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Creating Legitimacy for Private Rules: Explaining the Choice of Legitimation Strategies in Transnational Non-State Governance

Philip Schleifer

European University Institute
Robert Schuman Centre for Advanced Studies
Global Governance Programme

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Abstract

Transnational non-state governance supplies a growing proportion of the rules and regulations that govern the global economy, raising pressing questions about its legitimacy. Cutting across established perspectives, this article adopts the empirical approach of legitimation research to explain variation in the choice of normative strategies to create legitimacy for private rules. To this end, it reviews existing explanations of institutional design in private governance research and integrates them into a common framework of analysis. This framework is put to work in three in-depth case studies, tracing the formation of multi-stakeholder governance in the field of sustainable agriculture – currently the most dynamic site of transnational non-state institution building. The case studies reveal that a full explanation of variation in the use of participation-, expert-, and procedural fairness-based strategies needs to consider both the internal mechanisms of institutional choice as well as differences in the political environments in which these choices are taken.

1. Introduction

Transnational non-state governance supplies a growing proportion of the rules and regulations that govern the global economy. Today, private rule-makers set behavioural norms and standards for a wide range of industries and issue areas, raising pressing questions about their legitimacy. The existing literature on the topic falls fairly neatly into two camps: one normative, the other empirical in its orientation. Scholars working in the normative tradition theorize and evaluate private governance from the vantage point of democratic theory, in particular, deliberative democratic theory has become an important model (e.g., Dingwerth, 2007; Bäckstrand *et al.*, 2010; Schouten *et al.*, 2012). Empirically oriented scholars, on the other hand, define legitimacy in relational terms. From this perspective, legitimacy is granted or denied by an institution's audience in a dynamic process of legitimation, and scholars study how private rule-makers can gain, maintain, or lose it (e.g., Cashore, 2002; Bernstein and Cashore, 2007; Bexell, 2014).

While sharing a common interest in the concept of legitimacy, the normative and empirical literatures have developed largely in isolation from one another. To bridge this divide, Sigrid Quack (2010) has proposed a cross-cutting perspective, which explores the normative dimension through the views and strategies of real actors. Since then, some progress has been made in explaining these choices, but the causal mechanisms underlying them are not yet fully understood. Several authors have examined institutional pressures and whether or not they push private governance organizations to emphasize inclusiveness, expertise, and procedural fairness in their overall designs (Dingwerth and Pattberg, 2009; Overdevest, 2010; Fransen, 2012; Marx, 2014). Others describe how the preferences of institutional entrepreneurs and processes of learning and intergroup bargaining matter in these contexts (Auld *et al.*, 2007; Abbott and Snidal, 2009; Conzelmann, 2012). But studies that systematically combine the analysis of external pressures with how institutional choices are made on the inside of these arrangements are still missing.

To fill this gap, this article reviews arguments about the design of private governance and integrates them into a common framework of analysis. This framework is then put to work in three in-depth case studies, tracing the formation of multi-stakeholder initiatives (MSIs) in the field of sustainable agriculture – recently, the most dynamic site of non-state institution building. MSIs are often referred to as the gold standard of private governance. However, as this article will show, they as well vary greatly in the choice of costly legitimation strategies. The cases reveal that a full explanation of variation in the use of normative legitimation strategies needs to consider both the internal mechanisms of institutional choice as well as differences in the political environments in which these choices are taken.

The remainder of this article is structured in five sections: the next section introduces the concept of legitimacy, explaining the distinction between normative and sociological approaches. This is followed by a brief description of the variety of private governance and legitimation strategies that exist in the real-world. Then, the explanatory framework is developed, followed by the case studies. A final section concludes.

2. The legitimacy of private governance: two perspectives

In their landmark study on *Private Authority in International Affairs,* Claire Cutler and colleagues (1999, p. 16) observed that "private actors are increasingly engaged in authoritative rule-making that was previously the prerogative of sovereign states". These and the findings of other studies (e.g., Biersteker and Hall, 2002) have sparked much scholarly debate about the legitimacy of non-state transnational governance. As mentioned in the introduction to this article, existing studies are often either normative or empirical in their orientation. Buchanan and Keohane (2006, p. 405) describe the difference between the two as follows: to say that an institution is legitimate in the normative sense is

to assert that it has *the right to rule.* On the other hand, an institution is legitimate in the sociological (empirical) sense when it is widely *believed to have the right to rule.* The difference appears subtle at first, but has important implications for the type questions being asked.

To assert that a non-state institution has *the right to rule* requires a normative theory of legitimate private rule-making. Such a theory needs to specify and justify standards against which real-world arrangements can be evaluated. With its focus on preference aggregation and principal-agent accountability, liberal democratic theory is widely considered unsuitable for this purpose. Mainly, that is because the transnational realm lacks a *demos* or principal and is characterized by a multitude of actors and diffuse authority structures instead (Dryzek, 2000; Dingwerth, 2007).

In search for substitutes, scholars have proposed alternative standards for normatively evaluating the legitimacy of transnational governance. The three most important are: inclusiveness of participation, expertise-based effectiveness, and procedural fairness (Quack, 2010, p. 7). As described by Sigrid Quack, these concepts find some common ground with what Fritz Scharpf (1999) and Risse and Kleine (2007) define as input, output, and throughput legitimacy. Most influential among students of private governance have been input-oriented approaches, in particular, deliberative democratic theory (Dingwerth, 2007; Bäckstrand and Khan and Kronsell and Lövbrand, 2010; Schouten and Glasbergen and Leroy, 2012). In a nutshell, deliberative democrats believe that "getting the process right" can help to revitalize and restore democratic legitimacy (Dryzek, 2000). Strongly influenced by Habermas' theory of communicative action, inclusiveness of participation is the key procedural criterion of the deliberative approach. It requires that all those affected by a rule are given an equal opportunity to participate and express their voice in the rule-making process. In addition to input-oriented approaches, scholars have studied the output legitimacy of transnational non-state governance (e.g., Kalfagianni and Pattberg, 2014). This line of research suggests that the legitimacy of private governance organizations depends, at least partly, on their ability to provide effective solutions to policy problems. This problem solving capacity is often seen as a direct function of their technical, professional, and bureaucratic expertise. Finally, with regard to throughput, procedural fairness and impartiality are sometimes considered as evaluative criteria. In this context, quasi-judicial conflict resolution mechanisms are believed to enhance the normative legitimacy of transnational non-state governance (e.g. Marx, 2014).

Empirically oriented scholars, on the other hand, are interested in the question why and when non-state institutions are *believed to have the right to rule* (Cashore, 2002; Bernstein, 2011; Bexell, 2014). The main difference is that, from this perspective, legitimacy is defined in relational terms. It is granted or denied by an institution's audience in a dynamic process of legitimation. In the words of Steven Bernstein (2011, p. 19): "legitimacy results from the interaction of the community of actors affected by the regulatory institution (…) that prevail[s] in the relevant issue area".

