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Introduction

Some Observations on the Politics of International Economic Law

Tomer Broude, Marc L. Busch, and Amelia Porges

Politics is the art of looking for trouble, finding it everywhere, diagnosing it incorrectly and applying the wrong remedies.

– Groucho Marx

In times of crisis, we are forcefully reminded of the links between politics and international economic law.[1] Indeed, the meltdown in world markets has refocused attention on how the fingerprints of the "visible hand" can be seen all over the institutions that underpin the rules of globalization. From trade and investment to finance, governments are under pressure to enforce, resist, and rewrite international economic law. To be sure, the future of the Bretton Woods institutions is, itself, the subject of heated debate. For legal scholars and political scientists, this is fertile ground; lawyers have seldom given enough attention to the influence of politics on law, whereas political scientists have had an on-again, off-again fascination with how the law influences relations among states. This book is motivated by a deceptively simple question: How do politics and international economic law interact with each other?

[1] The term "international economic law" has by default usually been identified with the law of international trade regulation. Thus, despite its worthy ambitions of covering "a very broad range of subjects that concern the relation of law to international economic activity," the contents of the *Journal of International Economic Law*, for example, have predominantly been devoted to trade law issues (see http://jiel.oxfordjournals.org/). In this book we have adopted and pursued a broad understanding of international economic law as comprising those areas of international law related to the transnational movement of goods, services, capital, and persons, including (but not limited to) trade law, investment law, economic integration law, private international law, business regulation, financial law, tax law, intellectual property law, and development law.

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CONTEMPORARY CONTEXT, ENDURING QUESTIONS

The prominence of international economic issues in the 2008 presidential campaign in the United States,[2] together with the global economic crisis that began to unfold at around the same time, inspired us to take stock of the ways in which politics shapes the legal frameworks within which international commerce takes place.[3] First, and most obviously, the crisis has reinforced the recognition of international economic interdependence. At the same time, however, it has also cast doubt on some of the institutional and normative underpinnings of liberal capitalism that have largely held sway since World War II.[4] If "[m]acroeconomics . . . was cast in the crucible of the [Great] Depression,"[5] then the economic turmoil of the early twenty-first century provides us, perhaps, with a new foundry in which to forge new solutions, new ideas, and new dynamics.

These are, after all, times characterized by changing politics, with novel yet insufficiently incorporated concerns and constituencies, such as the environment, energy needs, human rights, public participation, international equity, and a global economic map redrawn by the emergence of powerhouses such as Brazil, India, and China. We may also be witnessing the dawn of changed legal and institutional environments, with the multilateral Bretton Woods system. It has been amended in piecemeal style over the past few decades, and it has been viewed by some as no longer suited to the world's needs – hence the debate over Bretton Woods 2.0[6] and the replacement of the G-7. Clearly,

[2] See, e.g., the Clinton–Obama exchange on the future of the North American Free Trade Agreement (NAFTA) at the February 26, 2008, Democratic debate in Ohio (see transcript at http://www.cfr.org/publication/15604/); or the Obama–McCain exchanges on free trade agreements and labor and environmental clauses (e.g., see transcript of the third Presidential debate, October 18, 2008, Hofstra University, Hempstead, New York, at http://www.cfr.org/publication/17541/).

[3] The book consists of a selection of articles presented at the 2008 Biennial Conference of the American Society of International Law's International Economic Law Interest Group (ASIL-IELIG), held at George Washington University Law School, Washington, DC, November 14–15, 2008.

[4] This was most vividly expressed in the concession by Alan Greenspan, former Chairman of the U.S. Federal Reserve, that he had found a "flaw in the model" he had "perceived is the critical functioning structure that defines how the world works" in his October 23, 2008 testimony before the House Committee on Oversight and Government reform (see http://www.pbs.org/newshour/bb/business/july-dec08/crisishearing_10–23.html).

[5] Peter Passell, "A Nobel Award for a University of Chicago Economist, Yet Again," *New York Times*, October 11, 1995.

[6] Indeed, this possibility was made all the more tangible to the ASIL-IELIG conference participants, because by coincidence the G-20 Leaders Summit on Financial Markets and the World Economy, convened by then President George W. Bush to discuss steps necessary to produce

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in these circumstances, any effort toward progress and change will require an improved understanding of the relationship between political dynamics and international economic law, an understanding to which this book hopes to contribute.

