INTERNATIONAL ECONOMIC LAW: JURISPRUDENCE AND CONTOURS

by John H. Jackson[*]

My subject is a vast one, but after a few preliminary contextual remarks, I will discuss it in three short parts. In Part I, I will describe what I call the "landscape and logic" of the subject, briefly outlining some of the contours and also the logical assumptions of international economic law. In Part II, I will sketch the history and evolution of the General Agreement on Tariffs and Trade-World Trade Organisation (GATT-WTO) system, using this as a sort of case study to illustrate some of the points made in Part I. In Part III, I will mention some of the broader implications and personal perspectives of my discussion in Parts I and II.

But to begin, I cannot escape some preliminary remarks about the current context and particularly the worldwide financial difficulties of the past several years, partly because I feel that international economic law has an important and potentially profound relationship to those difficulties. Clearly, what is called the "current financial crisis"—the crisis in world finance and economics of 1997 and 1998—has been the most significant crisis in international economics since World War II, and poses a number of questions for scholars and thinkers on this subject. It is commonplace to see comments, in these times, about the extraordinary evolution of international economic activities toward linkages and interdependence and the stress that these developments are putting on existing economic and governmental institutions. But, though commonplace, these phenomena are not trivial. Evidence of the stresses caused by globalization already existed, in such events as the 1997 French national elections, the troubled inward turn of politics in the United States and adjustment-induced poverty in many countries of the world. We are beginning to see certain fallout implications of the financial crisis, economic and political, for U.S. society, in the context, for example, of the politics of steel, with the desire to reform U.S. laws in order to discourage steel imports. We are also seeing some of the effects upon transatlantic relations, particularly in the context of some of the WTO cases often mentioned, such as those concerning bananas and beef hormones. (It's one of the great joys of this subject that you always have concrete things like underwear and bananas and hormones to talk about.) Political leaders in the context of this growing interdependence 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.

It is particularly troublesome to witness how profoundly these linkages and this interdependence created severe economic problems that were almost totally unexpected and were largely discounted as they originally emerged. These problems have been extraordinarily contagious, and rapidly created a sense of—and even the potential for—a meltdown of the world economic system. Many will recall the sense of fear and impending doom in August and September of 1998, fortunately overcome by several governments' propitious actions. These problems have already had fearsome and pregnant damaging impacts throughout the globe. These effects have not spared the United States, which, early on, was congratulating itself as largely immune from the contagion. Yet the real trauma has occurred among the millions of households elsewhere in the world that considered themselves to be advancing toward middle-class status and then suddenly found their lifestyle destroyed. In societies such as Indonesia, societal tensions have boiled into violence and cruelty, with those already impoverished now facing death by starvation, exposure to the elements, or even war-related injuries. We see, as yet at least, little consensus on either the causes of this near-meltdown or what should be done about it.

[*] Portions of this lecture are based on a lecture by Professor Jackson on the occasion of his inauguration as University Professor of Georgetown University, Nov. 5, 1998, Washington, D.C.

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Some argue that we should get governments and existing international economic institutions out of the picture; others argue the need to restructure and thus rebuild governmental institutions. Clearly, many governmental institutions, particularly at the national level in some parts of the world, appear extremely faulty, described as kleptocracies or systems of "crony" capitalism, or by other disparaging names. Why didn't private and public institutions in the relatively healthy national or international systems anticipate some of the risks of such severe consequences?

It does appear that what we are witnessing and have witnessed since the late summer of 1997 is an extreme case of market failure, as economists put it. Or, to put it more strongly, the events of 1997 and 1998 suggest to some, not unreasonably, that markets are not working, and that, indeed, some of the more vocal or heavily tilted advocates of market economics as a solution to all the world's problems are losing credibility. The major clamor of the moment, even among many market advocates, is for governments to do something (that is, to act), and the markets themselves seem to be watching for signals that governments can cope or will try to cope with the problems, whether it be through interest rate adjustments, bail-out programs, ad hoc bankruptcy measures, lending of last resort, or changes in international institutions. Perhaps a decade's perspective would suggest that with the fall of the Berlin Wall, an event that symbolized the diminished popularity of socialist or state-controlled economic structures and viewpoints, there arose an overconfidence in market-oriented approaches to solving major human problems. 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, anticipated in various forms, is not deemed irrelevant.

