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EDITORIAL

IGOs in Crisis? Or New Opportunities to Demonstrate Responsibility?

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Abstract

This editorial seeks to explore the creative reactions of intergovernmental organizations ('IGOs') in times of global crisis. With emphasis on recent health and economic crises and the response of IGOs including the World Health Organization, the International Monetary Fund, the World Bank and the World Trade Organization, the editorial shows that crises have strengthened the institutional and law-making power of the IGOs that are forced to deal with them. Certain common elements emerge from this discussion, including the more prominent role that the leadership and Secretariats of IGOs regularly play in crises, the wider range of institutions and groups with which IGOs are prepared to closely collaborate in order to deal with new issues, and the increased prevalence of creative and informal law-making by IGOs as part of their institutional responses to challenges.

Keywords

intergovernmental organizations; international organizations law; secondary treaty law by international organizations; crisis; pandemics; credit crunch; transparency; World Health Organization; International Monetary Fund; World Bank; World Trade Organization; institutional creativity; informal law-making; cooperation; globalization; Doha Development Round

* Opinions expressed are only those of the author and do not bind the WTO Members or Secretariat.

With crisis comes change, and change can certainly be chaotic. IGOs do face crises. But every crisis can also produce improved international governance. This editorial suggests that, contrary to the claims of some, several Intergovernmental Organizations (IGOs) have been able to creatively adjust to new challenges and exercise world leadership. There are different types of crises afflicting IGOs; some resulting from an external (global) risk(s) and others from political or institutional tensions within and around the IGO.

There have also been many types of solutions to those crises resulting from the synergy between the IGOs' members and the secretariat/institution. In fact, in some instances, the international community's demands on the IGOs exceeded those IGOs' initial responsibilities. Even when handicapped both institutionally and legally, many IGOs have proven that they are able to respond effectively to crises and to new global challenges. Without a crisis, it may be difficult to effect substantial change in response to evolving circumstances. Crisis can provide an IGO with the stimulus needed to make the appropriate institutional changes. We know from experience in domestic politics and from the insights of behavioural economics that people often are unable to overcome inertia until they experience a crisis. In the words of Machiavelli, as echoed recently by the American political figure Rahm Emanuel, "Never waste the opportunities offered by a good crisis."¹

Indeed, if we look back at our most successful international organizations' innovations, many followed crisis, or at least a period of stagnation that increasingly was perceived as such. A few examples discussed below suggest that a crisis for IGOs can lead to creative and successful adjustments and adaptations that contribute to improved international governance. We need to reflect further on the (legal) nature of such IGOs' actions so as to better understand conditions that facilitate those creative adjustments.

The United Nations system and the creation of several specialized international organizations resulted from the lessons of the Second World War's atrocities. The Bretton Woods institutions responded both to war and to economic crisis. Indeed, even more recent crises have provoked important institutional changes. In contemporary international relations, the emergence and consolidation of such new economic powers as Brazil,

¹) K.Q. Seelye, 'A Different Emanuel for One Church', *N.Y. Times*, March 17 2009, <theaucus.blogs.nytimes.com/2009/03/17/a-different-emanuel-for-one-church/>, 13 July 2011.

Russia, India and China (BRIC) and the alleged decline of the United States' "unipolar moment", has led many authors to emphasize the existence of a "global systemic crisis".² Some of these new challenges that we have seen in recent years include the financial crisis and food shortage crisis, the outbreak of diseases and epidemics, global warming, and the stagnation in trade negotiations. For the most part, IGOs have adapted effectively to the constant evolution of modern international relations. IGOs have put in place innovative forms of normative frameworks.

These new adaptations and the proliferation of IGOs and of IGOs' responsibilities have presented some additional challenges. Certainly, IGOs face challenges in adapting to particular structural developments such as the increasing institutional density and complexity of global governance due to the proliferation of competitive regimes, new actors and innovative modes of governance, as well as the reconceptualization of old, or emergence of new, global issues and challenges.

