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Review Essay  
How Rational is  
International Law?

Niels Petersen





## **Review Essay**

# **How Rational is International Law?**

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June 2009

## Review Essay How Rational is International Law?

Niels Petersen<sup>\*</sup>

Andrew T. Guzman. *How International Law Works: A Rational Choice Theory*. Oxford: Oxford University Press, 2008. Pp. 260+xi. \$ 35.00. ISBN: 978-0-19-530556-2

Joel P. Trachtman. *The Economic Structure of International Law*. Cambridge, Mass.: Harvard University Press, 2008. Pp. 354+xii. \$ 55.00. ISBN: 978-0-674-03098-5

### Abstract

Economic approaches are becoming increasingly prominent in international law. A few years ago, Jack Goldsmith and Eric Posner caused a great stir with their account of *The Limits of International Law*, in which they argued that international law did not have any effect on state conduct. This contribution reviews two recent books analyzing the effectiveness of international law from an economic perspective. Both authors, Andrew Guzman and Joel Trachtman, take a much more differentiated approach than did Goldsmith and Posner, thus making analytical methods of economics more acceptable for mainstream international law scholarship. Still, this contribution argues that we should be cautious to perceive the economic perspective as a holistic explanation of “how international law works”. Economic models are, for methodological reasons, based on certain assumptions. The analytical tools are thus only capable to answer a certain range of questions so that they have to be complemented by other theoretical approaches. Therefore, we have to be very cautious with policy recommendations that are based on a purely economical perspective.

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## Introduction

In 1998, Peter Katzenstein, Robert Keohane and Stephen Krasner predicted that the debate between rational choice and constructivism would shape the field of international relations for the years to come.<sup>1</sup> With some delay, this discussion has also reached international law scholarship. The starting shot came when, a few years ago, Jack Goldsmith and Eric Posner caused a great stir with their rational choice account of *The limits of international law*,<sup>2</sup> in which they argued that international law does not have an independent effect on state conduct and should thus not be considered as law. Their analysis has drawn a lot of criticism from different theoretical viewpoints.<sup>3</sup> This essay deals with two recent books that try to set out different and more differentiated theories of international law from a rational choice perspective. While Andrew Guzman tries to explain us *How International Law Works*,<sup>4</sup> Joel Trachtman seeks to uncover *The Economic Structure of International Law*.<sup>5</sup>

The research agenda of rational choice scholarship is two-fold: On the one hand, the approach explores whether and why states comply with international law or specific legal norms – a question that has been crucial for international law scholarship for centuries.<sup>6</sup> On the other hand, it tries to explain, predict and evaluate why certain legal institutions emerge. Both authors work with analytical models in order to explain social mechanisms. In this context, they make two basic assumptions. First, they suppose that states are rational actors that try to maximize their preferences. For methodological reasons, these preferences are assumed to be exogenous and constant.<sup>7</sup> However, they do not have to be of a monetary or materialistic nature, but can also be aesthetic or moral desires.<sup>8</sup> Furthermore, they may vary among different states. Second, they assume that states are unitary actors. They are not concerned with the decision-making process within the state, but rather construct the state as a black box. Both authors acknowledge that this assumption is a simplification, but they make this simplification for methodological reasons. In order to be able to make valid predictions for a certain number of abstract situations, models are in need of a certain simplification.

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- 1 P.J. Katzenstein, R.O. Keohane and S.D. Krasner, 'International Organization and the Study of World Politics', 52 *IO* (1998) 645, at 683.
  - 2 J.L. Goldsmith & E.A. Posner, *The Limits of International Law* (2005).
  - 3 For a critique from a rational choice perspective, see A. v. Aaken, 'To Do Away with International Law? Some Limits to 'The Limits of International Law'', 17 *EJIL* (2006) 289. For a critique from a 'traditionalist' perspective, see D.F. Vagts, 'International Relations Looks at Customary International Law: A Traditionalist's Defence', 15 *EJIL* (2004) 1031.
  - 4 A.T. Guzman, *How International Law Works. A Rational Choice Theory* (2008).
  - 5 J.P. Trachtman, *The Economic Structure of International Law* (2008).
  - 6 The literature on this issue is abundant. From recent scholarship, see, e.g., T.M. Franck, *The Power of Legitimacy among Nations* (1990); A. Chayes & A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995); H.H. Koh, 'Why Do Nations Obey International Law?', 106 *Yale LJ* (1997) 2599. For a normative critique of international law see M. Koskenniemi, *From Apology to Utopia. The Structure of the International Legal Argument* (2005). However, the mainstream doctrinal approach to international law has often avoided the question of compliance by simply pointing out that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." (L. Henkin, *How Nations Behave: Law and Foreign Policy* (1979), at 47).
  - 7 Guzman, *supra* note 4, at 17.
  - 8 Trachtman, *supra* note 5, at 1.

In their analysis, both authors focus on general international law. They do not try to explain specific phenomena, but to make theoretical claims for the international legal system as a whole. Consequently, they deal with the secondary rules of international law in the Hartian sense<sup>9</sup> and thus analyze the different sources. This review will first give an introduction into the basic idea of each book (1.). It will then discuss the concepts of custom (2.) and treaty (3.) put forward by Guzman and Trachtman, before making some concluding remarks on strengths and limitations of the rational choice approach (4.).

