

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

ISBN: 978-0-85793-015-6

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 scarce – 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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DOI 10.7420/pyil2016r

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

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Marc-William Palen, *The 'Conspiracy' of Free Trade: The Anglo-American Struggle Over Empire and Economic Globalisation, 1846-1896*, Cambridge University Press, Cambridge: 2016, pp. 334

ISBN: 978-1-10710-912-4

1. SURROUNDED BY CONSPIRACIES

Most of us accept, at least on some level, the constructivist notion of the social world as a cultural and linguist construct. That the world is a social construct seems most evident from its dark side. The unknown spurs the imagination, rendering a threatening situation even more sinister. Such heuristic simplifications¹ tend to be particularly efficient whenever one needs to quickly fill in gaps in one's understanding of the world. Conspiracy theories, feeding on insecurity, can thus be traced throughout human history, from ancient mythologies to contemporary technological² and medical³ myths.

Even in law – arguably the most linguistically-embedded of social realms – it is rare to witness anyone capable of altering this structure beyond amplifying our deeply embedded beliefs, or the dexterous reframing of a dispute. However, occasionally we come across works that change our perception of the world. Such, for instance, was the case of Howard Zinn's *A People's History of the United States*.⁴ Whether one agrees with any of its diverse critics or not,⁵ Zinn managed to bring the ugly, underdog narrative of US history to general attention. Such rare occasions should be particularly cherished by lawyers, as they remind us to question the assumptions upon which normative claims are constructed.

The 'Conspiracy' of Free Trade. The Anglo-American Struggle Over Empire and Economic Globalisation, 1846-1896 by Marc-William Palen deserves just such particular attention.⁶ Inasmuch as the author challenges the reductionist oversimplifications of still-valid globalisation dilemmas, the book could, hopefully, immunise public discourse against irrational fears and the current surge of populism dictated by ignorance. This is important given that conspiracy patterns seem all too easily applied to the “sinister ways” of the (global) economy, notably to alleged secret alliances between the proponents of free-trade and the beneficiaries of neo-imperialism. The problem seems ever more pressing since the 2008 global financial crisis, as we are currently witnessing the questioning of the very foundations of liberal democracy and market economy (not to be confused with debates concerning needed reforms). Frantic news cycles have exacer-

¹ D. Kahneman, *Thinking Fast and Slow*, Penguin Books, London: 2012.

² Popular Mechanics, *9 Top Tech Myths Debunked*, available at: <http://bit.ly/2p8W8AR> (accessed 30 May 2017).

³ BBC, *Medical Myths*, available at: <http://bbc.in/2oAX51c> (accessed 30 May 2017).

⁴ H. Zinn, *A People's History of the United States*, Harper & Row, New York: 1980.

⁵ A. Domośławski, *Dzieje na nice wywrócone*, 22 Polityka 2016.

⁶ M.-W. Palen, *The "Conspiracy" of Free Trade. The Anglo-American Struggle Over Empire and Economic Globalisation, 1846-1896*, Cambridge University Press, Cambridge: 2016.

bated the deprivation of a subjective sense of security experienced by Western societies, which are struggling with the complexities of the global economy as well as the expectation that every subsequent generation will live a better life. Hence the turn from the expectations of liberty to quick-fixes vis-à-vis security.⁷

On one hand, this has given rise to a legitimacy crisis of the current political set-up and, even more so, of international organisations, which embody incomprehensible threats to cosy, local security. On the other hand, insecurity creates fertile grounds for populism, which has swept across political scenes, from Hungary (Victor Orban) to Poland (Beata Szydło/Andrzej Duda) to the UK's Brexit and Donald Trump presidency in the U.S. From the perspective of public international law, multilateral economic treaty talks – including the general backlash against TTIP, CETA or ACTA – have suffered from perfect storm conditions, combining the legitimacy crisis and populism. The culprit? Blame liberalism and a corporate conspiracy.

Economic globalisation has obviously created space for numerous problems, from tying national economies to the caprices of international capital flows to allowing the misuse investment protection in order to derail public regulation. This should not, however, pave the way from insecurity to conspiracy theories with respect to the international economic order. Accordingly, the recurrent theme of the Anglo-American debates concerning free-trade should resonate well with today's economic globalisation belligerents and conspiracy theorists: Does globalisation entail the “universal emancipation of mankind” and serve as a “tool for civilising less advanced societies”?⁸; or has “premature free trade kept societies in a barbaric uncivilised state” and “enslaved domestic manufacturers and labourers to foreign markets”?

2. POST-BELLUM RECAST OF THE NEO-IMPERIAL FREE-TRADE AGENDA

As Marc-William Palen demonstrates, the dominant perception of the inseparability of open-door imperialism and free trade is a “post-bellum recast”.⁹ For the greater part of the 19th century however, “free-traders” were the most vocal critics of American empire-building and should rather be perceived as “imperial anti-colonialists.”¹⁰ It was only at the end of the century that American Listian nationalists guided the Republicans towards state-supported, even coercive, market expansion, while Great Britain shifted towards imperial protectionism (not the ‘free-trade nightmare’ of conspiracy theorists).¹¹ “Open-door imperial interpretation stems from [...] depiction of the American late nineteenth century as a laissez-faire [...] debunking the myth of laissez-faire at home allows for a

⁷ F. A. Hayek, *The Road to Serfdom*, University of Chicago Press, Chicago: 1994; Z. Bauman, *Liquid Modernity*, Polity, Cambridge: 2000.

