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## BOOK REVIEW

### THE PROMISE OF INTERNATIONAL LAW

Andrew T. Guzman\*

#### INTRODUCTION

A major methodological shift is underway in the study of international law. The traditional approach to the subject, which assumes that states have a moral obligation to comply with rules of international law and/or a preference for doing so, is being challenged by alternative approaches with roots in the social sciences. Professors Jack Goldsmith and Eric Posner are major contributors to this movement toward a social science approach and their book, *The Limits of International Law*, will further accelerate change in the landscape. Like their past writing, this book will surely become an important part of the debate about how international legal scholars should conceive of states. In *The Limits of International Law*, Goldsmith and Posner have once again stuck a finger in the eye of traditional international law scholarship. They accuse traditional scholars of allowing “normative speculation” to drive their writings and label the associated research agenda “unfruitful.”<sup>1</sup>

As an alternative to this traditional approach, Goldsmith and Posner argue in favor of a rational choice model of international law. I wholeheartedly agree with the authors that international law scholarship must embrace approaches from the social sciences and study state behavior using the tools developed in these other fields. I also share their view that modeling states as rational actors is the

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<sup>1</sup> Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* 15 (1st ed. Oxford Univ. Press 2005).

most promising approach to the study of international law,<sup>2</sup> and I have adopted these same assumptions in most of my own writings. In the struggle between rational choice models of international law and other approaches, then, Goldsmith, Posner, and I are fellow travelers.

Because I agree with the basic assumptions made in the book, this Review will represent something of an internal critique. That is, I will engage the arguments presented in *The Limits of International Law* on their own terms. This turns out to be a challenge, however, because the book can be read to suggest three different sets of conclusions. The first, which I will call the “minimalist” reading, concludes that the book seeks only to argue that international law is, or at least should be studied as if it is, driven by states pursuing their own interests. As mentioned above, I agree with this conclusion, but it represents a problematic interpretation of the book both because the authors have assumed this result—ruling out the possibility that they can be said to have demonstrated it—and because this goal is so modest as to rob the book of its interest. The basic case for a rational choice model of international law is familiar, after all, and the authors do not move that literature forward.

The second possibility is what I will call the “empirical” reading. Under this interpretation, the book advances a set of hypotheses about international law and then tests them against evidence which, in the book, takes the form of case studies. On this reading, the key contribution of the book is the empirical case studies. The theoretical chapters are present only to demonstrate that their hypotheses are possible, not that they are inevitable or even probable. This interpretation is consistent with the theoretical portions of the book, as this Review will explain in detail below, but is hard to square with the case studies. The latter are simply not persuasive evidence regarding the theoretical claims.

The third possible interpretation, and the one that I think is the most reasonable, is what I will term the “theoretical” reading. This approach takes the theoretical discussion to be the heart of the

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<sup>2</sup> This should not be mistaken for a claim that the rational choice model should be the only one used. I recognize that other modeling strategies can also yield important insights into state behavior and international law.

book. The claims advanced are, at root, theoretical, and should be evaluated as such. The merit of the book, then, turns on the theory and an evaluation of the book requires an assessment of that theory. This Review will undertake such an assessment and conclude that the theory is unable to support the claims proffered by the authors. In particular, the theory does not lead to the pessimistic view of international law they advance. As will be shown below, the assumption of rational states is entirely consistent with a world in which international law constrains state conduct in important ways, including ways that Goldsmith and Posner explicitly reject. As a result, the conclusions of the book do not accurately reflect the limits of international law.

Because it is difficult to determine with certainty which of the above interpretations is intended by the authors, this review will address each of them. Parts I and II will address the minimalist and empirical readings of the book and explain why the book fails under each of these readings. Parts III and IV will then turn to the theoretical reading and address the main claims in the book: that customary international law has no exogenous influence on state behavior (Section III.A); that multilateral collective action problems probably cannot be solved by treaty (Section III.B);<sup>3</sup> and that a cheap talk model is able to reconcile the participation of states in the international law system with a model of impotent international law (Part IV).

### I. THE MINIMALIST READING

According to the minimalist reading, the book advances essentially just one claim—"that international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power."<sup>4</sup> The book's conclusion is largely consistent with this reading, as is the book jacket, which states that "[i]nternational law . . . is simply a product of states pursuing their interests on the international stage. It does not pull states toward compliance

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<sup>3</sup> What the authors claim with respect to this point is that they are "skeptical that genuine multilateral collective action problems can be solved by treaty." Goldsmith & Posner, *supra* note 1, at 87.

<sup>4</sup> *Id.* at 3.

contrary to their interests, and the possibilities for what it can achieve are limited.”<sup>5</sup> The merits of this claim are certainly defensible. Though reality is obviously more nuanced than this framework, assuming rational and selfish states may well be the best approach to analyzing state behavior.

If the book’s goal is to defend the claim that rational choice theory can and should be applied to the study of international law, however, it has failed in that task. Moreover, it would hardly be worth reading a book with such a modest goal.

### A. Assuming Rationality

*The Limits of International Law* begins, as any book about international law or international relations must, with assumptions about state behavior. Specifically, it assumes that states are selfish, rational actors. As assumptions go, this one is unremarkable but for the fact that it is being made in a book aimed at international law scholars and practitioners. The same basic assumption has been made by political scientists and economists studying international law and international relations for many years.<sup>6</sup> In fact, these same assumptions were often adopted—less explicitly to be sure—by traditional scholars of international law.<sup>7</sup> In recent years, the use of rational choice assumptions has also become commonplace in the international law literature, spurred on in no small part by Goldsmith and Posner’s earlier writings.<sup>8</sup>

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<sup>5</sup> Id. (book jacket).

<sup>6</sup> See, e.g., Robert M. Axelrod, *The Evolution of Cooperation* (1984); *Cooperation Under Anarchy* (Kenneth Oye ed., 1986); Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984); Kenneth N. Waltz, *Theory of International Politics* (1979).

<sup>7</sup> See, e.g., Anthony A. D’Amato, *The Concept of Custom in International Law* (1971); Louis Henkin, *How Nations Behave* (1979).

<sup>8</sup> See, e.g., Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *Yale J. Int’l L.* 335, 348–54 (1989); Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 *Yale J. Int’l L.* 1 (1999); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 *U. Chi. L. Rev.* 1113 (1999); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *Cal. L. Rev.* 1823 (2002); Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 *J. Legal Stud.* 303 (2002); Edward T. Swaine, *Rational Custom*, 52 *Duke L.J.* 559 (2002).

To understand the strengths and weaknesses of Goldsmith and Posner's claims, it is important to recognize that the assumption of rational states is just that—an assumption. At places in the book, Goldsmith and Posner are clear on this point. They state, for example, that “[o]ur theory of international law assumes that states act rationally to maximize their interests,”<sup>9</sup> and “we consistently exclude one preference from the state’s interest calculation: a preference for complying with international law.”<sup>10</sup> At other times, however, Goldsmith and Posner seem to claim that their analysis demonstrates the accuracy of these assumptions, stating, for example, that “under our theory, international law does not pull states toward compliance contrary to their interests, and the possibilities for what international law can achieve are limited by the configurations of state interests.”<sup>11</sup> Or, more explicitly, “[w]e have *argued* that the best explanation for when and why states comply with international law is not that states have internalized international law, or have a habit of complying with it, or are drawn by its moral pull, but simply that states act out of self-interest.”<sup>12</sup>

If one assumes that states act out of self interest and nothing else, one can immediately conclude that other influences are not present in the model. If one seeks to show that a rational choice approach is appropriate, however, it cannot be done by assumption.

