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Book Review, Economic Foundations of International Law, by Eric A. Posner and Alan O. Sykes

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BOOK REVIEW

Economic Foundations of International Law. By Eric A. Posner and Alan O. Sykes. Cambridge MA, London: Harvard University Press, 2013. Pp. viii, 372. Index. $65.

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Law has many goals: to express the values of a community, to change attitudes of its subjects, to structure their interactions, and to give them a language in which those interactions can occur. Law can legitimate particular conceptions of the general welfare and therefore provide the field on which groups motivated by self-interest and altruism alike compete for the attentions of others. Law can also define the obligations of the members of a polity to each other and, by creating mechanisms to encourage compliance with those obligations, change how its subjects behave.

For many years, international law scholarship focused on some of these goals, to the exclusion of others. It paid relatively scant attention to how international law creates incentives for self-interested states to behave in particular ways and to how those incentives, in turn, structure the process of international lawmaking. The last ten years, however, have seen a reversal in this trend. At present, economic analysis of international law—an approach that assumes states rationally pursue their self-interest—is commonly featured in many of the leading international law journals.[1] In *Economic Foundations of International Law*, Eric Posner, the Kirkland & Ellis Distinguished Service Professor of Law at the University of Chicago School of Law, and Alan Sykes, the Robert A. Kindler Professor of Law at New York University School of Law, provide what is, to date, the capstone of the economic analysis of international law. The book's objective is "to gather together and build on many of the ideas" generated in the first decade or so of sustained economic analysis of international law and "to present them in a manner suitable as an introduction for students and as a reference work for scholars" (p. 3). The book seeks to provide "an intellectual framework" for thinking about international law and therefore "aims for breadth, not depth" (p. 4). The book is wildly successful in fulfilling these goals. *Economic Foundations* is destined to be both a starting point for much future research and a bridge between international legal scholars and political scientists working in international relations, who have long embraced a rational choice approach.

The book is divided into five parts that proceed from the general to the specific. Part I (chapters 1–3), entitled "Basics," provides an overview of both international law and the concepts needed for its economic analysis. Most significantly, chapter 3 offers a succinct and accessible summary of the building blocks required to understand the substantive chapters that follow. It makes clear the central assumption at the heart of

[1] *See, e.g.*, Eric A. Posner & Alan O. Sykes, *Economic Foundations of the Law of the Sea*, 104 AJIL 569 (2010); Gregory Shaffer & Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, 52 VA. J. INT'L L. 103 (2011); Emilie M. Hafner-Burton, David G. Victor & Yonatan Lupu, *Political Science Research on International Law: The State of the Field*, 106 AJIL 47 (2012); Andrew Guzman, *International Organizations and the Frankenstein Problem*, 24 EUR. J. INT'L L. 999 (2013).

economic analysis of the law, namely that "individuals act in their rational self-interest" (p. 12). Quite appropriately, Posner and Sykes make little effort to defend this methodological choice beyond acknowledging that it is a simplifying assumption. Different methodologies are useful for answering different questions, and any generalizable approach has to abstract away from detail to generate meaningful predictions about how states will behave across a range of circumstances. The chapter also introduces the concepts of externalities, public goods, and collective-action problems and applies them to international law. In short, cross-border externalities create the demand for international law. Put in noneconomic terms, actions taken in one state often affect other states, but those cross-border effects are not reflected in the actor's decision-making process. International law is one tool that states use to control such cross-border externalities. Using international law for this task is complicated by the lack of a centralized enforcement mechanism, but, as Posner and Sykes explain, the literature has identified a number of decentralized mechanisms—including reputation, reciprocal noncompliance, and retaliation—that create costs for breaching international law obligations.

Part II (chapters 4–10), entitled "General Aspects of International Law," develops the economic analysis of the background institutions of international law. Thus, this part has chapters on sovereignty and statehood (chapter 4), customary international law (chapter 5), treaties (chapter 6), international institutions (chapter 7), state responsibility (chapter 8), remedies (chapter 9), and the relationship between international and domestic law (chapter 10). There is much to admire in the authors' treatment of these subjects, and much could be said about each. For the sake of brevity, I focus on the authors' treatment of international lawmaking, both customary international law and international law as made by international institutions. In brief, *Economic Foundations* provides a very valuable starting point for thinking about how the behavioral assumptions of economic analysis explain patterns of international lawmaking. The authors do an excellent job of detailing how and why states made (or did not make) different kinds of international law throughout much of the twentieth century. At the same time, international lawmaking has changed dramatically in recent decades. Economic analysis is a powerful tool to explain these new patterns of lawmaking as well.

