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

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. 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.

The range of work already produced in this growing movement is impressive. The economic approach to international law has largely focused on general issues of international law, such as questions of modes of treaty making as well as treaty exit; the nature of customary international law; international adjudication; and last but not least compliance, reputation, and reciprocity in international law. Empirical studies have
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 eco-
nomics 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 interna-
tional law in their national constitutions or law?

- What explains the continued existence of customary interna-
tional law?

- How is rational choice analysis able to inform regime studies?

These are ambitious questions. The contributions to this special is-
ssue, 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 in-
ternational law, and may thus inform a realistic approach to global prob-
lems. 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 in-
form 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 confer-
ence, we had two aims: one interdisciplinary and one intercultural. We
wanted to contribute to the nascent law and economics of public interna-
tional law. We noticed, however, that the use of the rational choice ap-
proach 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 appropriaten-
ness of the rational choice approach to international law. The sympos-
ium therefore features a number of different approaches within the ra-
tionalist 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.

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