

## **A Taxonomy of Drivers for Change: The Case of GlobalG.A.P. and the Forest Stewardship Council**

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*The global regulatory governance of goods has become increasingly complex and “polycentric.” This article explores how standard setting bodies have ensured their continued rulemaking roles both despite and because of their evolving and dynamic environment. This study focuses on two areas of goods in particular, namely forestry and food safety, and two standard setting bodies that have assumed a prominent regulatory role within these domains, GlobalG.A.P. and the Forest Stewardship Council (“FSC”). These standard setting bodies have demonstrated an adaptive capacity to dynamically respond to challenges and threats to their legitimacy from within and outside their organization. Alongside innate features of standard setting bodies that can explain this adaptive capacity, it is important to consider how much of an organization’s evolution is attributable to contextual elements. This article proposes a taxonomy of four contextual elements and corresponding factors that drive change within standard setting bodies and contribute to their success and survival over time, as found in the existing literature through an examination of theoretical perspectives and empirical case studies by experts in the field. These*

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*contextual elements and dynamics are unique for each organization and should thus be examined empirically and on a case-by-case basis. This article provides hypotheses for future research related to the interaction between these elements at critical moments when a standard setting body experiences a legitimacy crisis. These hypotheses focus on how conditions prevalent during exogenous shocks and regulatory disasters affect a standard setting body's margin of autonomy to make decisions to legitimate its activities, possibly alleviating constraints and opening up opportunities for these bodies to assert their right to rule.*

1 INTRODUCTION .....	180
2 SOCIO-ECONOMIC DRIVERS AND PRIVATE INTERESTS .....	185
DEMANDS.....	198
DEMANDS.....	206
FIELD STRUCTURES .....	218
6 CONCLUSION.....	226
SOCIO-ECONOMIC DRIVERS AND PRIVATE INTERESTS .....	228
THE INSTITUTIONAL DESIGN AND THE LOGICS OF INTERNAL LEGITIMATION	
DEMANDS AND STRATEGIES .....	228
THE INSTITUTIONAL ENVIRONMENT AND THE LOGICS OF EXTERNAL	
LEGITIMATION DEMANDS AND STRATEGIES.....	229
THE PERFORMANCE OF INSTITUTIONAL ENTREPRENEURS AND SOCIO-	
POLITICAL AND ECONOMIC FIELD STRUCTURES .....	229

## **1 Introduction**

The global regulatory governance of goods has changed profoundly since the 1970s. Institutional actors and systems have proliferated that have assumed important roles in addressing challenges relating the production and trade in goods. Perhaps most noteworthy is the rise of private and hybrid standard setting bodies (“SSBs”) across such different domains of manufacturing as product safety, forestry, automobiles, and information and communications technology

(“ICT”).<sup>2</sup> These SSBs fulfill functions in the transnational regulation of risk and behavior that complement or replace public regulation.<sup>3</sup> Recent years have seen high profile events and regulatory disasters within certain domains of manufacturing, revolving around the safety of products and production processes and scandals concerning harm to the planet or people. Such incidents can expose the deficiencies in existing regulatory regimes that were meant to prevent such incidents but failed,<sup>4</sup> and result in a demand for regulatory change.<sup>5</sup> They can trigger fundamental distrust and contestation of the legitimacy of existing institutional arrangements.<sup>6</sup> The COVID-19 pandemic is an example of an exogenous event that has affected the global economy, and various (many if not all) domains of manufacturing.<sup>7</sup> Exogenous shocks have led to increased demand for private standards; in turn, new private standards have been initiated as regulatory devices, and existing ones have either lost or taken on new or greater regulatory significance.<sup>8</sup> They serve as drivers for change and are thus

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<sup>2</sup> See Kenneth W. Abbott & Duncan Snidal, *International Regulation Without International Government: Improving IO Performance Through Orchestration*, in 5 *Rev. Int. Organ.* 315 (2010) (depicts the most significant schemes in terms of the participation of three categories of actors: international organizations/states, NGOs, and firms).

