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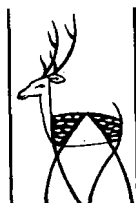
# Redefining sovereignty in international economic law

edited by Wenhua Shan,  
Penelope Simons and Dalvinder Singh.

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## REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW

The concept of state sovereignty is increasingly challenged by a proliferation of international economic instruments and major international economic institutions. States from both the south and north are re-examining and debating the extent to which they should cede control over their economic and social policies to achieve global economic efficiency in an interdependent world. International lawyers are seriously rethinking the subject of state sovereignty, in relation to the operation of the main international economic institutions, namely the WTO, the World Bank and the International Monetary Fund (IMF).

The contributions in this volume, bringing together leading scholars from the developed and developing worlds, take up the challenge of debating the meaning of sovereignty and the impact of international economic law on state sovereignty. The first part looks at the issues from the perspectives of general international law, international economic law and legal theory. Part two discusses the impact of trade liberalisation on the sovereignty of both industrialised and developing states and Part three concentrates on the challenge to state sovereignty created by the proliferation of investment treaties and the significant recent growth of investment treaty based arbitration cases. Part four focuses on the domestic and international effects of international financial intermediaries and markets. Part five explores the tensions and intersections between the international regulation of trade and investment, international human rights and state sovereignty.

**Studies in International Trade Law: Volume 7**

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*Shan, Simons and Singh*  
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## *List of Abbreviations*

|            |   |
|------------|---|
| AFSS       | Assessment of Financial Sector Standards  |
| AGOA       | Africa Growth and Opportunity Act   |
| AIM        | Alternative Investment Market   |
| AMS        | Aggregate Measure of Support  |
| ANC        | African National Congress   |
| ANCOM      | Andeans Community   |
| AoA        | Agreement on Agriculture  |
| APEC       | Asia Pacific Economic Cooperation   |
| ASEAN      | Association of South Eastern Asian Nations                                      |
| Bafin      | Bundesanstalt für Finanzdienstleistungsaufsicht                                 |
| BEE        | Black Economic Empowerment  |
| BIS        | Bank for International Settlements  |
| BITs       | Bilateral investment treaties   |
| CESCR      | United Nations Committee on Economic, Social and Cultural Rights                |
| CESR       | Committee on European Securities Regulators                                     |
| CFTC       | Commodities and Futures Trading Commission                                      |
| CNBV       | National Banking and Securities Commission                                      |
| CODESA     | Convention for a Democratic South Africa  |
| COSO       | Committee of Sponsoring Organizations of the Treadway Commission                |
| DSU        | WTO Dispute Settlement Understanding  |
| EC         | European Community  |
| ECB        | European Central Bank   |
| ECHR       | European Convention for the Protection of Human Rights and Fundamental Freedoms |
| ECJ        | European Court of Justice   |
| ECJ        | European Court of Justice   |
| ECtHR      | European Court of Human Rights  |
| ESC Rights | Economic, Social and Cultural Rights  |
| EU         | European Union  |
| FAO        | Food and Agriculture Organization of the United Nations                         |
| FDI        | Foreign Direct Investment   |
| FRRP       | Financial Reporting Review Panel  |
| FSA        | Financial Services Authority  |
| FSAP       | Financial Sector Assessment Program   |
| FSSA       | Financial System Stability Assessment   |
| FTA        | Free Trade Agreement  |

