Eugene Kontorovich, Francesco Parisi (eds.), *Economic Analysis of International Law*, Edward Elgar Publishing, Cheltenham: 2016, pp. 304

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Economic Analysis of International Law. Or is it?

1. INTERNATIONAL LAW PRACTITIONERS' COMPLEX

Going back to the anecdotal roots of law and economics (L&E), one may refer to professor Garry Becker's race against the clock. He had to choose between violating a parking ban next to his university building, or driving to a parking lot further down and increasing his already late arrival. While assessing the cost of receiving a parking ticket against the value of reducing his tardiness, the later Nobel economic prize laureate was struck by the fact that the same analysis could have been conducted by both a criminal pondering her career path, or a municipal legislator interested in harnessing a parking frenzy.

Thus was born the study of the efficiency of law. Since then we have witnessed a continuous development of law and economics, covering ever more and newer fields, including, *inter alia*: the impact of sexual discrimination on the labour market; challenges to the efficient management of companies posed by the divergent interests of managers and shareholders; acknowledgement of the fact that trade in pollution licences may contribute to a cleaner environment; and complex strategies for fighting criminal organisations. One field orphaned by this exhilarating scientific boom was public international law (PIL). Twice in fact.

Until relatively recent times, PIL struggled to be recognised as a fully-fledged area of law, mainly due to the never-ending disputes concerning its shortage of enforcement mechanisms. From that stage it appears to have moved directly to a post-national era of governance, where the need for global regulatory cooperation is not questioned, however, the "international" denominator becomes increasingly blurred. Paradoxically, the *Economic Analysis of International Law,* edited by Francesco Parisi and Eugene Kontorovich, reflects both existential dilemmas of PIL.

On one hand Francesco Parisi and Daniel Pi suggest – as is echoed by Parisi together with the other editor of the volume Eugene Kontorovich – that PIL "lagged behind compared to other areas of law in benefiting from the influence of economic analysis of law", due to its informal rules and weak enforcement mechanisms. Although such a suggestion seems somewhat surprising (in light of the interest in L&E in, e.g., the informal creation of property rights, analysis of criminal organisations, or the grey

economy), it does voice the above-mentioned complex felt by PIL scholars. On the other hand, contrary to the optimistic forecast by Eric Posner in the book's cover, the book appears more as a nail in the coffin of the merger between L&E of international and domestic law, rather than laying the "foundations for the work in years to come". While not rushing to conclusions, several points deserve to be mentioned.

2. STATE OF THE ART

In comparing the various definitions of L&E, one recurring regularity is the distinction between theoretical approaches (i.e. studies of normative efficiency, whether in its descriptive or normative meaning) and practical ones (focusing on incentives and people's reactions thereto).[1] It also appears that whereas theoretical analysis constitutes a departure point, as analyses of particular substantive fields of L&E mature practical approaches gain in popularity. However, seen from this perspective the volume seems to imply that economic studies in the area of PIL at best aspire to the theoretical level. Let's refer to two chapters, arguably the most interesting ones: "The emergence and evolution of customary international law" by Francesco Parisi and Daniel Pi (Ch. 6); and "The interaction between domestic and international law" by Tom Ginsburg (Ch. 8).

Francesco Parisi and Daniel Pi tackle the topic of international customary law from the perspective of a fragile equilibrium between short-sighted opportunism traded off for the long-term goal of efficient rules. Following general references to the games theory and cooperation surplus, the authors share several observations concerning the optimal effort level (for respecting a customary norm), and the interplay between subjective scope (group size) and effort incentives. References are made to the free-rider problem and reputational costs. Their paper offers several elegant formulas establishing ratios between elements such as costs, benefits, and discount rates to describe the situation under which a state, in accordance with the rational choice theory, would support or object to the establishment of a new customary law. However the factors considered, while undoubtedly interesting, are hardly quantifiable, hence the results are far from reaching the level of even strategic, not to mention practical, application. And this is without even taking into account the methodological disclaimers, such as the exclusion from the customary law analysis of reputational costs… The authors themselves acknowledge that the chapter "introduces exemplars" that ought to "provide groundwork for future research" (p. 156).

