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HUMANIZING THE FINANCIAL ARCHITECTURE OF GLOBALIZATION: A TRIBUTE TO THE WORK OF CYNTHIA LICHTENSTEIN

FRANK J. GARCIA*

Abstract: This Tribute reviews the many contributions by Cynthia Lichtenstein to the literature on international financial markets. When viewed as a whole, Professor Lichtenstein's work suggests that the globalization of the monetary system offers new opportunities for increased human welfare, but only if state and international regulators combine technical expertise with a genuine understanding of the human effects of global markets, much as Professor Lichtenstein does in her own work.

INTRODUCTION

This Symposium is a celebration of the rich tradition of international law at Boston College—rich for having had Owen Kupferschmid as a student, rich for the Holocaust and Human Rights project which he created and inspires to this day, and rich for the many contributions of our honored colleague, Cynthia Lichtenstein, during the thirty years in which she has called Boston College Law School her professional home. Many have noted Professor Lichtenstein's pioneering role as a woman in international law, making numerous significant contributions and reaching the highest levels of achievement in the profession, both in the United States and abroad. I would like to focus my reflections on her work as a scholar, in particular with reference to the central problem of our era: globalization and its effects on individual and communal social welfare—and particularly its effects on state sovereignty.

My students are surprised when I remind them that sovereignty can be understood at least historically as a progressive human rights concept: to strengthen the autonomy of states was to clarify their in-

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dependence from imperial and pontifical ambitions. It was, in this way, a subsidiarity principle, bringing the locus of control closer to the fundamental moral unit—the individual. Of course, state sovereignty is only part of the contemporary doctrinal equipment for protecting human rights, and it has unfortunately become more frequently associated with abuses of human rights—sovereignty as a cover for wrongdoing instead of as a shield against wrongful intervention. Our challenge is to preserve those vital and progressive aspects of sovereignty in a new, global environment, while reconfiguring its unnecessary, outmoded, or inimical aspects.

It is therefore fitting that our Symposium begins with the subject of international human rights and continues with the topic of globalization and the erosion of sovereignty. This juncture between the two Symposium sessions is noteworthy because the tension between the progressive and regressive aspects of state sovereignty is central both to the Kupferschmid Project and to the work of Cynthia Lichtenstein.¹

I. HUMAN RIGHTS & GLOBAL MARKETS

Historically we are at a critical juncture in the relationship between human rights and markets, between globalization and marginalization. In his recent book, *Jihad v. McWorld*,² Benjamin Barber reminds us that modern liberal democratic society is caught in the clash of two opposing forces: on the one hand, disintegrative tribalism and reactionary fundamentalism, and on the other hand, integrative modernization and aggressive economic and cultural globalization. According to Barber, the key to successfully navigating this challenge lies in developing truly democratic global institutions, capable of the humane exercise of economic and political power. It is at this juncture between economic power and human welfare that we can locate Professor Lichtenstein's work and draw lessons therefrom.

¹ Interestingly enough, it was Professor Lichtenstein herself who noted that international human rights and international economic policy were both very important to Owen Kupferschmid, when she opened the sixth Boston College Holocaust and Human Rights conference in 1992, honoring his memory. See generally Cynthia Lichtenstein et al., *Tribute to Owen Kupferschmid and Opening Address (Holocaust and Human Rights Law: The Sixth International Conference)*, 12 B.C. THIRD WORLD L.J. 191 (1992). It is also very appropriate to recognize and honor Professor Lichtenstein's own accomplishments in this context.

² BENJAMIN R. BARBER, *JIHAD V. MCWORLD: HOW GLOBALISM AND TRIBALISM ARE RESHAPING THE WORLD* 1 (1996).

A. *Regulating Financial Markets*

A central preoccupation in Professor Lichtenstein's work has been the responsible oversight of concentrated financial and economic power by state and multinational regulatory bodies. She has spent decades studying and shaping the complex relationship between, on the one hand, capital-rich states, private capital actors, and the Bretton Woods Institutions, and on the other hand, the individual human needs and rights of the millions affected by decisions taken at all levels in the international monetary system, especially those affected in developing countries.

Key to this relationship in the globalization era is understanding the variety of levels at which effective control over monetary policy can be exercised: regulation of private actors in their foreign capital transactions (foreign direct investment and portfolio equity investment); state banking regulation by quasi-public regulatory and professional bodies; and regulation by the international Bretton Woods institutions. The globalizing economy requires and enhances the exchange of international capital, as was recognized early on by the European Community (EC) in making the free movement of capital one of the four freedoms vital to the creation of the "single" market. Since the essential mobility of investment capital often defies effective national regulation, globalization requires increasingly comprehensive and powerful global monetary regulation, one reason for the erosion of state sovereignty. These developments have brought to the fore the role of the Bretton Woods institutions in forming global economic policy, and thereby enhancing, securing, or degrading global social welfare.

