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## Reflections on the *MJIL* Special Issue

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# REFLECTIONS ON THE *MJIL* SPECIAL ISSUE

John H. Jackson\*

## INTRODUCTION

The editors of this special issue of the *Michigan Journal of International Law* (“*MJIL*”) asked me to provide some reflections about the subject of this issue, and, needless to say, I am honored by that request as I am also honored and pleased by the project undertaken by the editors to provide this tribute in the form of an issue devoted to my subject. Since I played an important faculty advisory role in launching and developing the *MJIL*, I feel a particular kinship to this publication and its many distinguished alumni. But I also want to express my admiration and pleasure in the work of the editors to assemble such an impressive roster of authors, all of whom I have admired. I have also enjoyed a close relationship with these authors, many for numerous years. In addition to the personal significance of this group of writings, it is manifestly clear how timely and significant these are to current important issues of government and public policy.

Recent and current events of international economic activity demonstrate poignantly how important and vital are the subjects written about here. I will very briefly add some few reflections and observations and in doing so will touch on some very broad characteristics and systemic implications of these events.<sup>1</sup>

### *International Economic Law and Problems of Globalization*

It is commonplace to see comments on the extraordinary evolution of international economic activities towards linkages and interdependence, and the stress which these developments are putting upon existing economic and governmental institutions. But even though common-place, these phenomena are not trivial. Evidence of the stresses caused by “globalization” includes such events as the recent French national elections, the troubled inward turn of politics in the United States, adjustment induced poverty in many countries of the world, and of course the world financial crisis faced in 1997 and 1998, and now lingering in 1999.

Political leaders often feel helpless in the face of external trade and monetary pressures, and some succumb to the temptation to play upon similar frustrations of their constituents. But it is particularly troublesome

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1. Portions of this text are drawn from a lecture delivered Nov. 5, 1998 at the Georgetown University Law Center, Washington, D.C.

to witness how profoundly these linkages and this interdependence created severe economic problems which were almost totally unexpected and were largely discounted as these problems emerged and yet were extraordinarily contagious and rapidly created a sense of, and even the potential of, a “meltdown” of the world economic system. These events have already had fearsome and poignant damaging impacts throughout the globe. Of course these effects have been felt in the United States (which early on was congratulating herself as largely immune from the contagion.) Yet the real trauma has been in societies elsewhere, where millions of households which considered themselves to be advancing towards middle-class-dom suddenly find their lifestyle destroyed; where societal tensions such as those in Indonesia boil into violence and cruelty; where those already impoverished now face starvation or homeless freezing, if not war inflicted death or wounds.

There has been (so far) little consensus on either the causes of the near meltdown of 1998 or what should be done about it. Some argue we should get governments and existing international economic institutions out of the picture; others argue the need to restructure and thus rebuild the governmental institutions. Clearly many governmental institutions, particularly at the national level in some parts of the world, appear extremely faulty—described as kleptocracies or crony capitalism or other names. But why didn't private and public institutions in the relatively healthy national or international systems anticipate some of the risk of such severe consequences of the hindsight perceived faults? It does appear that we witnessed an extreme case of market failure, or to put it more strongly, the events of 1997 and 1998 do not unreasonably suggest to some that markets are not working and that indeed, some of the more vocal or heavily tilted advocates of market economics as the solution of the world's problems, are losing credibility.

The major clamor at the time of the 1998 crisis, including statements by many market oriented advocates, was for government to do something—*i.e.*, “to act.” And the markets themselves seemed to watch for signals that governments will cope with the problems, whether they be interest rate adjustments, bailout programs, ad hoc bankruptcy measures, lending of last resort, changes in international institutions, or what have you. Perhaps a decade's perspective would suggest that with the fall of the Berlin Wall as the symbol of the diminished popularity of socialist or state controlled economic structures and viewpoints, there arose an aura of overconfidence in market oriented approaches to solve major human problems, and maybe this hubris itself is one source of fault in the current crisis.