World Health Organization (WHO) performance in this regard has been impressive and informative. WHO has played a major and innovative role in preventing and controlling the worldwide spread of emerging and re-emerging infectious diseases in all sorts of new situations. A few years ago, WHO and the international community faced an outbreak of severe acute respiratory syndrome (SARS). WHO members did not promptly comply with their reporting obligations and the infection was spreading aggressively.³ Indeed, at the time, there was no adequate legal framework

²) The latter can be defined as a malaise in world governance existing since World War II and going well beyond the individual characteristics of any particular IGO. The malaise is further underpinned by the outbreak of the global financial crisis, the current food shortage, the outbreak of diseases and epidemics, divided environmental governance, the stagnation in trade negotiations, etc. While most of these crises are not entirely new, their scope and proportions are unprecedented. W. A. Kerr, *Conflict, Chaos and Confusion: The Crisis in the International Trading System* (Edward Elgar, Cheltenham, 2010), p. 10; A. Kay and O. D. Williams, *Global Health Governance: Crisis, Institutions and Political Economy* (Palgrave MacMillan, Hampshire, 2009); D. Zeroing, 'International Institutional Performance in Crisis' (2010) 10(2) *Chicago Journal of International Law* pp. 475–504; R. Wilkinson, *The WTO: Crisis and the Governance of Global Trade* (Routledge, London, 2006); E. Newman, *A Crisis of Global Institutions: Multilateralism and International Security* (Routledge, London, 2007).

³) See D. P. Fidler, 'Revision of the World Health Organization's International Health Regulations' (2004) *American Society of International Law Insights*, <www.asil.org/insigh132.cfm>, 13 July 2011.

available. Using the internet, the WHO Director General (DG) and Secretariat took the initiative and called for notifications from all sources, and started mapping instances of outbreak to provide the international community with the information it needed to coordinate in order to control the spread of the disease. The operation was a success, and the results were appreciated by WHO members who codified this practice as part of the new International Health Regulations (IHR). The new IHR now provide WHO with the explicit authority to respond to information received from non-governmental sources and to deal with virtually all urgent and serious public health risks, regardless of origin.⁴ These regulations struck a “balance between the protection of public health, its interference with international trade and fundamental human rights.”⁵

The role of the WHO Secretariat in the solution to this crisis is instructive. The challenges were both technical and political, but the fatal risks the world was facing called for immediate action. WHO DG Shaw responded to the urgency of the international situation responsibly and with leadership. WHO members understood that those actions were for their immediate and long-term benefit, and the organisation modified its framework regulation to codify this experience.

WHO’s response to pandemic influenza (AH5N1) led to a different type of solution – heavily negotiated by members. The dispute between Indonesia and WHO over the sharing of the influenza virus samples is illustrative of the balance that global health governance needed to strike between the need for “global health security” and the perception of certain States that they were disadvantaged by the development of pharmaceuticals that would be too expensive for them.⁶ This dispute triggered a mini-crisis. The Indonesian Government objected to the free sharing of the virus strains found on its

4) G. Luca Burci and R. Koskemäki, ‘Human Rights Implications of Governance Responses to Public Health Emergencies: The Case of Major Infectious Disease Outbreaks’, in A. Clapham et al. (eds.), *Realizing the Right to Health*, (Rüffer and Rub, Bern, 2009), p. 351. See D. P. Fidler, ‘From International Sanitary Conventions to Global Health Security: The New International Health Regulations’ (2005) 4(2) *Chinese Journal of International Law* pp. 325–329.

5) G. Luca Burci and R. Koskemäki, *ibid.*

6) See S. Rushton, ‘Global Governance Capacities in Health: WHO and Infectious Diseases’, in A. Kay and O. D. Williams (eds.), *Global Health Governance: Crisis, Institutions and Political Economy*, (Palgrave MacMillan, London, 2009), p. 75.

territory. It was concerned that pharmaceutical companies could obtain free access to materials shared through a network of national laboratories and research centers, also known as the Global Influenza Surveillance Network (GISN) and then file Intellectual Property (IP) claims on resulting products.⁷

The crisis provoked by Indonesian opposition boosted reforms within the WHO system, and many called for the establishment of a new and more transparent international mechanism that respected all relevant interests. The mechanism would provide fair access to vaccines and antiviral drugs, to the benefit of the originating State and developing countries in general.⁸

