

recognize that the WTO dispute settlement system is a central element in providing security and predictability in the multilateral treaty system. They confirm that the system exists to clarify the provisions of the agreements "in accordance with customary rules of interpretation of public international law." But then they add a very important caveat, of which other tribunals besides those of the WTO system should take note: "Recommendations and rulings of the Dispute Settlement Body cannot add to or diminish the rights and obligations provided in the agreements" (Article 3 (2)). This appears expressly to exclude a meta-judicial approach. We should not assume that procedurally uncontrolled law-creation by international tribunals—even by the International Court of Justice—is necessarily a good thing.

We ask, "Are international institutions doing their job?" In answering that question, we must not forget that international institutions, whatever their sphere of activity, are nothing more than the collective emanation of their members. Their limitations and failings, no less than their scope and successes, are attributable to the states that compose them. If these institutions fail us, it is because our states fail us. And if our states fail us, it is because we—the individuals here and elsewhere—have failed to get our states to behave as they should. The democratic political process places a heavy responsibility upon every one of us to identify and promote the things that matter. Institutions are instruments; they are not independent actors.

#### THE SUCCESS AND FAILURE OF INTERNATIONAL ORGANIZATIONS

*By Thomas M. Franck\**

The Annual Meeting that we are here drawing to a close faces a paradox in the question that we are addressing: "Are international institutions doing their job?" The paradox is this: The more international organizations, as constituted in the past fifty years, succeed, the more they become the agents of their own failure.

Let us look first at the evidence of success, as it has emerged from these three days of international conference. First of all, there is the success in creating a global economy and an expanding market: the evolution of the GATT into the WTO; the growth of the European Community into the European Union; the growth of the U.S.-Canadian Free Trade Area into the NAFTA, and ultimately, we believe, into an Inter-American Free Trade Area; and the emergence of a free trade area in South America. As Professor John Jackson said in one of the panels, "Economics has moved to the top of the international institutional agenda, and there can be little question that it is, on the whole, a striking success."<sup>1</sup>

The second success has been the establishment of collective security and dispute resolution mechanisms. Naturally, one tends to focus on the problems, and what at least the media perceive as the failures. But there has been remarkable development in the past fifty years in the capacity of the UN Security Council and General Assembly to undertake and authorize operations such as those in the Persian Gulf, Namibia, Cambodia, Mozambique, and Haiti. There has been a remarkable evolution in security mechanisms by treaty (those dealing with nonproliferation, chemical weapons, nuclear test bans) and institutions (the International Atomic Energy Agency in particular) but also institutional mechanisms visualized by these treaties. Then there has been the evolution in changing circumstances, and the remarkable flexibility to evolve of institutions like NATO, ECOWAS and ASEAN.

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<sup>1</sup> See this volume p. 422.

And finally, as Judge Schwebel pointed out, there has been the growth in the role of the ICJ, particularly in third-world country participation in litigation (Chad/Libya, Cameroon/Nigeria, El Salvador/Honduras, and so forth).

These developments all seem to be successes, so why do I speak of the seeds of failure? We have also talked at this Annual Meeting about the extreme strains on the multinational state. It arises in secessionist movements—in the resurgence of neotribalism. In part, this originates itself in the international organizations' support of self-determination. At Versailles, Lord Keynes pointed out that the Wilsonian dream of self-determination elevates ethnic conflict over the more obvious benefits of trade and conviviality.

We have seen the growth, through the UN General Assembly, of decolonization as characterized particularly by Resolution 1514 (and these subjects have been canvassed by Professors Farer, Hannum and others in earlier panels). This trend has been accelerated by the inherent weakness of the multinational state system—what Ernst Gellner refers to as the civil society—or Lockean social-contractual society. It was Cavour who said, after the Risorgimento, "Now we have created Italy. We must now create Italians."

The multinational state is a creative but fragile phenomenon. The ability of that fiction to survive the ever-present militation back toward tribalism depends on its ability to provide for deeply felt needs—and these needs are in the form of economies of scale and security. What has happened as a result of the success of international organizations is that the regional as well as the international ones are increasingly providing the economies of scale and the bases for collective security. That, of course, is not the only reason for the collapse of multinational states that has been such a recurrent phenomenon, particularly in the past six or seven years—but it is an underlying structural problem. Think, for example, of Belgium, with its Walloon and Flemish groups on the verge of secession. Would they be willing to secede if both groups did not know that they could remain in the European economic and social space—and also in the NATO security space? I doubt it very much. In Canada, the issue of whether Quebec could remain in the North American Free Trade area is important with the Quebec nationalists trying to reassure the citizens that that secession would not mean loss of any economic or security privileges provided by multilateral organizations.