To analyse processes of legitimation in the area of private governance, Benjamin Cashore and collaborators (2002; 2004) draw on the work of Mark Suchman (1995) and distinguish two main types of legitimacy: pragmatic and moral legitimacy. Pragmatic legitimacy is based on actors' self-interest, including calculations of material well-being. An institution is granted pragmatic legitimacy if it satisfies the substantive demands of its most immediate audiences'. The concept loosely corresponds to March and Olsen's (1998) idea of legitimacy based on the "logic of consequence". Moral legitimacy, on the other hand, is granted based on audiences' more resilient normative beliefs as to whether supporting an institution is "the right thing to do" (Suchman, 1995, p. 579). This dimension of Suchman's framework is broadly aligned with March and Olsen's (1998) notion of the "logic of appropriateness".

In Suchman's strategic approach – and later applications of his framework to the study of transnational non-state governance (Cashore, 2002; Cashore and Auld and Newsom, 2004) – legitimacy is seen as an organizational resource that private rule-makers can and need to manage. Their work has shown how the ability of private governance organizations to gain pragmatic and

moral legitimacy critically depends on the successful execution of legitimation strategies (Cashore, 2002).

Surprisingly, while sharing a common interest in the concept of legitimacy, the normative and sociological approaches have developed largely in isolation from one another. To bridge this divide, Quack (2010) has proposed a cross-cutting perspective which explores the normative dimension through the views and strategies of real actors. In a special issue of *Socio-Economic Review*, she and her collaborators show how transnational governance institutions vary in the degree in which they deploy participation-, expertise-, and/or procedural fairness-based strategies. While some progress has been made in understanding these institutional choices, the causal mechanisms underlying these decisions are not yet fully understood. The main goal of this article is to advance this research in the field of transnational non-state governance. To this end, the next section describes the institutional diversity that exists in this area. With a focus on MSIs – the gold standard of private governance – it then explores and compares the choice of legitimation strategies in three in-depth case studies.

3. Varieties of private governance

Transnational non-state governance has diffused rapidly and widely in the global economy. In areas such as environmental protection, labour rights, and technical standards, it now provides a rapidly growing proportion of the rules and regulations. As described by Abbott and Snidal (2009, p. 87): "the state is far from the only game in town, and may no longer be the most important game in town". While the decentralized evolution of private governance makes it difficult to keep track of its numbers and exact configurations, existing studies allow insights into the overall trend. Using data from the Ecolabel Index, a database that lists over 450 voluntary sustainability standards, Axel Marx (2014, p. 411) describes how the number of private governance initiatives in this area has increased almost nine fold since 1990.

Not surprisingly, this has sparked much debate about in the legitimacy of private rule-making. While some scholars warn that outsourcing regulatory functions to private actors will lead to "less democracy and accountability around the world" (Lipschutz and Fogel, 2002, p. 121), others are more optimistic, seeing these new modes of governance as part of a "deliberative turn" in global environmental politics (Bäckstrand and Khan and Kronsell and Lövbrand, 2010). While this debate is unlikely to be settled anytime soon, a closer look reveals a great diversity among private governance organizations. On a very general, three main types can be distinguished: industry initiatives, civil society initiatives, and MSIs (see Table 1).

While exact figures are hard to come by, industry initiatives clearly make up the lion's share of transnational non-state governance (Abbott and Snidal, 2009). Under political pressure to make their value chains more responsible, big brand companies have been very active in mobilizing around sustainability issues and to set standards in this area. However, without meaningful participation from civil society and with no effective oversight from the state (often a problem in the context of transnational production), business self-regulation remains problematic. Most importantly, there is the risk of regulatory capture – that is, "the control of the regulatory process by those whom it is supposed to regulate" (Mattli and Woods, 2009, p. 12). While civil society initiatives are widely regarded as more neutral and unbiased standard-setters, they as well suffer from a lack of representativeness. As pointed out by Abbott and Snidal (2009: 61) NGOs often pursue their own "private values" and do not necessarily represent the public interest.

Table 1 Varieties of private governance

Sector	Industry initiatives	Civil society initiatives	Multi-stakeholder initiatives
Agriculture	Global G.A.P, Sustainable Agriculture Initiative, Field to Market	Sustainable Agriculture Network, Rainforest Alliance	Roundtable on Sustainable Biomaterials, Bonsucro, Roundtable on Responsible Soy
Apparel	World Responsible Apparel	Clean Cloth Campaign, Workers Rights Consortium, Good Weave International	Fair Labor Association, Fair Wear Foundation
Fishery	Global Aquaculture Alliance, International Fishmeal and Fish Oil Organization	Friends of the Sea	Marine Stewardship Council, Aquaculture Stewardship Council
Forestry	Programme for the Endorsement of Forest Certification		Forest Stewardship Council
Mining	International Council on Mining and Metals, Responsible Jewellery Council		Initiative for Responsible Mining Assurance
Tourism	Tour Operators Initiative, Sustainable Slopes Program	The Travel Foundation	Global Sustainable Tourism Council
Energy	Global Sustainability Electricity Partnership, Equitable Origin	Ceres Principles	Hydropower Sustainability Assessment Protocol

Given these problems of schemes dominated by single groups of actors, MSIs promise to hold the greatest potential for legitimate private rule-making – and they have been praised as "one of the most innovative and startling institutional designs of the past 50 years" (Cashore and Auld and Newsom, 2004, p. 298). Their signature design feature is inclusiveness of participation. By definition, MSIs involve a variety of stakeholders in their governance and standard-setting activities. A prominent example is the Forest Stewardship Council (FSC), an organization that sets global standards for sustainable forestry management and operates a certification system. Praised for its deliberative approach (e.g., Dingwerth, 2007), the FSC features three stakeholder chambers, representing environmental, social, and economic interest, with equal participation from organizations from the global north and south. Next to inclusiveness of participation, the FSC also uses expert- and procedural fairness-based strategies to create legitimacy for its rules. The scheme involves independent scientists in its standard-setting process and was one of the first private governance initiatives to introduce a formal dispute resolution system in 1998 (FSC, 2015).

Over the last two decades, similar arrangements have been created in a wide range of industry sectors. Figure 1 illustrates the pattern of diffusion. Transnational MSIs first emerged in the forestry sector and then spread rapidly to other industry sectors. The population of MSIs started to increase towards the end of the 1990s and kept growing throughout the 2000s. Several schemes are currently in formation and new ones are likely to be initiated in the future.

