

#### THE POLITICS OF INTERNATIONAL ECONOMIC LAW

How do politics and international economic law interact with each other? Financial crises and shifts in global economic patterns have refocused our 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. 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 leads the way toward filling this interdisciplinary gap through a series of important studies written by leaders in the field on specific problems in international economic relations. The book demonstrates a variety of ways in which the international political—economic nexus may be researched and understood.

Tomer Broude is a Senior Lecturer with the Faculty of Law and Department of International Relations and Academic Director of the Minerva Center for Human Rights at the Hebrew University of Jerusalem. He is an expert in international economic law, particularly WTO and regional trade law, dispute settlement, investment, and development. He is the author of the book International Governance in the WTO: Judicial Boundaries and Political Capitulation (2004) and has coedited several other books, including The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiary (2008, edited with Yuval Shany); Multisourced Equivalent Norms in International Law (2010, edited with Yuval Shany); and Law and Development Perspective on International Trade Law (forthcoming, edited with Won-Mog Choi, Gary Horlick, and Y. S. Lee).

Marc L. Busch is the Karl F. Landegger Professor of International Business Diplomacy at the Edmund A. Walsh School of Foreign Service, Georgetown University in Washington, D.C., and an Adjunct Scholar at the American Enterprise Institute. He is an expert on international trade policy and law and the author of the book *Trade Warriors* and articles in the *American Journal of Political Science*, *American Journal of Sociology*, *British Journal of Political Science*, Fordham International Law Journal, International Organization, Journal of Conflict Resolution, Journal of World Trade, World Politics, and World Trade Review.

Amelia Porges practices law at the Law Offices of Amelia Porges PLLC, a law firm focused on WTO and international trade law. She is also a Professorial Lecturer at the Nitze School of Advanced International Studies of Johns Hopkins University, in Washington, D.C. She was the principal author of the sixth and final edition of the *Analytical Index/Guide to GATT Law and Practice*. She has authored many articles that have appeared as book chapters and law review articles on WTO and GATT dispute settlement, investment arbitration, trade in legal services, United States–Japan trade, and Japanese economic policy.



# The Politics of International Economic Law

Edited by

#### TOMER BROUDE

Faculty of Law, Hebrew University of Jerusalem

## MARC L. BUSCH

School of Foreign Service, Georgetown University

#### **AMELIA PORGES**

Law Offices of Amelia Porges PLLC





> CAMBRIDGE UNIVERSITY PRESS Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi, Tokyo, Mexico City

Cambridge University Press 32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org

Information on this title: www.cambridge.org/9781107003552

© Cambridge University Press 2011

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2011

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

The politics of international economic law / [edited by] Tomer Broude, Marc L. Busch, Amelia Porges.

p. cm.

Includes bibliographical references.

ISBN 978-1-107-00355-2 (hardback)

1. Foreign trade regulation – Political aspects. 2. Investments, Foreign – Law and legislation – Political aspects. 1. Broude, Tomer. II. Busch, Marc L. (Marc Lawrence), 1966–

III. Porges, Amelia.

к3943.G653 2011

343'.87 – dc22 2010037572

ISBN 978-1-107-00355-2 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.



### Contents

Contributor List		page vii
Acknowledgments		ix
1	Introduction: Some Observations on the Politics of International Economic Law Tomer Broude, Marc L. Busch, and Amelia Porges	]
	PART I: THE POLITICS OF LAW MAKING IN INTERNATIONAL TRADE	
2	The Politics and Indirect Effects of Asymmetrical Bargaining Power in Free Trade Agreements Meredith Kolsky Lewis	19
3	The Politics of Linkages in U.S. Preferential Trade Agreements Kimberlee Weatherall	<b>4</b> C
4	The Politics of African Trade Negotiations in the WTO's Doha Round Uche Ewelukwa Ofodile	64
5	The Politics of Legitimacy in the UNCITRAL Working Methods Claire R. Kelly	106
	PART II: THE POLITICS OF INTERNATIONAL INVESTMENT TREATY MAKING	
6	The Politics of the European Union's Investment Treaty Making Marc Bungenberg	133