Professor Lichtenstein's work accepts the basic premise of economic modernity—that a liberal trading system is a positive force for increased global welfare. However, she adds an important caveat to this: the economic benefits of modernity will not flow to the developing world unless the financial institutions of modernity, in particular the International Monetary Fund (IMF or Fund) and World Bank, pay adequate attention to these countries' concerns in setting international monetary policy. The centrality of monetary policy to the realization of modernity's economic promise illustrates a fundamental tension in liberal western capitalism: money is a necessary, if not sufficient, element in most forms of human welfare, but concentrations of money, and the way such concentrations are managed, can become powerful, inimical forces degrading individual human welfare. Moreover, while powerful financial institutions are often blamed

for a variety of domestic ills and abuses, the failure of powerful financial institutions can have calamitous effects on individuals, states, and the international economy, as seen in the 1994 Mexican peso crisis, in which a sudden withdrawal of much of the international portfolio investment disastrously weakened the peso's exchange rate.³

Professor Lichtenstein's work has always been concerned with both the vigor of domestic and international banking, and the soundness of the domestic and international financial regulatory system. For example, in her critiques of the FDIC Improvement Act of 1991,⁴ or the 1991 overhaul of the Federal Reserve Bank's international banking regulation, Regulation K,⁵ she endeavors to balance a concern for the prudential aspects of banking regulation with a concern to preserve the competitiveness of U.S. banking industry, and competition within that industry. Fewer restraints on competition among financial services providers contributes to more competitive U.S. capital markets for both the United States and foreign banking organizations.

Moreover, Professor Lichtenstein has sought to emphasize that domestic regulation should not proceed without an informed understanding of its international implications.⁶ Domestic regulators can create dangerous loopholes when they attempt to regulate the overseas banking efforts of their domestic banks without adequately resolving the coordination problems states face in multilateral regulation. An example is Professor Lichtenstein's criticism of the Federal Reserve Bank's 1982 regulations on U.S. banks' reserve and examination requirements, which operated to the detriment of U.S. banks interested in Euro currency markets.⁷ By paying close attention to potential costs to be borne by U.S. banks participating in markets overseas and the level of competitiveness of these banks, she sought to provide both the background and explain the need for the amendments for these regulations.⁸

³ See generally Cynthia Lichtenstein, *The Mexican Crisis: Who Should be a Country's Lender of Last Resort?*, 18 FORDHAM INT'L L.J. 1769 (1995).

⁴ Cynthia Lichtenstein, *U.S. Restructuring Legislation: Revising the International Banking Act of 1978, For the Worse?*, 60 FORDHAM INT'L L.J. 507, 537 (1992).

⁵ See generally Cynthia Lichtenstein, *Thinking the Unthinkable: What Should Commercial Banks or Their Holding Companies Be Allowed to Own?*, 67 IND. L.J. 251 (1992).

⁶ Cynthia Lichtenstein, *The U.S. Response to the International Debt Crisis: The International Lending Supervision Act of 1983*, 25 VA. J. INT'L L. 401, 417-18 (1985).

⁷ Cynthia Lichtenstein, *United States: Federal Reserve System Rules Concerning International Banking Facilities*, 21 I.L.M. 872, 872-77 (1982).

⁸ *Id.*

Thus, with respect to these and other issues, Professor Lichtenstein has repeatedly pointed out the difficulties faced by authorities in regulating their banks' foreign operations without impeding competitiveness in world markets, and emphasized the critical need for cooperative efforts in international banking regulation.⁹ However, Professor Lichtenstein's concern for sound financial regulation has never been merely a concern for the protection of capital through law. Rather, it has always extended to a concern that those with money, and those charged with regulating money, manage this tremendous power with an understanding of what is at stake for everyone else. Irresponsible involvement by U.S. banks in foreign lending creates vulnerability for all parties concerned—the individuals in developing countries whose economic futures are blighted by high levels of public debt, the U.S. banks themselves, and potentially the customers of the U.S. banks at home in the United States.

B. *Managing International Monetary Crises*

Professor Lichtenstein has also been an astute critic of U.S. approaches to international debt crises and international monetary policy with respect to emerging markets and developing economies.¹⁰ She has criticized the U.S.' past ad-hoc management approach of temporarily extending more lending to developing countries facing debt crises, and stressed the importance of enabling those countries to return to creditworthiness by reducing the total amount of debt, encouraging new investment flows, and promoting the return of flight capital.¹¹ Much of this concern has been focused on the many attempts by capital-rich countries to use or misuse the IMF for essentially political reasons—attempts which Professor Lichtenstein has roundly criticized.

