⁷⁸ Schneiderman (2008), p. 69.

⁷⁹ Marcuse (2002), p. 8.

historical alternatives. The first rule of critical inquiry, explains Marcuse, is to remember that every social situation can be intelligibly judged only against the limits of its own inherent potentialities, its own field of latent possibilities that haunt its current form as so many hidden contradictions, breaking points, as-yet-unrealised tendencies, for-now-suppressed legacies.⁸⁰

To know the limits of the critically possible is to understand first the limits of the objectively available: any '[t]ranscendence beyond the established conditions' always 'presupposes a transcendence *within* these conditions.'⁸¹ To execute a successful reform of the disciplinary consensus in IEL we must first tease out the limits of its inherent potentialities as a field: obtain a sense of what the IEL project can be by learning more clearly what this project has been, map out the possible directions in which it can travel in the future by tracing the roads explored by its closest siblings, project a universe of meaning it can inhabit by reconstructing the universes of meaning it visited or came close to visiting earlier.

At the most practical level, the purpose of this volume is to supply its reader with a range of practical illustrations: to try to convey through its drive for historical reconstruction and intellectual diversity that elusive sense of a disciplinary opening, the field of latent inherent potentialities that was mentioned earlier, and to use the opportunities this presents to help nudge the conversation about IEL to move in a decidedly different direction from the one it has moved in traditionally.

For far too long the standard conception of IEL implicitly adopted by European IEL scholars has been that of a flat, tri-partite structure composed of the three 'grand regimes' of international trade law, the law of foreign investment protection, and the law of international financial institutions (IFI).⁸² Neither the present practice of international economic regulation nor a careful examination of its history over the last half-century actually fits this impoverished model. Whatever it is that most deserves to be included under the rubric of IEL *as a matter of principle* – in retrospect, there appears to be a lot more merit to John Jackson's notoriously fuzzy non-definition of the concept than may have seemed at first⁸³ – it seems undeniable that a significant part of the actual living reality of IER today is grounded in, treated by, and routinely addressed through the modality of many *other* international and transnational legal regimes, institutions, frameworks, and segments of the global legal space-process – from international human rights courts, to regional political integration schemes and global supply chains.

None of this, of course, means that the three grand regimes have somehow lost their relevance – far from it. But if, as Guy Fiti Sinclair seems to suggest, most theoretical frameworks adopted by the IEL disciplinary mainstream can be ultimately understood as nothing more than mediating psychological devices deployed to help process and domesticate one or another traumatic world-historical event,⁸⁴ perhaps the time has come now for us to ask the question whether the discipline of IEL should already leave the theoretical time-horizon of whatever historical trauma may have given birth to this particular tri-partite structure. After all, a large part of the younger generation of IEL scholars certainly seem to have started doing that already.⁸⁵

⁸⁰ Ibid., pp. xl-xlii.

⁸¹ Ibid., p. 227.

⁸² For a typical illustration, see Loibl (2003), p. 689.

⁸³ See Jackson (1998), p. 1 (8-11).

⁸⁴ See Sinclair (2018), p. 841 (868).

⁸⁵ See for further discussion, Haskell and Rasulov (2018), p. 243. See also the various contributions in Mattei and Haskell (2015) and Brabazon (2017).

How and at what intellectual cost this paradigm shift can spread remains still to be seen. As Jean d'Aspremont observes, the endurance of disciplinary mythologies – the kind of theoretical fabrications that convince us, for example, to view IEL as not having much to do with debt-trapping, immigration regulation, or the conduct of economic boycotts, but everything to do with property rights and mutually enriching trade patterns – is a product as much of the underlying 'imaginary genealogies' that have not yet been debunked by serious historical research as it is a product of their general tendency to serve as coded, 'transcendental validators' for the discipline's various cultural and political commitments.⁸⁶

To attempt to overturn a conventional wisdom reinforced by an ideological formation of that degree of complexity may seem like a truly daunting task. But doing nothing about it is certainly worse.

To borrow a line from Pierre Schlag,⁸⁷ the dreariness of the *déjà vu* one feels when looking at the traditional IEL scholarship today most probably would have seemed a lot more tolerable had we somehow been able to muster the sense that the endless reproduction of the established paradigm might ultimately lead to something tangibly good and positive in the external world outside the narrow plane of our disciplinary debates: the empowerment of the weak, the vindication of the wronged, greater equality, fairer distribution, liberation, prosperity, participatory emancipation. But by and large, we know, that is simply not true. The brutal impoverishment of our collective imagination and the cynical truncation of our hopes and politics by the disciplinary orthodoxy have not been compensated for by any observable measure of progress or advancement towards anything even remotely recognisable as a plausible form of social and economic justice, in the real world. Nor have they resulted in any kind of aesthetically pleasing or intellectually stimulating experience for the vast majority of the IEL scholarly community.

And so the question inevitably arises: if all of that which we usually do as a scholarly community is still getting us nowhere better than where we have been before – and whence so many of us have since fled in embarrassment and disappointment – why not try to do something different?⁸⁸

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⁸⁶ See d'Aspremont (2018), p. 47-54.

⁸⁷ See Schlag (1998), p. 141

⁸⁸ Lest it be assumed that the only thing that is required for this is the 'opening of the mind' – e.g. that which might begin with reading volumes like this one – let us also recall the most basic lesson taught to us by the sociology of knowledge: moving 'outside the box' intellectually is an indispensable first step, but broader imaginational and discursive patterns will be able to change only when the underlying socio-institutional logics change too. For further discussion of what sort of factors these socio-institutional logics might involve, see Barrozo (2017), p. 114; Rasulov (2017), p. 189.

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