However, these momentous developments in global politics and economics provide only a general historical context for the inquiry into the interaction between politics and international economic law. To be sure, the links between them were pertinent before the crisis, and they will remain so long after it is over. Indeed, only one of the articles in this book deals directly with the political and legal reaction to the economic crisis, although surely an article on the topic of financial law would have been required with or without the crisis.[7] Rather, each of the selected contributions provides a detailed analysis of a discrete political process or phenomenon that relates to international economic law. In fact, several of the chapters look at political business being conducted far from the limelight in less-scrutinized areas of international economic law, such as the working methods of the United Nations Commission on International Trade Law (UNCITRAL),[8] the political use of technical rules of origin,[9] or economic agreements with small island states in the Pacific.[10]

That said, although the global economic crisis has confirmed and emphasized the importance of the links between politics and international economic law, this relationship is best studied by taking a look at several key thematic vignettes that, together, make up the global economy. Our book is organized in this way.

HOW DO POLITICS INTERACT WITH INTERNATIONAL ECONOMIC LAW? LET US COUNT THE WAYS . . .

This leads to our most central observation about the relationship between politics and international economic law: It is diverse. We find the diversity of the studies collected in this book to be rewarding not only because of the substantive richness it produces, but because it reveals processes that are

a "Bretton Woods 2.0," was held at the same time as the conference and only a few blocks away in downtown Washington.

7 See Douglas Arner, "The Politics of International Financial Law," Chapter 10, this volume.

8 See Claire R. Kelly, "The Politics of Legitimacy in the UNCITRAL Working Methods," Chapter 5, this volume.

9 See Moshe Hirsch, "The Politics of Rules of Origin," Chapter 13, this volume.

10 See Meredith Kolsky Lewis, "The Politics and Indirect Effects of Asymmetrical Bargaining Power in Free Trade Agreements," Chapter 2, this volume.

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indicative of the ways law and politics interact on a regular basis. Put simply, the interaction between politics and international economic law is far from monolithic and cannot be reduced to a single set of principles or hypotheses.

Thus, from the outset,[11] our project was premised on a two-way street between law and politics. In one direction, politics sways the development of international economic law and its implementation. Although this should be obvious, it is still a controversial statement in a field such as international economic law, which has traditionally taken pride in its depoliticization.[12] Furthermore, although economic *policy* is clearly a political outcome, our interest lies in examining how politics can influence the making of the *law* and its materialization in action, or in the way politics determines legal outcomes. This distinction between policy and law is not necessarily a bright line – certainly not if one takes the law to be merely the ultimate expression of policy, or the translation of policy into official acts that direct behavior – but it is a necessary one, and it determines the focus of the studies included here.

As an illustration of this distinction, consider the political genesis of the North American Free Trade Agreement (NAFTA). A popular narrative is that the NAFTA was the result of an auspicious confluence between the political interests of Mexico's Salinas, Canada's Mulroney, and the U.S. administration under George H.W. Bush. As an explanation, this might shed some light on why the negotiating project was launched, but it cannot tell us much about the legal *content* of the agreement. Note that this is a difference not only in the level of detail of the explanation, but also in its subject. In one case, the question is "why is there law?" In other words, what were the political interests that led to a policy that required law making for its execution? In the second case, which interests us here, the question asked is "why is the law as it is?" That is, what were the political dynamics that led the law to gain its particular attributes? Thus, returning to NAFTA, we find that one book-scale study of the process has argued that these negotiations were shaped by "(1) asymmetries of power between the three states; (2) sharply contrasting domestic political institutions; and (3) differences in the nonagreement alternatives, patience, and risk orientations of the heads of government and their chief negotiators."[13]

In propositions such as these we can find contestable political explanations for the emergence of legal outcomes, and many of these are presented in

[11] For the original call for papers that framed the papers presented at the ASIL-IELIG conference, see http://www.worldtradelaw.net/asilielig2008.pdf.

[12] See Arie Reich, "The Threat of Politicization of the World Trade Organization," 26 *University of Pennsylvania Journal of International Economic Law* (2005) 779.

[13] See Maxwell A. Cameron and Brian W. Tomlin, *The Making of NAFTA: How the Deal Was Done* (Cornell University Press, 2000), p. 15.