The solution was heavily negotiated by WHO members, assisted by WHO Secretariat experts. After four years of extensive negotiations within the framework of a working group coordinated by WHO, member states agreed in April 2011 upon a framework for ensuring that during a pandemic, influenza virus samples will be shared. The new framework, agreed to by members including Indonesia, is built around three objectives and includes a number of binding provisions for WHO and the entities within the GISN. Specifically, the framework provides for the equitable sharing of benefits, the expansion of global vaccine production capacity, and the enhancement of financial and technical cooperation to facilitate access to vaccines for developing countries.⁹

Technical health crises can be different from some of the more political and institutional tensions that may result from the geopolitics of today's architecture of international relations. For example, the dramatic events beginning in 2008 in global financial markets have provoked discussion of the need for reforms in economic governance, and in particular within the Bretton Woods institutions. These pressures gave birth to the start of important institutional adjustments and reorganizations. In 2008, the Executive Board of the International Monetary Fund (IMF) recommended a restructuring of the IMF's governance system in order to realign the quota and voting shares of member States to better reflect the new world

⁷) Cf. S. Vezzani, 'Preliminary Remarks on the Envisaged World Health Organization Pandemic Influenza Preparedness Framework for the Sharing of Viruses and Access to Vaccines and Other Benefits' (2010) 13(6) *The Journal of World Intellectual Property* p. 678.

⁸) Proposal made by Indonesia to the intergovernmental meeting held on 19 November 2007, annex to Doc. A/PIP/IGM/5, <apps.who.int/gb/pip/pdf_files/PIP_IGM_5-en.pdf>, 13 July 2011.

⁹) Vezzani, *supra* note 7, pp. 680–681.

economy. The reforms included a first round of *ad hoc* increases in quotas for the most under-represented members (China, Republic of Korea, Mexico and Turkey), and a second round of *ad hoc* increases to improve the representation of growing economies and of low-income countries.¹⁰ In March 2011, the Quota and Voice Reforms entered into force following the endorsement of the Amendment on Voice and Participation to the IMF's articles by 117 member States.¹¹

This type of crisis was different from that mentioned for WHO. The pressure of some member states to change the institutional voting system resulted from a “disconnect” between the previous scheme and the way the international economy really operated. The crisis and the solution found originated from changes in the international geopolitics and the challenge of the IMF (and the World Bank “WB”) was to adapt to this new international economic reality. The IMF staff worked informally on numerous alternatives for the recalculation of quotas, but its role is the final solution was more diffuse.

To some extent those institutional adaptations in the IMF (and the WB) are parallel to the disappearance of the traditional GATT/WTO QUAD (United States, Canada, EU, Japan) in favor of the G5 or G7 in the WTO informal decision-making process. Indeed the WTO has been able to offer an impressive level of flexibility and adaptation to different technical and political deadlocks or crisis.

Like many other IGOs, the WTO is driven mostly by member-initiated decisions.¹² A good example of such a member-driven solution was created in response to the AIDS crisis, when several WTO Members began challenging the disciplines of the Agreement on Trade-Related Aspects of International Property Rights (TRIPS) on patents. Members responded by negotiating the 2001 Doha Declaration on the TRIPS and Health which states that

¹⁰) ‘IMF Executive Board Recommends Reforms to Overhaul Quota and Voice’, 28 March 2008, *Press Release No. 08/64*, <www.imf.org/external/np/sec/pr/2008/pro864.htm>, 13 July 2011.

¹¹) ‘The IMF’s 2008 Quota and Voice Reforms Take Effect’, 3 March 2011, *Press Release No. 11/64*, <www.imf.org/external/np/sec/pr/2011/pr1164.htm>, 13 July 2011. Cf. ‘Position Paper of the Group of 77 and China on the Reform of the International and Financial Economic System’, *New York*, 26 May 2010, <www.un.org/esa/ffd/events/2010GAWGFC/6/Stmt_G77.pdf>, 13 July 2011.

¹²) WTO Members especially like to say that the WTO is a “member-driven” organization.

the TRIPS Agreement “can and should be interpreted and implemented in a manner supportive of WTO Members’ rights to public health and, in particular, promote access to medicines for all.”¹³ The Declaration also called for a solution for the incapacity of some members to produce sophisticated medicines domestically in order to benefit from the flexibilities relating to compulsory licenses. In response, Members actively negotiated a waiver for the relevant restrictions in TRIPS which was adopted in 2003¹⁴ and remains in force for each Member until an amendment to the TRIPS Agreement replacing its provisions takes effect.