For example, the close relationship between a country's money supply and its capacity to do business and project power abroad makes international investment or the re-payment of international loans an attractive point at which to attempt to control other govern-

⁹ See, e.g., Cynthia Lichtenstein et al., *Cooperative Efforts in International Banking Regulation*, 76 AM. SOC'Y INT'L PROC. 352, 353 (1982).

¹⁰ Cynthia Lichtenstein et al., *International Debt: How Can Developing Countries Regain Creditworthiness?* 83 AM. SOC'Y INT'L PROC. 87, 89 (1989).

¹¹ *Id.*

ments by indirectly blocking their access to financial reserves.¹² Such efforts, if undertaken without IMF approval, are violations of international legal obligations; so states have through political channels sought the IMF's blessing for such sanctions. Professor Lichtenstein quite properly and vigorously asks why the IMF should be in this game.¹³ The IMF was never meant to serve as a sanctioning agent or to have its authority over exchange controls used to legitimize political sanctions, but rather is concerned with furthering the health of the international trading markets for goods and services. Nevertheless, the IMF's power to affect the exchange position of participating countries makes it an attractive target for political lobbying, to the detriment of all parties concerned.

Another example is the controversial decision on the part of the G-7 countries in 1993 to funnel Russian aid through the IMF. In marshaling her critiques based on the history, culture, and legal structure of the IMF¹⁴, we see Professor Lichtenstein in the role of both lawyer and legal scholar, offering us the reality check of institutional limitations on client ambitions, and concerned that states not weaken important systems by choosing them for the wrong tasks. Such misuse of an international institution by powerful nations exposes the IMF to criticism from all sides for failures which could easily have been foreseen, given the nature of the IMF's intended role and its institutional culture. Instead, she emphasizes the Fund's role in aiding indebted countries to grow out of their debt burden by encouraging structural adjustments and furthering growth and transformation of economies.¹⁵ One can also hear in this criticism her disappointment on aesthetic as well as professional grounds—it is a sloppy way to make global law.¹⁶

C. Monetary Globalization

Returning to themes of globalization and sovereignty, Professor Lichtenstein was one of the first to understand how monetary globalization would reshape the architecture of power among states and in-

¹² Cynthia Lichtenstein, *The Battle for International Bank Accounts: Restrictions on International Payments for Political Ends and Article VIII of the Fund Agreement*, 19 N.Y.U. J. INT'L L. & POL. 981, 981-91 (1987).

¹³ *Id.*

¹⁴ Cynthia Lichtenstein, *Aiding the Transformation of Economies: Is the Fund's Conditionality Appropriate to the Task?*, 62 FORDHAM L. REV. 1943, 1944 (1994).

¹⁵ *Id.*

¹⁶ *Id.*

ternational organizations.¹⁷ Since money is power, and money must be regulated transnationally in a global economy, state power itself is being regulated at the multilateral level by the institutions that manage those capital flows, in particular the IMF. Professor Lichtenstein has never ceased to review and critique efforts by international institutions to manage systemic risks and consequences flowing from capital movement.¹⁸ Recognition of the evils of capital controls necessitates a degree of international oversight over capital flows. The international community can insist upon the adoption of financial reforms in debt-ridden countries, and the Fund will impose internationally agreed-upon reforms as a condition of extending credit. This necessarily implies an erosion of the sovereignty of nation-states.

But Professor Lichtenstein's work also recognizes that the erosion of sovereignty is not by itself a problem—it can be a positive development for global social welfare, if capital is effectively and fairly managed for the benefit of all concerned by the institutions of globalization.¹⁹ The real problem is not multilateralism per se, but situations in which the political element of international financial regulation allows the interests of powerful capital-owning classes, multinational corporations, and capital-rich countries to overpower the interests of the rest of the world in the structure of international financial policy. If the interposition of a layer of international governance between states and their money is to have any legitimacy, it must result in an increase in prudent decision-making in the best interests of the system and of the people it serves, particularly those in capital-poor countries.

D. *Reforming the System*

Concern over the integrity of the international financial regulatory system is a key refrain in Professor Lichtenstein's work—given a range of responses to international monetary crises, which is best from the perspective of the system's capabilities and traditions? For

¹⁷ See generally Cynthia Lichtenstein, *International Standards for Consolidated Supervision of Financial Conglomerates: Controlling Systemic Risk*, 19 BROOK. J. INT'L L. 137 (1993); Cynthia Lichtenstein, *Dealing with Sovereign Liquidity Crises: New International Initiatives for the New World of Volatile Capital Flows To and From Emerging Markets*, 29 MCGEORGE L. REV. 807 (1998) [hereinafter *Dealing with Sovereign Liquidity Crises*].