Figure 1 The diffusion of transnational multi-stakeholder governance[1]

■ Foresty ■ Apparel ▣ Agriculture □ Fishery ▨ Mining ▢ Tourism ▨ Energy
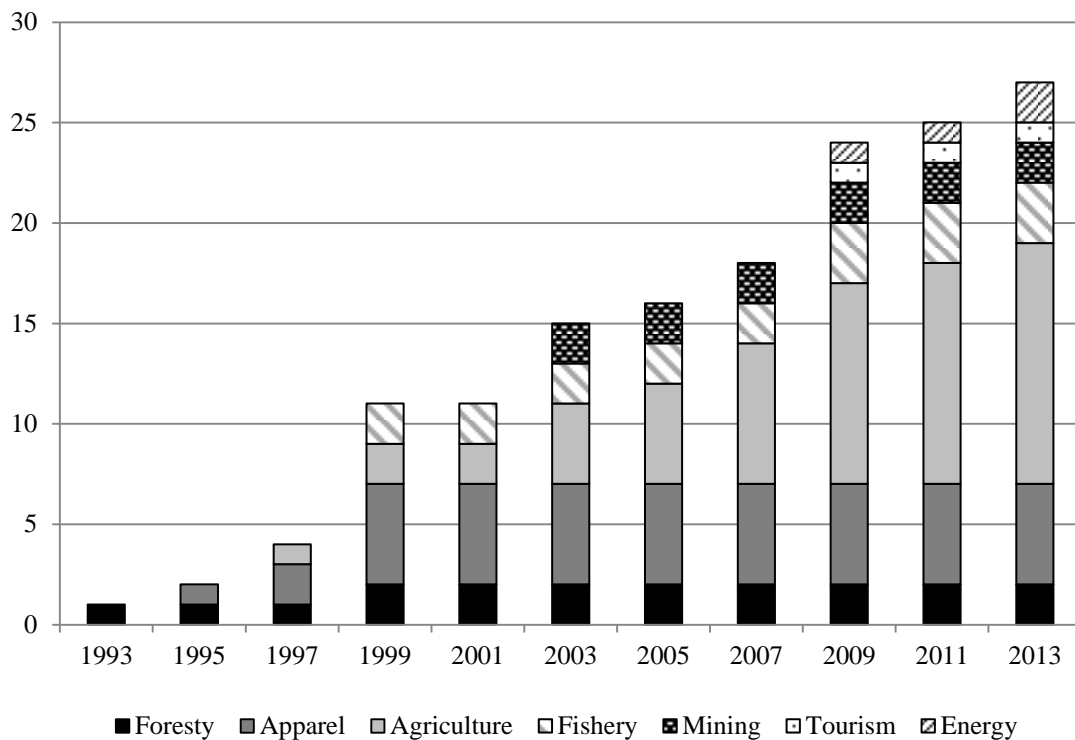
The MSI model has developed into what one could call the gold standard of transnational non-state governance. Luc Fransen (2012) describes how the label multi-stakeholder has become for many an indicator of legitimacy. However, not all MSIs are the same, and scholars have repeatedly criticized the dominance of established stakeholder groups, a focus on selective topics and discourses, as well as power asymmetries between participants (Fransen and Kolk, 2007; Cheyns, 2011; Schouten and Glasbergen and Leroy, 2012). In their analysis of twenty-two MSIs, Fransen and Kolk, for example, find significant variation in their level of inclusiveness. Distinguishing between initiatives of broad and narrow inclusiveness, they describe how "different types of multi-stakeholder standards currently co-exist under one and the same flag". They warn that "those who want to avoid difficult interactions with critics and true interest representation have to some extent the opportunity to do so" (Fransen and Kolk, 2007, pp. 669, 678-679).

There is also evidence for variation in the use procedural fairness-based strategies. In his analysis of 426 voluntary sustainability standards, Marx (2014) finds that only 30 of them had clear dispute settlement procedures in place. While most of them are MSIs, he describes differences in design across schemes. For example, differences exist as to what constitutes a complaint, by whom they can be made, and how dispute settlement decisions are reached. Finally, the literature points to variation in the use of expert-based strategies. Auld and Gulbrandsen (2010), for example, describe how the founders of the Marine Stewardship Council (MSC) put more emphasis on expert-based effectiveness, to compensate for a less participatory governance structure.

In sum, while the legitimacy of MSIs is commonly considered superior to that of other types of private governance, they do not form a homogenous group. This is not surprising as the choice of legitimation strategies involves costly trade-offs. While inclusiveness of participation may bring

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[1] This figure is based on a mapping analysis conducted by the author. It lists private standard-setting organizations that 1) develop social and/or environmental standards; 2) are governed by private actors; 3) have a distinct multi-stakeholder structure; and 4) operate transnationally.

legitimacy, true interest representation competes with more pragmatic objectives. In this regard, scholars have pointed to a negative correlation between inclusiveness and the speed of decision-making (Auld and Gulbrandsen, 2010). In a similar way, there is an inverse relationship between inclusiveness and the level of control individual actors or groups of actors enjoy over the regulatory process and its outcomes. Given these trade-offs, institutional designers possess incentives to substitute true interest representation with less costly legitimation strategies. The interesting question is: what explains variation in these choices?

4. The choice of legitimation strategies in non-state transnational governance: a framework for analysis

There are several studies that analyse the creation and evolution of non-state transnational governance. Reviewing this literature, three mechanisms of institutional choice can be identified: institutional pressures, institutional entrepreneurs, and intergroup bargaining. In the following, each mechanism will be described briefly.

4.1 Institutional pressures

A central argument in institutional theory is that organizational forms are shaped by the political and cultural environments in which they are embedded (DiMaggio and Powell, 1983). Coercive, mimetic, and normative institutional pressures are believed to make organizations become more similar (isomorphic) over time. Dingwerth and Pattberg (2009) have made this argument for the field of transnational sustainability governance. They describe how private rule-making organizations came to share a set of costly core features (stakeholder councils, process rhetoric, and participatory elements). They explain these similarities with the evolution of an organizational field in this area, resulting in strong coercive, mimetic, and normative pressures on its members (Dingwerth and Pattberg, 2009, pp. 722-731). A related argument has been made by Christine Overdevest (2010), who describes how public comparison and benchmarking have led to convergence among private governance organizations in the forestry arena. While institutional pressures may have led to convergence in some cases, the isomorphism argument struggles to account for the persistence of variation described in the previous section (see also Auld and Gulbrandsen, 2013). There are two possible explanations for this. One is that isomorphic pressures are not as strong as Dingwerth and Pattberg suggest. In addition, they may vary in strength, resulting in convergence in some areas but not in others (Fransen, 2011). The second explanation points to factors that are internal to private governance organizations. In this regard, Luc Fransen (2012) argues that private governance decision-makers maintain room to manoeuvre. Often, they would only partially conform to established norms of good governance, as they have to balance conflicting institutional pressures. The question that arises is how these decisions are made? Here, the literature points to two mechanisms: the preferences of institutional entrepreneurs and intergroup bargaining.