|          |  |
|----------|--|
| FTAA     | Free Trade Agreement of the Americas                           |
| GAAP     | Generally Accepted Accounting Principles                       |
| GATS     | General Agreement on Trade in Services                         |
| GATT     | General Agreement on Tariffs and Trade                         |
| GDP      | Gross domestic product   |
| GPA      | Agreement on Government Procurement                            |
| IATP     | Institute for Agriculture and Trade Policy                     |
| ICC      | International Chamber of Commerce                              |
| ICC      | International Criminal Court                                   |
| ICCAN    | Internet Corporation for Assigned Names and Numbers            |
| ICCPR    | International Covenant on Civil and Political Rights           |
| ICESCR   | International Covenant on Economic, Social and Cultural Rights |
| ICSID    | International Centre for the Settlement of Investment Disputes |
| IFRS     | International Financial Reporting Standards                    |
| IAs      | international investment agreements                            |
| IISD     | International Institute for Sustainable Development            |
| ILM      | International Legal Materials                                  |
| ILO      | International Labour Organization                              |
| IMF      | International Monetary Fund                                    |
| IOSCO    | International Organisation of Securities Commissioners         |
| MAI      | Multilateral Agreement on Investment                           |
| MERCOSUR | Common Market of the South                                     |
| MFN      | most favoured nation (treatment)                               |
| MIGA     | Multilateral Investment Guarantee Agency                       |
| MTN      | Medium Term Note   |
| NAFTA    | North America Free Trade Agreement                             |
| NFIDCs   | Net Food-Importing Developing Countries                        |
| NGOs     | non-governmental organisations                                 |
| NIEO     | New International Economic Order                               |
| NP       | (South African) National Party                                 |
| NYSE     | New York Stock Exchange  |
| OECD     | Organisation for Economic Cooperation and Development          |
| OHCHR    | Office of the High Commissioner for Human Rights               |
| PPPs     | public-private partnerships                                    |
| PTIAs    | preferential trade and investment agreements                   |
| QIS      | Quantitative Impact studies                                    |
| ROSC     | Report on Observance of Standards and Codes                    |
| RTAs     | Regional Trade Agreements                                      |
| SACU     | South African Customs Union                                    |
| SAPs     | Structural Adjustment Programmes                               |
| SCC      | Stockholm Chamber of Commerce                                  |
| SDT      | Special and Differential Treatment                             |
| SEC      | Securities and Exchange Commission                             |

|          |   |
|----------|---|
| SPS      | Sanitary and Phytosanitary Measures                                 |
| SPs      | Special Products  |
| SPS      | Agreement on the Application of Sanitary and Phytosanitary Measures |
| SSG      | Special Safeguard Mechanism   |
| SSM      | Special Safeguard Mechanism (for Developing Countries)              |
| TBT      | Technical Barriers to Trade   |
| TCE      | Treaty Establishing a Constitution for Europe                       |
| TNCs     | Transnational Corporations  |
| TRIPs    | Trade-Related Aspects of Intellectual Property Rights               |
| TRQ      | Tariff Rate Quota   |
| UDHR     | Universal Declaration of Human Rights                               |
| UN       | United Nations  |
| UNCITRAL | United Nations Commission on International Trade Law                |
| UNCTAD   | United Nations Conference on Trade and Development                  |
| UNDP     | United Nations Development Programme                                |
| UNESCO   | United Nations Scientific and Cultural Organization                 |
| UNGA     | United Nations General Assembly                                     |
| US       | United States   |
| USTR     | United States Trade Representative                                  |
| VCLT     | Vienna Convention on the Law of Treaties                            |
| WHO      | World Health Organization   |
| WIPO     | World Intellectual Property Organization                            |
| WTO      | World Trade Organization  |

# Introduction

W SHAN, P SIMONS AND D SINGH

*There exists perhaps no conception, the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.*

Lassa Oppenheim, *International Law* 137  
(AD McNair (ed), 4th edn 1928).

SOVEREIGNTY HAS ALWAYS been a controversial concept, but perhaps has never attracted as much discussion and debate as it does today. Rapid advancements in transport and communication technologies, together with a proliferation of international treaties and institutions, have led to an increasingly globalised world. The sovereign independence of states seems to have given way to interdependence, particularly in economic spheres. Has the concept of sovereignty lost its relevance in the current international legal system, as has been argued by some?<sup>1</sup> Or does it continue to play a key role in defining relations between states?<sup>2</sup> International lawyers have thus been debating and rethinking the meaning and significance of state sovereignty.