### *B. Familiar Battles*

The second problem with the minimalist reading is that it robs the book of any useful contribution. Though rational choice models remain a minority approach in international law, the concept has by now become familiar to legal scholars.<sup>13</sup> More importantly, these models are well established in other disciplines. The notion that international law can be studied through rational

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<sup>9</sup> Goldsmith & Posner, *supra* note 1, at 7.

<sup>10</sup> *Id.* at 9.

<sup>11</sup> *Id.* at 13.

<sup>12</sup> *Id.* at 225 (emphasis added).

<sup>13</sup> See *supra* note 8.

choice models is unremarkable at this point and, without more, would not merit the publication of a book.<sup>14</sup>

Though a discussion of this book could certainly contest the rational choice approach and explore possible alternatives,<sup>15</sup> I prefer to accept these assumptions. I do so in part because I am sympathetic to the rational choice approach. I believe that it offers the most fruitful strategy for studying state behavior and that it should be the dominant (though not the exclusive) approach to international law. I also choose to avoid a debate about these assumptions because I have nothing to add. The merits and demerits of the rational choice approach to the study of international law and international relations have been exhaustively catalogued. There is no point in revisiting those debates which cannot be resolved here and which Goldsmith and Posner mention, but to their credit do not try to engage.<sup>16</sup>

### *C. Dismissing the Minimalist Reading*

Though the book cannot be judged a success under the minimalist reading for the above reasons, it would be unfair to adopt such a reading. Any author writing about international law must choose some set of assumptions about state behavior. Goldsmith and Posner are open and clear about their commitment to a rational choice approach, and that strikes me as the most that can be demanded. It is clear that the authors seek to make stronger claims that, if proven, would be novel and important. I believe that the book attempts to demonstrate something about the "limits" of international law. It advances claims about the role of international law, attempting to show that there are some tasks for which international law is ill-suited and unable to affect state behavior, and it presents a pessimistic picture of the power of international

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<sup>14</sup> See Kal Raustiala, *Refining The Limits of International Law*, 34 Ga. J. Int'l & Comp. L. 423 (forthcoming 2006) (describing Goldsmith and Posner's approach as "simplistic").

<sup>15</sup> See, e.g., Peter J. Spiro, *A Negative Proof of International Law*, 34 Ga. J. Int'l & Comp. L. 445 (forthcoming 2006) (arguing that the book's failure to take into account non-state actors is a "serious flaw").

<sup>16</sup> Goldsmith & Posner, *supra* note 1, at 8 ("There is a massive literature critical of rational choice theory.").

law. These arguments represent the real contribution of the book and go beyond what the minimalist reading considers.

## II. THE EMPIRICAL READING

There are two ways in which to learn about the world. The first is to develop a theory based on some set of assumptions about behavior. Good theory either explains a phenomenon or makes predictions about what we should observe. The other way to learn about the world is through observation and empirical study. When making an assertion about the world, one can support it with theory, evidence, or both. In their book, Goldsmith and Posner use both approaches to advance their arguments. This Part evaluates the effectiveness of the empirical evidence presented by the authors.

### *A. The Case Studies*

The evidence presented by Goldsmith and Posner consists of case studies used to support their theoretical claims.<sup>17</sup> These studies have all the advantages and disadvantages of case studies. The most important advantage is that they are effective tools for illustrating the claims made. Real-life examples bring the theoretical discussion to life. This benefit, however, comes with several problems. First, case studies are obviously not comprehensive and are (intentionally) highly particularized. This makes it difficult to draw general conclusions. A case study cannot, for example, show that Goldsmith and Posner are right to be “skeptical that genuine multinational collective action problems can be solved by treaty.”<sup>18</sup> The most it can do is provide an account suggesting that a treaty has failed to solve the problem in a particular instance. Similarly, the most that the customary international law (“CIL”) case studies can do is suggest that a particular rule of CIL failed to influence the behavior of a particular state in a particular context at a particular time.

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<sup>17</sup> Goldsmith and Posner offer four case studies relevant to customary international law and two relevant to treaties.

<sup>18</sup> Goldsmith & Posner, *supra* note 1, at 87.



This problem of case studies is especially acute for Goldsmith and Posner because their case studies are invoked to demonstrate that CIL has no "exogenous influence on states' behavior"<sup>19</sup> and to suggest that treaties cannot solve multilateral problems of cooperation. Because these claims are so sweeping, it is simply not possible to infer from a single case study (or even a few case studies) that they are accurate.

### *B. Alternative Accounts and Case Studies*

Despite the above problem, one can imagine that case studies could at least make Goldsmith and Posner's claims plausible. On the one hand, if the case studies persuade us that the authors' claims are consistent with the particular instances covered, then they lend support to those claims. On the other hand, case studies can readily falsify the claims made because even a single counter-example can disprove many of the authors' assertions.

To achieve their goal, the case studies must be persuasive. This brings up a second problem with case studies in general and those advanced by Goldsmith and Posner in particular. Because a case study relates a narrative about a particular set of events, it can be presented in different ways. Goldsmith and Posner argue that their case studies support their claims, but at least some of those case studies are consistent with competing claims.

I illustrate this point below with a brief discussion of the international trade case study. Professor David Golove provides a more thorough engagement with one of Goldsmith and Posner's other case studies,<sup>20</sup> which I summarize here. If these alternative accounts are accepted, they disprove Goldsmith and Posner's claims regarding CIL and multilateral cooperation.

Golove has looked with care at the CIL case studies and is critical of the authors' methodology. He observes that:

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<sup>19</sup> Id. at 39.

<sup>20</sup> David Golove, *Leaving Customary International Law Where it Is*: Goldsmith and Posner's *The Limits of International Law*, 34 Ga. J. Int'l & Comp. L. 333 (forthcoming 2006); see also Detlev F. Vagts, *International Relations Looks at Customary International Law: A Traditionalist's Defence*, 15 Eur. J. Int'l L. 1031, 1036-39 (2004) (disputing an earlier version of Goldsmith and Posner's case studies).

Goldsmith and Posner make little effort to investigate direct historical evidence—of which there is mountains—of the actual motivations of the individuals who made the decisions on which they focus. Instead, they focus on the events themselves and draw speculative inferences about why states acted as they did. It is hardly surprising that their speculations confirm their starting hypothesis that self-interest provides the best explanation for state behavior in every instance. But this approach is straightforwardly unsound from a methodological perspective.<sup>21</sup>

To illustrate his views Golove examines the “Free Ships, Free Goods” example used by Goldsmith and Posner, focusing on the period of the U.S. Civil War.<sup>22</sup> He does not pull his punches, asserting that “Goldsmith and Posner’s account is, to put it bluntly, cherry-picked and fails to present a fair picture of the nature of the various disputes that arose and the resolutions which they engendered.”<sup>23</sup> Not only does Golove object to the methodology, he also disagrees with the conclusion, stating that “on my reading of the historical materials, customary international law played a surprisingly robust role in the long string of disputes which arose between the United States and Great Britain over neutral and belligerent rights under the law of nations.”<sup>24</sup> If Golove’s conclusion is correct, then not only does this case study fail to support Goldsmith and Posner’s claim that CIL has no exogenous influence on state behavior, it proves that they are wrong.

