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John H. Jackson

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A Trade Lawyer's Brief Comments on the Financial Crisis

JOHN H. JACKSON*

My perspective on the recent international financial crisis is somewhat different from most of the contributors to this symposium issue. I approach this topic not only as a lawyer, but also from the perspective of trade policy.

First of all, this financial crisis has been very instructive and interesting: many people think that it was a very "close call." But we seem to be coming through it, and there is now attention to taking actions to prevent either the next crisis like this current one or the next one that is of an unimaginable nature because we do not know what it would be like.

In many ways, the current crisis has been quite sobering—to government officials, economists and practitioners, as well as to academics. It is shown that we did not know as much as we thought we knew five, or even three, years ago. And in many ways, the crisis was an example, in economists' terms, of a massive market failure. As we are being increasingly instructed by very important economists, Nobel prize winners and others, markets depend on human institutions. In other words, they really do depend on the "architecture" of human institutions. When we have a major market failure, one can almost always point to the problem of human institutions. So I am very encouraged by Dr. Gianviti's discussion, because he recognizes the complexity of the issues involved. These matters are not something one can easily handle with a quick fix and short-term measures. Dr. Gianviti is clearly perceptive of and sensitive to the reality that some of the issues go outside the border of his institution, the International Monetary Fund (IMF). I fully agree with him that there is an "uneasiness" about the bulwark of events of all these activities.

What are some of the things that we might think about as roles for public parties, or roles for other institutions, and particularly trade? For instance, there is the role of the private sector and the question of liberalization or the new regulation of capital movements. We all know the trajectory, following it from some distance, of the various proposals for a new "architecture." Some of these proposals include capital restraints of various kinds. To where does this point? Roughly speaking, could we not say that whereas international fi-

*John H. Jackson is a Professor at Georgetown University Law Center. This article is adapted from a speech at the Global Conference on the Reform of International Financial Architecture, Centre for Commercial Law Studies, Queen Mary and Westfield College, University of London, London, England, May 24, 1999.

nancial institutions have been focused more (but not entirely) on macropolicy and broad governmental policy (exchange rates and so on), it is also necessary to focus on micropolicy? And here is where the private sector objectives come in. For example, Dr. Gianviti mentioned a number of activities of other international and private international organizations, such as the Policy Boards, that are beginning to focus on this.

One of the things that may have been somewhat overlooked in this crisis is the role of the World Trade Organization (WTO) or trade institutions generally. The trade institution's role in relation to monetary institutions has always been problematic, certainly since the Bretton Woods Conference. The Bretton Woods Conference did not include trade in its agenda, but it recognized that trade is a very important complement—the other side of the coin, so to speak—of international economic relations, the financial aspect being the flip side of the coin. The International Trade Organization (ITO) charter of 1948 was supposed to fill the gap, but failed to come into force. Arguably, we have now filled that gap after a somewhat defective process of the General Agreement on Tariffs and Trade (GATT) itself (which, nevertheless, had remarkable achievements) with a new institution entirely, thanks to the Uruguay Round.

It is interesting to me that as a footnote we have had this problem of decades of lack of evident cooperation and coordination between the trade and financial institutions. But during the financial crisis, we've learned that there is a lack of some coordination and cooperation, or of viewpoints, even between the two major international financial organizations—that is, between the IMF and the World Bank—which is a very interesting view of the current scene.

We already have in the WTO and its subordinate treaties, such as the GATT and the General Agreement on Trade and Services (GATS), a number of clauses that are directed to some of the financial institutional issues. For example, we have clauses in the original GATT about national trade administration and the need for adequate legal institutions. And we have a number of related clauses (about eight or ten) in the Services Agreement, one that says that “each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services.” In light of that and the two remarkable financial services or “financial/nonfinancial (if you want to call them that) services agreements” that have been concluded since the Uruguay Round (namely, the Financial Services Agreement itself and the Telecoms Agreement), and in light of other initiatives in the wings, we will see more and more attention devoted to the government regulatory aspect and its impact on individual companies.

One of the risks is that the system gets out of balance between the trade and financial sides, such that the financial side may pursue its own policies (e.g., the revision of bankruptcy law or encouraging the revision of bankruptcy law or corporate government measures) that are not exactly congruent with (and may develop a tension with some of the qualities of) the trade system. And the inverse, of course, is also true. But one of the things that the trade system is trying to do is to promote competition. In other words, it is supposed to provide that governments themselves do not devise regulatory atmospheres in ways that inhibit competition from foreign suppliers—either suppliers of goods or suppliers of services. And one can see risks here in developing some of these new laws that would be tilted in such a way as to inhibit foreign suppliers.

One of the phrases that developed in the context of this new crisis was “crony capitalism”—that is, the notion that the nongovernment private sector organizations, such

as corporations and private enterprises of various kinds, in some societies were really pursuing policies that were antithetical to proper market analysis. That is tricky because it deeply involves "sovereignty" and also financial structure and cultural questions. But nevertheless, it is quite clear that there has to be some attention devoted to this matter. Once again, the trade policy people have tried to look at this a little bit. There is certainly room down the road for additional attention to this matter and to seeing what can be done. One of the possible reasons for market failure is asymmetry of information in the market. And arguably a good bit of some problems encountered in this financial crisis has been asymmetry of information or lack of information of some major market players and, therefore, their inability to assimilate such information and make needed judgments in that regard. So, obviously, the transparency issue also extends to the private sector.