## 1. The Basic Concepts

Although both authors analyze international law from an economic perspective, they differ in their main focus. Andrew Guzman is primarily interested in why states comply with international law despite the lack of a central law enforcement mechanism, while Joel Trachtman is concerned with the explanation of the emergence of specific legal institutions.

### A. A compliance-based theory of international law – Andrew Guzman

Andrew Guzman's book primarily focuses on law as a social phenomenon. His main thread is whether legal norms influence state conduct because of their legal nature. While national legal systems provide a central sanctioning mechanism in order to enhance norm compliance, such a mechanism is lacking in international law. Nonetheless, Guzman perceives international law to be an effective legal order. He identifies three factors that enhance the compliance of states with international law: reputation, retaliation and reciprocity (pp. 32-33). The most intuitive factor seems to be reciprocity. Reciprocity works best in bilateral situations. If one of the two cooperating states refuses to comply with a legal norm, the other may react in the same way so that both states lose the benefit of cooperation. However, reciprocity does not work in all cases. In particular norms that concern human rights or global public goods cannot be based on a reciprocal basis because reciprocal behavior would either not affect the violating state at all (in the case of human rights) or lead to a breakdown of the whole normative system (p. 65).<sup>10</sup>

The possibility of retaliation establishes a decentralized sanction system. A state may punish another state for non-compliance. However, this mechanism is also less than perfect because imposing a sanction on another state may be very costly for the punishing state. Particularly in multilateral situations, states have an incentive to free-ride and to hope that another state will punish the violator (p. 66).

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9 See H.L.A. Hart, *The Concept of Law* (2nd ed. 1994).

10 R.O. Keohane, 'Reciprocity in International Relations', in *International Institutions and State Power* (1989) 132 makes a distinction between specific and diffuse reciprocity. The latter type is the one which may be problematic for inducing compliance.

Reputational incentives thus form the heart of Guzman's theory. He picks up an approach developed in international relations theory<sup>11</sup> and argues that reputation is important for states because it allows them to make more credible promises. Other states might not want to enter into a treaty with an unreliable state, and reliable states may be able to extract higher returns for their cooperation (p. 34). Consequently, states will comply with a legal norm if the reputational gain (or the prevention of a reputational loss) will outweigh the short-term benefits of a norm violation. However, Guzman deems the effect of reputational sanctions to be weakened by the fact that reputation is compartmentalized (pp. 100-6). A state that is considered to be reliable in trade or investment agreements might not be harmed by human rights violations with regard to future economic cooperation. But sectoral state conduct is not perfectly independent. Guzman acknowledges that there may be spillover effects. The strength of these depends on how much the different areas are related to each other.

Guzman's theory is a direct answer to Goldsmith and Posner's claim that international law lacks any normative force.<sup>12</sup> The decisive question concerning international law's effectiveness is whether legal norms affect state conduct. Analyzing different behavioral patterns that emerge in international relations does not help us in this respect. The analysis should therefore not focus on whether the payoff-structure of a particular game is such that states have incentives to defect, but whether the existence of legal norms alters this payoff-structure.<sup>13</sup> Guzman takes up this question by trying to identify different factors that enhance the effectiveness of international law, and shows that states often have an interest in complying with international law, even from a rational choice perspective.

## **B. International Relations as a market of jurisdiction – Joel Trachtman**

It is a frequent commonplace that international law has developed from an order of coordination to one of cooperation.<sup>14</sup> This development is underlined by recent debates in Continental international law scholarship about the supposition of an international community<sup>15</sup> or the emergence of an international constitutional order.<sup>16</sup> Due to the economic and social globalization, the effect of

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11 See R.O. Keohane, *After Hegemony. Cooperation and Discord in the World Political Economy* (1984), at 105-06.

12 Goldsmith & Posner, *supra* note 2.

13 Aaken, *supra* note 3, at, 292.

14 Seminally W.G. Friedmann, *The changing structure of international law* (1964).

15 A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926); B. Simma, 'From Bilateralism to Community Interests in International Law', 250 *RdC* (1994) 217; A. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (2001).

16 G. Scelle, 'Le droit constitutionnel international', in Faculté de droit Strasbourg (ed.) *Mélanges Raymond Carré de Malberg* (1933) 501; C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *RdC* (1999) 13; C. Walter, 'Constitutionalizing (Inter)national Governance', 44 *GYIL* (2001) 170; R.-J. Dupuy, 'L'unité de l'ordre juridique international', 297 *RdC* (2002) 9; E. de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', 19 *Leiden JIL* (2006) 611; A. v. Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany', 47 *Harv. ILJ* (2006) 223; S. Kadelbach and T. Kleinlein, 'International Law – a Constitution of Mankind? Attempt at a Re-appraisal with an Analysis of Constitutional Principles', 50 *GYIL* (2007) 303.

the conduct of states is often not limited to their own territory. Rather, states increasingly create external effects with their action so that there is a need for cooperation in order to find ways to internalize these externalities.