⁸ Palen, *supra* note 6, p. XXIX.

⁹ *Ibidem*, pp. XXIX-XXX.

¹⁰ *Ibidem*, p. XXXV.

¹¹ *Ibidem*, p. XIX-XX.

much-needed reconceptualization of [...] American imperialism abroad”.¹² By doing just this, Palen identifies the driving powers behind the imperial demand for foreign markets, to some extent replicating English cosmopolitanism, as well as both the domestic and global push-back against this policy. He questions the revisionist argument of a bi-partisan open-door or free-trade imperial consensus¹³ by addressing three questions:¹⁴

- How did Victorian free-trade cosmopolitanism influence American domestic politics and foreign relations?
- How did economic nationalism oppose the liberal agenda in the U.S. and in the British Empire?
- How did these conflicting ideologies shape Anglo-American relations, imperialistic yearning, and economic globalisation?

3. COBDENISM V. LISTIAN NATIONALISM

Although notions of both protectionism and free-trade can be traced back centuries, their substantive meanings continually evolved. It was only during the nascent globalisation of the Victorian period that two fierce disputants, Richard Cobden and Friedrich List, hand-in-hand moulded both notions into their contemporary sense (even though the terms of free-trade or reciprocity, and resulting presumptions concerning the political goals of both camps, can still be very misleading¹⁵). It was a clash between, on one hand, the concept of global free trade, non-interventionism and anti-imperial market expansion, and on the other the perception of a perpetual global conflict entailing nationalism, protectionism, and coercive expansion.¹⁶

Accordingly, free-trade policy can be traced back to Cobdenism, a political and economic doctrine developed by the Richard Cobden, a Victorian advocate of peace, withdrawal from the European competition for balance of power, and free trade. On this basis, Victorian liberals argued against the U.S. protectionist approach.¹⁷ In the U.S. Cobdenism peaked during the presidencies of Grover Cleveland (1885-1889 and again in 1893-1897), which are crucial for Palen’s book .

As for the Republican agenda, it can be traced back to Alexander Hamilton, and even earlier to Friedrich List. Based on the economic German school, “Listian nationalism” opted for the protection of infant industries, while pursuing an imperial foreign policy, including the acquisition of foreign markets by force. American Cobdenites’ campaign for free trade, which coincided with the alleged English interest, led the Republicans – “realists of international relations” – to the belief that Cobdenism was

¹² *Ibidem*, pp. XXX-XXXI.

¹³ *Ibidem*, p. XXXII.

¹⁴ *Ibidem*, pp. XVIII-XIX.

¹⁵ *Ibidem*, pp. XXII-XXIV.

¹⁶ *Ibidem*, p. 267.

¹⁷ *Ibidem*, p. XIX.

in fact a pro-British conspiracy designed to stunt America's growth.¹⁸ Unsurprisingly, this approach evolved into "Anglophobic paranoia".¹⁹

4. WHY DOES THIS MATTER FOR INTERNATIONAL LAW SCHOLARS IN THE 21ST CENTURY?

It seems that Palen's book, which provides a thorough chronological study of the positions and clashes between Cobdenites and Listians, is a precious resource for economic and imperial historians. Palen analyses an array of sources, from official documents to academic opinions to personal communications between the most prominent stakeholders to press narratives. It covers the Grover Cleveland and Benjamin Harrison presidencies (Chapters 5, 7, 9). We also find an analysis of the 1890 McKinley Tariff (Chapter 8). Although perhaps it falls short of author's own "universalistic ambitions", the book also provides some insight into third states' reactions to this debate in Australia and Canada (Chapter 6).

Whether the proof for the conspiracy argument is satisfactory or not from the strictly historical perspective,²⁰ this book constitutes a source of inspiration to those interested in international law, international relations, and international economics. By showing "how ideas have helped shape local and global history",²¹ it reminds readers that a coherent narrative describing the linear development of law or politics is always a product of posterity, thus filtering past actions, events and opinions through one's own experiences.²² Firstly, it compels readers to critically reassess what is taken for granted in the discussion on international economic regulation, which is especially pertinent in times when even the IMF, the World Bank and the WTO are cautiously re-examining their long-standing regulatory philosophies. Secondly, whereas conspiracy believers are hardly the type to be convinced by rational arguments it may be reassuring to see, at least for the simplified general discourse about economic globalisation, how similarly unfounded fears already framed debates in the 19th century. Whereas a lecture consisting of over 300 pages of dense historical analysis is not a quick read or an easy supplement to one's legal studies, for anyone hoping to gain broader understanding of the globalisation debate this book deserves, at the very least, a careful read-through.

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DOI 10.7420/pyil2016s

¹⁸ *Ibidem*, p. XV.

¹⁹ *Ibidem*, p. XX.

²⁰ Review by D. Kölling, in: 2 *Global Histories* 96 (2016).

²¹ Palen, *supra* note 6, p. 268.

²² L. Stomma, *A jeśli było inaczej... Antropologia historii* [If it was otherwise... Anthropology of history], Wydawnictwo Sens, Trzebaw: 2008.

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