4.2 Institutional entrepreneurs

Institutional entrepreneurs have been defined as actors "who have an interest in a particular institutional arrangement and who leverage resources to create new ones or change existing ones" (DiMaggio, 1988; Maguire *et al.*, 2004, p. 657). Several authors in the private governance literature have made use of this concept (Auld and Balboa and Bartley and Cashore and Levin, 2007; Bartley, 2007; Auld and Gulbrandsen, 2013). Institutional entrepreneurs are believed to play an important role in the supply of private governance organizations. When new arrangements are created, these focal actors do much of the "leg work". They set agendas, provide leadership, mobilize resources, and act as gate keepers. However, their preferences and institutional choices can vary, due to a range of factors. One is their perception of the environment in which they operate and, depending on that, how they

decide to balance different institutional pressures. Secondly, learning or selective mimicry is thought to play an important role in these situations (Auld and Gulbrandsen, 2013). Institutional entrepreneurs and their choices are often informed by the lessons they draw from their experiences and the experiences of others. Depending on the type of lessons they draw, they can be a force behind convergence, but also divergence is possible and has been observed. For example, Auld et al. (2007, p. 25) describe how, learning from the FSC, the founders of the MSC decided against the "psychotic democracy" of the forestry initiative in order to become a market mechanism faster.

4.3 Intergroup bargaining

The third mechanism is intergroup bargaining. From this perspective, organizations are seen as inherently political arenas in which struggles over influence and diverging interests take place (Pfeffer and Salancik, 1977). In the private governance literature, several authors have described processes of intergroup bargaining in connection with questions of institutional design (Abbott and Snidal, 2009; Conzelmann, 2012). Studying the proliferation of regulatory standard-setting institutions, Abbott and Snidal describe differences in the preferences of firms, NGOs, and states actors (as well as diversity within these groups). When new regulatory arrangements are created they often bargain explicitly with one another. Intergroup bargaining is thought to be particularly intense in the context of MSIs, as firms and NGOs often differ sharply over the structure and governance of schemes as well as the design of standards and procedures. The result is a "bargaining game" in which the distribution of bargaining power determines whose preferences prevail and which institutional outcomes are selected (Abbott and Snidal, 2009, pp. 72-82). Abbott and Snidal distinguish two principal forms of bargaining power in these situations: "go-it-alone-power" (GIAP) and "inclusion power". GIAP refers to the ability of actors to meet some or all of their goals unilaterally. Thus, GIAP creates an "outside option" for independent action. On the other hand, inclusion power creates an "inside option" for participation in MSIs. Actors possess inclusion power when they possess competencies or resources which others need in order to achieve their objectives.

This section identified three mechanisms thought to influence the choice of legitimation strategies in non-state transnational governance. One way to organize them is to distinguish between internal and external mechanisms. The external mechanism is institutional pressures. They can be weak or strong and vary across sectors and issue areas. The internal mechanisms are the preferences of institutional entrepreneurs and intergroup bargaining. In addition, one can identify a loose sequence between the internal mechanisms. While institutional entrepreneurs (programme founders) are most influential in the early stages of the design process, intergroup bargaining becomes more important as organizations develop and more actors with diverging interests become involved. The three mechanisms do not constitute competing explanations, but are likely to interact in complex ways. Figure 2 provides a framework for analysis.

Figure 2 Framework to analyse the choice of legitimation strategies in transnational non-state governance
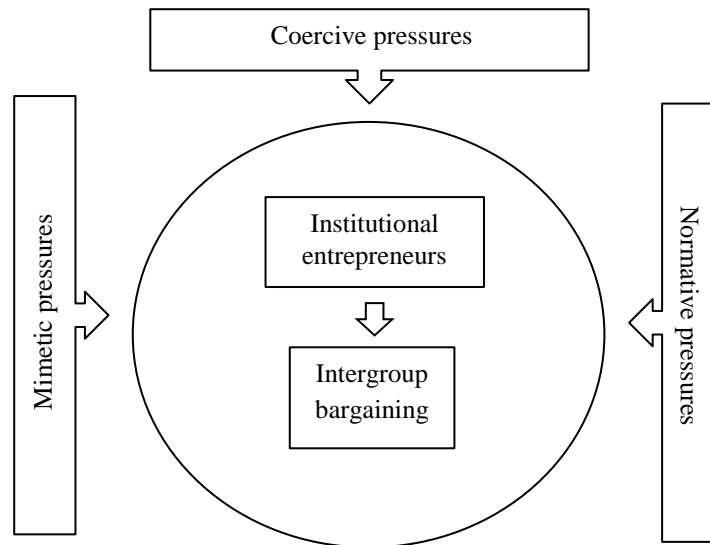
Existing studies of the design of private governance have mostly focused on single mechanisms – often taking an internal (e.g., Conzelmann, 2012) or external perspective (e.g., Dingwerth and Pattberg, 2009). In contrast, an integrated analysis of multiple factors and how they interact across levels is still missing. To fill the gap, this study explores the choice of legitimation strategies in the field of sustainable agriculture. In recent years, the agro-food sector has evolved into the most dynamic site of multi-stakeholder governance, with many new initiatives being created since the mid-2000s (see Figure 1). This makes agriculture an interesting case to study. Unlike the well-established MSIs in in the forestry, fishery, and apparel sectors, the "traces" in agriculture are still fresh. This allows for a more in-depth analysis of the choices taken and the dynamics driving these decisions.

Informed by the framework developed above, the case studies that follow trace and compare the design process of three major agro MSIs. The analysis draws on over fifty semi-structured interviews conducted with private governance managers and representatives from firms, NGOs, and state agencies. These interviews were conducted between 2011 and 2014 as part of a doctoral dissertation (Schleifer, 2014). The information obtained through the interviews was triangulated with meeting minutes, information provided on websites, as well as media reports.

5. Multi-stakeholder governance for sustainable agriculture

At the beginning of the 21st century, the agro-food system is characterized by a complex set of environmental and social problems. Major environmental challenges are deforestation, soil degradation, and biodiversity loss. Pressing social problems include food insecurity, poor labour standards, and foreign land acquisitions (Clapp, 2012). Many of these problems cross international borders and private governance institutions are being developed to mitigate these problems. While different types of private governance exist in the agriculture sector, MSIs make up an important proportion. In particular, the 2000s saw a wave of new MSIs being created in sectors like beef, biofuels, cocoa, coffee, cotton, tea, palm oil, soy, and sugarcane (Schleifer, 2014). To gain a better understanding of the choice of legitimation strategies in these contexts, the following analysis focuses on the creation of three major initiatives: the Roundtable on Sustainable Biomaterials (RSB), the Roundtable on Responsible Soy (RTRS), and Bonsucro (formerly known as the Better Sugarcane Initiative). These initiatives resemble each other in many, but display some interesting variation as

well. Notably, they differ in the way in which they use costly normative strategies to create legitimacy for their rules. Using the framework developed above, the following analysis tries to understand why.