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the chapters that follow. Bismarck famously quipped that the less people know about how sausages and laws are made, the better they would sleep.[14] This easily applies to international treaties, decisions of international institutions, and rulings of international tribunals. Along these lines, the request we made of our authors was not to help explain why sausages are made (or what international economic law is for), but rather to engage in the explicit study of sausage making (the making of law and law-based behavior). This does not mean that just any technotactical, play-by-play description of the international law-making process satisfies this objective; only the political dimension of law making and legal practice is within our analytical focus.

Of course, just as politics influences the law, we expect that international economic law, and its various domestic and international arrangements, shapes politics at all levels. Most basically, the law can constrain politics: Procedural rules in decision-making bodies of institutions such as UNCITRAL,[15] or the division of legal competence among institutions and member states in the European Union (EU),[16] are examples of legal structures that determine the effective weight of political influence. Indeed, in these examples, we see that actors such as states or nongovernmental organizations take the rules of the game seriously, wrangling over procedure and legal authority because of the understanding that these might be the ultimate determinants of policy outcomes.

Political scientists, in particular, have been eager to theorize about the use of law as a constraint on policy. For example, in explaining free trade outcomes, scholars insist that elected officials are able to "tie their hands" by citing international legal authority – such as a likely reversal in World Trade Organization (WTO) dispute settlement and exposure to legal trade retaliation in denying requests for import relief demanded by protectionist constituents. The literature observes that preserving some flexibility for governments to provide short-term protectionism is key to getting members to join, but this just speaks to the faith in legal obligations as constraints on policy.

WHICH POLITICS? WHOSE LAW?

Beyond the "Marxian" definition of politics given in the earlier epigraph – Groucho's definition, that is – we left it to our authors to choose what kind

[14] "Je weniger die Leute wissen, wie Würste und Gesetze gemacht werden, desto besser schlafen sie!"

[15] See Kelly, *supra* note 9.

[16] See Marc Bungenberg, "The Politics of the European Union's Investment Treaty-Making," Chapter 6, this volume.

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of politics is most important, and their studies provide a wide range of understandings of politics. A number of contributions focus on power in the relations between states in the international economic arena,[17] or on the connection between economic policy and other political interests.[18] Still others look at the use of international economic law as an instrument of "higher" politics in foreign policy.[19] Some authors choose to examine how economic interests play out in international institutions,[20] whereas others see fit to analyze instances of so-called judicial politics and its interaction with state politics.[21] At times, political constellations serve as an independent, empirical variable,[22] whereas others see politicized economic relations as a subject of social critique.[23] Taken together, the chapters cover all levels of (inter-)governmental politics – global, regional, and domestic – as well as the political participation of nongovernmental organizations, and public legitimacy as a political factor.[24]

Although these diverse approaches reflect a high degree of multidisciplinarity, the majority of contributors are legal scholars rather than political scientists. This is remarkable given the ingrained inhibitions of international lawyers against acknowledging the role of politics in their profession. Martti Koskenniemi has written critically of the "flight from politics" that characterizes international law, where "the fight for an international Rule of Law is a fight against politics."[25] International economic law has been no exception to this flight, with the added convenience that, in their positivism, international lawyers could rely on the seemingly objective scientific-economic basis of "embedded

[17] See Lewis, *supra* note 11; Uche Ewelukwa, "The Politics of African Trade Negotiations in the WTO's Doha Round," Chapter 4, this volume; and Axel Berger, "The Politics of China's Investment Treaty-Making Programme," Chapter 7, this volume.

[18] See Kimberlee G. Weatherall, "The Politics of Linkages in U.S. Preferential Trade Agreements," Chapter 3, this volume; and Henry Gao and C. L. Lim, "The Politics of Competing Jurisdictions in WTO and RTA Disputes, and the Use of Private International Law Analogies," Chapter 12, this volume.

[19] See Hirsch, *supra* note 10; and Perry Bechky, "The Politics of Divestment from Sudan: Investment Decisions and Intersystemic Dialogue," Chapter 14, this volume.

[20] See Arner, *supra* note 8.

[21] See Gao and Lim, *supra* note 19; and Marc L. Busch and Krzystof Pelc, "The Politics of Judicial Economy at the WTO," Chapter 11, this volume.

[22] See Lauge Skovgaard Poulsen, "The Politics of South–South Bilateral Investment Treaties," Chapter 8, this volume.

[23] See Yvonne C. L. Lee, "The Politics of Sovereign Wealth Funds: Benign Investors or Smoking Guns?," Chapter 9, this volume.

[24] See Kelly, *supra* note 9.