My own expertise does not permit me to do more than ask the question, but clearly this thought in various forms of articulation is not deemed irrelevant. The context of these reactions to the recent crisis then mingles deeply into the broad subject of the philosophy of government, or maybe what today we would describe as the philosophy of governance. And this it seems clear will necessarily be colored by many of the great ideas of civilization, such as: what is human nature (about which market economics is generally pessimistic and skeptical), what form of government works best in some situations referring sometimes to democratic forms compared with representative forms, how in a democracy elites and high levels of expertise can operate effectively and appropriately while avoiding abuse of power, the general dangers of concentration of power which the United States approaches through checks and balances or separation of powers, the role and perhaps crucial importance of human liberties or human rights, etc.

Although I have noted the likely growth of skepticism toward market economics, nevertheless it would be folly to ignore the powerful benefits which markets have bestowed on mankind. Whether economic policies which are based on market principles are the best approach for maximizing human satisfaction is, of course, controversial. Various alternatives have been much debated, and many of those largely rejected, but substantial arguments are made in favor of some sort of mixture of policies, perhaps to temper the perceived negative effects of "too pure market approaches." For example, there has been for decades in Germany a school of thought about the "social market economy" with some of this mixture. Whatever mixture may appeal to certain societies, however, it seems reasonably clear that markets can be very beneficial, and even when not beneficial, market forces demand respect and can cause great difficulties when not respected. Yet even when stressing the benefits of market economics, important thinkers note the importance of human institutions which guide and shape markets. Many economists, particularly in recent decades, have stressed this. Nobel Prize winners Ronald Coase and Douglas North have each made this point in their writings.<sup>2</sup>

Human institutions embrace many structures and take many forms, but it is very clear that law and legal norms play the most important part of the institutions which are essential to make markets work. The notion that "rule of law" (ambiguous as that phrase is) or a rule-based or rule-oriented system of human institutions is essential to a beneficial operation of markets, is a constantly recurring theme in many writings. And

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2. See also John H. Jackson, *Global Economics and International Economic Law*, 1 J. INT'L ECON. L. 1 (1998).

these ideas apply to the rules of international law as well as national or domestic law.

At least in the context of economic behavior, and particularly when that behavior is set in circumstances of decentralized decision-making, as in a market economy, rules can have important operational functions. They may provide the only predictability or stability to a potential investment or trade-development situation. Without such predictability or stability, trade or investment flows might be even more risky and therefore more inhibited than otherwise. If "liberal trade" goals contribute to world welfare, then it follows that rules which assist such goals should also contribute to world welfare. To put it another way, the policies which tend to reduce some risks will lower the "risk premium" required by entrepreneurs to enter into international transactions. This should result in a general increase in the efficiency of various economic activities, contributing to greater welfare for everyone.

In the context of disputes and procedures for settling them, for example, a "rule oriented approach" focuses the disputants' parties' attention on the rule, and on predicting what an impartial tribunal is likely to conclude about the application of a rule. This in turn, will lead parties to pay closer attention to the rules of the treaty system, and this can lead to greater certainty and predictability which is essential in international affairs, particularly economic affairs driven by market oriented principles of decentralized decision making, with participation by millions of entrepreneurs.

Clearly the important history of the Bretton Woods institutions established in the 1944-48 period and continuing to today is relevant. Although the GATT, as part of this history, had an uncertain beginning and troubled history, the GATT worked far better than anyone in 1948 had the right to expect.<sup>3</sup>

The GATT procedures were hampered by its lack of institutional clauses, since it had never been intended to be an organization. These problems, which I have called the GATT "birth defects," have been largely corrected by the 1994 Uruguay Round Treaty text with a new elaborate dispute settlement procedure which for the first time and uniquely in international law created a full appeal process for broad issues of law.

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3. See, e.g., JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969); JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW & POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (2d ed. 1997); JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* (1998); JOHN H. JACKSON, WILLIAM J. DAVEY, & ALAN O. SYKES, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS*, (3d ed. 1995).

The WTO charter, moreover, explicitly makes the GATT texts, decisions, reports, and generally its jurisprudence—"guidance" for the new organization so as to preserve the continuity of this jurisprudence into the new system, thus providing greater stability and predictability for non-government individuals and business entities.

