Alvaro Santos, Chantal Thomas and David Trubek (eds), ***World Trade and Investment Law Reimagined: A Progressive Agenda for an Inclusive Globalization.*** New York: Anthem Press, 2019. Pp. 278. £80.00. ISBN: 9781783089727.

In his pathbreaking 1979 article 'The Structure of Blackstone's Commentaries', critical legal theorist Duncan Kennedy made two important observations about the nature of law and the role of lawyers under conditions of liberal capitalism.[1] First, he argued that law is fundamentally contradictory as it reflects the fundamental tensions between individual autonomy and state authority. This claim about the indeterminacy at the core of the legal argument is, of course, familiar to international lawyers.[2] However, Kennedy also made a second, crucial claim. He posited that it is the very job description of lawyers to obscure the existence of these contradictions and to mediate them through the deployment of legal technique. Kennedy, in fact, argued that since Blackstone the primary mode of mediation for liberal legal thought has been the invocation of 'rights'. This singling out of rights as *the* mediating technique of liberal legalism was probably somewhat of an exaggeration. Kennedy's argument has nonetheless drawn attention to both the structural features of capitalist legality and to the specific role that legal work plays in this context. In fact, Kennedy noted that these mediating functions need not necessarily be apologies for the *status quo*, even though they certainly gravitate in that direction.

World Trade and Investment Law Reimagined offers a stark example of the promise and peril of legal work that aims at mediating the contradictions of capitalist globalization. Indeed, the unifying thread of this rich volume is its attempt to propose tools, such as legal pluralism, the concept of 'policy space', or regional integration, that will (hopefully) smooth the tensions of contemporary capitalism. Edited by Professors Santos, Thomas and Trubek, this book brings together 21 contributors based in the Global North and South (with a clear predominance of USA-based scholars) with the explicit aim of developing a new, progressive vision for international economic law (at 12) – a vision that emphasizes the reform of international investment law (at 18–22) – and of ensuring that the benefits and losses of international trade are shared more equitably (at 25–26). Despite the diversity of the contributions, a constant tension between state sovereignty and control over economic decisions on the one hand and a commitment to the legal institutions that have sustained global capitalism since the end of the Cold War on the other sets the frame for this volume's debates. This tension permeates much of international legal scholarship, but it becomes particularly pronounced where centre-left/left sympathy for the regulatory role of the state is coupled with a fundamental commitment to international forms of authority over political economy. In the face of this tension between state regulation and legalized economic integration, ideas such as 'policy space' and legal pluralism are suggested as prime mediation devices. There is nothing inherently apologetic about the deployment of such legal techniques in order to tame the most explosive contradictions of global political economy and its legal edifices. However, there is nothing inherently progressive about these efforts, either, especially to the extent that they ignore issues like climate change, which challenge the very core of international economic law in ways that do not render themselves to piecemeal reforms. Otherwise put, one wonders if the volume's efforts to recalibrate international economic law are capable of delivering long-term environmental sustainability and social justice, or whether they would up re-authorizing and legitimizing a fundamentally socially and environmentally destructive international legal architecture.

1 Kennedy, 'The Structure of Blackstone's Commentaries', 28 *Buffalo Law Review* (1979) 205.

2 M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

The book's extensive engagement with the work of the Harvard economist Dani Rodrik offers a window into the power and limitations of the search for mediating legal tools. The first five chapters of the collection offer a comprehensive reading of Rodrik's *Straight Talk on Trade*, and include a response by Rodrik. The appeal of *Straight Talk on Trade* to the book's contributors is easy to comprehend. Rodrik has been an early advocate of a pluralistic approach to capitalist development, which made him an outlier in mainstream policy circles up until very recently. As Gregory Shaffer points out, the need for 'a diversity of [developmental] models in competition with one another' (at 44) is at the heart of Rodrik's contribution. Additionally, for progressive trade lawyers such as Alvaro Santos, Rodrik's defence of the nation-state as 'the main site for governance and political deliberation' (at 55) offers a useful starting point for rethinking the legal structures of economic globalization in ways that avoid the pitfalls of both the 'ailing hyperglobalization and the retrenchment to economic nationalism' (at 57). Chantal Thomas also cautions against the appeal of economic nationalism, including in regard to developing states. Drawing from Rodrik's work, she emphasizes that the traditional paths to development through the support of domestic manufacturing are now unavailable for many poorer states (at 35), and interrogates briefly the role of South–South integration projects, such as the African Continental Free Trade Agreement, as a potential response to the core–periphery dynamics that have blocked these traditional pathways to development.