I will add to the examination of Goldsmith and Posner’s case studies by considering the trade example that they provide.<sup>25</sup> To make the discussion manageable, I limit my inquiry to the General Agreement on Tariffs and Trade/World Trade Organization (“GATT/WTO”) system. In their presentation of this case study, Goldsmith and Posner seek to provide support for their skepticism regarding the ability of treaties to achieve multilateral cooperation. The case study purports to show that “international trade rules that

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<sup>21</sup> Golove, *supra* note 20.

<sup>22</sup> See Goldsmith & Posner, *supra* note 1, at 45–48.

<sup>23</sup> Golove, *supra* note 20.

<sup>24</sup> *Id.*

<sup>25</sup> See Goldsmith & Posner, *supra* note 1, at 135.

were designed to solve multilateral prisoner's dilemmas have failed."<sup>26</sup> This is a provocative claim. It is also incorrect.

Though there are many ways in which the GATT/WTO system addresses multilateral prisoner's dilemmas, I will point out only two: multilateral bargaining and non-discrimination. To begin, let me be clear that Goldsmith and Posner agree that international trade presents multilateral prisoner's dilemma problems: "[O]ur assumptions about the interests of states . . . leads [sic] to the conclusion that international trade is not a bilateral prisoner's dilemma between multiple pairs of states, but a collective action problem, that is, a large-*n* prisoner's dilemma."<sup>27</sup>

GATT/WTO bargaining has always been a multilateral affair. It is true that negotiation rounds have often featured bilateral arrangements that are then extended through the most-favored nation ("MFN") clause. This simple description, however, masks the extent to which each state is in fact making a series of concessions to many other states while receiving benefits from the concessions of others. If bargaining were strictly bilateral, each state would have to be made better off in each of its bilateral relationships rather than simply better off overall. It is clear that, in fact, states do not engage in that sort of bilateral calculus. States recognize that they may make "uncompensated" or "under-compensated" concessions to country *A* while receiving benefits through country *B*'s concessions. With many parties and many concessions, it is unrealistic and fruitless for a party to demand a net benefit from every bilateral exchange.<sup>28</sup> Most concessions generate positive externalities (primarily through the MFN clause), and so what a state "gives up" will often be greater than what it gets in return for that particular concession. Overall, however, these spillovers can make every state better off than under the status quo. This form of bargaining can only be described as multilateral. The multilateral aspect of the bargaining is also clear

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 145.

<sup>28</sup> This discussion refers to the political costs and benefits from negotiation, rather than economic costs and benefits. It is obvious that every state benefits from liberalization, including a state that opens its markets unilaterally. In the course of negotiations, however, opening one's own market is perceived to be a concession, and so the discussion here treats it as such.

in its final stages. States perceived to have been free-riders in the negotiation are asked to make concessions of their own in exchange for the benefits they will enjoy as a result of the MFN clause. There is no bilateral exchange at this point. Rather, a state is asked to make concessions in exchange for the full package of benefits that it receives as a result of the multilateral negotiation.

Furthermore, though Goldsmith and Posner are correct that past negotiating rounds have often used bilateral negotiations to start the process, this has not always been the case. In the Kennedy and Tokyo Round negotiations under the GATT, for example, significant tariff reductions were achieved through what was termed the "linear technique."<sup>29</sup> Under this system, every state was to reduce existing tariffs by a specified percentage (fifty percent was used for the Kennedy Round and a more complicated formula was used for the Tokyo Round).<sup>30</sup> Exceptions were then negotiated against this baseline. This method makes it clear that the negotiations are a multilateral exercise rather than a bilateral one.

A second example is provided by the norms of non-discrimination in the GATT/WTO system. The key non-discrimination provisions of the GATT are the most-favored nation and national treatment ("NT") principles, each of which represents an important multilateral commitment. The MFN requirement is important to negotiations because it prevents a commitment made today from being undermined by more generous market-access provisions made to another member state in the future. It also ensures that concessions made between, say, the United States and the European Communities generate market openings for every other state. The NT principle is multilateral in the sense that it must be provided to all members. In a bilateral system, importing country *A* would have an incentive to refuse to grant NT to exporting country *B* if country *B* did not buy goods from country *A*. That is, if country *B* could not threaten a reciprocal denial of NT, country *A* could ignore the NT obligations.

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<sup>29</sup> D.M. McRae & J.C. Thomas, *The GATT and Multilateral Treaty Making: The Tokyo Round*, 77 *Am. J. Int'l L.* 51, 75 (1983).

<sup>30</sup> *Id.* at 67–68.

Goldsmith and Posner do not discuss the NT obligation, and it is hard to imagine how they could conceive of it as either ineffective (there appears to be consensus that it works well) or essentially bilateral. They attempt to dismiss the MFN obligation, but their only argument along these lines is to point out that there is a significant exception to the MFN obligation in Article XXIV of the GATT for states that enter into a customs union or free-trade area. As Goldsmith and Posner state, a significant number of these agreements have been formed, but I am unaware of anyone (other than Goldsmith and Posner) who argues that they have caused the underlying MFN provision to fail. The exception for preferential trading arrangements ("PTA") simply does not allow states to ignore or "circumvent" the MFN obligation at will, as Goldsmith and Posner claim.<sup>31</sup> It requires (among other things) that parties to a PTA eliminate duties and restrictions on commerce for substantially all trade amongst themselves. For trading partners unwilling to go that far, the MFN obligation continues to apply.<sup>32</sup> Thus, although many trading partners benefit from a PTA, many more do not. To make this point more explicitly, the United States has a PTA with Canada and Mexico, for example, but none with Europe, China, Japan, Russia, Brazil, or most other states. Article XXIV of the GATT creates an exception to the MFN obligations, but it does not follow that the MFN obligation is ineffective.<sup>33</sup> Furthermore, going beyond the GATT, non-discrimination obligations exist in many of the WTO agreements, often without an exception for PTAs. For example, Article 2 of the agreement governing health and safety issues (Agreement on the Application

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<sup>31</sup> Goldsmith & Posner, *supra* note 1, at 149.

<sup>32</sup> It is true that some PTAs are probably in violation of the requirements in the GATT, but there is no support for the implication that states can discriminate among countries in any way they choose or that the requirements are without effect. The obligations on states to comply with the requirements for PTAs have been emphasized by the WTO's most important adjudicative branch, the Appellate Body. In the *Turkey—Textiles* case, the Appellate Body ruled that Turkey's quantitative restrictions on imports of textiles and clothing from India were not permitted under the PTA exception to the MFN clause. Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (Oct. 22, 1999).