For example, the fate of customary international law as a category of legal norms, currently being debated by the International Law Commission,[2] is a key question facing international law in the twenty-first century. Posner and Sykes offer a compelling account of how customary international law emerges—through a common-law-like process of resolving similar disputes among small numbers of states (often only two) in a similar fashion. Consequently, prior disputes become precedents that states can use as bases to resolve current disagreements.

[2] *See* Michael Wood (Special Rapporteur), Formation and Evidence of Customary International Law, UN Doc. A/CN.4/653 (May 30, 2012); Sean D. Murphy, *Immunity* Ratione Personae *of Foreign Government Officials and Other Topics: The Sixty-Fifth Session of the International Law Commission*, 108 AJIL ___, ___ (2014).
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This account—which, in keeping with traditional international legal scholarship, treats custom as qualitatively different from treaties—has a great deal of purchase in describing how customary international law has historically emerged. One might wonder, though, how different modern customary international law really is from treaty law in terms of how the former develops and evolves. On the one hand, many international treaties, including most multilateral agreements, are very vague, just as Posner and Sykes note that customary international law can be. These vague treaty provisions are often given content through the subsequent practice of states in applying the treaty provisions. Indeed, the Vienna Convention on the Law of Treaties expressly directs a treaty interpreter to look at such state practice.[3] On the other hand, since at least the middle of the twentieth century, both treaties and international institutions have played major roles in defining customary international law obligations. Treaties frequently codify, and therefore help define, customary international law obligations, while resolutions passed by the UN General Assembly or draft articles produced by the International Law Commission are regularly cited as evidence of customary international law.[4] These forms of precedent differ fundamentally from the largely bilateral disputes described by Posner and Sykes. While described as customary international law, such precedent is often the product of multilateral negotiations and reflects a prospective declaration of what the law is or should be, rather than a retrospective assessment of the existence of a general, consistent state practice done out of a sense of legal obligation.[5]

Similarly, chapter 7 raises interesting questions about the lawmaking role of international institutions. Posner and Sykes take the conventional view that international institutions should be analyzed as delegations of authority from states. Such delegations "can be legislative, executive, or judicial" (p. 80). The authors compare international delegations with delegations of lawmaking authority from the U.S. Congress to administrative agencies, but they argue that international delegations are exceedingly rare. For example, the authors claim that legislative delegation—by which they seem to mean the ability of an international institution to make binding law directly without any intervening act, such as ratification, by states (p. 81)—is virtually nonexistent outside of the UN Security Council and the institutions of the European Union. Similarly, Posner and Sykes argue that "[j]udicial delegation at the international level is also extremely rare," (p. 81) although much of the chapter is spent describing the many international courts and quasi-adjudicative committees that exist despite the lack of binding authority.

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[3] Vienna Convention on the Law of Treaties, Art. 31(3)(b), May 23, 1969, 1155 UNTS 331 (stating that a treaty interpreter shall examine "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation") [hereinafter Vienna Convention]; Monica Hakimi, Law and the Universal Human Rights Treaties, Duke-Geneva Conference on the Role of *Opinio Juris* in Customary International Law (2013) (on file with author) (arguing that the Vienna Convention's state practice requirement for treaty interpretation is similar to customary international law's state practice requirement).

[4] *See, e.g.*, Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-Third Session 43,UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001).

[5] *See, e.g.*, Jonathan I. Charney, *Universal International Law*, 87 AJIL 529, 543–48 (1993).