Few would reject outright the wisdom of these proposals to re-imagine international economic law through enlarged policy spaces, alternative regionalisms or legal pluralism. After all, once-powerful institutions and thriving legal fields, such as the World Trade Organization (WTO) Appellate Body, investor–state dispute settlement or mainstream international economic law, for that matter, are currently under unprecedented pressure from governments, public opinion and disciplinary heterodoxies. Indeed, a shared understanding of the need to reform global political economy and its legal institutions animates the volume at hand. This common commitment is, however, undermined when the discussion turns to questions of method, theory and politics. For example, discussing *Straight Talk on Trade*, Santos casts doubt on the possibility of non-ideological models (at 49) either for economics or for other disciplines. In his response, Rodrik concedes this point, while also articulating a defence of empiricism as a way of disciplining the model selection process in a 'somewhat nonideological manner' (at 60). After all, '[o]bjective facts exist and they do matter' (at 60). One need not question the usefulness or possibility of empirical methods for law[3] to realize that the chasm between Rodrik's assertions and those lawyers who have been educated in the critical canon (broadly conceived) is impossible to bridge.

After all, despite his undeniable heterodoxy when it comes to policy prescriptions, Rodrik is part of his discipline's neoclassical orthodoxy in regard to his method and working assumptions. As Kevin Gallagher discusses, *Straight Talk on Trade* singles out economists as the target of its criticism for the blind faith in globalization during the preceding decades (at 38). However, Rodrik's scepticism towards his profession has not extended to supporting efforts to pluralize the method of economics beyond the current neoclassical orthodoxy. In his own words: 'The criticism of methodological uniformity in Economics can also be taken too far. Surely, the use of mathematical and statistical techniques is not a problem per se. Such techniques simply ensure our arguments are conceptually and empirically coherent.'[4] Anchoring progressive international law in such a narrow vision of what an alternative political economy would entail, as the volume at hand does, creates both methodological and political problems. Rodrik's equation of empiricism and conceptual clarity with the use of mathematical models obscures the fact that core neoclassical concepts, such as utility, have come under attack for being essentially

[3] For an excellent articulation of this objection, see: Peevers, 'Liberal Internationalism, Radical Transformation and the Making of World Orders', 29 *European Journal of International Law* (2018) 303.

ideological and conceptually incoherent approximations, or that the heavy reliance on mathematics and statistics is simply a way of mystifying and legitimizing the ideological preferences of neoclassical economists.

Unacknowledged ideological commitments create additional challenges for this volume. As I mentioned above, the embrace of pluralism is central to this book. This embrace involves two assumptions that are not always explicit, but they support the project of promoting legal pluralism as a successful mediating device in the context of contemporary global capitalism. First, developmental and juridical pluralism, as presented in the volume at hand, involves diverse *capitalist* models of development, but it does not extend beyond them. In other words, even though neoliberal capitalism no longer monopolizes international legal thought, the possibility of non-capitalist legal futures is virtually unthinkable. Secondly, the quest for pluralism relies on a presumption that the post-Cold War legal regime has been homogenous both in terms of 'black letter' law and in regard to its 'real-life' application. In other words, many of the contributors appear to identify an alleged 'one size fits all' approach to law and political economy as one of the biggest problems of international economic law since the 1990s.

I remain unconvinced both about the factual accuracy of the assumption that the problem is legal homogeneity and lack of flexibility and about the ability of tools and concepts such as pluralism or policy space to successfully mediate the contradictions of global capitalism. Tensions between national and international forms of authority over political economy have been a stable feature of the international legal theory and practice at least since the 19th century. On the one hand, international law has been invested in the crafting and proliferation of the modern, capitalist state that guarantees individual rights to trade and property and, more broadly, the conditions of accumulation within its territory.[5] On the other, international law constantly struggles to overcome and/or discipline national control over political economy, especially when it comes to guarantees for trade, investment and free enterprise. The protracted struggles for jurisdiction over the economic activities of foreigners spanning from 19th-century alien protection to contemporary investor–state dispute settlement are indicative of this tendency.[6] This conundrum lies at the heart of modern international law, including international economic law, and has been the (unconscious) focus of much legal scholarship that seeks to identify and promote the 'proper' balance between the two forms of authority, ignoring the fact that this tension reflects the very real contradictions of global capitalism as a system that relies on state power while seeking to overcome each and every border. To return to Duncan Kennedy's reflections, the volume at hand attempts to mediate between the contradictions of contemporary international economic law, but it does so without recognizing the enormity and fundamental character of the tensions it seeks to smooth.