As global institutions succeed and we take pride in their success, they become centers for decisions affecting access to goods and services. And, as the system is currently set up, only states can have voice in that distributive negotiation. You must be a state to have a place at the table, whether it be that of the World Bank, the General Assembly, the UN Development Programme, the Universal Postal Union or whatever other international organization. This is a major factor in promoting the ever-present tribal instinct into a clever political strategy.

Now, why does all this endanger the work of international organizations? Why are these the seeds of possible failure? UN Secretary-General Boutros-Ghali himself has warned of the imminence and dangers of a world of two thousand states. Those of you who participated in the ten year-long negotiations on the Law of the Sea Treaty will recall how extraordinarily difficult it was to engage in any legislative activity with approximately 150 parties. Think of trying to mobilize an international conference that would reach any conclusions—let alone create a working treaty—if there were in fact a community of two thousand states.

But that seems to me to be only one aspect of the problem created for international organizations themselves by the capacity of success to transform itself into failure. A second aspect is much more subjective. It is my belief that the multinational state is the training ground for good global citizenship—that is, that in the multinational state we learn the techniques of accommodation of a political system of aggregation, of trade-offs, of compromise, that prepare us for life on a multinational planet.

Ernst Gellner's concept of the civil society is an essential training ground for life in a multinational world. If the world breaks up into some two thousand states, they will be tribal states in which conformity and certitude—not compromise and accommodation—will be the leitmotifs.

Well, what to do about it? It is not easy to answer that question, particularly not in a few minutes. But let me suggest this: It seems to me that the international organizational system built on the notion of the state as the actor was fine when what was being done by these organizations consisted mainly of negotiating war/peace issues and a few friendship, cooperation and navigation treaties. Now that international organizations have become the cockpit of real political issues, real division of goods, and real allocation of services, we need to create an international organizational politic in which there is real voice, not just for the Executive branches of states (the current arrangement), but also for all kinds of interest groups *not* represented by states' Executive branches—in which, for example, the native peoples of North America would be able to find common cause with the native peoples of other countries, and agricultural interests would be able to aggregate across national boundaries. This has been understood in the European Union, as more power has gravitated toward Brussels. The Europeans have also thought about the necessity of creating an institution in Strasbourg that accommodates the European politic in the form of the European Parliament. Something of that sort must be considered in the international sphere, unless we are to continue the cycle in which success tends to lead to failure. My own preference would be to start very small, with the notion of amending the UN Charter to create a two-chamber General Assembly. (The General Assembly has little power, except over the UN budget.) One chamber would continue to be constituted as at present, with governments' consent necessary for any initiatives taken; but the other chamber would be made up of representatives directly elected.

Do I think that this is going to happen "tomorrow"? No. Do I think that China would be perfectly happy to enter into an electoral system immediately? No. Do I think that there would be problems about how many Chinese there would be in a direct-election system? Yes. I understand that these problems exist, and that there may be other and better solutions than the one I have put out for you; but I do believe that the democratic deficiency of our international institutions constitutes a problem that, if not addressed, will continue to make success the father of failure.

#### DISCUSSION

MICHAEL BYERS\*: I would like to make a general point about the topic of this conference, "Are international institutions doing their job?" My point concerns the definition of an international institution. I find it striking that Charlotte Ku spoke of the ASIL as an international institution, which is not the same kind of organization that the other commentators were talking about. We can think of international organizations as existing across a broad spectrum in terms of their detail—their degree of organization. Professor Franck's comment that the international system could disintegrate into several thousand tribally constituted states is an important one in this context, because even the state, I would suggest, can be an international institution in this sense: if it has multiple peoples within it, it reflects a degree of organization of activities among peoples and with the rest of the world.