Posner and Sykes' central insight—that international institutions should be analyzed differently depending on the functions that they perform—is of critical significance. Scholarship on international organizations often does not sufficiently distinguish among different kinds of international institutions. At the same time, a narrow analytical framework that focuses on whether institutions may directly enact binding law can unduly limit the potential for scholarly inquiry. International institutions vary considerably in terms of their aims and how they function and thus, not surprisingly, in how they are organized. The tools of economic analysis, including new institutional economics, may fruitfully be applied to greatly expand our understanding of the variation in how international institutions are structured, in how their internal governance procedures operate, and in how they relate to each other.[6]

Take the example of international legislative bodies. Posner and Sykes are, of course, correct that states empower few such bodies to enact binding law directly.[7] A slightly broader definition of a legislature reveals a very different picture, however. One might define an international legislature as a body in which states make collective decisions about the kinds of obligations, binding or not, that members of the group may make.[8] This definition does not preclude an institution from being considered a legislature merely because its acts must be individually ratified by states to be binding. Rather, it focuses on whether state *A* has a legal right to participate in, and possibly prevent, the formation of obligations by states *B* and *C* within a particular forum. National legislatures function in this way, at least in part. For example, two U.S. states may not make legal commitments to each other on their own. Instead, they must seek either national legislation to deal with the issue or the permission of the U.S. Congress to enter into a compact.[9] In either case, all other states, through their representatives in Congress, have the chance to say yes or no to the proposed law, even if it does not affect them.

Conceived of this way, there are dozens of international legislatures. The UN Security Council and General Assembly, which Posner and Sykes discuss, are perhaps the most obvious illustrations, but the conference of the parties (COP) to any multilateral treaty would qualify: the COP to the United Nations Framework Convention on Climate

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[6] *See, e.g.*, Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 36 (1999) (discussing the theory of the firm's applicability to international organizations); Timothy Meyer, *Epistemic Institutions and Epistemic Cooperation in International Environmental Governance*, 2 TRANSNAT'L ENVTL. L. 15 (2013) (applying the concept of asset specificity to explain whether technical and expert bodies should be integrated into, or independent of, international lawmaking bodies).

[7] In addition to the Security Council and the European Union, treaties such as the Montreal Protocol permit some binding technical changes to be made by a vote of the Parties. Montreal Protocol on Substances That Deplete the Ozone Layer art. 2.9, Sept. 16, 1987, S. TREATY DOC. No. 100-10 (1987), 1522 UNTS 3, 26 ILM 1550 (1987) [hereinafter Montreal Protocol]; *see* Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71 (discussing examples of nonunanimous lawmaking).

[8] Timothy Meyer, *From Contract to Legislation: The Logic of Modern International Lawmaking*, 14 CHI. J. INT'L L. 559, 569–70 (2014).

[9] U.S. CONST. Art. I, §10.

Change, the Assembly of Parties to the Rome Statute of the International Criminal Court (ICC Statute), the COP to the Stockholm Convention on Persistent Organic Pollutants, and the Ministerial Conference of the World Trade Organization (WTO), to name only a few. These institutions are organized like legislatures, often dividing their work into committees and "adopting" legislative acts through either consensus or various voting rules. The process of "adoption," in which an international legislature approves an instrument for possible ratification by its parties, is critical, even though it does not directly result in binding legal obligations.[10] The process of adopting a draft legal instrument permits dissenting member states to influence the obligations that cooperation-minded member states make to each other. By refusing to permit a COP to adopt a draft legal instrument, dissenters can prevent international lawmaking from proceeding. Defining the crime of aggression in the ICC Statute illustrates the point. Adopting the aggression amendments within the Assembly of the Parties, as was done at Kampala in 2010, required consensus in practice. This voting rule meant that states favoring a weaker definition of the crime of aggression were necessary if the aggression amendments were to be adopted at all. These states were thus able to extract concessions weakening the aggression amendments, despite the fact that some of these states likely have no intention of ever ratifying the aggression amendments.[11]

Applying economic analysis to the internal organization and to the rules of these international legislatures promises to advance considerably our explanations of modern international lawmaking. The classic "delegation" paradigm that Posner and Sykes use as their overarching model of international organizations does not adequately capture the dynamics at work in international legislatures. International legislatures are not delegations of the kind suggested by the comparison to the relationship between the U.S. Congress and administrative agencies or courts. They also do not exist to reduce the burden on lawmaking imposed by the requirement that states consent to their own legal obligations.[12] International legislatures usually retain the requirement that states consent through ratification to their own binding legal commitments, while also adding an additional requirement: that the legislature as a whole adopt the legal instrument before any subset of member states may ratify it.

International legislatures are thus an alternative way of structuring interstate negotiations. Legal obligations can be negotiated contractually, without institutional structures and rules, as many bilateral treaties are negotiated. Alternatively, they can be negotiated in legislative bodies, with permanent memberships and procedural rules.

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[10] Vienna Convention, *supra* note 3, Art. 9.