<sup>33</sup> The Goldsmith and Posner claim should also raise eyebrows as a theoretical matter because it would be odd to have a model of rational states in which an MFN provision is included in an agreement only to be fully gutted by an exception.

of Sanitary and Phytosanitary Measures) includes a non-discrimination provision that is not subject to such an exception. The same is true of the intellectual property agreement within the WTO system (Agreement on Trade-Related Aspects of Intellectual Property Rights). Simply put, the claim that the trading system has failed to solve multilateral cooperation problems is false.<sup>34</sup>

If the "Free Ships, Free Goods" and trade case studies are unpersuasive (or wrong), what conclusions should one draw about Goldsmith and Posner's empirical claims more generally? The answer to this question depends on whether one believes the book is primarily about offering empirical evidence to prove certain hypotheses about international law or advancing theoretical claims. If it is about the former, then the book has failed.

### III. THE THEORETICAL READING

If the key contribution of the book is not the case studies, it must be the theory. In that case, the book should be judged on the coherence and power of the theory. This strikes me as the most plausible reading of the book. The controversial claims in the book are presented as theoretical results and nested within the theoretical chapters. Perhaps most importantly, the above discussion of the case studies demonstrates that the book's merits will turn on the quality of the theory. If the theory is persuasive, the case studies are valuable as (controvertible) illustrations. If the theory is not persuasive, the case studies are not strong enough to carry the weight of the arguments.

This focus on the theory is consistent with the way in which the authors frame the book's results—as general lessons about international law rather than issue-specific observations: "[W]e do hope that this book will help put international law and international law scholarship on a more solid foundation."<sup>35</sup> The

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<sup>34</sup> It is also worth noting that many other examples of collective action problems being solved through treaty can also be identified. To cite just one instance, the Montreal Protocol succeeded in generating a dramatic reduction in CFC consumption.

<sup>35</sup> Goldsmith & Posner, *supra* note 1, at 226.

balance of this Review, then, looks at the theory developed in the book and considers whether it supports the conclusions reached.

### *A. Customary International Law*

The CIL chapter introduces the key game theoretic framework of the book. It presents four simple games that the authors assume capture the key interactions of states. The game that does most of the work throughout the book is what the authors refer to as a game of cooperation.<sup>36</sup> This is a prisoner's dilemma and it yields the familiar result that the states involved will not cooperate in a one-shot game. The question for international law is whether it can overcome this cooperative problem. It is clear that as long as we remain in the context of a one-shot game, no cooperation will occur. Goldsmith and Posner acknowledge that cooperation may emerge in an iterative context because states may find it worthwhile to cooperate today in order to establish a reputation for cooperation that may yield payoffs tomorrow. The ability to achieve cooperation in a prisoner's dilemma depends on several factors: discount rates, repetition of the game with no fixed endpoint, and payoffs from cooperation that are large enough relative to payoffs from a one-shot defection. The simplest example of such cooperation is in simple bilateral arrangements in which the threat by one country to withdraw its own compliance is sufficient to generate compliance by its treaty partner. This is the case, for example, in the Boundary Waters Treaty between the United States and Canada that, among other things, regulates the obstruction and diversion of water by one party.<sup>37</sup> Each party has a certain incentive to violate the treaty (by, for example, diverting water that flows from their side of the border into the other state) but refrains from doing so because it gains more from the cooperative regime than it would from a one-time breach followed by a cessation of compliance by the other side.

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<sup>36</sup> A more detailed discussion of my views on cooperative games and international law can be found in Guzman, *A Compliance-Based Theory of International Law*, *supra* note 8.

<sup>37</sup> Treaty Relating to the Boundary Waters and Questions Arising Along the Boundary Between the United States and Canada, U.S.-U.K., art. 3, Jan. 11, 1909, 36 Stat. 2448.

Based on this theoretical apparatus, Goldsmith and Posner advance their claims about CIL. The first important claim is the following:<sup>38</sup>

**Claim:** “[W]e are skeptical that customary international law’s supposed multilateral or ‘universal’ behavioral regularities are best explained as examples of overcoming multistate prisoner’s dilemmas. . . .”<sup>39</sup>

Goldsmith and Posner explicitly state that this claim does not emerge from their theory: “Game theory does not rule out the possibility of such multistate cooperation.”<sup>40</sup> Their claim, then, is in part an empirical one: “[G]enuine multistate cooperation is unlikely to emerge. . . . [T]here is no evidence that customary international law reflects states solving multilateral prisoner’s dilemmas.”<sup>41</sup> The development of this claim is incomplete in the book, presumably because a nearly identical claim is developed in more detail in the chapter on treaties. In any event, this claim about multilateral custom is a necessary implication of Goldsmith and Posner’s larger conclusion that CIL does not affect state behavior:

**Claim:** “[W]e deny the claim that customary international law is an exogenous influence on states’ behavior.”

This is a powerful claim, and surely the most important one made with reference to customary international law, but it requires some careful unpacking. Goldsmith and Posner accept that certain norms come to be called customary international law, but the core of their

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<sup>38</sup> Goldsmith and Posner also make the claim that CIL—as they have modeled it using four games—would not be viewed as an example of custom by traditional international law scholars. This is surely correct, but it emerges directly from the assumption that states are self-interested and rational. Goldsmith and Posner have assumed away the possibility that states operate out of a sense of legal obligation (*opinio juris*) and so have ruled out the possibility of CIL as traditionally conceived.

<sup>39</sup> Goldsmith & Posner, *supra* note 1, at 36 (citation omitted). Goldsmith and Posner make a similar, though weaker, claim about the resolution of multilateral coordination games. I do not address this claim primarily because I am not persuaded that when such coordination occurs (in time zones, driving on the right-hand side of the road, and use of a common language at meetings, for example) it is thought to be CIL.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 37.



argument is that this is simply a label that has no impact on behavior. In simple terms, the message is that CIL does not affect the payoffs of states or, at least, it does not do so *because* it is law.<sup>42</sup>

To understand the argument it is helpful to see the full presentation of the claim:

[M]ost international law scholars . . . insist that the sense of legal obligation puts some drag on such deviations. Our theory, by contrast, insists that the payoffs from cooperation or deviation are the sole determinants of whether states engage in the cooperative behaviors that are labeled customary international law. This is why we deny the claim that customary international law is an exogenous influence on states' behavior.<sup>43</sup>

That payoffs are the sole determinants of state behavior is, of course, assumed in their model, and necessarily implies that a sense of legal obligation cannot play a role. These assumptions do not, however, lead to the conclusion that customary international law is not an exogenous influence on states' behavior.<sup>44</sup>

In fact, rational choice models that accept the relevance of CIL are in the legal literature and have been for several years.<sup>45</sup> I have discussed my own view of customary international law at length in other writings and have disagreed with many of the assertions made in *The Limits of International Law*.<sup>46</sup> The key point here is that the assumption of rational states simply does not lead to the conclusion that customary international law has no "exogenous influence on states' behavior."

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<sup>42</sup> Earlier writing by Goldsmith and Posner is both stronger and more explicit. Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 Va. J. Int'l L. 639, 640 (2000) ("The faulty premise is that CIL . . . influences national behavior.").

<sup>43</sup> Goldsmith & Posner, *supra* note 1, at 39.

<sup>44</sup> In the interests of clarity and simplicity, I will summarize their claim as one in which CIL "does not matter." I recognize that Goldsmith and Posner accept the existence of social norms that may influence states, and so to say CIL does not matter is to say that having the status of law does not give these norms any additional impact.