Certainly the European Communities are part way toward constituting a state—but we still talk about them as an international institution. And, going to the other end of the

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spectrum, is the G-7 group of nations an international institution? Is a collection of states that merely meet regularly without a secretariat an international organization? Are regularly scheduled informal meetings of ambassadors in New York or elsewhere an international institution? Is it perhaps even true that the *process* of customary international law is an international institution? We must be careful not to assume that only international organizations in the sense of the United Nations are international institutions. And perhaps what we have been talking about, and the conclusions that we have reached, apply on a much wider spectrum than we have imagined.

Professor STERN: Your comments are apt. Naturally, some problems of definitions are raised—in fact, I mentioned some of them in my written paper, although there was not time in my oral presentation to discuss them. The NGOs are of course part of the international system. There are problems in the relations between NGOs and international organizations. Also, as mentioned in the WTO panel, nowadays the WTO has guidelines for relations between itself and the NGOs. But we panelists decided to concentrate on the central issue: Are international *institutions* doing their job?

Dr. KU: Your remark is a good one, and this issue arose in the panel on transparency, which discussed how private actors—NGOs, international standards organizations, and others—may also have seeds of failure planted in their success. That is, when they take part in negotiation and drafting of government positions. The successful participation of nonstate actors seems suddenly to have resulted in a lack of accessibility, as negotiating sessions have been held, for example, in private, informal sessions rather than public and formal sessions. So the conclusions that Professor Franck gave us about success being of a certain limit does go across the entire spectrum of international institutions.

JANMINE SHEN:\* Professor Stern, in terms of sovereignty, if we look at the entire globe, do we see that states are really moving toward giving up their sovereignty? The regional economic integration, and perhaps political associations, do not suggest to me such a trend, as yet. I think that while a state system exists, sovereignty will continue to be part of the international system.

You said that it is no longer true that states can choose their own political systems, and also that modern states are democratic and capitalist. Although I am not against or for any particular form of state system, I wonder whether it would be against the very principle of democracy to deprive the state of its right to choose its own political, economic, social and cultural system.

Professor STERN: First, as to states giving up their sovereignty, I did not say that this is the unique trend. There is the shrinking on one side, but as I also noted there is evidence of states' reaffirming their sovereignty. I quite agree that in this globalization of politics, the state should go on having great importance. Last year, I gave a talk in Tokyo on "The State in the Twenty-first Century." The main idea of the colloquium was that at present other agents are in the ascendancy over the state. But my argument was that the state is the last unit of cultural sovereignty—that is, only in the state do we have a community in which peoples can identify themselves. I mentioned a few roles that only the state can play. It can be arbitrator between market and society: I think, in short, that the state is the last defense against imperial control of the world by economic powers. The state is also the guardian of nonmercantile values, such as cultural values, democracy, human rights, and solidarity among peoples. States should be the reservoir of values. Even if there is a trend toward the end of sovereignty, I think that it should be fought against. As to your second point—What is a legitimate state?—I just wanted to show the emerging consensus on what a good state is.

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FREDERICK M. ABBOTT:\* Professor Franck, yesterday in the Regional Integration panel, we were pressing the panelists to reflect on the importance of increasing the parliamentary involvement in the regional integration process. We received a very clear message from both the North Americans and the Southern Cone representative that in the current state of affairs, it must be the executives who reflect the political will and meet quickly and efficiently to "bring things together." When we go back to our parliaments—even in the Mercosur arrangement—we find a break in the movement forward. So, for the time being, at least, we should look not to increasing institutionalization and structure, but rather to the rapidly moving progressive executive involvement. The reason that resonates is that in the United States in the integration process, our Congress is not progressive or forward-looking. And if we look to the European Union in the past few years, we see that the Parliament has acted not as an impetus but as a brake. We end up with a conundrum: as we move toward this parliamentary legitimacy and democratization, we may also find a conservatism that raises its own problems. So I ask you to reflect on the tensions between those two movements.

PROFESSOR FRANCK: Let me make two points in reply. The people who were speaking yesterday were responsive to the status quo arrangement. I have never yet met a cabinet minister who didn't have a similar view of his/her own parliament. Parliaments are a real nuisance to people trying to govern. That is the perfectly natural short-term view. But the longer-term perspective is that where there is no such parliament, sooner or later the executive process is derailed by some other form of resistance—whether it be a tax revolt or a simple refusal to serve in the armed forces in a conflict that the Executive branch has gotten the citizenry into; and so, people with a longer-term perspective know that they have to bring their *polis* along, nuisance though it is.