Now, after four years of experience, the new WTO dispute procedures are clearly considered a success. Among other indicia the number of cases brought have increased dramatically, to a rate about triple before the Uruguay Round, with cases brought already numbering more than 150. The rulings of the appellate process are front page news and are studied carefully for their implications. They have a sort of precedential effect or guidance, although they are not precedent in the *stare decisis* sense of common law systems. These procedures are also fundamentally changing the way diplomacy is conducted, to the dismay of some of the experienced participants.

The appellate reports are extraordinarily interesting, not only for international law experts and scholars, but also for their broader jurisprudential content. Indeed a book published in London in July of 1998 bears the title, *WTO: The Constitution and Jurisprudence*<sup>4</sup> because there I explore some of these issues, including the question about what is the appropriate role of the WTO appellate body. Is it to be considered another highly constrained international tribunal which can only gingerly poke its nose into nation-state governance questions, or is it more appropriately a "constitutional court" which will in significant ways guide the future evolution of the WTO as an institution?

The Uruguay Round treaty has enormous implications for almost every subject of nation-state economic regulation. Already it is being invoked for a variety of different economic problems including some relating to the current financial crisis. The development of treaty norms did not stop with the Uruguay Round either. Negotiators continued after 1994 to pursue agreements in various other subjects notably financial services, and telecommunications. Financial services obviously relates to the current financial crisis, and telecommunications is in reality replacing ports as the new infrastructure for international trade. Negotiators for both of these subjects were basically trying to catch up with the fast moving developments of globalizing markets. These agreements would truly astonish sovereigns of several decades ago, as the agreements penetrate deep into national regulation and government. Currently it appears that a launch of a new round of negotiation, probably to be called

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4. JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE*, *supra* note 3.

the "millenium" round, could take the WTO system further in these directions.

With treaty clauses as profound as those in the Uruguay Round text come some important constitutional problems. It is not surprising that this treaty has many gaps and ambiguities, since it was negotiated with over twenty national participants and diplomatic needs to come to closure often dictates papering over differences. A key question facing the dispute settlement system is whether it is appropriate or feasible to pass to it the responsibility of correcting these gaps and problems. In many of these cases it would demand that the panels and appellate body undertake tasks that would appear to be law-making rather than law-applying arguably more appropriate for a legislature which does not exist, or negotiations which substitute for legislation. Yet the WTO rules regarding decision-making and negotiation were purposely designed by the Uruguay Round negotiators to preserve so-called "sovereignty" for the nation-states, and thus impose a number of constraints on the exercise of power. These restraints could result in stalemate or impasse. In such cases the temptation will be stronger to overburden the dispute settlement process, despite treaty clauses also aimed at constraining the authority of that process.

As government leaders attempt to deal with the current international economic situation, in the light of the 1998 events, which has been described by some to be the worst crisis since the beginning of the Bretton Woods system, clearly what they are considering is the institutional framework for needed government intervention, and generally this means international government intervention with nation-state participation. Lessons from the history of many international institutions but especially those of the Bretton Woods system including the GATT/WTO history are obviously a crucial part of the necessary learning and expertise which will be needed for these measures.

The legal structures of the institutions impose constraints as well as suggest potentials for change. The very structure of international law and particularly the normal rigidities of treaties and their formation as well as the intricate links of treaty developments to many national constitutional structures will often create barriers to what some policy makers perceive to be the optimum solutions to problems. Yet sometimes these constraints have important longer range policy underpinnings and, dare I say it, derive from fundamental "constitutional" considerations.

For example, the IMF and World Bank have an interesting structure of weighted voting which has been highly criticized in some quarters, but very prized in others. The political realities of world economic institutions today is very strongly opposed to weighted voting or even certain

other constructions that might be considered for new institutions so as to recognize more realistically the actual power relations in the world, for better or worse. To a great extent the WTO Charter has been heavily shaped by some of these considerations, as a result tilting toward consensus decision-making for even detailed procedural rules. As to the IMF and World Bank, it seems very unlikely that the major economic powers will lightly abandon these considerations, and thus it appears very unlikely that those institutions will be discarded or put aside in favor of totally new institutions. If this is the case, solutions are most likely to be arranged within the constitutional parameters of those existing institutions.