<sup>45</sup> See, e.g., Guzman, *A Compliance-Based Theory of International Law*, *supra* note 8; Andrew T. Guzman, *Saving Customary International Law*, 27 Mich. J. Int'l L. 115 (2005); George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 Am. J. Int'l L. 541 (2005); Swaine, *supra* note 8, at 564.

<sup>46</sup> Guzman, *A Compliance-Based Theory of International Law*, *supra* note 8; Guzman, *Saving Customary International Law*, *supra* note 45.

Rational choice models of CIL rely primarily on reputational effects to generate an incentive toward compliance. In simple terms, when states comply with legal rules, including rules of CIL, they develop a reputation as cooperative actors. When they violate the rules, that reputation is damaged. A reputation for compliance is valuable because it allows you to enter into cooperative arrangements with others and because it encourages others to honor their own obligations toward you. In other words, cooperative states are more desirable partners and can enjoy the gains of cooperation more easily. The key point is that a reputational model establishes a link between compliance and payoffs. This preserves the assumption that states are selfish, rational actors and yet gives states an incentive to comply with international law rules.

Goldsmith and Posner are aware that reputational concerns may affect behavior, stating that “we do not deny that states and their leaders care about their reputations.”<sup>47</sup> If states care about their reputations for compliance with international law, a rule that has the status of CIL generates at least some (perhaps small) incentive to comply. A concern for reputation turns the interaction from a one-shot game to a repeated one and, in doing so, makes possible a set of cooperative equilibria.

If cooperative outcomes are possible as a matter of theory, how can we determine if Goldsmith and Posner’s claims about CIL are correct? The answer to this question can be found in the standard formulation of a repeated prisoner’s dilemma. Cooperation in that context, as already mentioned, turns on discount rates, repetition, and the payoffs from cooperation and defection. We need not dwell on the question of whether states play a repeated game, for it is clear that they do. The Goldsmith and Posner claim, then, is really an assertion that the short-term gains from a violation of CIL are larger than the long-term cost of that violation, appropriately discounted.

This claim is obviously an empirical rather than theoretical one, but because Goldsmith and Posner make a fairly absolute claim regarding the impotence of CIL (“not an exogenous influence”)

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<sup>47</sup> Goldsmith & Posner, *supra* note 1, at 103. I discuss Goldsmith and Posner’s view of reputation in more detail below. See *infra* Part IV.

they can only be right if there are no instances in which a reputational loss from non-compliance affects behavior. For this to be true it must be the case that in every instance in which CIL is relevant, the payoffs are such that a modest change in payoffs as a result of the existence of CIL will have no effect on behavior. That is, it must never be the case that the non-reputational payoffs are such that the presence of a rule of CIL tips the state toward compliance with the rule.

Described in this way, the Goldsmith and Posner claim is quite striking. It is not only an assertion that a rule of CIL generates only a small reputation impact (which seems both correct and consistent with their presentation) but that the costs and benefits of state decisions are never balanced enough to allow these reputational concerns to tip the balance.

Because there is, to my knowledge, no strong empirical evidence on the impact of customary international law, we cannot evaluate the claims made by Goldsmith and Posner with existing data.<sup>48</sup> The above discussion shows, however, that for Goldsmith and Posner to be correct would require a rather surprising empirical result—one in which state decisions are never close enough to the margin to be influenced by customary international law. Put another way, Goldsmith and Posner's theory cannot demonstrate that customary international law has no exogenous impact on state behavior, and the assumptions necessary to get that result seem extreme.

To illustrate how CIL can influence behavior, consider a simple illustration that draws on material in *The Limits of International Law*. In their chapter on CIL, Goldsmith and Posner argue that it has no exogenous effect on behavior. Yet in their chapter on treaties they argue that one reason why "legal" commitments in international law are more effective than soft law is that they are perceived to be more serious.<sup>49</sup> But why would a treaty be more serious or more binding than other agreements? One possible explanation is the rule of customary international law providing that treaties are to be obeyed. This rule is reflected in the Vienna

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<sup>48</sup> The above-mentioned discussion of the "Free Ships, Free Goods" case study by Golove represents evidence that contradicts Goldsmith and Posner's claim. See *supra* text accompanying notes 20–24.

<sup>49</sup> See Goldsmith & Posner, *supra* note 1, at 98–99.

Convention on the Law of Treaties,<sup>50</sup> but it is also an example of CIL and thus binds states that are not party to the convention, including the United States.

It is difficult to think of international legal obligations more universally accepted than the notion that treaties must be obeyed. General acceptance of the fact that treaties are the most formal pledge a state can make seems likely to influence state behavior and to do so *because* of the perception that there is a legal obligation. It is, after all, a reputation for compliance with legal obligations that states are calling on to lend credibility to their commitments when they sign a treaty rather than a soft law instrument.<sup>51</sup> In other words, states enter into international treaties as a form of commitment. This is effective because there are consequences for violating the commitment. In particular, beyond signaling a willingness to renege on commitments, a violation signals a willingness to ignore the customary international law that treaties must be obeyed. States, therefore, leverage the legal obligation generated by custom to make a more credible commitment.

One might respond that a treaty is simply a norm by which states signal their seriousness. The problem with this explanation is that there are many simpler and less costly ways to deliver that signal without, for example, triggering the cumbersome domestic law procedures of treaties.<sup>52</sup> States (or their leaders) could enter into agreements printed on red paper when they are very serious, yellow when they are slightly less serious, and green when they are least serious. Or they could title the agreement: "A very serious

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<sup>50</sup> Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 339.

<sup>51</sup> There are additional reasons to choose soft law instruments or treaties, as Goldsmith and Posner discuss.

<sup>52</sup> There are, of course, reasons why states may want to trigger the domestic procedures demanded of formal treaties, and Goldsmith and Posner are right to point these out. But there is no reason why a single decision—to use a treaty or to use soft law—should be used both to signal the seriousness of the state and to trigger a particular domestic process. The same is true of the default rules of the Vienna Convention. If states want these rules to apply they can simply say as much in their agreement. Having done so, they can make their decision about whether to use a treaty or soft law form independently of these default rules.

commitment between the state of *X* and the state of *Y*.”<sup>53</sup> States could then enter into treaties when they (or their leaders) felt that domestic participation was important for whatever reason and still retain control over the seriousness of the commitment. The most plausible reason why they do not operate in this way is that compliance with treaties is required by CIL, and the legal obligation that is created gives additional credibility to the promises made.

### *B. Treaties*

Though the debate about CIL has attracted a good deal of attention, it is really only a skirmish in the much larger struggle over the content and significance of other forms of international law, most importantly treaties and other international agreements.

Early in the chapter on treaties Goldsmith and Posner state that “[i]n repeated prisoner’s dilemmas, when the agreement sets out clearly what counts as a cooperative action . . . it becomes more difficult for a state to engage in opportunism and then deny that the action violated the requirements of a cooperative game.”<sup>54</sup> I highlight this passage because it demonstrates that Goldsmith and Posner believe that international agreements can sometimes solve problems of cooperation. Though they do not lay out a theory of how international agreements can succeed, they clearly have in mind that states “fear retaliation from the other state or some kind of reputational loss.”<sup>55</sup> In other words, Goldsmith and Posner agree that cooperation can take place and that it works at least in part as a result of the reputational concerns of states.