These reactions to the crisis then raise issues of philosophy of government, or what today we might describe as the philosophy of "governance." This subject, it seems clear, will necessarily be colored by many of the great questions 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, can elites and those with high levels of expertise operate effectively and appropriately without abusing power?; How can governments avoid the general dangers of the concentration of power? (which the United States approaches through checks and balances or separation of powers); and What is the role—and the importance—of human liberties or human rights in regard to economic progress?

LANDSCAPE AND LOGIC

We begin to see the context of international economic law as a basis for law school teaching and scholarship and as an important activity for legal professionals.

Several characteristics of international economic law can be mentioned. First of all, international economic law can have an extraordinarily broad scope of application. Virtually every type of government regulation of economic activity is attracted by the subject, including antitrust or competition policy, securities regulation, labor law, immigration law, insurance, banking, bankruptcy, trade and goods, trade and services, capital flows, monetary policy, labor adjustment policies for unemployment and exchange rate effects. So, the subject is really not a narrow one. Indeed, in some ways, it embraces a very large proportion of the subjects that we think of more broadly as general international law. If one looks in the casebooks currently used in American law schools, one will find that as much as seventy or eighty percent of the actual case studies or case instances in those books derive from some economic activity or other. This is indicative of the scope of what we are dealing with. Furthermore, an observable feature of these government regulatory regimes I have mentioned is that, increasingly, national

governments find they cannot effectively regulate many of these activities without some type of cooperation or coordination with other national governments or national institutions.

In some cases, one can focus on economic regulation as the subject; in other cases, transactional activity can be the focus. I view my subject as an economic *regulation* subject and not a transaction subject, but there is a great part of the subject that is transactional, perhaps more relevant to the active professional who has to figure out how to do things.

Another characteristic, which is integral, is the linkage between the national or municipal law and international law. One cannot successfully approach this subject without looking to the intertwining of those two levels of law. I tend to think that is also true of general international law, incidentally, but it is certainly accentuated in the context of international economic law.

Scholars and others have speculated that international economic law or GATT-WTO law is somehow a separate regime, somehow walled off from general principles of international law. I think that is exactly wrong and I think the practice in the GATT-WTO context is now demonstrating that it is wrong. The new WTO appellate body process in its very first case nailed that subject by indicating explicitly that the WTO agreement and interpretation were part of international law.[2] A little bit later in this paper I want to indicate some of the reciprocal influences between international law generally and international economic law.

Of course, the phrase "international economic law" suggests a multidisciplinary approach. That does not mean we all have to be economists. But it does mean that we need to be sensitive to the policy motivations that carry forward our subject so that we can really understand a treaty norm or a national law norm in the context of these policy motivations.

International economic law generally is focused on treaty law. There is not an awful lot that customary international law can help us with in this subject. There may be a variety of reasons for this. I do not have time to speculate on them.

Now I want to turn to another aspect of this first topic, namely, the logical framework for international economic law, exploring the underlying premises that motivate policy in this area. I have noted the likely growth of skepticism toward market economics. Nevertheless, it would be folly to ignore the powerful benefits that markets have bestowed on humankind. Whether economic policies based on market principles are the best approach for maximizing human satisfaction is 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 overly 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, such as social safety net policies and competition policies. 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 when stressing the benefits of market economics, important thinkers note the importance of human institutions that guide and shape the markets. And many economists in recent decades have stressed this, including Nobel laureates Ronald Coase and Douglas North, both of whom have made this point in their writings.[3]

Human institutions embrace many structures and take many forms. But it is clear that law and legal norms play the most important part in the institutions that are essential if markets are to work. So part of the problem of the economic crisis of the last two years is an inadequacy of the legal institutions, whether these be international law institutions or national law institutions, or national institutions with weaknesses that could have been influenced by

[2] United States–Standards for Reformulated and Conventional Gasoline, WT/DS2/AB (Apr. 20, 1996).