The second point is that what is needed is something more sophisticated than a reference back to national parliaments. Yes, the NAFTA negotiations went much better because, as part of the "fast track" deal, Congress was involved every step of the way in the Uruguay Round. That is evidence of the fact that, if you bring your legislature along, you are more likely not to have trouble; and if you ignore the legislature for long, you store up difficulties.

But I am not thinking primarily of a once-removed *polis* in which the national parliament becomes a kind of check on executive participation in the international organization process; I am thinking of some direct input by a global *polis*, in which, as in Europe, Germans, for example, think of themselves not only as Germans, but also as Europeans—and they also vote for members of the European Parliament. Now, that Parliament is not very effective or powerful, but it is appropriate for this stage of history; it is the beginning of a *polis* in which German Social Democrats come to think of themselves as having some common interests with their French equivalents, their Polish equivalents, with the British Labour Party, and so on. And the same is happening with the Christian Democrats and other conservatives in Europe. So, there begin to develop some substratal formations of interest aggregations that are not purely the state.

CYNTHIA LICHTENSTEIN:\*\* This question is for Professor Lauterpacht and Professor Franck. Professor Lauterpacht, you were very clear that you are against judicial lawmaking. Professor Franck, you suggest that we think about restructuring the international lawmaking system to, in effect, give what would be called in Europe a prerogative—undefined as yet—to an international parliament. We have seen in the European system that the nascent European Parliament has needed the European Court of Justice to protect its prerogatives. And there are decisions of the ECJ that do so—that say to the Council,

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"You have not thought about the role of the Parliament here." And we must let them do this—work out the difficulties among the institutions. If we do not have a court—or if we say dispute resolution organs may not have the "judicial" authority to make law—who, then, is the decider among our international institutions?

Professor LAUTERPACHT: I should begin by saying you are mistaken in interpreting the manner I express myself as absolute opposition to judicial lawmaking. A certain amount of such lawmaking is inherent in the process and is unavoidable. While you were speaking, I looked back at what I had actually said; I was pleased to find that I used the words, "procedurally uncontrolled," so that my sentence read: "We should not assume that *procedurally uncontrolled* law creation by international tribunals, even the ICJ, is necessarily a good thing."

I believe that the element of procedural control is not just a matter of words. It is very important that judicial bodies, when (as they see it) they are developing the law, should do so on a basis that is itself predictable. The concept of "meta-judicial" upon which I hung my observations troubles me because we have no idea of what elements go into this meta-judicial approach. To what extent is a tribunal entitled to take into consideration its own beliefs as to the underlying factual or economic circumstances? Is a tribunal entitled to ask the parties to declare to it what each party regards as the true economic factors, let us say, that underlie the dispute? Or is the tribunal simply entitled to invent them? That is why I use the words "procedurally uncontrolled." If a tribunal is to perform this function of making law, it must do so in a manner that is itself open to a form of objective review. I do not necessarily mean review by an appellate body; but the process ought to be, to use the current buzzword, "transparent." This is not the first time I have expressed this opinion, which I hope is not regarded as a reactionary one. As long ago as 1977, when I gave a talk on "Equity Equivocation, Evasion, and Evolution in International Law," I suggested that this introduction by the ICJ in the *Continental Shelf* cases of the concept of equitable principles was not only novel but also a bit dangerous, because the Court was going to make law without giving the parties the opportunity to debate the evolving law. One of the most interesting aspects of the GATT procedures that have evolved is the notion that a WTO tribunal (or a NAFTA tribunal) should first give an interim report to the parties. And the parties should have a opportunity to comment on or even criticize that interim report prior to the adoption of a final report by the tribunal.

The second point is that we should distinguish clearly between judicial *lawmaking* and judicial *review*. The situation that you mention, of the role of the European Court in relation to the European Parliament, is in part a situation of judicial review. I am very much in favor of judicial review; I have never understood, for example, the disinclination of states to permit the ICJ to review the validity of decisions—even those of the Security Council. Indeed, people often forget that the Court itself carried out a significant process of judicial review thirty-seven years ago in the International Maritime Consultative Organization Advisory Opinion, when the Court considered the validity of an election carried out at the IMCO Conference in 1958. So, again, one must distinguish between review and lawmaking. I favor the former, if the appropriate power is given; and I do not oppose the latter, provided it is a controlled process.