5.1 The Roundtable on Sustainable Biomaterials

In November 2006, a group of stakeholders from industry and civil society, and government agencies met at a workshop at the École Polytechnique Fédérale de Lausanne in Switzerland. The reason for the meeting was growing concern about biofuels and the industry's environmental and social impact. At the meeting, a decision was made to develop an "internationally accepted and implementable standard for sustainable biofuels" (RSB, 2006, p. 1). This was the beginning of the RSB as a global standard-setting and certification organization.

How did the founders of the RSB try to create legitimacy for their rules? Using Quack's distinction between strategies based on participation, expertise, and procedural fairness, the RSB put strong emphasis on the first. Its designers provided their organization with a highly participatory governance structure, which maintains a careful balance between industry and civil society interests as well as stakeholders from the global north and south. In the RSB, decision-making was organized in eleven stakeholder chambers (now part of the so-called Assembly of Delegates). The private sector was represented by four chambers and environmental and social groups by a further six. State actors and research institutions were given observer status in an eleventh chamber. In 2010, a decision was made to reduce the number of chambers from eleven to seven (three civil society chambers, three industry chambers, and the former chamber eleven). Standard-setting in the RSB was organized in four working groups (WGs). Participation in the WGs was free of charge and open to all interested parties. Overall, some 280 organizations and individuals participated in the work of WGs. The founders of the RSB also allowed for high level of external scrutiny. All their meeting minutes were made publicly available and, following the guidelines of the ISEAL alliance[2], several outreach and consultation events were organized (Schleifer, 2014: 114-123).

The second component of the RSB's legitimation strategy was expert-based effectiveness. To this end, three expert groups on genetically modified organisms, greenhouse gases, and indirect impacts were formed in 2009 to complement the work of the WGs. Composed of RSB members and independent scientists and experts, the expert groups helped to define the technical details of the standard. In addition, in 2008, the RSB commissioned the Kluyver Centre for Genomics of Industrial Fermentation in Delft, Netherlands, to conduct an independent review of its standards (Schleifer, 2014: 114-123).

As the RSB evolved, it also used procedural fairness-based strategies to create legitimacy for its rules. In 2011, the RSB created a dispute resolution mechanism, which was revised and updated in 2013. Under the reformed procedure any person or entity can file a complaint against the RSB, its members, or certified operators. The procedure clearly defines the requirements, processes, roles, responsibilities, as well as the time period in which complaints need to be resolved. While disputes shall be resolved at the lowest possible level (e.g., the certification body), ultimate decision-making authority rests with the Assembly of Delegates (EPFL, 2014, pp. 48-54).

What explains these choices, in particular, the strong emphasis on costly participation-based strategies? Through the interviews and a background analysis of media and NGO reports, the highly politicized environment of the biofuels industry could be identified as an important factor. Launched in 2006, the formation of the RSB fell in a time of increasing controversy surrounding biofuels and the policies promoting it. While biofuels had long been praised as a green solution to problems with energy security, the dynamic of the debate started to shift as topics like competition with food, land grabs, and indirect land use change appeared on the agenda (e.g., Oxfam International, 2008). A main

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[2] The ISEAL alliance is an umbrella organization of voluntary standard systems that defines standards of good practice.

driver was the global food crisis of 2007/2008. As prices for staple foods rose sharply in this period, many blamed biofuels as a main driver. The United Nations' Special Rapporteur on the Right to Food, Jean Ziegler, even went as far as calling them a "crime against humanity" (The Guardian, 2008).

It was in this environment in which the founders of the RSB held their initial meetings. In light of the controversial nature of biofuels, legitimacy was a much discussed topic. The meeting minutes reveal how founders of the RSB were eager to avoid making mistakes that would compromise legitimacy at a later stage (RSB, 2006, p. 2). Interviews with members of the founding steering board lend support to the hypothesis that institutional pressures strongly influenced the choice of their legitimation strategy. In this regard, one members of this group explained: "in biofuels there was so much polemic and criticism. Take, for example, Jean Ziegler and his statements. The situation was so explosive and created the necessity of a broad process".[3] Another member described how "the complexity of biofuels made it necessary to have a range of different voices at the table. This was in a sense trying to get ahead of some of the criticism of biofuels by getting in place a framework that would diffuse concerns about the competition with food".[4]

Strong political pressures pushed the founders of the RSB to adopt a more participatory approach, as it was hoped that this would help them gain legitimacy in the highly contested environment of the biofuels sector. But the choice of legitimation strategies in the RSB cannot be fully understood without considering the role of learning. The initiators of the RSB had close connections to the FSC. They hired the former director of the forestry initiative as a consultant and he participated in their meetings from the very beginning. This facilitated a learning process between the two initiatives and the FSC became an important reference point and model for the RSB, as one interviewee explained: "the FSC clearly was a key driver for the RSB. We had many people with experience with the FSC who knew that this was a robust system that works."[5]

Finally, the case study revealed how the choice of legitimation strategies can become a political process as well. In 2009, the RSB was launched as a formal organization, with a governance structure consisting of eleven stakeholder chambers. It was also during this period in which the RSB's membership base increased rapidly, with many producer organizations joining the initiative. Producers in the RSB soon felt that its governance structure gave too much influence to civil society actors. In particular, there were concerns that this would result in a standard too complex and costly to implement. What followed was an intense period of intergroup bargaining. On the one hand, producers argued that "[i]t will not be possible to sell the RSB to industry players when there are other lower cost options (…)" (RSB, 2010b, pp. 3-4). They believed that "there was a problem with representation of chambers in the RSB all along" and demanded significant changes (RSB, 2010a, p. 3). On the other hand, civil society rejected the reform proposals which they regarded "as a step backward for their constituencies returning to the 'top-down' approach, which denies the rights of small-scale and vulnerable stakeholders" (RSB, 2010c, p. 21). While this episode did not result in a major reversal of the RSB's participation-based approach, it shows how intergroup bargaining can play a role in these decisions.

5.2 The Roundtable on Responsible Soy

The RTRS evolved out of the Forest Conversion Initiative of the World Wide Fund for Nature (WWF). In the early 2000s, the WWF-Switzerland began exploring the relationship between agriculture and forest conversion in the tropics. Because of its high expansion rate in Brazil and other South American countries, soybean farming was soon identified as a priority sector. In May 2004,

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[3] Interview with a member of the RSB Founding Steering Board, London, December 2011.