This is the starting point of Joel Trachtman's analysis of the *Economic Structure of International Law*. Trachtman perceives international relations to be a market for authority and international law to be its institutional framework (p. 10). He draws an analogy to the market of property rights. It is the central goal of property rights to internalize externalities by giving the holder of the property right incentives to care for its value. Jurisdictional rules are supposed to have the same effect in international relations: they shape governmental incentives in order to internalize externalities (p. 29). With this approach, Trachtman tries to break up the distinction between private and public international law that has long been popular among Continental scholars.<sup>17</sup> He assumes that state preferences are expressed through national legislation (p. 36). Therefore, the distinction between facultative and mandatory rules is much more important than the one between public and private law. A facultative rule expresses weak preferences as private entities are allowed to contract out of the rule at a certain cost. Correspondingly, a mandatory rule is an indication of strong preferences as states do not tolerate any deviations.

How does the market of authority work? According to the Lotus principle,<sup>18</sup> jurisdiction is generally associated with territory as property was formerly linked with possession (p. 32). However, as there is growing regulatory competition between states, such an approach leads to an increase of externalities. Decisions of antitrust agencies or environmental policies frequently do not only affect the issuing states, but also related jurisdictions. There is thus a need for a different allocation of authority. The starting point of the analysis is the Coase theorem:<sup>19</sup> In a world with no transaction costs, the allocation of property rights does not have any effect on social welfare because the party valuing a certain right most will acquire it anyway or will at least strike a deal with the incumbent of the right.<sup>20</sup> The conclusion is, however, that allocation matters if there are transaction costs. In such a case two efficient solutions are possible: The allocation either anticipates the transactions, thus conceding the right to the party valuing it most, or it is performed in order to facilitate later transactions, depending on the costs for anticipating the transactions and the actual transaction costs (p. 33).

For international law, Trachtman proposes four different strategies (pp. 39-40). If the costs for anticipating later transactions are low, then jurisdiction should be allocated in order to minimize later transaction costs. If the costs of an anticipation of the allocation are high, but formal transaction costs low, then it is the best strategy to create clear and complete property rights, which

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17 This distinction becomes increasingly meaningless anyway, with the emergence of international regulatory institutions addressing states and private entities at the same time and thus blurring the traditional public-/private-divide. On this development, see B. Kingsbury, N. Krisch and R. Stewart, 'The Emergence of Global Administrative Law', 68 *Law & Contemp. Probs.* (2005) 15.

18 *S.S. Lotus*, P.C.I.J. (ser. A) No. 10 (7 Sept. 1927).

19 R.H. Coase, 'The Problem of Social Cost', 3 *J. L. & Econ.* (1960) 1.

20 There are, of course, distributional issues because the parties themselves do care about the allocation of property rights.



can be traded later on. If the allocation cannot be anticipated and formal transaction costs are high, then it is most efficient to issue vague or muddy property rights, which can later be concretized either by informal negotiations or by a third party through litigation. An alternative strategy is the establishment of a formal institutional mechanism entrusted to deal with the reallocation of rights. The institutional solution has the advantage that it can override holdouts by states that are favored disproportionately by the *status quo*. However, the question whether the creation of formal institutions in order to internalize externalities is efficient should be subject to a comparative institutional analysis (pp. 51-52).

## 2. Customary International Law

Although customary law is one of the principal sources of international law, its theory is far from being uncontested. Nearly every issue surrounding the identification of customary norms is subject to controversy. Certainly, there is almost a consensus that custom consists of state practice and *opinio iuris*, i.e., a sense of obligation to follow that particular practice.<sup>21</sup> However, there is uncertainty on what duration, frequency and consistency of state practice is necessary in order to create a customary norm.<sup>22</sup> Furthermore, there are no criteria for selecting and evaluating precedents of state practice so that arguments based on custom always suffer from a considerable degree of arbitrariness.<sup>23</sup>

The rational choice literature has recently attended to the problem of customary international law.<sup>24</sup> The principal situation discussed among rational choice scholars is the prisoner's dilemma. In the prisoner's dilemma, the socially optimal situation would be reached if both parties cooperated. However, every party has an individual incentive to defect, so that rational choice predicts that both parties will defect in a one-shot prisoner's dilemma. The prisoner's dilemma is so well-suited to analyzing the effectiveness of customary norms because we can model the legal norm as representing the socially optimal solution while every single state has short-term incentives to defect from the legal norm.<sup>25</sup> If the legal norm can prevent states from defection in such a situation, then it can be considered to be effective.

What factors induce state compliance with customary legal norms in prisoner's dilemma situations? Trachtman identifies two principal factors in which the reality of international relations

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21 Even this definition is not uncontested, as there are authors who try to get rid of the state practice requirement. See B. Cheng, 'On the Nature and Sources of International Law', in *International Law. Teaching and Practice* (1982) 203, at 222-29; F.R. Tesón, 'Two Mistakes about Democracy', 92 *ASIL Proceedings* (1998) 126, at 127.

22 A. D'Amato, *The Concept of Custom in International Law* (1971), at 58.

23 H. Hestermeyer, 'Access to Medication as a Human Right', 8 *Max Planck UNYB* (2004) 101, at 158.

24 See J.L. Goldsmith and E.A. Posner, 'A Theory of Customary International Law', 66 *University of Chicago LR* (1999) 1113; M.A. Chinen, 'Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner', 23 *Michigan JIL* (2001) 143; P.-H. Verdier, 'Cooperative States: International Relations, State Responsibility and the Problem of Custom', 42 *Virginia JIL* (2002) 839; E.T. Swaine, 'Rational Custom', 52 *Duke LJ* (2002) 559; A.T. Guzman, 'Saving Customary International Law', 27 *Michigan JIL* (2005) 115; G. Norman and J.P. Trachtman, 'The Customary International Law Game', 99 *AJIL* (2005) 541.