The tensions and paradoxes at the heart of this mediating endeavour emerge clearly through discussions about China, which is posited as a clear example of the principled and pragmatic need to accept institutional pluralism and experimentation as part of international trade law. Indeed, a defence of plural paths to development and prosperity lies at the heart of the volume and goes beyond its engagement with Rodrik's work. For example, Poul Kjaer states unequivocally that 'a future oriented trade and investment law . . . should be thought of in the plural, not

[4] Rodrik, 'What is Wrong (and Right) in Economics?', *Dani Rodrik's Blog* (7 May 2013), available at https://rodrik.typepad.com/dani_rodriks_weblog/2013/05/what-is-wrong-and-right-in-economics.html.

[5] On the bias of international law towards the modern, capitalist state as the only available form of political community, see: R. Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (2019); Tzouvala, 'Civilisation', in J. d'Aspremont and S. Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (2019) 83.

[6] Greenman, 'Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels', 31 *Leiden Journal of International Law* (2018) 617.

the singular' (at 67), while Rolland and Trubek call for 'a new version of the embedded neoliberal truce' (at 95) that will enable China and other emerging economies to pursue models of state capitalism lawfully. Morosini further supports this re-balancing exercise by pointing out that Brazil's scepticism towards investor–state arbitration clauses did not have a negative effect on the inward flow of foreign direct investment (at 167).

The authors' laudable efforts to push back against the anti-Chinese hysteria, prevalent in President Trump's rhetoric, does not negate the necessity to interrogate the limitations of China's state capitalism. This does not only (or even predominately) involve the slowing down of China's economy or the question of whether the Chinese example is replicable. Rather, the increasing involvement of China in expansionist projects overseas,[7] coupled with the rising authoritarianism at home, the turn to accumulation through practices of internment and racialization, as in the case of the Uighur population,[8] as well as the issues of internal displacement and environmental degradation at the heart of the Chinese economic rise raise doubts about the sustainability and replicability of capitalist miracles. The contributors of this volume appear reluctant to engage with these difficult questions. Rather, emerging economies are used as examples of the need to allow for more policy space while preserving the core of international trade and investment law.

This emphasis on rebalancing the relationship between the 'national' and the 'international' in the pursuit of a stable global economy runs against certain factual and legal problems. As Andrew Lang points out, China's rapid growth was the outcome of a historically unique form of state capitalism, which would have been impossible outside the broader framework of globalized neoliberalism (at 86). The problems with a defence of limited pluralism, such as that offered by many chapters of this volume, are further elucidated by Dan Danielsen's chapter on supply chain capitalism. Danielsen persuasively argues that geographically and economically fragmented production and distribution has become a defining characteristic of today's capitalism and it is being actualized through 'numerous legal and private ordering mechanisms and business practices' (at 128). In this context, the idea of legal homogeneity as the previous state of play becomes somewhat unpersuasive. In other words, if we look beyond the 'textbook' version international trade and investment law, the picture that emerges is one of (asymmetrical) multiplicity, rather than homogeneity. The ability of some developed states to adopt measures that might give right to investor-state arbitration because they can afford the risks of litigation, the selective model of liberalization espoused by the WTO, the proliferation of regional models of economic integration as well as the interaction of public international law with domestic and customary legal orders, contract law or forms of calculated illegality are only some examples of how 'one size fits all' has been an ambition rather than the concrete reality of the global economy and its legal infrastructure.