V



vi	Contents	
7	The Politics of China's Investment Treaty-Making Program Axel Berger	162
8	The Politics of South–South Bilateral Investment Treaties Lauge Skovgaard Poulsen	186
	PART III: THE POLITICS OF SOVEREIGN WEALTH AND INTERNATIONAL FINANCIAL LAW	
9	The Politics of Sovereign Wealth Funds: Benign Investors or Smoking Guns?  Yvonne C. L. Lee	211
10	The Politics of International Financial Law and the Global Financial Crisis Douglas W. Arner	236
	PART IV: THE POLITICS OF DISPUTE SETTLEMENT IN INTERNATIONAL ECONOMIC LAW	
11	Ruling Not to Rule: The Use of Judicial Economy by WTO Panels Marc L. Busch and Krzysztof J. Pelc	263
12	The Politics of Competing Jurisdictional Claims in WTO and RTA Disputes: The Role of Private International Law Analogies C. L. Lim and Henry Gao	282
	PART V: LINKAGES BETWEEN INTERNATIONAL ECONOMIC LAW AND FOREIGN POLICY	
13	The Politics of Rules of Origin Moshe Hirsch	317
14	The Politics of Divestment Perry S. Bechky	337
Ind	ex	363



#### Contributor List

**Douglas W. Arner** Director, Asian Institute of International Financial Law, Director of the LLM Programme and Professor, Faculty of Law, University of Hong Kong

**Perry S. Bechky** Visiting Assistant Professor, Seattle University School of Law, Washington State

Axel Berger Fellow, German Development Institute, Bonn, Germany

**Tomer Broude** Senior Lecturer, Faculty of Law and Department of International Relations, Hebrew University of Jerusalem

Marc Bungenberg Professor of Public Law, European Law, Public International Law, and International Law, Siegen University, Germany

Marc L. Busch Karl F. Landegger Professor of International Business Diplomacy, Edmund A. Walsh School of Foreign Service, Georgetown University, Washington, D.C.

**Henry Gao** Associate Professor, Faculty of Law, Singapore Management University, Rochor

**Moshe Hirsch** Hofmannsthal Professor in International Law, Faculty of Law, and Head of the Department of International Relations, Hebrew University of Jerusalem

Claire R. Kelly Professor of Law, Associate Director of the Dennis J. Block Center for the Study of International Business Law, Brooklyn Law School, New York

**Yvonne C. L. Lee** Assistant Professor, Faculty of Law, National University of Singapore, Pulau Bukom



viii

#### Contributor List

Meredith Kolsky Lewis Senior Lecturer, Victoria University of Wellington Law School, New Zealand, and Co-Director, New Zealand Centre of International Economic Law

C. L. Lim Professor of Law and Associate Dean for Academic Affairs, the University of Hong Kong

**Uche Ewelukwa Ofodile** Professor, University of Arkansas School of Law, Fayetteville

Krzysztof J. Pelc Assistant Professor, Political Science Department, McGill University, Montreal, Canada

Lauge Skovgaard Poulsen Ph.D. Candidate, London School of Economics

**Amelia Porges** Professorial Lecturer at the Paul H. Nitze School of Advanced International Studies of Johns Hopkins University, Washington, D.C.

Kimberlee Weatherall Senior Lecturer, TC Beirne School of Law, University of Queensland, Australia, and Adjunct Research Fellow, Australian Centre for Intellectual Property in Agriculture



## Acknowledgments

The editors thank all of the authors who submitted chapters for this book, as well as the other persons who contributed to the success of the November 2008 conference of the International Economic Law Interest Group of the American Society of International Law (ASIL): The Politics of International Economic Law: The Next Four Years. Taking place at a special, optimistic point in time, shortly after the U.S. presidential election of 2008, the conference benefited from the participation of many from Washington, D.C., and from far away, including our keynote and endnote speakers, Jennifer A. Hillman (World Trade Organization [WTO] Appellate Body Member and German Marshall Fund of the United States), Hon. William Frenzel (Brookings Institution), Prof. John H. Jackson (Georgetown University Law Center), Lucy Reed (ASIL and Freshfields, Bruckhaus, Deringer LLP), and Ambassador John K. Veroneau (Deputy U.S. Trade Representative [USTR]).

We also thank all those who authored conference papers or participated as discussants, including Padideh Ala'i (American University, Washington College of Law); Todd Allee (University of Illinois at Urbana–Champaign, Department of Political Science); Alberto Alvarez-Jimenez (University of Ottawa School of Law); Douglas W. Arner (Hong Kong University, Faculty of Law); Peter Bakstansky (New York, NY); Perry S. Bechky (University of Connecticut School of Law); Axel Berger (German Development Institute); Ljiljana Biukovic (University of British Columbia Faculty of Law); Yves Bonzon (World Trade Institute, Bern, National Centre of Competence in Research–Trade), Michael Bradfield (Jones Day LLP); A. Jane Bradley (Georgetown University Law Center); Marc L. Busch and Krzysztof J. Pelc (School of Foreign Service and Department of Government, Georgetown University); Marc Bungenberg (Ludwig-Maximilians University, Munich); Michael Castellano (Counsel and Senior Policy Adviser, Majority Leader Harry Reid, U.S. Senate); Sungjoon Cho (Chicago–Kent School of Law); Barnali Choudhury