25 Trachtman, *supra* note 5, at 81.

deviates from the assumptions of the classical prisoner's dilemma (p. 83-84): on the one hand, states play the game repeatedly. If one state defects, the other may react on this defection with non-cooperation in the future. On the other hand, states do not play an isolated game. There is an interconnection with many other areas. Thus, if a state does not comply with a specific customary norm, this may have an effect also on its cooperation with states in other subject areas. These two factors may often lead to compliance with legal norms in prisoner's dilemma situations, even though the individual states have short-term incentives to defect. Trachtman's concept of compliance with customary law is thus very close to Guzman's theory of norm compliance. The function of reciprocity and retaliation in Guzman's approach is represented by the design of the models as repeated games. Moreover, reputation is the medium for giving effect to cross-sectoral effects of norm-compliance.

Both authors draw certain consequences for the doctrine of customary international law from their observation of how custom works. Guzman adopts a functional definition of customary law: customary rules are those norms that affect state payoffs because they are considered to be law (p. 190). What is important for an international actor in selecting his strategy of behavior is thus not whether he thinks that a certain norm exists. It is rather whether he thinks that the actors he is interacting with believe that there is a certain legal norm. *Opinio iuris* does thus not refer to the state that performs a certain conduct, but to the evaluation of this conduct by the international community (p. 195). State practice, on the other hand, is not a constitutive element of custom, but only an indication for the existence of an *opinio iuris* (p. 201).

As Guzman admits himself, this approach runs into problems when it comes to the identification of customary norms. States may vary in their evaluation of other states' opinions on certain norms. They will probably have different estimations regarding whether the violation of a certain norm imposes a significant cost on them or not. Asymmetrical compliance is certainly a problem for the cohesion of a legal system. However, Guzman's approach would not only lead to an asymmetrical compliance, but to a 'relative normativity'<sup>26</sup>, which would violate the basic assumption of every modern legal system that the legal subjects are equal.<sup>27</sup> Guzman tries to evade this identification problem by recurring to secondary sources of identification like decisions of international courts and tribunals. However, how do you plead before such a tribunal if there are no precedents? The problem of the functional approach lies in its identification of normativity with effectiveness. Both concepts are distinct, though.<sup>28</sup> While functional norm concepts may thus have a great value for heuristic analysis of a legal system, we probably need formal criteria of norm identification if we want to make doctrinal propositions about the law.

Trachtman avoids these difficulties by sticking to the traditional definition of customary international law. He interprets *opinio iuris* not to be a factual belief of obligation, but rather to be a

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26 The term is borrowed from P. Weil, 'Towards Relative Normativity in International Law?', 77 *AJIL* (1983) 413.

27 Comp. U.N. Charter art. 2, para. 1 (establishing the principle of sovereign equality).

28 N. Petersen, 'Rational Choice or Deliberation? – Customary International Law between Coordination and Constitutionalization', 165 *JITE* (2009) 71, at 76-77.

normative view that a specific rule should be law (p. 112). A customary rule is thus created if certain states want to promote a certain rule and act correspondingly.<sup>29</sup> This rule is confirmed as a customary norm if there are a sufficient number of other states that adopt this specific conduct. However, the value of Trachtman's analysis is mainly limited to traditional forms of international law, which is based on the observation of behavioral patterns. In the last decades, international law scholarship has increasingly applied more interpretative methods of identifying customary norms, though.<sup>30</sup> In particular in the field of human rights, expressions of a supposed *opinio iuris* play a much bigger role than actual state practice. As lawyers have a great margin of appreciation in evaluating this *opinio iuris*, they do not only interpret, but also shape international law through adjudication and scholarship.<sup>31</sup> Constructivist studies on the effect of human rights norms argue that the human rights discourse imposes a burden of justification onto states violating human rights norms and thus influenced state behavior.<sup>32</sup> The concentration on behavioral patterns of states therefore neglects this active role of lawyers in the formation of international law.

### 3. Treaties and International Organizations

#### A. Treaties on Matters of Substance

The second principal source of international law, treaties, is less debated than the concept of custom.<sup>33</sup> Rational choice approaches are thus to a lesser extent concerned with the effects of treaties, but rather concentrate on their formation. Guzman analyzes why states choose particular forms of cooperation. While deciding about the institutional strength of an agreement, states have to balance the credibility of the commitment against its costs. Soft law agreements have low costs (because they are easy to violate), while the establishment of monitoring and sanctioning systems increases the costs of the commitment, but also its credibility (pp. 134-35).

If states therefore have a strong interest that other states cooperate, they will establish a strong treaty mechanism. If their own flexibility is more important than their partners' compliance, instead, a soft law agreement or a treaty without institutional teeth is more likely to be agreed upon. An example might be the field of human rights. Here, states only have little benefit of the

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29 M. Byers, *Custom, Power and the Power of Rules* (1999), at 150-51.

30 See B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian YIL* (1992) 82, at 88-97; N. Petersen 'Customary Law without Custom? – Rules, Principles, and the Role of State Practice in International Norm Creation', 23 *American University ILR* (2008) 275, at 278-86.