[3] RONALD COASE, THE FIRM, THE MARKET AND THE LAW (1988); DOUGLAS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990).

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international norms and may yet need to be so influenced. I will come back to that a little later in this paper.

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 reoccurring theme in many writings. 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, such as in a market economy. Rules can have important operational functions and 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 contributes to world welfare, then it follows that rules that assist the goal of liberal trade should also contribute to world welfare. To put it another way, policies that 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 broadly to greater welfare for everyone in the world. In particular, in the context of disputes, a rule-oriented approach focuses the disputant party's 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. 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 the participation of millions of entrepreneurs.

A Case Study: GATT/WTO Evolution

By looking closely at the case study of the evolution of GATT and WTO (which is really quite a profound case study full of jurisprudential, legal and policy implications), one can get into the detail of it. And there are lessons to be learned. Indeed, this particular case study or this particular set of practices has attracted a lot of attention from other disciplines within international economic relations, so as to lead other parties to think in terms of the value of bringing their subjects under the GATT, such as the case for intellectual property and services. Some would now point to half a dozen other subjects that they would like to bring under a GATT umbrella.

Most remember the outlines of this history. The GATT was created just after World War II in a context where it was understood that GATT was not supposed to be an organization. Instead, the International Trade Organization (ITO) was to be the organization for trade. But the ITO failed to come into being, largely because the U.S. Congress would not accept it. And so the GATT was left in place as the only institution where governments could go for assistance with solving some of their trade problems. The GATT became the focus of their attention and, thus, the GATT began to evolve.

One of the interesting aspects of the GATT's process of evolution was in the dispute settlement process itself. The original GATT had very few clauses on this; therefore, the dispute settlement process could mean different things to different people. There were at least two rather contradictory views of what that process should be—one was the view that it should be a rule-oriented process; the other view was that this should simply be a means of facilitating negotiation by sovereign entities concerning their problems. In the course of forty-five or more years of GATT dispute settlement practices, there was a constant evolution toward more rule orientation. Today, some people debate whether it has gone too far. But nevertheless, this trend toward rule orientation characterizes the practice that actually took place, and which developed largely out of whole cloth with very few treaty words involved. Various checkpoints and precedents along the way created certain elements of the practice as it developed.

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Toward the end of this history of GATT, in the mid-1980s, when the Uruguay Round negotiation (the eighth of the major trade negotiations under GATT auspices) began to get started, it was clear that the GATT generally had problems. The GATT was never intended to be an institution, and it lacked institutional clauses. Likewise, it was clear that the dispute settlement process had some important defects.

Perhaps as a consequence, the Uruguay Round rather surprisingly developed a new institution. The idea of such a new institution was not on the original agenda of the Uruguay Round, but rather developed about halfway through the process as people began to realize that this massive negotiation would require something special to ensure that it could be implemented effectively. And that something special was, in the minds of many, a new organization—the WTO, the World Trade Organisation.

When one reflects on this history of GATT and the dispute settlement process, some generalizations seem both apparent and quite remarkable. With meager treaty language as a start, plus divergent alternative views about the policy goals of the system, the GATT, like so many human institutions, to some extent took on a life of its own. Both as to the dispute settlement procedure and to the substantive focus of the system, the GATT panel procedures, as I have said, became more and more rule oriented. Indeed, I have received concurrence from a number of the negotiators in the Uruguay Round that at the end of the negotiating round, when the many countries signed the treaties in April 1994 in Marrakesh, Morocco, no country *really* knew what it was getting into. That is not necessarily a fault, because I think you could also argue that at the promulgation of the U.S. Constitution, some two centuries ago, the people who launched it on its path did not know *fully* what they were going to get into. And I think that is a characteristic of human institutions. This suggests some caution on the one hand, but it also suggests continued vigilance on the other. One cannot simply put these institutions up on the mantle to operate by themselves; one has to continually tweak them.