[25] Martti Koskenniemi, "The Politics of International Law," 1(4) *European Journal of International Law* (1990) 4, p. 5.

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liberalism."[26] Although "trade liberalization was embedded within a *political* commitment," its technical economics enabled a "forgetfulness or amnesia concerning the political foundation of the postwar trading regime."[27] The willingness to overcome this amnesia and recall the importance of politics in international economic law might be taken as a confirmation that "the liberal and pragmatic assumptions that have guided international economic law are increasingly beset with uncertainty, stemming from dilemmas in the study and practice of economics as well as from political disagreement and social discontent."[28] Renewed attention to politics is only a positive development, which will nurture and inform debates on future architectures of international economic relations.

At the same time, political scientists have traditionally been hesitant to engage with international law and legal process as an object of study, although over the past decade this has changed, as some of the contributions to this book vividly demonstrate. Indeed, political scientists and international lawyers "seem increasingly to see the same world outside their office windows,"[29] and this applies as well in the areas of international political economy and international economic law. Although this may not always generate true interdisciplinary research, it does, in projects such as this one, facilitate cross-disciplinary dialogue and exchanges on the interactions between politics and law.

On the backdrop of these observations, we now turn to a contextual summary of the book's contents.

CONTENTS OF THE BOOK

The book is organized under five thematic headings, covering trade agreements, investment protection treaties, international finance, dispute settlement, and foreign policy.

[26] J. G. Ruggie, "International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order," 36 *International Organization* (1982) 379; J. G. Ruggie, "Taking Embedded Liberalism Global: The Corporate Connection," in D. Held & M. Koenig-Archibugi (eds.), *Taming Globalization: Frontiers of Governance* (Cambridge Polity Press, 2003), p. 93.

[27] Robert L. Howse, "From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime," 96 *American Journal of International Law* (2002) 94, at 97.

[28] Tomer Broude, "At the End of the Yellow Brick Road: International Economic Law Research in Times of Uncertainty," in Douglas Arner, Isabella Bunn, and Colin B. Picker (eds.), *International Economic Law: The State and Future of the Discipline* (Hart, 2008).

[29] See Anne-Marie Slaughter, Andrew S. Tulumello, and Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship," 92 *American Journal of International Law* (1998) 367, at 370.

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A recurring theme in the first two parts is the role of power in international economic law making. These are exercises in the study of sausage making – sometimes with unexpected conclusions. Meredith Kolsky Lewis argues that the outcomes of asymmetrical trade negotiations between powerful actors such as the United States or the EU, on one hand, and weaker states, on the other, can indirectly prejudice the legal situation of even less powerful third parties in formally separate relationships or subsequent negotiations. For example, the terms of the Australia–United States Free Trade Agreement (AUSFTA),[30] in which Australia served as the weaker, "term-taking" party, have spilled over into the substance and procedure of regulatory coordination between Australia and New Zealand (a dyad in which Australia serves as the stronger party) under the Australia–New Zealand Closer Economic Relations Trade Agreement (ANZCERTA).[31] In an unrelated example, members of the Pacific Island Forum have had the legal options available to them in their negotiations with the EU effectively constrained by legal arrangements with Australia and New Zealand (the latter now serving as the stronger party). Thus, asymmetrical trade arrangements that might be justified under contract theory as freely entered into by both parties nevertheless suffer from flawed legitimacy, because they limit the legal options of third parties without their participation. Lewis sees this as yet another reason why the shift from multilateralization to bilateral or regional trade agreements is problematic.

Kimberlee G. Weatherall also focuses on the way in which politics trumps the text of trade agreements – in this case, the intellectual property rights chapters in U.S. free trade agreements. Her central thesis is that when politics and implementation are factored in, the copyright-related provisions in the AUSFTA – praised by U.S. copyright industry groups – actually achieved little of any significance to extend protection for U.S. right holders, and had unintended and undesirable consequences. By prescribing detailed rules requiring Australia to change its law to match U.S. statutory approaches, Weatherall argues, these provisions have led to resentment in Australia against U.S. dictation, creation of new exceptions to copyright to rebalance Australian law, and resistance to new remedies against online copyright piracy – in effect, delegitimization of strong copyright protection. If, instead of the standard model U.S. FTA intellectual property text, the AUSFTA had used a customized text limited to provisions addressing areas of substantive bilateral difference, the chapter would have generated less criticism and cost. Weatherall traces

[30] Australia–United States Free Trade Agreement (AUSFTA), entry into force, January 1, 2005, WT/REG184.