If this is the case, then the dichotomy between the 'national' and the 'international' and the quest to strengthen the former while saving the latter become less politically sustainable and intellectually coherent. Indeed, some of this volume's chapters appear sceptical about the dualism of 'states versus international institutions' that largely structures the book. Nicolás Perrone, for example, raises the issue of local communities and the potential of having their interests and desires represented within the architecture of international investment law. Perrone puts forward a modest proposal of establishing committees with potential advisory and/or consent functions (at 179), which he nonetheless considers unlikely to succeed. Similarly, Frank Garcia argues that for consensus on trade to be restored, trade agreements should include adjustment mechanisms

[7] On the political economy of the Belt and Road Initiative and Chinese capitalism, see Harris, 'China's Road from Socialism to Global Capitalism', 39 *Third World Quarterly* (2018) 1711; Petranek, 'Paving a Concrete Path to Globalization with China's Belt and Road Initiative through the Middle East', 41 *Arab Studies Quarterly* (2019) 9.

[8] D. T. Byler, 'Spirit Breaking: Uyghur Dispossession, Culture Work and Terror Capitalism in a Chinese Global City' (2018).

which 'would place entities that benefit tremendously from trade liberalization–major financial institutions–in the role of assisting those who suffer most from the same' (at 238).

Creative proposals for compensation mechanisms are, in fact, central to numerous of this volume's chapters. For instance, Antonia Eliason and Rob Howse discuss the prospects of a global market in legal cannabis and the risk of it being dominated by Big Pharma and Big Tobacco (at 132). In this context, they highlight the potential of equity permit programmes 'to benefit those who have suffered under the War on Drugs' (at 132). Chantal Thomas also discusses the necessity of compensatory mechanisms in the context of the politically divisive but urgent question of immigration. Drawing from the case of the North-Atlantic Free Trade Agreement (NAFTA), which was followed by an increase in migration from Mexico to the USA, contrary to the prediction of mainstream economists, Thomas advocates for correcting 'the asymmetry in the international economic order between open markets and closed borders' (at 236) and doing so in ways that compensate those displaced in the process and avoid the distractions of anti-immigration rhetoric that has swept up many rich nations.

For all the richness of practical suggestions, the volume at hand glaringly ignores the biggest challenge of our time: the unfolding climate catastrophe that, amongst all else, threatens to evolve into a centrifugal force of unprecedented proportions. My concern here is not one of selectiveness, which is of course part of all projects, however comprehensive they might be. Far from 'yet another issue', climate change not only challenges the reproduction of global capitalism, but also points to its inherent limits and its potential to destroy the material matrix of social life. Indeed, the global economy and its legal infrastructure have been conceptualizing the world around us predominantly in terms of 'resources' to be exploited,[9] while efforts to preserve the very matrix of life need to be tailored narrowly as exceptions to the logic of free markets which are posited as the rule, for example under Article XX of the General Agreement on Tariffs and Trade (GATT).[10]

To return to my initial point, the efforts to re-balance the relationship between states and international authorities through ideas of policy space, institutional pluralism, and experimentation are welcome and fruitful. If anything, the contradictions and tensions of this edited volume say more about the nature of the legal profession in the context of globalized capitalism than about the concrete endeavour. There is little doubt that if the editors' and contributors' visions materialized, the international legal order would be fairer and more sustainable than it is now. In this respect, the mediating exercises that run through many of the chapters indicate the potential of progressive legal imagination in action. At the same time, the exercise can tilt towards apology if it does not acknowledge that the adoption of modified versions of already existing forms of political economy will serve a *status quo* that is socially unjust and environmentally destructive to its core. If this is the case, the volume at hand constitutes a first step for us to challenge what is thinkable in international economic law circles. Ideally, this process of rethinking will involve not only the substance of the field, but also the purpose and means of legal work. Recognizing our mediating work as such and being willing to let go of it if it gravitates towards apology for the *status quo* should also be part of this re-orientation.

Ntina Tzouvala

Senior Lecturer, College of Law, Australian National University
Email: ntina.tzouvala@anu.edu.au

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[9] Pahuja, 'Conserving the World's Resources?' in J. Crawford and M. Koskenniemi, with S. Ranganathan (eds), *The Cambridge Companion to International Law* (2012) 398.

[10] Article XX General Agreement on Tariffs and Trade, 30 Oct. 1947, 1947, 61 Stat. A-11, TIAS 1700, 55 UNTS 194.