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Remarks on Andrew Lang's World Trade Law After Neo-Liberalism

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Andrew Lang concludes his monograph on international trade law – without a doubt one of the most important recent contributions to liberal international law scholarship – with the call for 'the reformulation of a legitimating collective purpose to ground the work of the trade regime' (Lang, 2011: 347). Having focused in his book on the 'ideational conditions of possibility' for the development of the world trade law regime over the past seven decades, Lang asserts that this regime finds itself in a 'crisis of legitimacy' (Lang, 2011: 313) as a result of challenges raised by various parties including those making human rights claims. International lawyers can and indeed must 'rescue' the international trade regime from this crisis (and presumably from its demise) through the 'collective reimagination' of its *raison d'être*. No explanation as to the necessity of this task being given, one may presume this is for no reason other than that 'law must be defended'. Lang's argument thus seems to build on a premise that, whilst outwardly self-conscious, implicitly celebrates the role of lawyers as civilizing agents.

In this short commentary, I want to explore Lang's conclusion, and, more generally, the subject matter he addresses in the lead essay of this symposium, from a different vantage point. My first claim in this regard will be that Lang's thesis fails as an *explanatory theory* of legal interpretation for the reason of his sole focus on the 'ideational' or superstructural half of the story (Lang, 2014). Approaching the matter from a historical-materialist perspective, the supposition that a legal regime may be saved by an act of collective reimagination would seem unlikely, yet to critique Lang's argument solely on this basis would be ungenerous as well as uninteresting. A more interesting approach might be to view Lang's conclusion to his ideational story precisely as a product of the particular social context in which it was articulated and to investigate the relation between Lang's argument and this context, in other words, to look at it as existing within the dialectic between the ideational and the material aspects of the global trade regime.

Lang's scholarship, like 'any scholarly enquiry into the intersubjective frameworks of meaning operating in a particular social field' (Lang, 2014: ___) is produced by this self-

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same dialectic and forms an inseparable part of it. An attempt at identifying the specifically ideational therefore is necessarily artificial and only tentative or proximate whilst giving rise to an immediate risk of fetishisation. The production of ideational constructs engaged in by international trade law professionals and legal scholars (and we can include Lang himself in this group) is not only 'structured by habits of thought and forms of rationality characteristic of the field' (Lang, 2014: ___) but also influenced in some degree by their class allegiances: Characteristic of the material context (the web of material relations) from within which and according to the logic of which, they operate. International trade lawyers and scholars, members of international civil society, non-governmental organization (NGO) and United Nation (UN) professionals working on issues affected by international trade law *generally* belong to a specific professional subset of local elites and the 'global capitalist class'. For this group, an attachment to liberal values such as the rule of law forms the unstated premise to all meaning-creation that is never interrogated or fundamentally challenged.

It is when Lang calls for the 'remoralization of international trade law' that he most clearly evokes the language that is characteristic of this intellectual attitude, as evidenced, amongst others, in the writings of what one might regard as his intellectual predecessor, John Ruggie. Rather than arguing that in a 'post-liberal age', we must reconceive the collective purpose of international trade law, I would argue that it is exactly this call itself that defines the shift from neo-liberalism to what one might perhaps call 'late liberalism', but what to all intents and purposes is very much an iteration of liberalism and emphatically not 'post-liberalism' (Baars, 2011: 429). This is the moment of an attempted ideological reinvention of liberalism at the precise time of global crisis and unprecedented global popular resistance to the reigning economic order. The 'moralization of markets' in the move to 'global governance' specifically in the shape of the development of regimes such as 'corporate social responsibility' and 'socially responsible investment' – key aspects of Ruggie's 'embedded liberalism thesis' (Ruggie, 2008) – has been critiqued as in fact amounting to the 'marketization of morality' by Ronen Shamir (Baars, 2011; Shamir, 2008, 2010). In the context of Lang's particular argument relating to the ideational development (and reinvention) of international trade law in the face of challenges brought to it framed as arguments from the fields of human rights and environmental law, one could adjust Shamir's broad argument as follows. Rather than a 'marketization of morality' the reimagination of international trade law's collective purpose through its 'remoralisation' through human rights and environmental law concessions leads to the confirmation that 'human rights' and 'trade law' are two sides of the same coin and operate according to the same logic, which is the logic of capitalism (Baars, 2012).