¹⁸ See Cynthia Lichtenstein, *Introduction to the Panel on "Preventing Asian Type Crises: Who, If Anyone, Should Have Jurisdiction Over Capital Movements?"*, 5 ILSA J INT'L & COMP. L. 395, 396 (1999).

¹⁹ *Dealing with Sovereign Liquidity Crises*, *supra* note 17, at 812.

example, Professor Lichtenstein chronicles the extent to which the role of modern capital markets in developing economies has put exchange controls on capital transfers (not current accounts transfers) outside the range of tools available to developing countries to manage their money supply. This has put development and welfare at the mercy of foreign capital, especially portfolio-based capital. How can the balance be restored?

One part of the answer, in her words: “financial sector reform and the creation of a domestic banking system that adheres to adequate (and internationally agreed-upon) prudential standards and is regulated and supervised by an independent technically adequate supervisory system.”²⁰ Thus, we have come full circle, from the local to the global and back to the local again. Effective domestic banking regulation is part of the prescription for a well-managed, pro-development global financial system.

Another part of the answer arises in one of my favorite pieces by Professor Lichtenstein, an essay in memory of Bill Bishop. In this essay, she asks the question: “Does international human rights law have something to teach monetary law?”²¹ A wonderful question, very much suggesting the way in which Professor Lichtenstein’s work fits into the questions raised by this Symposium. In this essay she defends the validity of current-account exchange control regimes by developing countries, based on the essential relationship between capital and development.²² She notes that the creation of the Bretton Woods system has eroded the sovereignty of states to impose exchange control regimes at will.²³ At the same time, the system also strengthens sovereignty, in that it requires other states to recognize Fund-approved exchange control regimes as grounds for not enforcing otherwise valid exchange contracts in their domestic courts. The particular problem Professor Lichtenstein writes about in that piece concerns the difficulty of preventing circumvention of these exchange controls by private parties, through this contract-voiding mechanism alone, and she makes the innovative suggestion that states could avail themselves of the alien tort statute by framing their suits in U.S. courts as claims in international tort against circumventing parties.²⁴

²⁰ *Id.*

²¹ See generally Cynthia Lichtenstein, *Does International Human Rights Law Have Something to Teach Monetary Law?*, 10 MICH. J. INT’L L. 225 (1989).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

There are several interesting points presented by this essay. First, it helps us understand, through the lens of exchange controls, the complex architecture of globalization and its effects on state sovereignty. Second, it is innovative—there is no mention of the idea of using the alien tort statute in this context before Professor Lichtenstein's piece, and after one reads her exposition of this, one says, "of course, why didn't I think of that?" Third, it takes a very lawyerly approach to issues of great political and moral importance. Professor Lichtenstein is writing, essentially, about development, about the relationship between capital and development, and about the responsibility which states have, in the positive use of sovereignty, to enact monetary policy protecting and promoting the human rights of their citizens.²⁵

But she does not remain in the comfortable world of generalities—I think she would consider that a failure of her responsibility as a lawyer, as one who is given the keys to the system. Rather, she is quite specific and practical—states face the problem of making their legitimate exchange control systems work in the face of private circumvention—what can the legal system do about this? Here is one possibility: take a successful human rights remedy in U.S. courts, the Alien Tort Statute, and re-imagine it as a vehicle against the circumvention of exchange controls. Let's figure out what the system can do.

CONCLUSION

When speaking at a conference on globalization, Judge Christopher Weeramantry made the striking observation that during the late Middle Ages when stock markets were first being formed, capitalists consulted with theologians as to the moral requirements attendant to forming such exchanges. In today's world, legal academics are the new theologians, globalization the new exchange. In the endeavor to match sophisticated morally informed legal advice to the regulatory developments of her time, Professor Lichtenstein stands out. There has not been a single major event in the field of global banking and financial regulation that Professor Lichtenstein has not studied, thought about, written about, and sought to reform, ranging from the seizure of Iranian assets in the early 1980's,²⁶ through the growth of European financial markets, the various Mexican financial crises, and

²⁵ See generally *id.*

²⁶ See generally Cynthia Lichtenstein & Edward Gordon, *The Decision to Block Iranian Assets—Reexamined*, 16 INT'L LAW 161 (1982).

important changes in U.S. financial regulation over the last thirty years, to the Latin debt crisis of the 1990s, and the Asian crises of the past decade.

Professor Lichtenstein's many responses to these issues as a scholar bear the hallmarks of Cynthia herself—insightful, pragmatic, and to the point. Her work embodies the defining characteristics of a gifted academic lawyer. It is not simply the presence of moral concern—we all can and must share that—but the *marriage* of moral concern with a sophisticated and deeply pragmatic understanding of the regulatory system, and a passion to make that system work for the benefit of those at risk, that I find most challenging about her work.