[4] Interview with a member of the RSB Founding Steering Board, via phone, December 2011.

[5] Interview with a member of the RSB Founding Steering Board, via phone, November 2011.

participants from civil society, industry, and producer groups attended a workshop in London. At the meeting, it was decided to launch a multi-stakeholder process to develop a standard for sustainable soy production.

Creating legitimacy through inclusiveness of participation was also the primary strategy of the founders of the RTRS, but some compromises were made. The result was a stronger position of industry actors and a less a participatory approach to standard-setting. The RTRS central decision-making bodies (the Executive Board and the General Assembly) consist of three stakeholder chambers: 1) producers, 2) industry, trade and finance, and 3) civil society organizations. While industry actors outnumber civil society actor two to one, each chamber possesses a veto right. This means that no single interest group can dominate the process. Standard-setting in the RTRS was organized in the so-called Principles Criteria Verification Development Group (PCVDG). But unlike the RSB's open approach, participation in the PCVDG was restricted. Each chamber could appoint nine experts to represent its interests in the PCVDG. In terms of enabling public scrutiny, there are few differences between the RSB and the RTRS. Detailed meeting minutes of the RTRS' central decision-making bodies are made publicly available and several outreach and consultation events were organized (Schleifer, 2014: 152-163).

The founders of the RTRS also used expert-based strategies. This was essential to make the RTRS standard workable (e.g., define technical indicators), but drawing on expert authority also served a legitimation function. Like in the RSB, expert knowledge played an important role in the standard-setting process. One example is the creation of a so-called International Technical Group in 2010. Composed of external experts, but still reflecting the three chamber structure of the RTRS, the group reviewed the responsible soy standard and provided technical feedback to the PCVDG (Schleifer, 2014: 152-163).

While inclusiveness of participation and expert-based effectiveness constitute the RTRS' primary legitimation strategies, more recently the scheme has also given attention to issues of procedural fairness. In 2011, a grievance procedure and, in 2013, a conflict resolution procedure were introduced. Through the grievance procedure members and non-members can submit a complaint against the RTRS, its members, as well as certified operators. All complaints or grievances are handled by a so-called Grievance Committee. The committee decides on the legitimacy of the complaint and determines an appropriate course of action to address the grievance. The conflict resolution procedure, on the other hand, is a mechanism to solve internal conflict through the help of a so-called Mediation Committee. While requirements, processes, roles, and responsibilities are clearly defined in the RTRS dispute settlement procedures, the dominance of industry actors in the Grievance and Mediation Committees has been criticized as a weakness (EPFL, 2014, pp. 39-43).

What explains the choice of legitimation strategies in this case? Like the RSB, the RTRS was subject to strong institutional pressures during its formation phase. Reports about soy expansion in connection with deforestation in the Amazon had attracted much attention from NGOs and the mainstream media. In addition, the widespread use of genetically modified organisms (GMOs) in the industry was a major issue with environmental NGOs.

From the very beginning, the RTRS was at the centre of this criticism. In particular, the organization came under attack from civil society groups for its plans to certify GM soy under its scheme. Already, the first RTRS roundtable conference in 2005 in Foz do Iguaçu, Brazil, became a highly politicized event. Parallel to the roundtable meeting, GMO-critical NGOs held a counter-conference. The second roundtable conference in August 2006 in Asunción, Paraguay, was accompanied by similar protests. A coalition of NGOs organized a protest march and published a declaration opposing the idea of "responsible soy". Protest activities surrounded also the third and fourth RTRS roundtable conferences (e.g., ASEED, 2008).

The interviews revealed that there was a general perception among the founding group that the controversy surrounding GM-soy made the sector a very difficult environment for launching a MSI.

One member of the founding group described how they were "sticking their head in anthill" and that it was a "really though environment".[6] Similar statements were made by other interviewees: "it was a much politicized environment. There was the GMO issue. It was very difficult to set up." After the protests surrounding the first roundtable conference, there was much discussion among the members of the founding group and the feeling that they had underestimated the political nature of the issue.[7]

When preparing the launch of the formal organization in 2006, the so-called Organizing Committee hired a consultancy firm to provide guidance. Its report reads: "who will be affected, who can affect the RSS [RTRS] and the level of impact are key guides in determining who should participate and to what extent. Because stakeholders are also those who oppose to an initiative, the higher the controversy around a project, the more SH [Stakeholders] must be closely involved with decision-making" (Pi Environmental Consulting, 2005, p. 23). The interviews confirm that this was an important driver behind the choices made. It was hoped that emphasizing inclusiveness in the RTRS's overall design would protect the organization from further criticism, as one interviewee explained: "we were under very close scrutiny from the NGOs because of the GMO issue. Everything we were doing was watched closely and we did not want to give them any further ammunition to criticise us on governance".[8]

As in the previous case, the FSC served the founders of the RTRS as an important reference in their discussions about institutional design. However, they soon realized that there were significant differences between the forestry and the soy product fields. While many forestry products are directly visible to the end consumer, soybeans are what one interviewee described as a "hidden commodity". Only a very small percentage of global production is directly consumed by humans, whereas about 98 percent of global production is used for animal feed. Because of this, it was reasoned that the consumer-oriented approach of the FSC was unsuitable for the RTRS. Instead, its founders opted for a so-called business-to-business approach, in which the certifier functions as an assurance mechanism between supply chain actors.[9]

The decision to adopt a business-to-business approach had several implications. Firstly, it created the need to differentiate more clearly between firms occupying different positions in the agro supply chain. At a minimum, the business-to-business approach made it necessary to distinguish between corporate consumers and producers (in the FSC all industry actors were organized in one single stakeholder chamber). Secondly, it was reasoned that the business-to-business model would require more business ownership. On this topic, the report from Pi Environmental Consulting described "that a scheme designed for B2B [business-to-business] declarations will need less inclusiveness to be effective than a scheme designed to provide a consumer oriented label" (Pi Environmental Consulting, 2005, pp. 4-5). Ultimately, with their design decisions, the founders of the RTRS sought to strike a balance between process efficiency and legitimacy as the following quote from the official project description reveals: "The viability of the RTRS is also dependent on its capacity to deliver its objectives, i.e. its effectiveness. With increased legitimacy, often the speed of the process is reduced. Somewhere in the middle, there is a combination of the two where the RTRS will be both inclusive and efficient" (RTRS, 2007, pp. 3-4).