Professor FRANCK: Just a brief comment on Professor Lichtenstein's point: In the *Lock-erbie* case, the Libyans say that the Security Council exceeded its jurisdiction. It would be much easier for the Court to respond to that and assume jurisdiction in that case if the Australians had won in San Francisco, and provision had been made in the UN Charter for judicial review. The fact that it was not made means that although the ICJ is the principal judicial organ of the United Nations, its results are harder to predict, and the ICJ judges are less willing to go out on a limb.

Professor JACOBSON: We will close by having all remaining speakers from the floor give their questions and comments, and then our panelists will give their responses.

JEREMY P. CARVER\*: My remarks are directed to the concluding words of Professor Lauterpacht, to the effect that international organizations are not independent actors. I sympathize with the need to remind ourselves of the responsibility we all have for international organizations. But it is a fallacy that underlies much of the weakness we inflict on these organizations, *not* to recognize their complete independence. Unless they are understood to be completely independent, they will not do their job properly—because their job is to carry out functions given to them as independent actors. In listening to the remarks this morning, I was struck by the constant counterpoint of reference to success in the economic sphere and relative lack of success in other spheres. The explanation for that is simple: In the economic sphere, we are talking about different *motives* from those active in general politics; we are talking about market forces, which operate in a much more powerful, direct way for implementation—so that the organizations that operate in the economic sphere are inevitably clearer and more successful. The number of participants and their motives are much more sharply defined, and the needs are clearer. In the more general political sense, controlling the public will—the body politic, as Professor Franck said—is much harder to achieve, by new democratic institutions or whatever means.

JEANNETTE TRAMHEL:\*\* Professor Lauterpacht, you mentioned a study on the review of the multilateral treatymaking process. At last year's General Assembly of the Organization of American States, a resolution was adopted that the OAS Secretariat undertake a review of the entire Inter-American treatymaking process. As we undertake our review, of course we have been referring to that study. What can we do differently this time, to ensure that our study will be more effective?

Professor M. J. PETERSON:\*\*\* The problem of assembling the voice of the various peoples around the world is more complicated than has so far been indicated. The models have been drawn on the notion of geographical representation; if this is the basis of an elected chamber, presumably it would be somewhat like the European Parliament, which is also drawn nationally. At the same time, in the European Union there is a sectoral, almost corporatist kind of representation, because all the European interest groups have aggregated themselves and have lobby offices in Brussels to push their interests with the various parts of the EC Commission. It seems to me that an analogous process is at work in the UN system, where the various specialized agencies and negotiation forums also attract those actors most interested in what they are doing, so that, for example, doctors go to the World Health Organization. But there is also a democratic deficit there, because it is easy for those communities and those who are active to become an elite themselves, who may not be accountable to others in their own "sectors." It seems that there are several forms of democratic deficit in operation; I would be interested in Professor Franck's reflection on this.

THOMAS VILES:\*\*\*\* Before the first international institution—in fact, before the first nation—there were people. And before we were international lawyers, we were people as well. This may be more a provocation than a question, for which I apologize. I think we have been circling around an issue, but not jumping on it. Democratic participation in international institutions is very important. Since Emmerich de Vattel (probably the villain in the piece), states have been the foundation of international institutions, and people

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have not really mattered. Of course, with the end of the Cold War and the globalization of markets, the markets have become a great impetus for the extension of international institutions' influence. Professor Franck has spoken of the need for vindication of democratic rights to give international—indeed national—institutions legitimacy. I suggest that there is another kind of right, neither particular nor democratic—in fact, it is probably anti-statist, and anti-institutional in general. This is the group of due-process rights. Are we not at the point where international scholars and lawyers should be looking at the need to create an effective international bill of rights—a set of guarantees, so that *individuals* and peoples will feel comfortable with the extension of international institutions into their lives?

