Introduction

Alberta Fabbricotti

As the title clearly suggests, this book ambitiously aims at exploring Public International Law (PIL, or simply IL) through the lens of Political Economy (PE). Although interdisciplinarity seems to have become a must in most areas of academic research and so in the sphere of law, The Political Economy of International Law – A European Perspective is the first edited book providing a systematic and coherent review of the interactions between PE and IL. PE considerations have indeed been a late arrival in IL. Such an interdisciplinary approach was only proposed in the 1990s and has gained prominence since 2000, whereas questions of PE have been placed on the scholarly agenda of other legal science branches from time immemorial.

PE is not a unified discipline. This entails that the term ‘Political Economy’ is used in different ways. In its most common meaning, PE refers to interdisciplinary studies drawing upon economics, law, and political science in explaining how political institutions, the political environment, and the economic system influence each other. Given the overlap between legal and political systems, some of the issues in PE are also raised in Law and Economics – in other words, the application of economic, specifically microeconomic, methods to legal analysis – Constitutional Economics and Political Science. PE is also often associated with rational-choice theories relying on the assumption that an actor, be it an individual, a State or an international organisation, acts intentionally in order to achieve its set of goals.

In this book, PE refers to the study of the ‘why’ questions (why do we have laws, institutions, courts) using as explanatory variables the ‘who’ questions (who are the actors – legislators, executives, judges, interest groups within a country, a country itself or international organisations, NGOs, business – that participate in shaping IL) and ‘what’ motivates them (their preferences) on the one hand and their constraints (power, resources, institutions and laws etc.) on the other hand. A change of the law may lead to a change in the constraints. PE combines a descriptive approach, explaining why we sometimes are unable to achieve the best
possible outcome, and a prescriptive approach, suggesting how to move in a way that would be more efficient or democratic.

This book explores how PE can increase our understanding of IL. Whereas international lawyers bring their knowledge of institutions and their experience to the table, PE brings a theoretical framework that helps to capture a problem’s underlying structure. The combination of these two elements allows us to find better solutions to problems.

The interdisciplinary perspective offered in this book would have been unthinkable just a few years ago. International lawyers kept on viewing the real world through the (legalistic) Westphalian lens of equal sovereignty of the nation-States. The paradigm that only States’ behaviours matter for IL purposes – the so-called ‘unitary State perspective’ – has however been seriously undermined recently, especially in the context of global governance. The interpenetration of global political and economic life has dramatically changed the context for international lawyers’ investigations. It is nowadays almost self-evident that a new way of thinking in IL is needed in order to keep abreast with globalization (that is, with individuals, corporations and nation-States reaching around the world farther, faster and deeper than ever before). PE can lead international lawyers towards a non-unitary State perspective.

The book project came out of a conference that was hosted by La Sapienza University in Rome on 16–17 May 2014. Following to a large extent the scheme of the conference programme, the book is divided into five parts and eighteen chapters representing the main categories, subcategories and topics of IL.

In Part I, the seminal introductory chapter by Anne van Aaken and Joel Trachtman shapes the basic concepts and methodological approaches to the investigation which will inspire the following chapters.

In Part II, the authors address the sources of IL. The understanding of Customary International Law (CIL) has always been difficult without social science explanation: the compared chapters of Niels Petersen and Alessandra Gianelli provide pros and cons regarding the use of PE in order to explain custom. Paul Stephan explains the logic of *jus cogens* by drawing on divergent interests of different actors and illuminates his analysis with the decision of the International Court of Justice (ICJ) in *Jurisdictional Immunities of the State*. Panos Merkouris concentrates on treaties: their making and functioning as well as treaty conflicts and interpretation as well as the interests of different actors therein. The chapter of Ramses Wessel and Evisa Kica addresses the decisions by International Organizations (IOs) by pointing to the choice of States (or
other actors in the public sphere) to move from formal to informal international decision-making as well as to some consequences of this choice.

Part III highlights the most relevant questions concerning the enforcement of IL. Barbara Delcourt and Meredith Kolsky Lewis ask on the basis of PE why States comply with IL. Delcourt presents a framework for answering this question, embedding a PE analysis in competing theories on that issue. Lewis explores the PE game theory of the prisoner’s dilemma in the context of compliance with IL. The role of national and international courts in IL is becoming ever more crucial. Paul Stephan and Eyal Benvenisti explain court behaviour. Benvenisti suggests that domestic courts not only make and enforce IL, but they may actually be responsible for ensuring that international organizations and courts adhere to procedural and substantive norms that protect human rights and ensure accountability of global decisions to diverse stakeholders. They do so to protect their own authority domestically. Stephan offers a PE theory on how international tribunals decide and identifies different PE models of international adjudication. Andreas von Staden picks the (non-) compliance behaviour of States with the international human rights pronouncements and explains it on the basis of a PE analysis. André Nollkaemper presents a PE analysis of shared responsibility in IL.