31 See J.H.H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', 35 *JWT* (2001) 191; E. Benvenisti, 'Customary international law as a judicial tool for promoting efficiency', in E. Benvenisti and M. Hirsch (eds.) *The Impact of International Law on International Cooperation* (2004) 85.

32 T. Risse, 'International Norms and Domestic Change: Arguing and Communicative Behavior in the Human Rights Area', 27 *Politics & Society* (1999) 529.

33 But see J. Klabbers, *The Concept of Treaty in International Law* (1996). There are also many unresolved issues in the context of treaty interpretation. See S. Sur, *L'interprétation en droit international public* (1974); R.K. Gardiner, *Treaty Interpretation* (2008).

compliance of other states. What is more important to them is to send a moral signal that they themselves are willing to respect human rights. In such a case, they may value flexibility to breach their legal obligations if other interests prevail, so that they will choose a softer treaty mechanism. The same considerations guide the decisions on whether to include exit or escape clauses in a treaty or whether to allow for reservations. All these institutions are mechanisms increasing the flexibility and thus lowering the costs for entering into the treaty, but they are also reducing the expected return (p. 152). A consequence of Guzman's approach is that he does not make a binary distinction between hard law and soft law. The difference rather lies in the signal regarding the strength of the commitment. And this signal does not represent a qualitative distinction, but is rather situated on a gradual scale (p. 144).

Concerning the substance of treaties, there should be a general tendency to have treaties with a small scope because the less complex a treaty, the lower are the transaction costs (p. 162). Yet, some international agreements do not fit into that scheme. Guzman offers three explanations for complex treaty mechanisms. First, some treaties need a broader scope in order to be effective because several issues are interrelated and it would thus diminish the effectiveness of a certain regime to treat them separately. Second, broadening the range of an agreement provides the opportunity to compensate over different issue areas if states have contrary interests. Finally, broad scopes allow capturing economies of scope in using existing infrastructures. It is, e.g., rational to conclude trade agreements under the umbrella of the WTO in order to use the institutions of the latter for administration and dispute settlement.

Trachtman conceptualizes the conclusion of treaties as a two stage-game. First, it has to be asked why states enter into an agreement, and second, why they comply with a treaty they have entered into. The answer for the first question seems to be relatively simple: States agree upon a treaty if they benefit from cooperative behavior, but if their benefit is dependent on the cooperation of other parties. The underlying incentive structures may vary in this respect: Trachtman considers global public goods<sup>34</sup> as well as the chicken and the stag hunt game. In all cases, states enter into a treaty in order to be able to expect a certain behavior from the other parties. Once states have entered into an agreement, there are several factors that induce compliance: Among these are countermeasures, claims for restitution, decentralized punishment and reputation (pp. 139-40).

After the explanation of the functioning of treaties, Trachtman deals with some normative consequences of economic analysis. With regard to treaty interpretation, he counters opinions raised in the law and economics literature that economic efficiency should be the main standard of interpretation.<sup>35</sup> As all parties to a treaty know their own preferences best, it should be them who determine the standards of interpretation (pp. 146-47). These should thus follow from the mandate implied in the treaty (p. 148). However, such a mandate will often be difficult to determine, and it might differ with respect to the adjudicating bodies. One might thus be inclined to resort to

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34 There is a small mistake in all columns, except the first, of table 4.1 (p. 133), which overstates the gains from non-cooperative behavior. As the gain for cooperation is two, and the costs are three, the difference between compliance and non-compliance should be one, not three.

35 R.A. Posner, *Economic Analysis of Law* (1998), at 105.

the text of the treaty, as the text may be the best expression of the preferences of the parties.<sup>36</sup> But texts are subject to varying interpretations, and sometimes parties may have consciously included lacunae in lack of an agreement. Finally, there might be a principal-agent-problem, i.e., that governments have different interests than their population. This justifies the dynamic interpretative approach of many human rights courts that protect the interest of the citizens against the reluctance of governments to profuse restraints of their sovereign power.<sup>37</sup>

## B. Institutional Treaties

Treaties are not only a codification of substantive issues. Increasingly, they set up institutions, or have, at least, some institutional provisions for the implementation of substantive issues. It is one major shortcoming of Guzman's book that it does not contain a part on international institutions.<sup>38</sup> Trachtman, in contrast, dedicates two chapters to international organizations and international adjudication. The traditional assumption in the International Relations literature is that international institutions are formed because external effects induce market failure.<sup>39</sup> Trachtman argues that this explanation was too simplistic, as Coase had shown that external effects do not influence the overall efficiency.<sup>40</sup> Because externalities will always be internalized through negotiations if there are no transaction costs, the true justification of International Organizations is not the existence of external effects, but of transaction costs (p. 157).<sup>41</sup>

However, the occurrence of significant transaction costs does not call for a regulatory intervention *per se*. As regulation equally causes transaction costs, neither the market nor governmental regulation have an advantage per default. Rather, it is necessary to perform a comparative institutional analysis considering the gains and the losses from the transaction as well as the transaction costs in order to find the optimal solution (p. 159). Normatively, Trachtman consequently advocates empirical analyses, which are based either on cross-jurisdictional or on historical comparisons (pp. 180-81).