The within-case analysis also revealed several episodes of intergroup bargaining. Like in the RSB, producers groups and NGOs in the RTRS often held conflicting views on a wide range of issues. In this regard, one major conflict was about the scheme's position on GMOs; another concerned the RTRS' policy on deforestation. These episodes confirm that intergroup bargaining is an important

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[6]   Interview with a member of the RTRS Organizing Committee, via phone, May 2013.

[7]   Interview with a member of the RTRS Organizing Committee, via phone, May 2013.

[8]   Interview with the first President of the RTRS, via phone, May 2013.

[9]   Interview with a member of the RTRS Organizing Committee, via phone, May 2012.

mechanism of institutional choice in multi-stakeholder governance. However, in the case of the RTRS, no explicit bargaining over the choice of legitimation strategies was observed.

5.3 Bonsucro (Better Sugarcane Initiative)

According to the WWF, agriculture accounts for about 70 percent of all freshwater withdrawn for human use. In a series of studies and publications on the impact of agriculture on global water systems, a number of crops, among them sugarcane, were singled out as the world's "thirstiest crops" (WWF, 2003). To mitigate the impact of global sugarcane production, the WWF reached out to Tate & Lyle, one of the world's largest refiners of sugar, and together they organized a multi-stakeholder workshop in London. Held in June 2005, the *Better Sugar Better Business Meeting* became the founding event of Bonsucro (WWF, 2005).

In comparison to the RSB and RTRS, Bonsucro is the least participatory of the three organizations. Formally, Bonsucro distinguishes between five stakeholder categories: 1) end users, 2) civil society, 3) farmers, 4) intermediaries, and 5) industrial. In practice, however, the scheme's central decision-making body (the Board of Directors) was dominated by a coalition of big brand companies and large northern NGOs from the very beginning. Civil society groups from the global south were not represented at all in this body and no veto mechanism was put in place to protect the organization from regulatory capture. Standard-setting in Bonsucro was organized in three Technical Working Groups (TWGs) on agronomy, processing and milling, and social impacts. Like in the RTRS, access to these bodies was restricted to a small group of experts. But unlike in the RTRS, there was no formal balance in the composition of the TWGs. Instead, all three TWG leaders had an industry background and only few NGOs participated in the standard-setting work. Later in the process, Bonsucro followed ISEAL guidelines and organized several outreach and consultation events. However, the scheme does not make its meeting minutes public, thus limiting the degree of external scrutiny (Schleifer, 2014: 188-197).

To compensate for this lack of inclusiveness, the founders of Bonsucro emphasized expert-based effectiveness in the overall design of their organization. This is exemplified by their objective to create a "science-based commodity discussion" (WWF, 2004). While the RSB, RTRS, and most other standard systems work with process standards (best practices), the founders of Bonsucro broke new ground by developing a metric-based system. Instead of defining best practices, the metric-based approach works with measurable impact indicators. At least in theory, this makes it possible to quantify impact reductions and thus to better demonstrate scientific rigour and effectiveness – although the interviews revealed that in some areas defining reliable indicators proved to be very difficult.[10]

Since 2011, Bonsucro has also a formal complaint resolution process in place. Under the procedure, anyone can file a complaint against a Bonsucro member, the certification process, or Bonsucro as an organization. Complaints are handled by a complaint manager, who investigates the case and submits a report with recommendations to the Chief Executive Officer (CEO) of Bonsucro. The CEO prepares a decision and presents it to the Board of Directors, which makes the final decision. In an assessment of dispute resolution and settlement for biomass certification schemes, Bonsucro's complaint resolution process has been criticized for the fact that the CEO and the Board of Directors decide on a complaint: "They are not independent and this implies that there are potential conflicts of interests. In combination with the fact that the Board consists of more members representing company-interests in Bonsucro than the civil society there is a risk of being biased to favor the industry interests" (EPFL, 2014, p. 46).

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[10] Interview with the leader of the TWG Social, via phone, June 2012.

What explains the mix of legitimation strategies in the case of Bonsucro, in particular, the emphasis of expert- over participation-based strategies? The previous two case studies identified strong political pressures as a factor pushing the founders of the RSB and the RTRS to adopt participation-based strategies. In comparison, these pressures were found to be much weaker in the sugarcane sector. In the past, there has been some NGO criticism of poor working conditions in the industry (Amnesty International, 2008). However, no major NGO campaigns were underway during the formation phase of Bonsucro. The situation somewhat changed when sugarcane became a feedstock for the world's growing demand for biofuels. As a result, the industry was increasingly associated with the controversial topics of the biofuels debate (Friends of the Earth, 2010). However, Bonsucro was created as a food crop initiative, and only later did it enter the biofuels certification market.[11] A background research on media coverage and NGO reports confirmed the low level of political pressure during the organization's formation phase. It produced only one report of the European Corporate Observatory in which the "little known Better Sugarcane Initiative" was critically mentioned (Corporate Europe Observatory, 2008). Thus, in comparison to the RSB and the RTRS, Bonsucro was "sailing in calm waters" as one of the interviewees put it.[12]

However, the choice of legitimation strategies in Bonsucro cannot be fully understood without considering the preferences of institutional entrepreneurs. While Bonsucro, like the RTRS, was an initiative of the WWF, the two roundtables were initiated by different national organizations of the WWF network. In the case of the RTRS, the WWF Switzerland was the main driver; in the case of Bonsucro, it was the WWF United States. In the world of the WWF, a highly decentralized network organization, the two country chapters occupy different ends of the political spectrum. As explained by one WWF official, the United States chapter is known for its strong ties to big business and large corporate foundations, whereas the Swiss country chapter is considered more left-wing and more "grass roots" in its orientation.[13]

The within-case analysis revealed how the WWF United States had a strong influence on the institutional trajectory of Bonsucro, pushing it to adopt a more managerial and science-based approach. After the founding workshop was held in London, a so-called Steering Committee was formed to initiate the standard-setting process and to develop the organizational structures of Bonsucro. Central to the decisions of this group was a senior official of the WWF United States. As described by one of the interviewees, "[person X] had very clear ideas how to do this and he wrote a paper about the principles that we should use to set up this kind of initiative."[14] In the memo to the founding group, the official criticized the open and deliberative approach of previous roundtables initiatives: "While talk, discussion, or even consensus may be a means to an end, they are not a sufficient end in and of themselves to be worthy of WWF's time. The goals need to be agreed to before the first meeting" (WWF, 2004, p. 1).

With regard to stakeholder inclusion, the memo instructed the founding group to identify the "key leverage points for change" of the agro supply chain. The process should be driven by "the players that bring sustained interest in the commodity to the table, and that bring considerable financial resources to the work of the group as well" (WWF, 2004, pp. 3-4). On the corporate side, these are buyers and traders as well as banks. These companies, which transact with large numbers of producers, can induce environmental change by making their buying decisions and loans conditional on standard compliance. In contrast, the memo warned not to involve producer or manufacturer associations early on in the process, which it identified as the most conservative members of the agro supply chain. Civil society organizations should also be selected using criteria such as their level of commitment and

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[11]   Interview with a member of the Steering Committee, via phone, May 2012.