With the common framework provided by a reputational model in hand, we can turn to examine in detail Goldsmith and Posner’s most important claim about treaties:

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<sup>53</sup> Though this sounds somewhat absurd, it is hardly more so than the current practice by which states enter into agreements entitled “A non-binding agreement on XYZ.”

<sup>54</sup> Goldsmith & Posner, *supra* note 1, at 85.

<sup>55</sup> *Id.* at 90.

**Claim:** “[W]e are skeptical that genuine multinational collective action problems can be solved by treaty.”<sup>56</sup>

This claim about multilateral treaties is in contrast to their view of bilateral treaties, which they see as having the potential to overcome problems of cooperation. In fact, to the extent multilateral treaties succeed, Goldsmith and Posner argue that what is really going on is bilateral cooperation under the umbrella of a multilateral agreement. Their story puts particular emphasis on enforcement mechanisms: “[T]he victim of a violation almost always has to enforce the terms itself through the threat of retaliation . . . . The lack of third-party enforcement, except in unusual circumstances, is strong evidence against the view that multilateral collective goods are created.”<sup>57</sup>

Goldsmith and Posner’s skepticism about multilateral cooperation emerges more or less directly from this implicit assumption that the key to cooperation is what they term “retaliation.” They use this term to include pure retaliatory measures as well as what I will term “reciprocity.” A bilateral effort to resolve a commons problem may succeed because each state realizes that if it defects the other state will respond in kind. Since both prefer the cooperative outcome to the non-cooperative outcome, they will comply. This is an example of reciprocity—states accept costly obligations only as long as their treaty partners do the same. One can also imagine an instance in which a violating state is “punished” by its treaty partner in the sense that the treaty partner sanctions the violating state by taking actions that are costly to both the sanctioning state and the violating state. This is an example of pure retaliation.

Though they do not say so explicitly, when discussing multilateral cooperation Goldsmith and Posner assume a theory of compliance in which cooperation can only exist under the threat of retaliation or reciprocity. They dismiss the other important

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<sup>56</sup> Id. at 87. Throughout most of this Review I have assumed that the authors are advancing arguments intended to persuade the reader that multinational collective action problems cannot be solved by treaty. This is, I believe, consistent with the tone and content of the book. Strictly speaking the authors do not make this claim explicitly, choosing instead to state that they are skeptical about the power of treaties to play this role.

<sup>57</sup> Id. at 88.

mechanism by which states are induced to cooperate (and which they acknowledge matters in the bilateral context): reputation. If one ignores reputation, Goldsmith and Posner are right that international law is quite limited and that multilateral cooperation is difficult (though even under these conditions I would not go so far as to say that multilateral cooperation problems cannot be solved by treaty).

When they address cooperation in multilateral treaties, Goldsmith and Posner appear to go even further and assume that only pure retaliation (and not reciprocity) can support a cooperative outcome, stating that in a multilateral prisoner's dilemma "every state would need to commit to punish every state that violates the treaty, and to punish every state that fails to punish every state that violates the treaty, and so forth."<sup>58</sup>

It is true that multilateral retaliation is unusual (though not unheard of) in the international arena, and Goldsmith and Posner are correct to point out that a regime built on punishments of this sort and nothing else is unlikely to succeed. But by ignoring two other important forces that promote multilateral cooperation—reciprocity and reputation—Goldsmith and Posner dramatically understate the theoretical case for cooperation.

Reciprocity is, to be sure, a more reliable enforcement tool in the bilateral rather than multilateral context, but this does not mean that it cannot work multilaterally. Where states simply cannot be excluded from a public good, reciprocity will obviously not work well. But in other contexts it is possible to respond to a violation through reciprocal sanctions. Consider an example from international trade. Under the safeguards provisions of the WTO, a state is entitled to adopt safeguard measures (usually higher tariffs) under certain conditions. When they do so, however, they are expected to provide some form of compensation to other affected states. If this is not done, those affected states are entitled (again, under certain conditions) to suspend the application of "substantially equivalent concessions."<sup>59</sup> In other words, affected

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<sup>58</sup> *Id.* at 87.

<sup>59</sup> Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 315, 320, 1869 U.N.T.S. 154, 158 (1994).

states are entitled to a reciprocal withdrawal of their own compliance. This is admittedly done in a bilateral fashion (each country withdraws concessions based on how it is affected), but the result is a meaningful check on behavior in the context of a multilateral agreement.

Though glossing over the role of reciprocity is problematic, the larger problem is Goldsmith and Posner's dismissal of reputation. The authors "do not deny that states and their leaders care about their reputations,"<sup>60</sup> but almost totally overlook the potential that reputation has for generating compliance. Their treatment begins with the statement that "reputational arguments must . . . be made with care."<sup>61</sup> They then advance several reasons why reputation may not generate compliance. Curiously, having stated both that they believe reputation matters and that theories of reputation must be treated with care, they ultimately ignore this factor altogether.

Notice how this relates to their assertion that treaties do not generate multilateral cooperation. If one accepts that reputation is capable of affecting state behavior (as discussed below), it follows that multilateral collective action problems can be solved, at least some of the time, through treaties. Goldsmith and Posner do not demonstrate (or even explicitly claim) that reputation is unable to affect state behavior, yet they suggest that multilateral cooperation cannot be sustained through treaty. The only possible inference is that they have assumed that reputation has no effect (or little enough effect to ignore).<sup>62</sup>

So now we can see the structure of their argument. It dismisses the role of reputation and reciprocity in multilateral agreements and observes that retaliation is difficult in a multilateral setting. The effect is to remove from the analysis all the forces that connect today's behavior with tomorrow's consequences. These assumptions bring us back to a one-shot prisoner's dilemma where, of course, cooperation is impossible. Once they have made these assumptions, then, it is hardly surprising that multilateral

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<sup>60</sup> Goldsmith & Posner, *supra* note 1, at 103.

<sup>61</sup> *Id.*

<sup>62</sup> This is true notwithstanding the fact that they acknowledge that states care about their reputations.



cooperation is difficult to maintain. The point here is that Goldsmith and Posner's conclusion about multilateral treaties is really a product of strong assumptions about reputation and reciprocity rather than a theoretical result that emerges from their rational choice assumptions.

What about the possibility that they are right to assume that reputation is too weak to influence behavior—especially in the multilateral context? To the extent Goldsmith and Posner defend this position, the four arguments they make fall short. First, they point out that a state may have different reputations in different issue areas. This seems plausible, and has been eloquently argued by Professors George Downs and Michael Jones.<sup>63</sup> But the existence of more than one reputation says nothing about whether reputation matters. To use Goldsmith and Posner's example, if a state has "a good record complying with trade treaties and a bad record complying with environmental treaties"<sup>64</sup> then the state will benefit from its reputation in trade. Furthermore, the state will have an incentive to protect that reputation by, for example, complying with trade commitments that, absent reputational concerns, it would violate. Possessing compartmentalized reputations of this sort has consequences for behavior (for example, reputational forces will be strong in areas where reputation is valuable to the state, and weaker in areas where it is not), but does not suggest that multilateral cooperation cannot be sustained. In fact, to say that states have multiple reputations is to say that they have reputations that they care about in some instances. If a particular reputation is valuable, states have an interest to protect it and, therefore, an interest in compliance with international legal rules that implicate the reputation. In these areas, reputation will support multilateral cooperation.