[11] Beth Van Schaack, *Negotiating at the Interface of Power and Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT'L L. 505, 518–21 (2011).

[12] *Cf.* Joel P. Trachtman, THE FUTURE OF INTERNATIONAL LAW: GLOBAL GOVERNMENT 253 (2013) ("There will be increased demand both for more international law and for more international organizational capacity to provide mechanisms for legislative or decision-making action"); Andrew T. Guzman, *Against Consent*, 52 VA. J. INT'L L. 747, 763 (2012) ("An excessive commitment to consent can cripple efforts to use international law as a tool to help solve the world's largest problems."); *see also* Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AJIL 259, 279 (1992) (describing an international legislature for environmental law capable of binding states).

Organizing the negotiation of legal obligations through legislatures creates holdup power.[13] As with the Kampala negotiations, the legislature's procedural rules give some states veto power over the entire institution's ability to act. A state (or a small group of states)—including a state with no intention of ratifying the act of a COP—may thus prevent cooperation-minded states from using existing international institutions to adopt legal instruments among themselves.[14]

Using institutions to create additional holdup power is puzzling, given that international lawmaking is already bedeviled by the requirement that states consent to their own legal obligations. New institutional economics, however, suggests that this kind of holdup power lubricates negotiations. It does so by making enforceable "vote-trading" agreements in which states agree to make concessions to each other across issues not under simultaneous negotiation.[15] For example, the Trans-Pacific Partnership[16] (TPP) consists of a variety of "chapters" negotiated sequentially. Each chapter could be adopted as an individual treaty. Instead, the diplomatic conference negotiating the TPP will adopt (or not adopt) the entire package as a single undertaking.[17] This procedure means that a state that makes concessions on the terms contained in one chapter with the expectation of receiving concessions in a later-negotiated chapter can prevent the adoption of the entire agreement if states do not honor the agreed-upon exchange of concessions. By contrast, if states adopted chapters as they negotiated them, a state making a concession in earlier chapters would have no assurances that the concessions that it expects to receive in later chapters would actually materialize. States might be reluctant, therefore, to make concessions in the first place.[18] Adoption procedures and the holdup power that they create thus actually reduce the transaction costs of iterative negotiations.

Having built out the framework for analyzing international law in general, part III ("Traditional Public International Law" (chapters 11–15)), part IV ("The Environment" (chapters 16–17)), and part V ("International Economic Law" (chapters 18–19)) analyze substantive areas of international law. These three parts are especially valuable for the

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[13] *See* Meyer, *supra* note 8, at 564; Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132 (1988).

[14] Nor can cooperation-minded states costlessly step outside of a COP to enter into the same agreement among themselves. Modern international institutions are usually continuing bodies that develop law over time. If a subsequent instrument is not made by the legislative body governing the institution, it may not be related to the governing instrument and therefore may lose much of its value. For example, if a trade agreement is adopted outside of the WTO, the WTO's already well-developed dispute settlement process will not be available to resolve disputes under that agreement. Similarly, if the crime of aggression had been defined by a treaty only among states favoring a strong definition of aggression (and therefore outside of the Assembly of the Parties to the ICC), the ICC would not have been able to prosecute the crime as defined. In the environmental context, decisions by COPs, such as the COP to the Stockholm Convention, to subject certain chemicals to the Convention's controls reduce transaction costs by relating a very narrow decision—the control of a particular chemical—to an already existing legal framework.

[15] Meyer, *supra* note 8, at 591.

[16] *At* http://www.ustr.gov/tpp.

[17] *See* Deborah Elms, *Getting the Trans-Pacific Partnership over the Finish Line*, NBR ANALYSIS BRIEF (Oct. 22, 2012), *available at* http://www.nbr.org/publications/nbranalysis/pdf/brief/102212_Elms_TPP.pdf.

[18] *See* Meyer, *supra* note 9, at 594.

amount of ground that they cover and, true to the authors' intent, provide an incredibly useful reference for scholars interested in the economic analysis of a wide range of international legal topics. The topics covered include the treatment of aliens, foreign property, and foreign debt (chapter 11), the use of force (chapter 12), the conduct of war (chapter 13), human rights (chapter 14), international criminal law (chapters 15), international environmental law (chapter 16), the law of the sea (chapter 17), international trade (chapter 18), and international investment law (chapter 19). In each chapter, the authors identify the core economic rationale for the law or the economic puzzle in the law, and they also critique the law where it does not seem justifiable on economic grounds.