During this above-mentioned “access to medicine” crisis, and although the Secretariat assisted WTO Members during the negotiation and drafting stages of the necessary instruments, it was the WTO Members – provoked, *inter alia*, by the criticisms of Médecins Sans Frontiers against the WTO TRIPS patent requirements – who initiated and negotiated a solution to the political crisis between the human right to health and their TRIPS obligations.¹⁵

A different type of solution was created in response to claims against the WTO for its alleged lack of transparency. Although it is difficult to label the calls as a “transparency crisis” (in good part because the Secretariat took the lead in that regard), pressures for increased transparency have been very intense since the WTO’s entry into force. In light of its institutional limitations, the WTO Secretariat reacted to the calls for increased transparency by making use of the provisions of an initial set of 1996 Guidelines¹⁶ on the WTO’s relations with NGOs that mandated the Secretariat to “play a more active role in its direct contact with NGOs.” In recent years, the WTO Secretariat has engaged with civil society groups on several fronts by opening Ministerial negotiations to a large number of NGOs, setting up an annual two-day Public Forum, creating a series of briefings including by the Doha Development Agenda (DDA) Chairs, and inaugurating WTO Induction Days. One could also mention the creative interpretation by the

¹³) WT/MIN(01)/DEC/2.

¹⁴) See the waiver WT/L/540 adopted by the GC WT/GC/M/82. S. Joseph, ‘Trade and the Right to Health’, in A. Clapham et al. (eds.), *Realizing the Right to Health*, (Rüffer and Rub, Bern, 2009), p. 362.

¹⁵) The 2/3 Members’ ratification needed for the entry into force of the TRIPS amendment has yet to be achieved.

¹⁶) Guidelines on the WTO’s relations with NGOs, WT/L/1162.

dispute settlement organs of the WTO, providing for *amicus curiae* and open hearings. In that context, the Secretariat is thus now supporting open hearings when agreed by the parties.

These technical and creative solutions were implemented by the Secretariat in interpreting the 1996 Guidelines. Those pragmatic innovations do not satisfy all calls for enhanced transparency and NGO participation, but they help to avoid or diminish crises and respond to calls for improved governance. Today, several of those solutions for increased transparency are part of the WTO's regular activities supported by budget allocations. This illustrates the Secretariat's success in introducing new norms of transparency acceptable to WTO Members. The nature of those norms set up by the WTO Secretariat and never formally ratified by its Members – although accepted in practice – call for further work on the informal law making by IGOs. International law recognizes the legal value of (subsequent) practices of States, but are we witnessing the development of what could be called “(subsequent) practices of the organization”?¹⁷

Another instance in which the WTO Secretariat found a creative solution took place during the 2008 financial crisis, which had serious repercussions on trade when there didn't seem to be any WTO tool available to deal with the situation. The WTO Director-General/Secretariat initiated two important processes: one on trade financing and the other aimed at monitoring Members' possible protectionist measures.

At the onset of the crisis, the WTO's Director-General convened the leading players in trade financing to try to find solutions to the lack of credit on the market. This meeting of the Secretariat Expert Group on Trade Finance (set up in 2003 to take lessons from the Asian crisis) was held in Geneva on 12 November 2008, and around 30 participants attended, including international financing and development institutions (WB, IMF), regional development banks, private commercial banks as well as credit insurance agencies (Berne Union). It was proposed to Members that the meeting concentrate on two main approaches: (1) finding collective short-term solutions, notably by mobilizing government-backed export credit agencies and regional development banks; and (2) developing technical measures to

¹⁷⁾ Recall that the International Law Commission is now working on draft rules on responsibilities for international organizations, trying to identify which of the rules of international law applicable to States' responsibility could be made applicable to responsibilities of international organizations.

allow better interaction between private and public sector players in the short and medium-terms. It was unusual for the WTO, which traditionally only maintains direct contact with governments, to reach out and deal directly with private agencies in connection with international trade financing in this manner. Because of the scope of the problems encountered, however, and the dramatic consequences of the unprecedented contraction of international credit, the search for a practical solution became essential. This tradition of pragmatism, inherited from GATT 1947, and the skill of the WTO's present Director-General, a former international banker, played an important role in putting these measures in place.