Positively, states will opt for the establishment of an international organization if the complexity and the involved uncertainty of the subject matter make it difficult to write a complete treaty. The establishment of majoritarian institutions is supposed to react to changes in the environment that cannot be predicted at the time when the treaty is concluded (p. 170). States have incentives to enter into such an agreement if they think that they can benefit collectively from cooperation, but if they are uncertain what share of the gain they will capture (p. 184). Trachtman points out that the inability to write complete treaties is much more frequent in international law than in the

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36 See *Medellin v. Texas*, 128 S. Ct. 1346, at 1361-63 (2008).

37 Cf. G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007), at 79.

38 Accord M. Goldmann, 'A Quantum of Solace: Guzman on the Classical Mechanics of International Law', 1 *Göttingen JIL* (2009) 219, at 226.

39 R.O. Keohane, 'The Demand for International Regimes', 36 *IO* (1982) 325, at 335.

40 See *supra* note 19.

41 In this aspect, Trachtman relies on Coase' theory of the firm. See R.H. Coase, 'The Nature of the Firm', 4 *Economica* (1937) 386.

domestic context. International treaties do not have the institutional structure in order to support and complete contracts that are common in domestic systems (pp. 171-74). Therefore, international organizations are sometimes also set up in order to create such a supporting structure, as can, e.g., be observed in the case of the WTO.

In the final chapter of his book, Trachtman analyzes the role of adjudication in international law. He distinguishes two types of legal norms – rules and standards. While rules are specific and concrete, standards are vague and leave a considerable margin of discretion to judicial decisions. When the drafters of a treaty have to decide on whether to employ rules or standards, they face a trade off: rules provide more predictability, but less flexibility. As it will be difficult for the parties to foresee and resolve in advance all possible conflicts, they often need to use standards in order to avoid excessive drafting and negotiation costs. One important field that is subject to standards is the area of regime conflict. There are no clear rules on how to balance trade issues with environmental or human rights matters. The principal norm for the resolution of these conflicts, Art. XX GATT, leaves a considerable margin of appreciation to adjudicators.<sup>42</sup>

But what are the standards for resolving these conflicts? Trachtman first examines the proposition to leave the question to national legislators (*laissez régler*). However, he rejects this approach as an erosion of the international legal system (p. 224). It would allow states to externalize the cost of their conduct to other jurisdictions. Furthermore, the concerns regarding the legitimacy of judicial decision-making are less serious than often assumed. While legislation creates abstract norms, courts can make a context-specific analysis (p. 234). As it is not possible to establish an abstract hierarchy of values between competing goals of the international order,<sup>43</sup> such conflicts have to be resolved on a case-by-case basis.<sup>44</sup> For such a decision, however, courts are the best institutions. Regarding their standards of decision, Trachtman compares comparative cost-benefit-analysis with proportionality, the balancing test and necessity as standards for the resolution of normative conflicts. He points out that each of these methods has deficits: they all have to make assumptions about reality that may be more or less correct; they have to make decisions of distribution that rely on the applied normative standard; finally, they have to compare goods that are not commensurate so that the comparison always includes a political judgment. Consequently, these judicial decision-making procedures have to be complemented with market coordination and political processes (p. 247).

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42 The normative literature on this issue is abundant. See, e.g., D. Palmeter and P.C. Mavroidis, 'The WTO Legal System: Sources of Law', 92 *AJIL* (1998) 398; J.P. Trachtman, 'The Domain of WTO Dispute Resolution', 40 *Harv. ILJ* (1999) 333; G. Marceau, 'WTO Dispute Settlement and Human Rights', 13 *EJIL* (2002) 753; J. Neumann, *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen* (2002); J. Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to other Rules of International Law* (2003).

43 M. Kumm, 'Liberale Gerechtigkeitstheorien und die Struktur der Grundrechte', in R. Alexy (ed.) *Juristische Grundlagenforschung* (2005) 218, at 220.

44 See Kadelbach and Kleinlein, *supra* note 16, at 337-338; Petersen, *supra* note 30, at 287-88.

## 4. Rational Choice and International Law

Both authors show us the potential that a social science approach has for the study of international law. However, it would be misleading to perceive rational choice as a holistic explanation of the functioning of law in international relations. Rationalist approaches have one significant blind spot, the formation of preferences (A.). This blind spot does not diminish the explanative power of rational choice theories for the questions they are focused on. We might, however, run into problems if we try to draw normative conclusions from the positive models (B.).

### A. Preferences as the Blind Spot of Rational Choice

Rational choice approaches may be challenged for two reasons – an ontological and a methodological one.<sup>45</sup> The ontological critique challenges a certain set of empirical assumptions about social life and social interactions that rational choice scholars are supposed to make. The most prominent of these assumptions is that every social phenomenon is reducible to interacting individuals. The methodological critique, in contrast, focuses on the shortcomings of the analytical toolbox of economic theory. It does not claim that the formal analytical methods of economics are flawed *per se*. But, such as scissors may be useful tools except when it comes to agglutinating two pieces of paper, economic models may be inappropriate to answer certain questions of social life in the international arena.

Regardless of which of these two perspectives you take, economic theory has one significant blind spot – preferences. Economic models are based upon the assumption that actors have certain preferences, which are supposed to be constant, transitive and exogenously given. There are, however, no suggestions how preferences come about. Constructivist scholars claim that preferences are shaped by the identity of an individual. They depend on the ideals to which a person tries to live up to, and these ideals are influenced by history, culture, religion, language, and the relation to peers.<sup>46</sup> If you accept this ontological claim, then law does not only have one, but two ways of influencing individual behavior. In accordance with rational choice assumptions, it does so by imposing additional costs on certain strategic options. But it can also alter the actors' preferences by shaping their ideals – which would be inconsistent with the ontological assumptions of rationalism.