For the sake of international trade law, Lang's argument remains on the level of the ideational. One might read this as a reflection of a certain need, in the interest of the survival of the world trade regime, to adjust the ideological justification of this regime. Lang concedes this project will be difficult to achieve, and hurdles must be cleared (Lang, 2011: 343ff). However, one might argue, it is precisely its perception as difficult that will make its success appear so much more valuable. By presenting international trade law and human rights as opposites, and performing the discursive *concession* of one to the other, a veil of ideational legitimacy is pulled over the continually increasing gap between rich and poor, exploiter and exploited.

What this also conceals is that in order for the claims of the exploited to be able to compete with those of the exploiter, they are expected to be articulated as human right claims. The desire to be free from exploitation must be translated into a 'right to development' and a claim to a certain measure of material wealth. The exploited must articulate 'claims for admittance to law' (Douzinas, 2010: 95). The practical effect of this is that individuals affected by the particular excesses of capitalism in conflict are constituted as rights-holders who must seek to negotiate the 'price' of the harm done to them, under the commodified responsibility relationship of global governance (Baars, 2012: Chapter 6). The neo-liberal global legal 'marketplace' thus persists and is extended rather than rescinded.

After all this, then, it comes as something of a surprise that Lang concludes his argument – in the original book but not in his essay in these pages – with one final recommendation with which, as it happens, I find myself in full agreement. Having focused on retelling the history of the ideational, Lang concedes that there is a need 'for more work [to be done] which focuses explicitly on the substantive outcomes of international economic law, tracing in detail the lines of causation from choices made in the global context through to their consequences on the ground' (Lang, 2011: 352). It is in this seemingly contradictory call that we may find the seeds of the new, truly critical project of international trade law scholarship. Those of us trained in the technical language and workings of the law have a contribution to make here: We can and must show concretely how both international trade law and human rights law constantly work hand in hand to uphold the same structures of governance and domination, how 'law congeals capitalism'. One cannot but hope that when the time comes for Lang to write the companion piece to his ideational exploration, this will be the direction in which his argument will turn. Without this, any rearticulation of the 'purposes of the trade law regime' would be a mere restatement of power cloaked in the mantle of legitimacy (Uvin, 2007: 603). With this, such work performed by international lawyers can hope to make a contribution to effecting a real material change. In the end, however, we must remind ourselves, such change will not be brought about primarily by lawyers and legal scholars through their ideational work, but by law's objects, the exploited, displaced and 'wretched' of the earth, through their material actions.

Notes

1. According to the historical-materialist tradition, any historical change in general is conceived to be the result of the constant dialectical interplay between contradicting forces in society. Change is not the result solely of our ideas or of our 'willing' of change. For further discussion, see, for example, Ollman (2003).
2. For further development of the idea of the global capitalist class, see, for example, Hanafi and Taber (2005) and Uvin (2007: 603).
3. This is partly the role of the local and international UN/NGO professional classes that channel the subaltern's claims into the structures of power. See further Baars (2012: Chapter 6).
4. For a similar call, more generally to (Marxist) international lawyers, see Rasulov (2008: 259).

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Historicizing International Trade Law

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1. The argument which Andrew Lang presents in his essay – and before that in the similarly titled monograph (Lang, 2011) to which, as he puts it, the former is meant to 'serve[] as an entrée' (Lang, 2014: ___) – is very complex, multifaceted and ambitious. In these pages, I am only going to focus on one, relatively narrow, aspect of it, which should not, of course, be taken to suggest that I do not find the rest of Lang's contentions sufficiently interesting or deserving of attention; quite on the contrary. Lang's essay provides, to my mind, one of the most compelling, nuanced, and sophisticated accounts of the history of international trade law (ITL) offered in recent years. Tracing out its various strands has proved without