The initiative was welcomed by Members and yielded tangible results. For example, the World Bank, through its International Finance Corporation (IFC) trade finance facilitation program, together with regional development banks, doubled the maximum amount of trade finance guarantees, from US\$4 to US\$8 billion.¹⁸ This initiative was even taken up by the G20 at their London Summit when member States undertook to make US\$250 billion available to finance international trade over a period of two years.¹⁹

The second initiative, also prompted by the WTO Director-General, led to the establishment of a mechanism that monitors on a regular basis all trade and trade-related measures taken at the national level to deal with the crisis. Confronted with a risk of a resurgence of protectionist pressures generated by the impact of the global financial crisis, the WTO introduced the trade monitoring mechanism to enhance transparency and provide for a regular multilateral surveillance of Members' trade policy actions. To perform this monitoring exercise, the Director-General undertook to have the Secretariat collect all relevant information available and produce public reports describing in detail all trade and trade-related measures taken in the context of the crisis.²⁰ To perform its task, the Secretariat uses all possible sources of information; official inputs provided by Members themselves are the main source, and when the source is different, such as counter-notifications of the press, the relevant information is submitted to delegations for verification. Still today, the Director-General's trade monitoring reports are submitted

¹⁸) P. Lamy, 'The WTO and the Financial Crisis' (2009) *International Organization of Employers, Annual Labour and Social Policy Review* p. 4.

¹⁹) *Ibid.*

²⁰) Giving this responsibility to the Secretariat was quite innovative.

to the Trade Policy Review Body, in which all Members of the WTO and Observer Governments are represented.²¹

These new reports provide details of the various trade and trade-related measures taken by Members and Observer Governments in to the context of the financial crisis. The coverage includes both trade restrictive and trade facilitating measures. The reports also present information on the economic stimulus measures put in place to mitigate the impact of the crisis. For example, the reports include information on increases in import tariffs and non-tariff measures, States' rescue plans and other government support measures. These reports are not intended to judge the legality of such measures *vis-à-vis* WTO law, but rather to enhance transparency by making them "public", making use of peer pressure so that protectionist tendencies are contained.

At their Summit in London in 2009, G20 Leaders supported the WTO initiative. They renewed their commitment to resist protectionism, and called on the WTO, together with other relevant IGOs, to monitor their trade and investment actions and to report publicly the results; this commitment and call were renewed at subsequent G20 Summits, the last one being at Seoul in November 2010. They went even further and called on the WTO and other international organizations dealing with economics to continue to list and monitor the measures taken by States and to publically report every quarter how States were complying with this commitment. Thus, now a specific mechanism to monitor G20 measures is also in place at the request of G20 Leaders. The WTO together with the OECD and UNCTAD, regularly produce joint monitoring reports on G20 trade and investment measures.²²

²¹) Six reports have been submitted under this procedure so far. They were issued on 26 January 2009 (JOB(09)72), 20 April 2009 (WT/TPR/OV/W/1), 15 July 2009 (WT/TPR/OV/W/2), 18 November 2009 (WT/TPR/OV/12), 14 June 2010 (WT/TPR/OV/W/3), 24 November 2010 (WT/TPR/OV/13) and two are expected in mid-June 2011 and mid-November 2011. All these reports can be found at <www.wto.org/english/news_e/archive_e/trdev_arc_e.htm>, 13 July 2011.

²²) The first combined WTO-OECD-UNCTAD report to the G-20 was issued on 14 September 2009. Others came on 8 March 2010, 14 June 2010, and 4 November 2010. Two more are expected in 2011 at the end of May and end of October. These reports can be found at <www.oecd.org/document/48/0,3343,en_2649_201185_44909552_1_1_1_1,00.html>, 13 July 2011.

Those solutions, initiated by the WTO DG/Secretariat, and supported by other IGOs, were able to incorporate Members' active participation, which provided legitimacy to that new process. It was a unique opportunity for the WTO to confirm its role as a governance "enceinte". A question arises as to how to define the role of international law in this type of normative framework. Are we witnessing the creation of norms by international organizations themselves, and can these examples be qualified as "informal law making" or "informal practice of the organization"? Or are we faced with an informal power of initiative that in this specific case was accepted by member States?