[31] Australia–New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), entry into force, January 1, 1983, WT/REG111.

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similar patterns emerging for the labor and environmental provisions in U.S. FTAs. In 2007, Congress demanded changes to Peru's environmental laws as a condition of approval of the Peru–United States FTA. Weatherall argues that Peru's legislation enacted to implement these changes has been problematic for human rights and the environment, and viewed as illegitimate; here, too, the U.S. agenda for foreign laws may backfire. She suggests that U.S. negotiators pay more attention to what can be achieved by trade agreements – and what cannot.

Politics can interact with international economic law making on several levels simultaneously. This is evident in a few of the volume's component articles, and it is drawn out clearly in Uche Ewelukwa Ofodile's article on the politics of African trade negotiations in the WTO's Doha Round. Ewelukwa provides a detailed analysis of central African proposals and positions in the Doha Round. On this basis, she explains that the political challenges faced by African trade negotiators lie on three levels. First, there is the long-standing face-off with developed countries, which need to be persuaded to change policies detrimental to African development; in this context, African states have to be careful not to trade away concessions too easily. Second, African states now have to consider their negotiating relationships with the emerging economic powerhouses who are no longer classified simply as developing countries, mainly China, India, and Brazil; these have become important markets as well as sources of investment, and their rise has significantly altered the political–economic map faced by African states. Third, there is the challenge of African domestic politics: Progress in trade negotiations is dependent not only on complicated external politics and diplomacy but also on the ability of African governments to enact significant domestic policy reforms, which entails political sacrifices. Ewelukwa's contribution also addresses forward looking, post-Doha steps to be taken by African states, but its significance in the context of this volume is that it provides a detailed case study of multilevel politics in international economic law making, within different power constellations.

Moving away from international trade agreements to the regulation of private international law, Claire R. Kelly examines the law-making process in a relatively understudied institution of international economic law: the United Nations Commission on International Trade Law. UNCITRAL does not deal with state-to-state issues, acting rather as a "soft" forum for the voluntary harmonization of national laws applying to private parties. Nevertheless, as Kelly shows in this case study, politics holds sway over negotiation processes, as France and the United States have significant differences over the formulation of UNCITRAL's rules of procedure, especially over the meaning of consensus, and the participation of nonstate actors. What is the political

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explanation for these clashing positions? Interestingly, its sources can be found in legal environments. On one hand, the United States and France have different legal traditions, not least in commercial law, and UNCITRAL, although soft law, might force a change upon them. Therefore, the preservation of particular national legal regimes becomes a political interest and UNCITRAL's rules of procedure become the rules of international law making. On the other hand – or in conjunction – the different national positions reflect diverging conceptions of the political legitimacy of the rules that will emerge from the process, with France focusing on state consent and the United States on nonstate participation. In discussing these competing explanations – each of which presents an interesting nexus between law and international politics, ever the contest over both power and legitimacy[32] – Kelly's contribution also shows a key difficulty in the work of any researcher interested in the politics of international economic law: namely the opaqueness of the interests and political processes that inform negotiating positions.

Similar expressions of power politics are evident in the studies relating to investment protection treaties. Marc Bungenberg, in his analysis of the development of EU investment treaty policy, presents a particularly complex, multilevel interaction between law and politics, engaging national interests, community interests, and global regulatory competition. To promote the protection of European investments abroad – in competition with U.S. and other investments – the EU will gain new legal competences under the Lisbon treaty, at the expense of member states that are loath to lose their powers. The Lisbon bargain grants unclear degrees of exclusive and shared competences between the EU and its member states. In aviation policy, the Commission managed to strong-arm states into accepting a de facto exclusive competence to conclude open skies agreements. Will it be similarly successful in the area of investment? This depends on the myriad legal and political factors that Bungenberg presents. He also discusses the politicization of the EU's Common Commercial Policy through linkage to external policy aims that will be evident in the interinstitutional political game, with the European Parliament's increased involvement already reflected in demands for human rights conditionality in investment protection treaties and chapters.

Axel Berger documents a remarkable turnabout in policy, impelled by economics and politics. Whereas developing countries have competed to sign a wave of similar bilateral investment treaties (BITs) with developed countries, China, India, and Brazil have had enough leverage to refrain from signing

[32] Inis L. Claude, *Collective Legitimation as a Political Function of the United Nations*, 20 *International Organization* (1966) 367, 368.

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