In Part IV, the book then turns to specific subject matters. Alberta Fabbricotti explains the surge of Regional Trade Agreements (RTAs) on the basis of a PE analysis. Lehmann offers a PE theory, based on the political science selectorate theory on why States conclude international investment treaties. This theory offers an alternative and potentially better theory than the ‘competition-for-capital’ theory relying on the State as a unit of analysis so far mostly discussed. Laurence Boisson de Chazournes and Christina Leb analyse the PE reasons for (insufficient) benefit sharing in international water law. Ulyana Kohut considers the applicability of the principal theories of compliance with IL specifically to human rights treaty-based obligations. The chapter by Daniela Vitiello and Marion Panizzon reviews key PE theories regarding migration, and considers the suitability, efficiency and democracy of current instruments of global transaction over migration in light of new migratory trends and challenges.

Part V contains the authoritative chapter by Eyal Benvenisti and Jan Wouters, who masterfully conclude the book by highlighting that the relationship between IL and PE turns out to be a story of paradoxes, but also one which carries great potential.
The methodological approach featured in the whole structure of the book has been to take as a point of departure the traditional catalogue of an IL general treatise and to systematically inject insights from PE into each of its sections and chapters. The rationale for this approach assumes that it is up to IL scholars to pioneer the trespassing on the discipline of PE and not vice versa. It is indeed the international lawyers who actually feel the need to open their traditional frontiers to insights from other scientific branches, and particularly from PE. It follows from this perspective that this book takes for granted the reader’s basic knowledge of the structure, theories and institutions of PIL.

This method is a distinctive trait which makes the present book completely different from other publications which look at IL in an interdisciplinary context, typically the US literature. The title subheading *A European Perspective* was added in order to emphasize this difference, and not to mean any geographical, cultural background or academic affiliation, which would have been even contradictory given the listing among the contributors of academicians from outside Europe, and particularly from the US.

It would clearly have been impossible to cover all potential PE intersections with each of the IL fundamentals in a single volume. To avoid any misunderstanding it should first be said that this book is not dealing with the PE of IOs, an issue which deserves a specific and autonomous investigation. Moreover, the editor and the authors agreed on discussing, in connection with each IL fundamental, one or more selected issues of particular relevance for the understanding of the PE/IL interplay. For example, concerning the international treaties as a source of IL (by Panos Merkouris), it was deemed that a representative picture of the PE/IL interaction would be offered focusing on areas having a great instructional value: i) non-State determination of the existence of a treaty; ii) evolutive interpretation; iii) normative conflict and iv) termination of treaties.

The main distinctive feature of IL compared to the other branches of the law is probably the extraordinary relevance of custom among its normative sources. Therefore it is not surprising that CIL is the most debated issue in existing PE/IL literature. In light of these considerations, the present book dedicates two chapters to the CIL though from two different perspectives in a dialectic relationship, *The Political Economy of Customary International Law* by Niels Petersen, and *Can Political Economy Help Solve the Riddle of Customary International Law* by Alessandra Gianelli.

Also, it would not have been feasible, in an effort to contain the length of this book within reasonable limits, to review PE game theories...
systematically. The fact that only the prisoner’s dilemma game is investigated in one separated chapter, *International Political Economy and the Prisoner’s Dilemma: Compliance with International Law* by Meredith Kolsky Lewis, is simply due to the great popularity gained by this game theory in PE and now also in IL. In other words, this does not imply a doctrinal preference for this strict dominance game over other theories, like coordination games, for example.

To ensure that the many different chapters would merge into a homogeneous and coherent framework, the contributors were asked to address some core themes raised in the basic introductory chapter *Political Economy of International Law: Towards A Holistic Model of State Behaviour* by Anne van Aaken and Joel Trachtman. In particular, they were asked to answer: 1) whether they were adopting a PE or an International Political Economy (IPE) approach; 2) whether they were considering IL as *explanandum* (they had to explain the determinants of its creation) or as *explanans* (they had to explain its consequences and effects); and 3) whether they were going to discuss the determinants of the adherence of the State to IL (why the State enters into a particular treaty, for instance) or of its compliance with IL (why the State obeys given rules). This kind of leitmotiv all along the volume was intended to ensure that the terminology and method in the introductory chapter were maintained in the chapters of the book’s main body.