[12]   Interview with a member of the Steering Committee, via phone, May 2012.

[13]   Interview with an official of WWF Switzerland, via phone, May 2012.

[14]   Interview with the first coordinator of Bonsucro, via phone, May 2012.

expertise. The memo makes clear that there are many different stakeholders (NGOs and companies) that should not be "invited to the table", because of a lack of expertise, commitment, or ideological opposition: "Wanting to be at the table is an insufficient reason to be there". In this context, the WWF official identified the politicization of the rule-making process as one of the main problems of previous roundtable initiatives. Instead, he promoted the idea of a "science-based commodity discussion", in which legitimacy is created through using science to build consensus among stakeholders (WWF, 2004, pp. 2-6).

As in the previous cases, the within-case analysis revealed several episodes of intergroup bargaining between business and civil society actors in Bonsucro. However, intergroup bargaining was found to be less intense when compared to the RSB and RTRS. A plausible explanation for this is that the level of politicization was lower in the sugarcane sector and that the members of Bonsucro were a more homogenous group from the start.

5.4 Summary of results

The case studies revealed how the RSB, RTRS, and Bonsucro differ in their choice of legitimation strategies. While participation-based strategies were deployed by all three organizations, they did so to different degrees. Inclusiveness of participation was high in the RSB, somewhat restricted in the RTRS, and strongly restricted in Bonsucro. On the other hand, Bonsucro put more emphasis on the use of expert-based effectiveness in its overall design – clearly a less costly legitimation strategy than true interest participation. With regard to procedural fairness-based strategies, it was found that they played only a secondary role in the cases studied. They were deployed as the organizations were more mature and developed, suggesting a sequence in the use of legitimation strategies in private governance. While some differences in the design of dispute settlement mechanisms were observed, the critical difference was the composition (inclusiveness) of the bodies in charge of making the arbitration decisions.

Using the framework developed above, differences in the strength of coercive institutional pressures were identified as an important explanatory factor. These pressures were strong in the biofuels and soy arenas, whereas the sugarcane sector was a much less politicized environment. The within-case analysis revealed how this had important implications for the choice of legitimation strategies in the three organizations. Under intense scrutiny from critical stakeholders, the founders of the RSB and RTRS reasoned that increasing the "fit" with widely accepted norms of democratic governance would protect their organizations and help them gain legitimacy in these arenas. In contrast, in the low conflict environment of the sugarcane sector, the founders of Bonsucro were not exposed to the same pressures and therefore felt less need to invest in costly legitimation strategies.

But the case studies also showed that the choice of legitimation strategies in private governance is not simply a function of external pressures. Factors that are internal to these arrangements are also important. In this context, two mechanisms were explored: institutional entrepreneurs and intergroup bargaining. In particular, institutional entrepreneurs were found to play an important role in the design phase of three MSIs. Consequently, their preferences mattered for the institutional pathways these organizations took. While institutional entrepreneurs responded to political pressures in their environments, they also had ideas and preferences that were not context-specific. These preferences were rooted in their material interests, worldviews, and the lessons they drew from their experiences and the experiences of others. In this regard, the case studies showed how the founders of the three organizations held different believes about multi-stakeholder governance. This came out most clearly in the case of Bonsucro. From the beginning, the founders of Bonsucro had the idea of a science-based and less political organization.

The third mechanism of institutional choice was intergroup bargaining. Several episodes of bargaining could be observed in the three cases studied, in particular, in the RSB. The conflict lines often ran between civil society and industry actors. However, in most episodes, the stringency of the

standard was the focal point of bargaining, not the choice of legitimation strategies. Only in the RSB there was a prolonged sequence of intergroup bargaining about the inclusiveness and distribution of decision-making power in the organization. However, this episode of intergroup bargaining only occurred at a later stage of organizational development, when initial institutional design choices had already been taken. This suggests two things: first, inclusive and heterogeneous organizations like the RSB are more prone to intergroup bargaining than less inclusive ones. Second, intergroup bargaining can play a role in these decisions, but it is not the primary mechanism of institutional choice.

6. Conclusion

The growing importance of private governance in the global economy has raised pressing questions about its legitimacy. The academic literature on the topic is largely divided into two camps: one normative, the other empirical. While works in the normative tradition (e.g., Dingwerth, 2007; Bäckstrand and Khan and Kronsell and Lövbrand, 2010) theorize and evaluate private governance and its *right to rule,* empirically oriented scholars (e.g., Cashore, 2002; Bernstein, 2011; Bexell, 2014) study why and when non-state institutions are *believed to have the right to rule.* Following Quack (2010), this article cut across this divide, by explaining the choice of normative legitimation strategies in field of transnational non-state governance. It was shown how even MSIs – often referred to as the gold standard of private governance – vary significantly in the way they use participation, expert-based effectiveness, and procedural fairness to create legitimacy for their rules. Because true interest representation involves costly trade-offs with efficiency and control, variation was found to be particularly strong in the area of inclusiveness of participation.

While some progress has been made in explaining the institutional design of private governance, the underlying causal mechanisms and now they interact are not yet fully understood. Existing works have mostly focused on single mechanisms, either studying the effects of institutional pressures (e.g., Dingwerth and Pattberg, 2009) or factors that are internal to these arrangements (e.g., Conzelmann, 2012). In contrast, analyses that systematically combine the two have been missing. To fill this gap, this article reviewed existing explanations and integrated them into a common framework of institutional choice. Put to work in three in-depth case studies, it was shown how institutional entrepreneurs respond to political pressures, but that their design choices are not fully determined by them. Worldviews, material preferences, and learning matter as well in these decisions. In addition, it was found how decisions about legitimation strategies can become the focal point of intergroup bargaining, although it was not the primary mechanism of institutional choice in the cases studied.

Situated in the broader debate about the legitimacy of transnational private governance, this article adopted the empirical approach of legitimation research to explain variation in the choice of normative strategies. It made an important contribution to this cross-cutting perspective by delineating and empirically examining the causal mechanisms underlying these decisions. Future research on the legitimacy non-state governance should continue on this path. Given the growing supply and demand for private rules in the global economy, understanding the complex dynamics that lead to normatively more or less desirable outcomes is an important task.

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Author contacts:

Philip Schleifer

Max Weber Fellow

Robert Schuman Centre for Advanced Studies

European University Institute

Via delle Fontanelle 18

50014 San Domenico di Fiesole, Florence

Italy

Email: philip.schleifer@eui.eu