Tom Ginsburg invites readers to question the reductionist vision of the relationship between international and domestic legal orders (no matter whether one adheres to the realist school of international relations or to the communitarian tradition of a unitary

[1] *See e.g.* B. E. Butler, *Law and Economics*, in *Internet Encyclopedia of Philosophy*, available at: http://www.iep.utm.edu/law-econ/; or P.H. Rubin, *Law and Economics*, The Concise Encyclopedia of Economics, available at: http://www.econlib.org/library/CEE.html (both accessed 30 May 2017).

legal system). Ginsburg sketches the great complexity of this situation. On one hand, international compliance may be a function of domestic structures and preferences. On the other hand, transnational interest groups may transfer the centre for aggregation of interests to another level. The author notes that nuances in this relationship were not subjected to systematic scrutiny until 2002, and that the literature thereon remains scare - apart from a single, loosely related, work of 2012, references do not reach beyond 2009. The subsequent general overview of pertinent topics – including nested jurisdictions, public goods, and agency costs – is certainly interesting. However, just as the reader becomes intrigued by the introductory combination of general (and well established) theories … the paper ends. The fact that the paper halts right at the point where reader would expect to actually dive into actual L&E is not limited to this particular paper. What is, however, striking is its confirmation of the above-described premise that just at the time international law matured enough to receive equal attention, it seemed to vanish into the blurred reality of the nascent post-state international order. This chapter also confirms the conclusion concerning the state of the (L&E) art in the field of international law: it does not go beyond rather modest conceptual considerations.

Unlike the two papers mentioned above, some others deserve much less credit, such as *The economics of state emergence and collapse* by Bridget Coggins and Ishita Kala. If one eliminates the 32 pages of "technical background" (some general theories of state emergence and legal personality, case-studies, and other issues subsidiary to the research question), the actual analysis is limited to roughly 3.5 pages. Interestingly, while the entire book appears as an homage to Goldsmith and Posner (Amazon search engines suggest 50 references to the latter in only 10 chapters), Coggins and Kala dedicate five pages to discussing the seminal work *The Limits of International Law* (2005). This is by no means to undermine significance of that work. The question is, however, as the two authors did not engage in actual law & economics, was the actual aim of the voluminous 32 pages to prove that "rational choice approaches have great unrealized potential regarding the most fundamental dynamics of international law" (p. 72); i.e. supposing that nothing changed since the last quoted paper of 2011? Indeed, claims from the early 2000s appear firmly established today.

3. WHAT IS IT NOT? WHAT ACTUALLY IS IT?

The filling in of the gaps in the economic analysis of international law is eagerly awaited by numerous scholars, who jump with excitement at each such promise, usually to their disappointment. Such is the case of this book, which is all the more disappointing given that the disillusionment is more due to its unfortunate title than to its contents.

So, what is the *Economic Analysis of International Law not* about?

As suggested above, one will not find actual economic analysis, in the sense of either a methodology consistently applied throughout a specific branch of law, or a volume consisting of analysis of its specific area. It rather is *an Anthology.*

As also described above, it certainly is not a practical approach to L&E. Even at the theoretical level, most articles mainly review generalities in the relevant theories of law and economics and public international law, hardly contributing any new syntheses. Accordingly, it rather is *An Anthology of Law & Economics: Sketches*.

As for the international law denominator, the Table of Contents speaks for itself. The book is divided into four parts: – *Building Blocs of International Law* (about states); *Sources of Law* (namely treaty law, customary law and soft law); *Enforcement* (consisting of a chapter on enforcement and another on interactions between domestic and international law); and the last part, consisting of one substantive analysis (related to IHL regimes) and one methodological paper (behavioural economics). Again, rather than speaking of an 'Analysis of' International Law, the term *Anthology* seems a more appropriate title.

According to the promises made in the book cover, the volume is supposed to provide "original and incisive contributions" and, from the cover review, "innovative essays". Obviously academic work consists of an accumulation of experiences, thus the ample references to the literature of 1970s and 1980s is fully understandable. However, the fact that the frugal references dating from 2010 onwards are rather exceptional not only undermines the claim concerning "the catching up of L&E with other fields" and "providing a path through recent literature", but makes one wonder whether the field has actually stagnated in the last decade.

Finally, it seems on numerous occasions (e.g. Chapters 1, 8, 9) that if one changed the title term "economic analysis" to "political economy" the contents could still be presented unaltered.

Having said that, an *Anthology of Essays on the Economic Analysis of International Law* is an interesting proposition, which invites readers to re-examine some long-established notions of international law and open themselves up to fascinating insights from other sciences that may fundamentally alter our understanding of the legal environment, as in the arguably most interesting chapter, Chapter 10, which introduces elements of the concept of behavioural economics.[2] It allows economists to grasp some basic notions of public international law, and lawyers to become acquainted with basic economic theories applied to law. Finally, it is a useful overview of the available literature on international law and economics. Put simply, in this case do not judge the book by its cover.

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[2] *Behavioral economic analysis of international law*, authored by A. van Aaken & T. Broude, pp. 249-275.

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