X

Cambridge University Press 978-1-107-00355-2 - The Politics of International Economic Law Edited by Tomer Broude, Marc L. Busch and Amelia Porges Frontmatter More information

Acknowledgments

(Pace Law School); Angelos Dimopoulos (European University Institute, Florence); Uche Ewelukwa Ofodile (University of Arkansas, School of Law); Steven Fabry (USTR); Michael Fakhri (University of Toronto Faculty of Law); Susan Franck (Washington & Lee University Law School); Ermal Frasheri (Harvard Law School); R. Michael Gadbaw (Georgetown University Law Center); David Gantz (University of Arizona Law School); Henry Gao (Singapore Management University) and C. L. Lim (Hong Kong University Faculty of Law); Robin F. Hansen (McGill University Faculty of Law); Moshe Hirsch (Hebrew University of Jerusalem Faculty of Law); Jorge L. Kamine (Skadden, Arps, Slate, Meagher & Flom LLP); Suzanne Katzenstein (Columbia University Department of Political Science); Claire R. Kelly (Brooklyn Law School); J. Patrick Kelly (Widener University School of Law); Yaraslau Kryvoi (Morgan Lewis & Bockius LLP); Rafael Leal-Arcas (Queen Mary University of London, School of Law); Yvonne C. L. Lee (National University of Singapore Faculty of Law); Meredith Kolsky Lewis (Victoria University of Wellington Law School); Dorotea López and Felipe Muñoz (University of Chile Institute of International Studies); Willajeanne F. McLean (University of Connecticut Law School); Patrick Meagher (University of Maryland IRIS Center); Joshua Meltzer (University of Michigan School of Law); James Mendenhall (Sidley Austin LLP); Kate Miles (University of Sydney Faculty of Law); Clint W. Peinhardt (University of Texas at Dallas, Department of Economic, Political and Policy Sciences); Colin B. Picker (University of Missouri-Kansas City School of Law); Lauge Skovgaard Poulsen (London School of Economics International Trade Policy Unit); Jenik Radon (Columbia University School of International and Public Affairs); Gustavo Ribeiro (Indiana University School of Law); Christopher M. Ryan (Shearman & Sterling LLP); Miriam Sapiro (Summit Strategies International LLC, Washington, D.C.); Deborah Siegel (International Monetary Fund Legal Department); Michael Smart (National Security Council, Washington, D.C.); Lars Thomann (University of Mannheim, Department of Political Science); Paul B. Stephan (University of Virginia School of Law); Joel P. Trachtman (Fletcher School of Law and Diplomacy, Tufts University); Edwin M. Truman (Peterson Institute for International Economics); and Kimberlee Weatherall (University of Queensland, TC Beirne School of Law).

We thank our conference host, the George Washington University Law School, including Dean Frederick M. Lawrence (Associate Dean for International and Comparative Legal Studies), Susan Karamanian, Professor Steve Charnovitz, and Silena Davis for their generous welcome to the conference and its participants.

© in this web service Cambridge University Press



#### Acknowledgments

хi

We also thank Elizabeth Andersen, Sheila Ward, Nasser Qadri, and Scott Lyons of the ASIL for their unstinting support and administrative assistance for the conference and the activities of the Interest Group. We thank the members of the Conference Committee: Karen Bravo (Indiana University School of Law); Rachel Brewster (Harvard Law School); Marc L. Busch (Georgetown University School of Foreign Service); Steve Charnovitz (George Washington University Law School); Sungjoon Cho (Chicago-Kent School of Law); Steven Fabry (USTR); Susan Franck (Washington & Lee Law School); R. Michael Gadbaw (Georgetown University Law Center); Susan Karamanian (George Washington University Law School); Claire R. Kelly (Brooklyn Law School); Rafael Leal-Arcas (Queen Mary College, University of London); Simon Lester (Worldtradelaw.net); Joshua Meltzer (Washington DC); Krista Nadakavukaren Schefer (World Trade Institute, Bern); Sheila Ward (ASIL); and Richard Wilder (Microsoft Corporation). Julianne T. Zollinger of Georgetown University Law Center provided administrative assistance to Tomer Broude and the Conference Committee.

In addition, we appreciate the conference support provided by Cambridge University Press, Edward Elgar Publishing, Hart Publishing, and the *Trade Law Guide*, as well as the partnership of the Society of International Economic Law.

We also thank John Berger and his staff at Cambridge University Press for their continued support and guidance throughout the editorial and production phases of the book. Finally, we are grateful for the financial support of the Nathan and Judith Feinberg Fund at the Hebrew University of Jerusalem.

> TB, MLB, and AP Jerusalem and Washington, D.C.