The ontological question is basically an empirical one that cannot be answered by purely analytical tools. There is some evidence in the research of social psychology that preferences of individuals are, indeed, very much influenced by their social environment.<sup>47</sup> It is, however, a valid question to what extent this research can be transferred to the field of international relations. There is some research in human rights law, which suggests that the formation of preferences

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45 J. Fearon and A. Wendt, 'Rationalism v. Constructivism: A Skeptical View', in W. Carlsnaes, T. Risse and B.A. Simmons (eds.) *Handbook of International Relations* (2002) 52, at 52-53.

46 J.L. Hochschild, 'How Ideas Affect Actions', in R.E. Goodin and C. Tilly (eds.) *The Oxford Handbook of Contextual Political Analysis* (2006) 284, at 290.

47 See P. Slovic, 'The Construction of Preference', *50 American Psychologist* (1995) 364.

may be influenced by legal norms. Thomas Risse has shown in several case studies how the process of arguing about human rights, of asking for a justification for human rights violations can induce a certain increase of compliance with human rights norms.<sup>48</sup> But the influence of culture and ideals is not limited to the field of human rights. With regard to the World Trade Organization, Joseph Weiler has pointed out how the juridification of the WTO dispute settlement has changed the culture within the dispute settlement system and thus leads to a new paradigm in world trade law.<sup>49</sup>

The judgment on this ontological question is still pending. But even if you do not buy the ontological assumptions of rationalism, its analytical toolbox can still be very powerful. Economics is then rather to be understood as a formal instrument of analysis.<sup>50</sup> Such a formal rational choice analysis is flexible enough to account, to a certain extent, for preferential changes.<sup>51</sup> It cannot explain how preferences are formed and why they change. But once the preferences and their alterations can be assumed, it can explain what action states will choose.<sup>52</sup> Consequently, Andrew Guzman acknowledges that rational choice is not the only possible perspective on international law (pp. 18-22). There are other theories that have a certain explanatory value. Rational choice is, in his opinion, superior, though, because it has a predictive power that other theories do not have (p. 21). However, this predictive power is still to be proven in the context of international law. Some doubts may be raised in this respect. If we do not know the actors' preferences, we do not know his pay-off structure and can thus not tell which game states are playing.<sup>53</sup> The prediction of the economic model thus depends on the prediction of preferences. This may be a surmountable obstacle in some situations, where interactions are numerous and where we have observed stable preferences in the past. It may not be possible, though, in fields with only few interactions and changing preferences.

Are there ways to account for preferential changes in international relations? States are neither natural persons who have preferences of their own, nor are they monolithic entities. Preferences rather depend on the internal political process, and this process is, obviously, open to changes. Rational choice theory is sufficiently flexible to accommodate such circumstances. Some authors in the field of international relations have tried to capture changes in the internal political process by presenting a two-step model that first addresses the national forum before looking at the inter-

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48 See Risse, *supra* note 32; T. Risse, "'Let's Argue!': Communicative Action in World Politics', 54 *IO* (2000) 1.

49 Weiler, *supra* note 31, at 197-200.

50 See A. v. Aaken, "*Rational Choice*" in *der Rechtswissenschaft. Zum Stellenwert der ökonomischen Theorie im Recht* (2003), at 288-313.

51 K.W. Abbott, 'Toward a Richer Institutionalism for International Law and Policy', 1 *JILIR* (2006) 9, at 19; D. Snidal, 'Rational Choice and International Relations', in Carlsnaes, Risse and Simmons, *supra* note 45, 73, at 84-85.

52 See J. Legro, 'Culture and Preferences in the International Cooperation Two-Step', 90 *APSR* (1996) 118 (proposing a two-step model, in which the preferences are explained by constructivist theories, while strategic action based on these preferences is explained by rational choice).

53 Cf. C. Engel, 'States Playing Games', 7 *International Studies Review* (2005) 328, at 328 (noting that states often have heterogeneous preferences, which is difficult to capture by game theory).



action in the international arena.<sup>54</sup> Such a model can only give reasons for developments *ex post*. It has, however, too many flexible variables in order to be suitable for predictions.

The rational choice approach can thus not claim to provide a holistic explanation of ‘how international law works’. Its explanatory power rather depends on the circumstances and the social context of a specific phenomenon.<sup>55</sup> It depends on the question we are asking. If you can make relatively stable assumptions about the preferences of the relevant actors and if you want to explain why actors choose a specific strategy, then rational choice provides the best analytical instruments. If you want to analyze, however, whether and to what extent norms shape the preferences of an actor, then an alternative theoretical framework is more appropriate. Joel Trachtman is thus right, when he asks for more empirical research (pp. 4-9). Such studies may shed light in particular on the ontological dimension of the debate. Although, there are some attempts in this direction,<sup>56</sup> much work remains to be done.

