"From the Big Crisis to Real Reform of the System": speech held in New York, at Metropolitan Club, by Alberto Santa Maria, opening the Section on May 6th, 2009

1. As a psychological effect of the present deep crisis on a global scale, there are almost daily proposals coming from the most various sources, like private groups as well as public institutions, and in numerous forms, like overviews, reports, *memoranda*, communications and so on, prompting the introduction of new international rules, planned for the future, in order to (i) improve the "ethics" in the economic and financial activity and (ii) reach a more efficient control of the actors and their operations. From those proposals as well as from the far more relevant *communiqués* realized at the end of the last meetings of G20 in London and G8 in Rome come out a first common approach: many suggestions are addressed both to governments and to corporations and business units (financial institutions included) emphasizing the strict connection everybody sees between macroeconomic and microeconomic issues.

2. It ensues a generalized expectation involving also private persons, wherever located in the world, individually hit by the present crisis – never occurred before, not even at the end of the II world war when Bretton Woods Agreements and the former GATT were executed – that any real prospects for systemic reform in order to cope with possible future hazards chiefly depends on actions to be taken at international level by States through international organizations.

3. Beyond and above new criteria for the appointment to executive positions at the IMF or the WB, or the manners in which either should take supporting actions and the requirements for eligibility to such support, the real problem rising from the ashes of Bretton Woods is how to identify and make transparent new *minimum* rules capable to govern exchange rates, which are lacking at this time (possibly except for the unspecific provisions in Article IV, Section 1 of the IMF's Articles of Agreement, seeking orderly exchange arrangements and prohibiting — rather, earnestly advising against — competitive devaluation). In the *Leaders' Statement* issued at the end of the last London Summit of G20 nothing is said of targeted currency underquotation, which is bound to be the result of any one State's individual policies.

It has to be specified, however, when and to what extent continuing currency underquotation may legitimately be performed while causing imbalances degenerating into protectionism in whatever form, and being also a serious cause of disturbance in the "uniform" (fear) functioning of competition rules across the global market.

There have been dazzling examples of this continuing currency under quotation in the past few years. One is China, with its "seeming" currency basket, which has made the yuan stuck in fact to the US dollar and heavily undervalued against the euro, in the face of the "unique", fast-growing development of the Chinese economy, still in the present crisis at a rate of + 6 % of the GDP as contrasted with – 4% for the United States (and – 4,2 of EU) for the current year.

Another example of a full confusion in the exchange matter is offered by Russia: its ruble has been devaluated more than twenty times over the last few months by more than 15% against the euro since the beginning of 2009. In the same way as in the case have been performing the currencies of the nearby countries former members of the Soviet Union.

The issue is also quite topical within the EU, though, in respect of the exchange rates to

the European single currency of the national currencies of each member States (eleven) out of the *euro area* because of their failure to meet the Maastricht criteria or even out of their own choice in a *permanent* opt-out regime. The pound sterling, with fluctuations exceeding the ±30% band from the introduction of the euro to mid-2008, has now devalued by more than 15% against the euro in the last few months. Though the Swedish krona had largely remained stable until September 2008, it has recently been devalued about 12% against the euro. The domestic currencies of Eastern European countries newly acceded to the European Union have also been devaluated against the EU's single currency.

Distortion of exchange rates is even more disruptive within the European Union, as it occurs in a market otherwise considered "single" for all purposes in the absence of any type of suitable correctives to deal with the actual present monetary gaps, even when it comes to the application of competition law.

4. Even before taking any action on the "system", the "enforcement" issue should be faced. I do not believe it so important that a large number of international rules should be introduced. Do not forget that the implementation of any restrictive rule can have a cost for the addressees what would be unacceptable if they were too many.

In this respect, let me point out that none of the proposals made so far has envisaged the rule — an essential one, in my view — that, if a private person is free, whether in isolation or in association (investment funds of any kind), providing he is adequately informed on what he is choosing to do, to "speculate" in derivatives or other financial instruments (as well as to go horse-racing betting or casino gambling), such behaviors should, however, drastically be prohibited to banks and other financial institutions, which must be barred from speculating on their own under threat of severe penalties both for individual officers and the institution itself found to be in breach.

All the new rules would be enforceable to bring a concrete, positive result.

So said, I have no doubt that the "international treaty", if compared with unspecific proclamation vaguely reminiscent, at best, of "soft law" provisions, would be the best instrument for introducing the new rules. Furthermore, it is capable, through the customary regulations for adjustment of domestic laws to the treaty norm, to lead to the uniform creation, in the contracting States' internal systems, of actual rules of law, sources of subjective rights and legal obligations *binding* upon private individuals, which the entitled entities, whether public authorities or private persons, will have standing to assert in domestic courts of competent jurisdiction.

Under domestic systems of law, violating any treaty rules described as "irretrievable" or "of public policy" might even entail voidance of the underlying private-law instrument or result in the entity unduly benefited by the violation being held jointly liable with the violator and punished accordingly (let me make reference, *e.g.*, to the Progress Report of October 17, 2008, on the enforcement of the OECD Convention on combating bribery, and to the Bribery Bill currently laying before the UK Parliament, which contains rules and standards on the administrative liability of companies or other entities "failing to prevent bribery", essentially along the same lines as the Italian Legislative Decree No. 231/2002, in its original formulation. The same solution I deem should be extended to all international crimes. If "deterrence" effects are really sought, as many seem to advocate, I believe this the approach to be taken.

5. Thus, the *optimum* would be signing a concise "global" agreement on economic

matters, a sort of a "General Agreement on Economics and Finance" (to follow the successful GATT approach, *mutatis mutandis*, in words as well), which should operate as a compendium of all existing international conventions on economic and monetary matters attached to it and coordinate their enforcement and also to include those multilateral treaties already existing apt to govern such harmful occurrences as bribery, money laundering, terrorism and pollution, all of which require a consistent enlargement to new States and coordination measures be taken. Coordination could be reached also referring to the network of bilateral conventions on double imposition by enlarging and enforcing the reciprocal commitment of the tax authorities of the contracting parties exchanging information, setting aside bank secrecy.

But, since we are practical men and we are aware that not always is the *optimum* better than the "feasible", we know that neither the legal structure nor all the details of the solution above envisaged could be easily achieved in the near future. The drafting of a multilateral convention can need, as a matter of fact, years of gestation. However, I deem important to set this as a goal *medio tempore*, hence laying the roots of the initiative, even if at this stage the G20 States may realistically choose to aim at the definition of some common ethical principles, even few principles, I repeat, but of general (global) convergency.

New York, May 6th, 2009