This same debate is taking place within international economic law in relation to the operation of the major international economic institutions, such as the World Trade Organisation, the World Bank and the International Monetary Fund. This book compiles the papers presented at the Society of Legal Scholars (SLS) Symposium 2006 entitled 'Redefining Sovereignty: An International Debate on Sovereignty and International Economic Law', which was held on 30–31 May 2006 at Oxford Brookes University, Oxford. It is the first collection of writings on this topic by leading scholars from both developed and developing country backgrounds.

The structure of book resembles that of the conference. Thus the book is divided into five parts, with Part One focusing on the general theme and

<sup>1</sup> L Henkin, for instance, has argued for a complete abandonment of the concept of 'sovereignty'. He writes, '[F]or legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era'. L Henkin, *International Law: Politics and Values* (Dordrecht, Martinus Nijhoff Publishers, 1995) at 10.

<sup>2</sup> R Jennings, for example, has observed that, '[L]ooking even briefly at such international constitutional law as we have, one can only conclude that the suggested demise of national State sovereignty has been much exaggerated'. R Jennings, 'Sovereignty and International Law', in G Kreijen *et al* (eds), *State, Sovereignty, and International Governance* (Oxford, OUP, 2002), at 35.



the other four Parts devoted to trade, investment, banking and human rights respectively. The first Part of the book looks at the impact on state sovereignty of international economic law and institutions from general and theoretical perspectives. Drawing on his extensive research on this topic, *John Jackson* argues that the traditional, Westphalian concept of sovereignty no longer represents an adequate understanding of sovereignty in today's globalised world and he identifies a new notion of sovereignty which he refers to as 'Sovereignty-Modern'. The essence of this new approach is that the concept of sovereignty should not be completely discarded or eliminated without establishing a valid substitute, but should be disaggregated and redefined by employing analytical tools such as 'power allocation analysis'. *Ernst-Ulrich Petersmann*, in his chapter, contends that the effective protection of human rights and market rights requires the constitutionalisation of international law. He develops a case for the extension of rights-based multilevel constitutionalism, which characterises German and EU law, to international economic law and its institutions. For Petersmann, this would entail the strengthening of democratic processes and legal remedies at the global, transnational level to ensure a proper balancing of rights and obligations. *Robert Howse* questions two commonly held assumptions about state sovereignty: first that states have in fact relinquished sovereign power of control to global markets; and second that economic globalisation and the globalisation of common social values, such as human rights, has led to the shift of sovereign power from the state to international organisations or other international governance mechanisms. Providing poignant examples, Howse suggests that in many cases state sovereignty has not in fact been ceded, but rather strengthened. *Vaughan Lowe*'s contribution provides an excellent conclusion to this Part. For Lowe, the term 'sovereignty' in public international law is a 'signifier', rather than a legal norm, principle or institution, and he argues that, for lawyers, the debate over the term is, strictly speaking, unnecessary.

Part Two of the collection discusses the impact of the WTO's regime on sovereignty of both industrialised and developing states with specific reference to the dispute settlement system and proposals for reforming the organisation. It attempts to address the issue of a law-based system of trade liberalisation and the pressures exerted by state sovereignty. *An Chen* reviews the outcomes of the last three rounds of trade cases to critique the US unilateralist approach to the multilateralist model adopted by the international community represented by the WTO. Utilising this analysis Chen highlights the threat this unilateralist approach poses to general international peace and security and state sovereignty. *Philip Nichols* provides a broad survey of international law and sovereignty both from an historical and contemporary perspective. He suggests the WTO should adopt a new criterion for membership to better represent the more modern interpretation of sovereignty in international law and international relations. *Asif Qureshi* explores the relationship between the WTO and state sovereignty by briefly analysing state sovereignty from the perspective of self determination and the right to development. He uses this perspective to analyse