Second, Goldsmith and Posner argue that states have "multiple reputational concerns, many of which have nothing to do with, or even are in conflict with, a reputation for international law

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<sup>63</sup> George W. Downs & Michael A. Jones, Reputation, Compliance, and International Law, 31 J. Legal Stud. 95, 97 (2002).

<sup>64</sup> Goldsmith & Posner, *supra* note 1, at 102.

compliance.”<sup>65</sup> This point is surely correct.<sup>66</sup> It has, however, little relevance to the question of whether reputation affects behavior. As I have said in earlier writing, reputational incentives, like all incentives, act at the margin.<sup>67</sup> To say that there are other forces at work is simply to recognize this fact. It makes no more sense to dismiss reputation based on the fact that it operates at the margin than it does to dismiss the impact of retaliation on the same grounds.

Third, Goldsmith and Posner argue that treaties are often rendered obsolete by changing circumstances. On the one hand, it is true that changes in circumstances may make a treaty inappropriate to a particular context. On the other hand, one of the important reasons to enter into a treaty is to protect against future changes by assigning risk and encouraging reliance. The fact that circumstances change over time and treaties sometimes grow less relevant tells us nothing about whether breaches of non-obsolete treaties generate reputation consequences.

Finally, Goldsmith and Posner state that once one assumes that states incur a reputational cost whenever they violate a treaty “it becomes more difficult to explain why some treaties generate more compliance than others.”<sup>68</sup> The authors do not offer an explanation for this claim, but even the simplest reputational model demonstrates that it is false. Even if a reputational cost follows every violation, and even if that reputational cost is always the same, one would expect some treaties to generate more compliance than others. A treaty that solves a coordination problem, for example, is unlikely to generate a violation. Even among prisoner’s dilemmas, unless one also assumes that the payoffs of the parties are the same in every treaty, there is no reason to expect the same level of compliance across treaties.<sup>69</sup>

What, then, should one conclude from Goldsmith and Posner’s discussion on treaties? For present purposes the important point is

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<sup>65</sup> *Id.*

<sup>66</sup> See Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 *Harv. Int’l L.J.* 487, 497 (1997).

<sup>67</sup> Guzman, *A Compliance-Based Theory of International Law*, *supra* note 8, at 1875 n.189.

<sup>68</sup> Goldsmith & Posner, *supra* note 1, at 103.

<sup>69</sup> This point is obvious if one thinks of reputational effects as acting at the margin.

that they have not established a persuasive theoretical case for their skepticism regarding the ability of treaties to promote multilateral cooperation. They defend their skepticism primarily by assuming away the forces of reputation and reciprocity. The same conclusion attaches to the customary international law version of this claim—Goldsmith and Posner's theory does not lead to the result that multilateral cooperation cannot succeed.

#### IV. RHETORIC IN INTERNATIONAL LAW

If international law has as little a role in international affairs as Goldsmith and Posner argue in their book, one might wonder why it receives so much attention from states and their representatives. Why, for example, did the United States work so hard (though ultimately in vain) for Security Council support of its 2003 invasion of Iraq? Why has the United States argued so aggressively and for so long that there is a customary international law requiring "prompt, adequate, and effective" compensation when foreign investment is expropriated?<sup>70</sup> Why has the United States government invested resources in multilateral environmental agreements, whether to encourage their formation or to prevent U.S. participation? In short, if Goldsmith and Posner are right, why do states expend resources on international law in contexts where, according to Goldsmith and Posner, international law has no effect?

This is a significant challenge to Goldsmith and Posner because rational states will only expend resources when doing so is justified by the benefits they receive. In the interest of brevity, I only want to address the expenditure of resources in the contexts of multilateral cooperation and customary international law.<sup>71</sup> As already discussed, Goldsmith and Posner argue that international law fails in both of these circumstances.

Goldsmith and Posner are aware of this challenge to their claims, and attempt to address it with the following signaling argument:

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<sup>70</sup> Ibrahim F.I. Shihata, *Legal Treatment of Foreign Investment: The World Bank Guidelines* 86–87 & 87 n.50 (1993).

<sup>71</sup> Virtually identical arguments would apply in the human rights context, which I point out because Goldsmith and Posner devote a chapter to that topic.

**Claim:** "Because the talk is cheap, no one will be influenced by a state's claim that it is cooperative; that is, no state would adjust its prior belief about the probability that the speaker is cooperative. But a state that failed to send this weak signal would reveal that it belongs to the bad type. In equilibrium, all states send the signal by engaging in the appropriate international chatter. In this pooling equilibrium, everyone sends the weak signal because no one gains from failing to send it. Talk does not have any effect on prior beliefs about the likelihood that the speaker is cooperative, but it is not meaningless, because failure to engage in the right form of talk would convey information that the speaker is not cooperative."<sup>72</sup>

I want to mention three problems with this passage. The first is that Goldsmith and Posner do not explain why a state would want to be seen as cooperative. The authors are committed to the assumption that states rationally seek to maximize their own payoffs and to the belief that reputation is insufficient to overcome cooperative problems outside of a few bilateral contexts. Recall that Goldsmith and Posner assert that customary international law has no "exogenous influence on states' behavior." If that is so, there is no sense in which a state would benefit by being seen as cooperative with respect to custom. There is, therefore, no reason to make any claims about the legality of your own conduct or the illegality of the conduct of others. We certainly observe that states engage in "the appropriate international chatter" with respect to both of these subjects and, indeed, we often see exchanges in which questions of legality seem to be a major source of friction between states. There is, therefore, something of an inconsistency between the authors' argument about international rhetoric and their claims about custom and treaties.

With respect to multilateral treaties, Goldsmith and Posner are "skeptical that genuine multinational collective action problems can be solved by treaty." Yet there can be no doubt that treaties are negotiated and drafted with an eye toward solving such problems. The paradigmatic example of multilateral treaties intended to address collective action problems is environmental

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<sup>72</sup> Goldsmith & Posner, *supra* note 1, at 174.

treaties. Some such treaties, to be sure, demand so little from states that one could argue that they are motivated by objectives other than the resolution of a collective action problem. Others agreements, however, including the Montreal Protocol,<sup>73</sup> the Long-Range Transboundary Air Pollution Agreements,<sup>74</sup> the International Convention to Regulate Whaling,<sup>75</sup> and the Kyoto Accord,<sup>76</sup> are clear and unambiguous attempts to address such problems. The Goldsmith and Posner view is that treaties cannot succeed in this task, and it follows that rational states would not enter the treaties with this objective.<sup>77</sup> But if international law cannot resolve this problem it follows that states have no incentive to be perceived as "cooperative." Indeed, it is difficult to even know what it would mean for a state to be perceived as "cooperative" since the theory leaves no room for reputational effects.

The one place where Goldsmith and Posner accept the notion that law may promote cooperation is in the context of bilateral treaties.<sup>78</sup> Here, the reason for cooperative behavior is a concern for retaliation or reputational loss.<sup>79</sup> One possibility, then, is that the rhetoric of cooperation in customary international law and multilateral treaties somehow signals that the state has a general propensity to comply with its international legal commitments, including its bilateral commitments. This view of reputation, however, is inconsistent with the way in which Goldsmith and Posner view the subject. They argue that a state's reputation is different in different subject areas, and so "it makes little sense to talk about a state's general propensity to comply with treaties."<sup>80</sup>

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<sup>73</sup> Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10 (1987), 1522 U.N.T.S. 3.