MARY PAGE POLLY:\* I come to this conference from a different angle—as a practicing private attorney. The overall message to me is that the international organizations are perhaps misjudging where they should look to assess their success. Professors Franck and Lauterpacht touched on that briefly, and I was excited to hear that, because these organizations are like the canvas upon which the world works, and upon which the rest of the organizations—the businesses, the people, the tribal communities—paint. An international organization should measure its success, not on the greatness of the canvas, but on the overall success of the painting. I am hearing for the first time, at this meeting, people addressing the repercussions to those organizations—the tribal nations, the big businesses and the marketplace. What it really comes down to is not what, for example, the WTO does, but how it affects a business. The issue is less about the canvas than about the pain and the resultant painting. I ask each panelist, How do you feel the organizations are doing in creating a canvas for the rest of the world to paint upon?

Professor JACOBSON: Professor Stern, you were promised the last question.

Professor STERN: Professor Franck said that one of the successes of international organizations has been the creation of a global economy. But I think that one of the *problems* of these organizations will be to rule these market forces. I am not sure that the creation of the global economy comes from the international institutions—but they do indeed have to rule it.

Professor JACOBSON: We will now have a quick sweep of the panel to answer all these questions and comments from the floor.

Professor LAUTERPACHT: It important to distinguish between organizations of states meeting in general conferences or in particular representative bodies. I can agree with Mr. Carver that the Secretariat must be in law independent of the states and that its capacity to promote initiatives within the framework of the Organization is immensely important. To that extent, I agree that the Organization must be independent of its members. But beyond that, I cannot go along with him, because the Organization is an accumulation of representative organs. Therefore, it can do no more than those representative organs (consisting of the member states) permit it to do.

Turning to Ms. Polly's point, until I see the Secretariat as preparing the canvas and to some extent putting the paint on it, I will believe that it is up to the states to draw the configuration that appears on the canvas.

Professor KU: Ms. Polly's point that the very existence of international institutions has implications is well taken—and not only their existence, but also the ways in which they act. This continuum is of course in the full context of international politics—states, institutions and individuals. I think all of this complicates the exercise enormously. But that yields both good and bad, and perhaps it is our understanding of the good and bad implications that will lead us to a bit of wisdom on the subject.

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PROFESSOR STERN: One of the comments from the floor was that "before we were international lawyers, we were people." I think that we are going to become people more and more. I want to refer especially to this Annual Meeting's first panel—Global Networks, New Technologies and International Law. This panel drew the portrait of the new cyberworld, and the expression "global democracy" was used. This will be a world in which people are instantly in touch with each other, without any state borders. The idea of a world community will be increasingly important, and developing the idea of an international bill of rights—of how best to use the Internet, the Worldwide Web and cyberspace in general—is one of the big tasks of the next few years.

PROFESSOR FRANCK: Let me see if I can combine remarks by Professor Peterson, Tom Viles, and Professor Stern. It is implicit in what I said and evident from the facts that, as the international system succeeds in developing what are essentially executory organs, it is not only necessary to deal with the lack of a *polis* to support it; it is also necessary to develop what Mr. Viles refers to as a due-process regime. (I am glad that he pointed this out, although it is too late for us on this panel to discuss it at length.) Professor Peterson suggests that NGOs at first filled an aspect of the democratic deficit—the absence of a *polis*. There still is nothing else to connect the people to the executory organs of the international system. Thus, the NGOs are the "next best thing." But the NGOs are simply two things: (1) American, British and French—that is, nonuniversal, Western, developed-country institutions; (2) special interest groups—what Madison would have called *factions*—and we know how he felt about their danger to democracy. So, something must be done to redress the imbalance that will eventually be created by what are essentially special interest lobbies in special agencies—whether a transnational corporation or Amnesty International, for example—to act in an executory capacity in areas of special interest to these agencies. To the extent that they lobby, they must be made transparent, and perhaps they must even be controlled.

Finally, let me respond to Professor Stern's point. Yes, I believe that part of the responsibility of the international executory system is not just creation of markets, but also maintenance of their openness (whether this mechanism is called antitrust or anticorruption). The international system will have to play a role in this, and countries are trying to multilateralize those aspects of the process. Evidence of the success of international organizations as an idea is that one does think that it makes a lot of sense to try to bridge gaps between national antitrust practices—to try to universalize environmental protection laws; to try to bring into coherence anticorruption laws—if only because of the "free rider" problem. That is, if we do not institutionalize these rules, the bad will tend to drive out the good and thus interfere with the free market.

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