The WTO has now been in existence five years. The WTO Charter itself embodies an effort to carry forward and perpetuate the jurisprudence of the GATT. There is a clause in the WTO Charter, the so-called Guidance Clause, that says that the decisions and reports of the GATT should serve as guidance for the WTO.[4] That is a very carefully worded clause because if it had been worded on one side or the other of that notion of "guidance," it could either have been too weak to provide some stability and predictability to the system, or it could have been too rigid. It could have mandated too much, really creating from trial-and-error practice and pragmatic experiments the equivalent of treaty law, which of course would not be wise.

After these five years of WTO existence, one can now say that the WTO dispute procedures are clearly considered a success. They are, of course, just reaching the phase when they are beginning to bite, as illustrated by both the banana case and the beef hormone case. For example, a member government, the European Union, has found that these procedures, taken with the case rulings, are disconcerting to it in these two cases for a variety of reasons.[5]

There has, however, been a high level of compliance up to this point. Especially interesting is that the United States has made quite a point that it will comply with the dispute settlement process. But now we are beginning to get into this crunch, this transatlantic problem, because of the enforcement of the panel process results. And one of the things that causes great difficulty in this regard is the fact that the procedures in the dispute settlement understanding, which is annexed to the WTO, are faulty. The procedures in the treaty language have some contradictory phrases and considerable ambiguities. Again, I do not view that as

[4] WTO Agreement, Article XVI, para. 1.

[5] European Communities—Regime for the Importation, Sale and Distribution of Bananas, Report of the Appellate Body, WT/DS27/AB/R (Sept. 9, 1997); European Communities—Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

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surprising. After all, when 120 nations take it upon themselves to negotiate a treaty, there are bound to be certain gaps, certain areas where the negotiators feel they have to paper over differences by creative ambiguity, etc. But the real challenge then is what do you do about it? How do you resolve some of these issues? And one of the worries I have about the WTO constitution is that I do not think we can depend on the dispute settlement system to resolve all these kinds of problems. We have to think about alternative procedures. And, of course, alternative procedures suggest a decision-making process or a treaty-amending process or certain other kinds of decision-making processes in the context essentially of negotiations, since we do not really have a legislature. And one of the problems of the WTO Charter is its rigidity in this respect. The negotiators were jealous of each other and worried about the impact on sovereignty of this new organization. They were fearful of some of its potential powers. In particular during the last six months of the active negotiation, the negotiators put into the WTO Charter a series of checks and balances and constraints which arguably may have gone a little too far. So I think that the challenge in the near future, and maybe for the longer run, is to figure out how to work around those different constraining aspects of the system so that we can achieve some of the things that we will need to achieve to essentially fill the gaps, if not be creative with new subjects that are coming on stream.

Now I will talk a bit about two other elements before I turn to a discussion of implications and perspectives. Earlier I mentioned that there is a reciprocal analogy relationship between international law and international economic law. I want to illustrate that with a particular example. In the first appellate body case that went through the WTO (and also in some preceding cases under the GATT), the appellate body asked the question, "Is this system part of international law?" and answered carefully and clearly "Yes." And then it turned to the issue before it, which was how to interpret some of the treaty language. And in that regard, the appellate body referred to the Vienna Convention, Articles 31 and 32, on interpretation of treaties. The Vienna Convention itself does not apply to all parties and particularly does not technically apply to the United States, but the notion is that the Vienna Convention represents a good articulation of customary international law. The appellate body made it quite clear that that could be a potential way of drawing on principles and analogies in other subjects. In the shrimp-turtle case that came later you can see some ideas along that line also.[6]