Finally, some have suggested that the WTO is in crisis because its Members are not able to conclude the ambitious Doha Development Round they launched 10 years ago. This is said to be caused (in good part) by the changes that have taken place in the last 10 years in the relative economic and political power of relevant players. Yet notwithstanding some of the negotiating deadlocks, the WTO has been able to respond creatively (and pragmatically) to many specific trade-related needs. For instance, WTO Members agreed on the text of an impressive new government procurement agreement responding to urgent calls for tackling corruption.²³ Members have agreed on two new Transparency Decisions – one on Regional Trade Agreements²⁴ and one on Preferences²⁵ – introduced in those two sectors the benefits and the notification, transparency and monitoring practices of the WTO Trade Policy Review Mechanism (TPRM). If those institutionally creative solutions do not satisfy the expectations of the Doha Development Agenda (DDA), they are nonetheless evidence of the capacity of the WTO to adapt and respond to calls for changes in international governance. Members' trust in the capacity of the WTO to adapt to this new international governance was confirmed again in May 2011 when Members mandated²⁶ the WTO Secretariat to study and explore the relationship between exchange rate and trade – a subject matter highly sensitive internationally. On a more prospective basis, the challenge of the DDA is whether the WTO Secretariat and Members will be able to suggest adapted actions in the areas of the stalled

²³) GPA/W/313.

²⁴) WT/L/671.

²⁵) WT/L/806.

²⁶) WT/WGTDF/W/53 and press reports of the meeting that took place on 10 May 2011.

market access negotiations that mirror changes in international geopolitics, while capturing the positive results of other more technical negotiations through other creative instruments. In that context the previous GATT and the Uruguay Round negotiations developed a series of adapted and provisional schemes that may be used as models.²⁷

All the examples described above highlight new realities, one of which is the speed of changes and the need to respond effectively to new risks. Indeed “[e]vents and the law have entered into a speed contest.”²⁸ If some States take too long to integrate geopolitical changes in their economic behaviors, IGOs often appear to be capable to react quickly and efficiently to (some) crises and their action should lead us to reflect on the nature of the normative framework they put in place in such context.

In light of the insufficiency of domestic and regional measures to tackle certain diseases or financial collapse, the international community has placed even greater expectations on certain IGOs that are perceived as effective governance fora.²⁹ These expectations confirm that IGOs remain the primary fora for addressing critical global issues, and they show recognition of the IGOs’ potential to deliver greater benefits through changes in the architecture of international relations. In their capacity as “subject[s] of international law ... capable of possessing international rights and duties,”³⁰ many of these organizations have acquired a considerable degree of effectiveness when initiating actions to resolve international crises. As a result, their responsibility has grown and is now called upon to find solutions to conflicting agendas of the member States alongside the values and needs of the international community. IGOs have given birth to various types of solutions responding to these various challenges. The mixed roles

²⁷⁾ After all the GATT itself as well as the DSU and TPRM agreements were first adopted as mid-term provisional agreements.

²⁸⁾ R.-J. Dupuy, ‘La codification du droit international a-t-elle encore un intérêt à l’aube du troisième millénaire?’, in *Droit international à l’heure de sa codification: Études en l’honneur de Roberto Ago*, vol. 1, (Giuffrè Editore, Milan, 1987), p. 270.

²⁹⁾ The number of IGOs and their membership has increased exponentially in recent decades, affecting different dimensions of human life. Between 1909 and 1999, the number of conventional IGOs grew from 37 to 251. See Union of International Associations at <www.uia.org/statistics/organizations/ytb2999.php>, 13 July 2011.

³⁰⁾ ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, and ICJ Reports 1949, p. 179.

of the organizations and their members in developing such solutions vary depending on the technical or political nature of the matter at issue, the leadership situation, and the externalities or “public goods” problems in existence at the time.

The examples of IGOs’ successes in moving beyond the legal and policy frameworks originally imposed on them are non-negligible. In reality, the global challenges to which the IGOs are increasingly exposed constitute an opportunity for alternative and innovative solutions to their institutional designs and improved decision-making mechanisms. Innovative analytical approaches (such as the one developed by Global Administrative Law “GAL” and the Informal International Law Making “INLAW” projects) allow us to change our perceptions of the IGOs’ role. We can thus better appreciate that technical and political crises have allowed IGOs to develop more sophisticated normative capacities and responsibilities.