## **B. The Normative Dimension of Economic Theory**

The Economic approach, as it is championed in the two books considered in this review, is basically a positive theory. It tries to describe, explain and predict the conduct of states. We have to be careful, however, with deducing normative claims from positive theory. Such normative claims can come in two garments. On the one hand, there is a normative strand in law and economics theory. Some authors turn the descriptive analysis into a normative claim, arguing that society should strive to establish institutions that maximize the joint social utility.<sup>57</sup> This normative approach has received much criticism, as it is inextricably linked to utilitarian ethics. There are good reasons to disagree with utilitarianism in certain aspects, in particular with regard to its blindness concerning distributive issues.<sup>58</sup> Neither Trachtman nor Guzman advocates such a normative approach. Trachtman’s book is probably closer to normative economics, as the author pleads for a comparative institutional analysis in order to determine the best institutional setting. He is well aware of the problems, though. Instead of making simplistic proposals that seek to maximize welfare or other materialistic goals, he is sensitive to the difficulties in balancing competing and incommensurate policy goals (pp. 221-48).

On the other hand, scholars are often quick to draw normative consequences from their positive models. The most famous example in this respect is probably the claim of Jack Goldsmith and Eric Posner that international law should not be considered as law because it is deemed to be ineffective. But there are also other such instances: Andrew Guzman, e.g., derives certain conse-

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54 A. Moravcsik, ‘Taking Preferences Seriously: A Liberal Theory of International Politics’, 51 *IO* (1997) 513.

55 A. Wendt, *Social Theory of International Politics* (1999), at 34.

56 See, e.g., B.A. Simmons, ‘International Law and State Behavior: Commitment and Compliance in International Monetary Affairs’, 94 *APSR* (2000) 819; O.A. Hathaway, ‘Do Human Rights Treaties Make a Difference?’, 111 *Yale LJ* (2002) 1935; E. Neumayer, ‘Do International Human Rights Treaties Improve Respect for Human Rights?’, 49 *J. Conflict Resolution* (2005) 925.

57 R.A. Posner, ‘Utilitarianism, Economics, and Legal Theory’, 8 *J. Legal Studies* (1979) 103.

58 See R. Dworkin, ‘Why Efficiency?’, 8 *Hofstra LR* (1980) 563, at 573-90.

quences for the doctrine of customary international law from his positive analysis of the functioning of international law.<sup>59</sup> These normative claims are problematic, though, if they are based on the ontological assumptions of rational choice theory. If policy recommendations do not consider that norms may also influence state conduct by setting up normative ideals that may shape the preferences of the relevant actors, such recommendations may have an incomplete analytical basis, unless we have some empirical evidence for the assumptions of the analytical model.<sup>60</sup>

## Conclusion

Polemics of traditional international law scholarship against the economic approach is as little justified as a sense of superiority of some law and economics scholars. The appropriateness of the approach depends on the question we are asking. If we want to know what the law is, then economic theory may be helpful for certain legal questions, but it has to be embedded into a doctrinal framework.<sup>61</sup> However, if we ask why and under what conditions states comply with international law, the analytical tools of economics are much more powerful than the instruments of legal doctrine. Both Guzman and Trachtman illustrate the big potential of economic analysis in this field.

Even in this respect, we have to keep in mind, though, that the economic approach is only one perspective.<sup>62</sup> If we take a wide-angle lens, we should not complain that we cannot see the details in the centre of the picture. Rational choice has certain blind spots, questions that may be examined more appropriately by taking a different perspective. We should thus not concentrate on a particular theoretical approach in order to analyze the role of legal norms in international relations, but choose our lenses according to the question we are asking.

In any case, the reader who reaches for the accounts of either Guzman or Trachtman will be rewarded. The books are highly stimulating and thought provoking, and offer new perspectives to international law scholarship. Which book to consult basically depends on what you are looking for. Guzman's *How International Law Works* is particularly addressed to readers who do not necessarily have to be familiar with the law and economics literature. The author is a master of clear and simple language. The book is easy to read and does not require much prerequisite knowledge in the field of economics. It is therefore a great merit of Guzman to bring the law and economics approach closer to mainstream international legal scholarship and to highlight the potential of the economic perspective.<sup>63</sup> In particular, his theory of norm compliance offers many insights. His accounts of customary and treaty law are less compelling, though. His redefinition of custom fails to provide criteria for the identification of customary norms. And his explanation

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59 See above, 2. See also Guzman, *supra* note 24.

60 Fearon and Wendt, *supra* note 45, at 64.

61 See A. van Aaken, *A Functional Approach to International Constitutionalism: The Value Added of a Social Science Contribution*, University of St. Gallen, Law and Economics Research Paper Series (2008), at 9-11.

62 See R.O. Keohane, 'International Relations and International Law: Two Optics', 38 *Harv. ILJ* (1997) 487, 494; Abbott, *supra* note 51, at, 17.

63 Accord Goldmann, *supra* note 38, at 226.

of treaty regimes remains somewhat on the surface and avoids dealing with international institutions.

In contrast, Trachtman offers a thoughtful in-depth analysis of the latter aspect. His perspective of perceiving international law as a market place for authority is innovative, and his explanation of the choice of institutions by referring to the degree of uncertainty faced in the particular issue area is highly illuminating. However, Trachtman's analysis requires a lot and may thus not be easily accessible for readers unfamiliar with economic theory. In any case, both books are excellent pieces of legal scholarship: they shed new light on traditional problems of international law, and open avenues for new research. In this context, the authors only understand their works as providing a framework for future scholarship. In particular, the empirical research is still underdeveloped. Considerable challenges thus remain to be addressed.