PUBLIC INTERNATIONAL LAW AND ECONOMICS

SYMPOSIUM INTRODUCTION

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We live in an era of increasing international interdependence, in which there has been a proliferation of international law and international organizations. Yet our understanding of the workings of international law has not kept pace. While we have a good deal of work on international law doctrine, our analytic tools are much weaker, and we are far from anything approaching a science of institutional design. We are therefore ill prepared to advise policy makers in the project of developing effective tools to solve transnational problems and to provide global public goods.

The hallmark of international law scholarship has been meticulous doctrinal work. There will always be a need for telling the ought from the is, for prudently creating consistency, for distilling general principles from colorful case law, for boldly helping state practice gaining momentum, and for turning these ideas into opinio iuris. However, doctrine is not the only item on the agenda of public international law as a discipline. Public international law scholars should also assume the role of outside observers, applying the sharpest analytic tools and the most powerful empirical methodology to their assigned topic. And the discipline should not exclusively look at the law in force, but also at the law in making, that is, at institutional design.[1] In the latter perspective, a disconnect would not be acceptable between the normative positions adopted by international law scholars and courts on the one hand, and the real-world

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1. *See* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 5–6 (1999).

possibilities of what is achievable, given state interests.[2] Ultimately, ad hoc advice could not be sufficient either.[3]

In response to this, a growing number of scholars are turning to the social sciences to inform international law. This movement was started nearly two decades ago at the intersection of international law and international relations.[4] It was, perhaps, only a matter of time until scholars began to apply the sharpest analytic tools and the hardest empirical methodology to international law: law and economics has reached the discipline. It starts from the sometimes controversial but always thought-provoking assumption that states are self-interested, rational actors.[5]

The range of work already produced in this growing movement is impressive.[6] The economic approach to international law has largely focused on general issues of international law, such as questions of modes of treaty making[7] as well as treaty exit;[8] the nature of customary international law;[9] international adjudication;[10] and last but not least compliance, reputation, and reciprocity in international law.[11] Empirical studies have

2. *See* Laurence B. Solum, *Constitutional Possibilities* (Univ. of Ill. Pub. Law & Legal Theory, Research Paper Series, Paper No. 06-15, 2007), *available at* http://ssrn.com/abstract=949052.

3. *Compare* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995), *with* David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U. L. REV. 879 (2003).

4. *See, e.g.*, Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, *in* HANDBOOK OF INTERNATIONAL RELATIONS 538 (Walter Carlsnaes et al. eds., 2002); Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L. 367 (1998).

5. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 3 (2005).

6. *See, e.g.*, Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 28–33 (1999); Symposium, *Rational Choice and International Law*, 31 J. LEGAL STUD. S1 (2002); Alan O. Sykes, *The Economics of Public International Law* (Chicago Working Paper Series, John M. Olin Law & Econ. Working Paper No. 216, 2004), *available at* http://ssrn.com/abstract=564383.

7. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance,* 54 INT'L ORG. 421, 421 (2000).

8. *See, e.g.*, Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005).

9. *See, e.g.*, Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT'L L. 143 (2001); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1119–20 (1999); Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 149–50 (2005); George Norman & Joel. P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541 (2005); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559 (2002); Pierre-Hugues Verdier, *Cooperative States: International Relations, State Responsibility and the Problem of Custom*, 42 VA. J. INT'L L. 839 (2002).

10. *See, e.g.*, INTERNATIONAL CONFLICT RESOLUTION (Stefan Voigt et al. eds., 2005); Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004).

11. *See, e.g.*, George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95 (2002); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1826–27 (2002); Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L.J. 93 (2003); Beth A. Simmons, *Money and the Law: Why Comply with the Public International Law of Money?,* 25 YALE J. INT'L L. 323 (2000).

helped our understanding of why international law takes the form that it does, and they can also help us evaluate the conditions under which treaty regimes are effective. Although thriving, the young law and economics of international law has barely touched upon many worthy topics. Some questions that deserve further considerations include:

- Who should be modeled as rational actors: states and other legal persons of international law, or those individuals—corporate and collective actors—at the interior of the legal person who shape its will? What could the behavioral turn, so popular in domestic law and economics, mean for the analysis of international law?
- What explains whether states bind themselves to treaties? By what international law mechanisms do they incorporate international law in their national constitutions or law?
- What explains the continued existence of customary international law?
- How is rational choice analysis able to inform regime studies?

These are ambitious questions. The contributions to this special issue, though they involve a wide range of different approaches and topics, share a commitment to using the core methodological assumptions of the rational choice approach in seeking to answer them.

We do not assert that the rational choice approach is the only valid way to study international law. Rather, our view is that the tools may help to generate novel insights into both the possibilities and limits of international law, and may thus inform a realistic approach to global problems. The approach tends to proceed through positive analysis of why institutions take the form that they do, explaining rather than suggesting new doctrine, but many of the contributions also seek to engage and inform normative debates.

The papers published in this Symposium were first presented at a conference at the Max Planck Institute for Research on Collective Goods in Bonn, Germany in December 2006. In putting together the conference, we had two aims: one interdisciplinary and one intercultural. We wanted to contribute to the nascent law and economics of public international law. We noticed, however, that the use of the rational choice approach to international law has been largely confined to the United States, creating a methodological gap between European and American international law scholarship. We sought to generate a trans-Atlantic discussion not only about the substantive papers, but on the appropriateness of the rational choice approach to international law. The symposium therefore features a number of different approaches within the rationalist tradition, including empirical papers, formal modeling, and game theory. Each American paper was accompanied by comments from European international lawyers, several of which are included in

this symposium issue. The cross-disciplinary and transnational nature of the discussions were highly fruitful.

Our thanks go to the staff of the Max Planck Institute for Research on Collective Goods in Bonn, as well as the editors of the University of Illinois Law Review for their superb efforts in producing the conference and symposium issue. We are also grateful to the Volkswagen Foundation for their generous support of the meeting.