<sup>74</sup> Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 34 U.S.T. 3043, 1302 U.N.T.S. 217.

<sup>75</sup> International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72.

<sup>76</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22.

<sup>77</sup> One might argue that states falsely believe that the treaties can work when in fact they cannot. There are a number of problems with this ignorance assumption and Goldsmith and Posner are wise enough not to make arguments of that sort.

<sup>78</sup> Goldsmith & Posner, *supra* note 1, at 85.

<sup>79</sup> *Id.* at 90.

<sup>80</sup> *Id.* at 102.

A second difficulty with Goldsmith and Posner's signaling argument is that it assumes that international talk is cheap or, as Goldsmith and Posner put it, "arbitrarily close to zero."<sup>81</sup> But this assumption of nearly free talk is inconsistent with much of what we observe. To begin with, disputes over international law are often very expensive. Most obviously, litigating cases at the WTO, the International Court of Justice, or any other forum often consumes substantial sums of money. Especially for poor states, these disputes simply cannot be described as cheap talk. Beyond dispute settlement, many more resources are devoted to the creation, monitoring, and rhetoric of international law, and this too must be counted as "talk." For example, the creation of multilateral treaties to address collective action problems often requires a great deal of time by high-ranking officials (including heads of state), significant domestic and international political sacrifices, and large sums of money. The same can be said of state efforts to monitor the performance of their counter-parties and to defend their own actions. What is the cost to the United States of monitoring compliance with international law, explaining why its own conduct is consistent with its obligations, and debating the state of the law? Whatever the answer, it is not "arbitrarily close to zero."

If the talk is not cheap, the theory breaks down. Whatever the rewards from being seen as cooperative, as the price of investing in international legal activity goes up states will begin to conclude that they are better off not sending the signal and the equilibrium will break down.

My third and final concern with the cheap talk model developed by Goldsmith and Posner is that it requires the heroic assumption that states take a failure to invest in the appropriate international activities as a signal that a state is not cooperative. But why would states believe this to be true? It is not because the talk actually distinguishes cooperative from uncooperative players; for that to be true would require that the talk have some cost to it and that there be some reward for cooperation. But if those two things are true, Goldsmith and Posner's conclusions about international law cannot be sustained.

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<sup>81</sup> Id. at 173.

Furthermore, in conventional signaling models, the cost of sending a signal is higher for one group of players than for the other group. Thus in Professor Michael Spence's original presentation of signaling he uses the example of education, in which "good" workers are able to get an education at lower cost (monetary and psychic) than "bad" workers.<sup>82</sup> This difference gives employers a reason to assume that workers with an education are more likely to be good workers than those without. In Spence's model a pooling equilibrium in which all workers get an education is only one of several possible equilibria. As Spence puts it, the employer's beliefs about worker quality are confirmed in a "degenerate"<sup>83</sup> way—they are confirmed only because there is no disconfirming data.

In Goldsmith and Posner's model, however, there is no reason to think that "cooperative" players are more likely to engage in the rhetoric of international law. The talk is "cheap" for both parties, and Goldsmith and Posner advance no argument about why it is more costly for one party than the other. The identification of international talk as a signal, then, is entirely arbitrary. The same signal could just as easily be provided by almost anything else over which a state has control—the way it addresses foreign leaders, whether it participates in the Olympic Games, the colors of the national flag, or anything else. The point here is that we are left without even the weak justification for prior beliefs that is present in Spence's pooling example. The theory, therefore, relies on the unjustified assumption that a failure to say the appropriate things conveys that a state is not cooperative.

The reason states have these beliefs can only be because the theory assumes it to be the case. That is, the theory assumes that the talk is cheap and assumes that states engaged in such talk are rewarded in some way (described as being perceived as cooperative). In effect, Goldsmith and Posner assert that states engage in international legal rhetoric because they receive a reward for doing so, but that reward is simply assumed rather than the product of a theory.

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<sup>82</sup> Michael Spence, *Job Market Signaling*, 87 Q.J. Econ. 355, 361 (1973).

<sup>83</sup> *Id.* at 366.

It seems to me that a much more plausible explanation is that the rhetoric of international law operates as a more conventional costly signal. In exchange for signaling a willingness to comply with international law, for example, a state is perceived as being cooperative if it complies, but suffers a loss of reputation if it fails to comply. Sending such a signal will be more expensive for uncooperative states and will, therefore, generate a separating equilibrium in many contexts such as treaty signatories.

### CONCLUSION

*The Limits of International Law* and its authors are pioneers in the effort to move the study of international law away from its doctrinal past toward a new methodology much more grounded in social science. This movement is underway and all evidence is that it will succeed. High on the list of questions being asked by scholars using this approach is whether international law matters and, if so, why and when.

This book offers answers to these questions in a simple and provocative way. It will surely provoke considerable debate about its methodology and its conclusions. This is all to the good, and the authors deserve plenty of credit for pushing international law scholars of all stripes to defend their positions.

Part of the debate surrounding this book will concern its particular claims which this Review has attempted to engage. An initial challenge is determining just what it is that the book is attempting to say. I believe that the three "readings" outlined above address each of the reasonable interpretations of the book.

The most modest reading of the book would take it to be advancing the claim that a rational choice approach to international law should be preferred over more traditional methodologies. This claim is, in my view, correct. Rational choice provides a parsimonious and workable description of states that allows consideration of a whole range of international legal structures. As such, it should form the backbone of the way in which we study international law. Other approaches—including efforts to disaggregate the state and constructivist models—also hold promise, but at present seem incapable of providing a set of foundational assumptions from which we can derive predictions



about behavior. They are most likely to be valuable, therefore, as supplements to or refinements of rational choice models. The book, however, does not attempt to advance an argument in support of a rational choice methodology. That approach is, instead, assumed by the authors. Goldsmith and Posner were wise to avoid a rehashing of familiar arguments about rational choice methodology, but they cannot be said to have presented the case for that approach.

An alternative reading of the book focuses on the case studies as evidence of their claims. Closer examination of these case studies, however, reveals flaws. They are contentious, and the conclusions of at least the trade case study are incorrect. The case studies are also problematic because even if they were persuasive they could do no more than illustrate the claims made. For these claims to be persuasive they must emerge from the theory.

The success of the book, then, must turn on the theory. Examination of the theory demonstrates that the conclusions do not emerge neatly from the rational choice assumptions but instead require additional strong assumptions. Most importantly, one must assume that reputation plays no significant role beyond the bilateral treaty context. The authors do not, however, explain why reputation will behave differently in the multilateral treaty or customary international law contexts. The most plausible accounts of international law in rational choice models rely on reputational arguments. If those arguments are assumed away there is no reason to have confidence in the pessimistic results regarding international law.

Ultimately, *The Limits of International Law* is an important and timely book for international law scholars and will represent a major positive contribution if its message is heard by traditional scholars in the field. Whether international law is as limited as the book argues, however, is very much in doubt.