Yet existing institutions tend understandably to have inherited characteristics that may be difficult to overcome. Some of the current WTO discourse suggests this in relation to the very large shift in the dispute settlement process. Nevertheless there are strong suggestions for similar large shifts of attitudes and practices in the financial institutions of the IMF and World Bank, with proposals for greater transparency, more checks and balances on discretionary exercise of power and decision making, and more inputs from what is currently termed the "civil society," generally meaning non-government active citizen or private group participation.

Another aspect of the approaches regarding reform of the world financial system, whether it be called constitutional reform or reconstructing the architecture, is the relationship of the financial institutions with that of trade, namely the WTO. The financial institutions are now more than before realizing the *microeconomic* sources of important defects in the *macroeconomic* world structure as they digest the failures within nation-state economic systems that are linked to such defects as lack of transparency and lack of important economic information, arbitrary and capricious and therefore often unpredictable governmental decisions, and decisions discriminating against those from outside the society which in today's global market are often the most significant source of capital inputs which can drive economic development. Virtually all the solutions suggested involve a degree of intrusiveness into domestic governance that will be unprecedented and several decades ago would have been deemed impossible.

A key question in these directions will be whether the international and other non-domestic pressures (whether multilateral, bilateral, or non-government) will always be in the best interests of the target countries and world prosperity, or whether they will be tilted to favor certain special interests which have the ability to strongly influence the direction of reforms being hatched.



The WTO has already begun to address some of these good governance policies, in the massive Uruguay Round text and the follow—on treaties such as financial services and telecommunications. It too has been increasingly subject to objections to its approaches by various government and non-government critics. But a key part of any proposals for reform should involve a higher degree of “coherence” between the trade system and the financial system than has heretofore been witnessed.

There will always be temptations to disregard trade rules for short term advantage for other policy objectives. Likewise there will be temptations to change some of the trade rules and these temptations will not always be *inappropriate*. But the worry will be that such broadening will be difficult to contain and will lead to abuse. Many other suggestions could be thought of in this context also.

Finally, let us step back from these constitutional worries and reflect for a moment on a deeper phenomenon that is a common thread in the landscape painted above. This involves what Professor Louis Henkin of Columbia Law School, perhaps the doyen of international law in this country, calls the “s word,” namely sovereignty.<sup>5</sup>

This word is so constantly misused that he and others argue we should abolish it. Certainly many of the centuries old concepts of sovereignty are no longer part of today’s world of international law and international relations. Almost no one thinks sovereigns have unfettered power to treat their own citizens as they like, to arbitrarily chop off heads or hands or violate virgins, and the like. A massive structure of treaty law already evidences virtual unanimity among nations that at least certain human rights are subject to international legal controls, sometimes but not always effective but almost always respected by word if not deed. Likewise we now see a growing body of economic regulatory principles imposed by international treaty, and between these two subjects we see the system edging towards international legal principles of “good governance,” as I noted before.

But there remains an important sub-topic of the concept of sovereignty, namely the question of appropriate allocation of power. This refers to allocation of power between nation-states and international bodies, but in my view this is really part of a broader matrix or road-map of power allocation that can apply vertically from the multilateral international institutions, through regional and specialized international organizations, to the nation-state and to sub-units of nation-states such as

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5. See John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT’L L. 157 (1997).

federal sub-entities and even to the local neighborhood. The term “subsidiarity” is sometimes used to refer to this problem of allocation.

Without attempting to go much further, let me simply note that some (but not all) of these thoughts can be carried out in the context of traditional economic analysis of market failure and the need for various types of government intervention. A central question, for example, is what is the impact of globalization on a decision whether market failure exists; a follow-up question then is whether the government intervention should be at the nation-state level or at another level of government. Those close to current debates about competition or anti-trust policy, as well as a number of other regulatory subjects, will instantly see some of the implications of my statements here.

One thing is certain. There are many questions concerning international economic law and institutions which need careful study and analysis. It is a delight to see so many capable scholars represented in this publication who will obviously be able to carry forward this work.