Chapter 14 on human rights provides an illustrative example. As Posner and Sykes describe the conundrum, in most areas of international law a "treaty sets out a quid pro quo—each party incurs an obligation that benefits the other party . . . . Human rights treaties do not seem to fit this model" (p. 202). Instead, Posner and Sykes argue that, in entering into human rights treaties, "Western liberal states that set the agenda believed that they would not have to change their behavior. In their view, they already respected human rights. The idea of the treaty regime was to compel other states . . . to do the same" (*id.*). The puzzle, in the authors' view, is why other states agreed, given that liberal democracies were not offering any concessions in the agreement itself.

Posner and Sykes present a creative explanation of this puzzle. States with troubling human rights practices join and comply (when they do) with human rights treaties in exchange for side payments of various kinds, as a signaling device to foreign and domestic constituencies and as a means to avoid sanctions from liberal democracies. But the real value in human rights treaties, Posner and Sykes argue, is that they solve a collective action problem among liberal democracies. Poor human rights practices in other countries create a kind of externality in the sense that liberal democracies suffer disutility from poor human rights practices in other countries. Improving human rights practices is thus "a 'good' for which they have preferences (for which they are willing to pay)" (p. 203). Moreover, liberal democracies are likely to have overlapping preferences for good human rights practices; the United States and European nations all prefer, for example, that genocide not occur. These overlapping preferences create a collective action problem. Although each state would like to encourage human rights violators to improve their practices, it fails to internalize the entire benefit of its efforts. Therefore, it will attempt to "free ride" on the efforts of other countries to improve human rights practices, generating inefficiently low sanctions for human rights violators. Human rights treaties arguably help solve this problem by coordinating sanctioning efforts among liberal democracies. To the extent that this coordination is ineffective, it may be because "liberal countries rarely have a strong interest in improving well-being in other countries" (p. 206), rather than because the mechanism itself does not work.

This explanation has the great virtue of explaining why human rights treaties may not be that different from many other kinds of international agreements. The United States, for instance, has long used international law to export U.S. regulatory regimes in fields other than human rights. The Montreal Protocol, which followed domestic U.S.

regulation of ozone-depleting substances, and the anticorruption conventions of the United Nations and the Organisation for Economic Co-operation and Development, which followed the enactment of the Foreign Corrupt Practices Act,[19] are two prominent examples where the United States regulated a problem domestically first and then pushed for an international agreement. In both cases, the United States accepted few new obligations in the corresponding international agreements, precisely because these agreements were based on U.S. domestic standards. Other countries still joined, however, perhaps in part because of how the international treaties coordinated sanctions.[20]

Other chapters in parts III, IV, and V of the book highlight situations where economic analysis has already made significant inroads into international law and where it holds promise for considerably greater gains. Part V, on international economic law, is the most detailed section, comprising two chapters and sixty-six pages. This length reflects the fact that international economic law is the field in which economic analysis of international law began and in which it has its greatest synergies. In contrast, chapter 16 on international environmental law is a brief eight pages. Although some very excellent economic analyses of international environmental law exist,[21] the brevity of this chapter underscores the opportunities available for future economic analysis. For example, many international environmental regimes contain trade rules aimed at reducing trade-based environmental externalities. These regimes—the Convention on International Trade in Endangered Species, the Rotterdam Convention on Prior Informed Consent, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, and the Stockholm Convention on Persistent Organic Pollutants, to name only a few—are susceptible to economic analysis in a fashion similar to trade and investment law.

No single review can do justice to the breadth of material and ideas covered in *Economic Foundations of International Law*. The book should be required reading for the serious scholar of international law, whether or not engaging in economic analysis. In a book with such a wide scope, no doubt any reader will find something with which to disagree. But such disagreements should not take away from Posner and Sykes's achievement. *Economic Foundations* consolidates the gains and insights made in the economic analysis of international law to date and sets the stage moving forward.

[19] 15 U.S.C. §78dd-1 et seq.

[20] *See* Montreal Protocol, *supra* note 7, Art. 4 (requiring parties to the Montreal Protocol to impose trade sanctions on nonparties not in substantive compliance with the treaty's terms).

[21] *See, e.g.*, SCOTT BARRETT, ENVIRONMENT & STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING (2003).