Now how did the appellate body handle this question of interpretation of treaties? What specifically seemed to concern it? The Vienna Convention focuses on the *language* of the treaty being interpreted and gives great emphasis and importance to the language and text, while downplaying the use of preparatory work, arguably providing that preparatory work should not be used initially, but only as sort of a last resort, if I may paraphrase broadly. The appellate body seemed to be going in that direction and seemed to take advice from that. But there are conceptual problems about this approach. The appellate body struggled with some of the treaty text and it noted that in the primary article of the Vienna Convention concerning interpretation, it is stated that a treaty should be interpreted in its context in the light of the object and purpose of the treaty. So then the appellate body asked, "How do we find out what is the object and purpose of the treaty?" And lo and behold, you look at preparatory work to find out those purposes. So to some extent, what the appellate body has done is to pull the use of preparatory work back into the priority area of interpreting a treaty, as it mentioned in a footnote, without really being very explicit about that. And I think that is a very interesting device. Now, in fact, throughout the history of GATT, there have been a lot of reference to preparatory work. So one of the reciprocal analogy influences potential here, that is the influence that GATT can have on international law as compared to vice versa, is the fact that

[6] United States–Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R (Oct. 12, 1998).

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there is a lot of practice in GATT and WTO about the nitty-gritty of handling an ongoing treaty; how one applies it should be very interesting to general international law scholars, judges and teachers.

The only other point I will make in this regard about the jurisprudence so far in the WTO and the panel process is that I think we can also see, at least at the appellate body level, quite a bit more deference to national sovereignty than may have been the case in the GATT panels before or that may be the case in some other international tribunals today. I could go a little bit into the personalities of the seven appellate body members and why this might be, noting the fact that, in many cases, they are generalists and not specialists on trade, but time does not permit.

IMPLICATIONS AND PERSPECTIVES

I now want to turn to a few personal thoughts and perspectives. Here I could get into the question of how one would go about reforming the international institutions. For example, the International Monetary Fund and the World Bank have interesting structures, including weighted voting. There has been discussion about reforming this system by doing away with one or the other or both of those institutions and starting fresh. But there seems to be general agreement that that will not happen. This sort of dovetails a bit with the lecture by Oscar Schachter at the present Annual Meeting on the subject of power. One of the things weighted voting does is to recognize some of the power differences in the world. It seems almost certain that the powerful nation-states of the world are not going to lightly give up these Bretton Woods institutions that use this procedure, knowing that if you try to create new institutions today, the politics of international negotiation and institution making is such that it is clear that you could not get weighted voting again. So what does that mean for the scholars of international economic law? It means that the lawyers and the legal profession have to be looking at these institutions very carefully and very cautiously. I will use the word *creative* as an adjunct to *interpretation*. There has been some writing about that—how you should judge these charters more as constitutions than as contracts, for instance.[7] We must see if there are ways that can be used within the broad framework of the existing human institutions to reform the Bretton Woods institutions.

Now finally there is another issue here, which Lou Henkin calls the "S-word"—*sovereignty*. This word is so consistently misused that he and others argue that we should abolish it.[8] Certainly many of the centuries-old concepts of sovereignty are no longer part of today's international law and international relations. But what is really involved here? I suggest that there may be a different implication of *sovereignty* than that which has traditionally been used. The word may represent the concept we should call "allocation of power." That is, what sovereignty may really mean is that when someone says that such and such an action of the WTO or a treaty clause in the WTO or any other international institution violates national sovereignty, what that really means is not that there is something holy about the national entity, a nation-state government, which comprises a whole set of rights and prerogatives to fend off any supervision from the outside, even including on human rights or other issues. It means instead to pose the question: Should the contemplated decision be made in Geneva or Washington or Sacramento or Berkeley or at the local neighborhood level? How do you allocate power? And you can almost take that up decision by decision or subject by subject. In the economic area, we do have some tools relating to concepts of market failure that we use in trying to judge that allocation. But I will conclude here and leave that for another day.

[7] John H. Jackson, *The Mythology of Sovereignty*, ASIL Newsletter, Mar.–May 1993, at 1.
[8] Louis Henkin, *The Mythology of Sovereignty*, ASIL Newsletter, Mar.–May 1993, at 1.

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