<sup>3</sup> Paul Verbruggen & Phillip Paiement, *Transnational Private Regulation*, OXFORD BIBLIOGRAPHIES (July 26, 2017), <https://www.oxfordbibliographies.com/view/document/obo-9780199756223/obo-9780199756223-0226.xml>.

<sup>4</sup> Julia Black, *Learning from Regulatory Disasters*, in 10 *POLICY QUARTERLY* 3, 3-4 (2014) (defines regulatory disasters as “catastrophic events or series of events which have significantly harmful impacts on the life, health, or financial wellbeing of individuals or the environment, caused, at least in part, by a failure in the design and/or operation of the regulatory regime put in place to prevent their occurrence”).

<sup>5</sup> Paul Verbruggen, *Private Food Safety Standards, Private Law, and the EU: Exploring the Linkages in Constitutionalization*, in *THE ROLE OF THE EU IN TRANSNATIONAL LEGAL ORDERING: STANDARDS, CONTRACTS, AND CODES* 54 (Marta Cantero Gamito & Hans-W. Micklitz eds., Edward Elgar Publishing 2020).

<sup>6</sup> Christopher Ansell & David Vogel, *The Contested Governance of European Food Safety Regulation*, in *WHAT’S THE BEEF: THE CONTESTED GOVERNANCE OF EUROPEAN FOOD SAFETY* 3, 5, 10 (Christopher Ansell & David Vogel eds., MIT Press 2006).

<sup>7</sup> *The Impact of Covid-19 Crisis on Industrial Production*, Eurostat (March 2021), <https://ec.europa.eu/eurostat/statistics-explained/pdfscache/86728.pdf>.

<sup>8</sup> Fabrizio Cafaggi, *Transnational Governance by Contract: Private Regulation and Contractual Networks in Food Safety*, in *Private Standards and Global Governance: Economic, Legal and Political Perspectives* 195, 196 (Axel Marx, Miet Maertens, Johan Swinnen & Jan Wouters eds., 2012); Spencer Henson, *The Role of Public and Private Standards in Regulating International Food Markets*, in 4 *Journal of International Agricultural Trade and Development* 63, 67-68 (2008).

important to our understanding of the evolution of SSBs within such complex and dynamic polycentric systems.

The evolution of SSBs in the area of goods has been studied theoretically and empirically, but only partially, and not in relation to crises. Influential theories from different disciplines provide useful insights about the evolution and resilience of SSBs. We know from the theoretical perspective of transnational private regulation (“TPR”)<sup>9</sup> that the private interests and rationales of economic actors, like companies, retailers and non-governmental organizations (“NGOs”), have served as drivers behind the creation and evolution of SSBs. Moreover, the plurality of such interests and rationales account for variation across SSBs and TPR regimes, and in case interests diverge, the proliferation of multiple private schemes and regulatory competition in certain areas of goods.<sup>10</sup> There is literature assessing the institutional legitimacy of SSBs and the strategies they adopt to legitimize their activities and ensure their perceived right to rule.<sup>11</sup> From the perspective of polycentric governance, we know how SSBs operate in “polycentric,” de-centralized regulatory environments that are populated by a multiplicity of public (state) and private (market-non state) actors and systems.<sup>12</sup> SSBs are affected by and adapt in response to the interactions and legitimacy

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<sup>9</sup> Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, in 38 J LAW SOC 20, 20-21 (2011) (defines transnational regulation as “a new body of rules, practices, and processes, created primarily by private actors, firms, NGOs, independent experts like technical standards setters and epistemic communities, either exercising autonomous regulatory power or implementing delegated power, conferred by international law or by national legislation.”).

<sup>10</sup> *Id.* at 25-26; Verbruggen & Paiement, *supra* note 3; Suzanne Schaller, *The Democratic Legitimacy of Private Governance: An Analysis of the Ethical Trading Initiative* (University of Duisburg, Institute for Development and Peace, 2007), <https://core.ac.uk/download/pdf/71735042.pdf>

<sup>11</sup> Axel Marx, Emilie Bécault & Jan Wouters, *Private Standards in Forestry: Assessing the Legitimacy and Effectiveness of the Forest Stewardship Council*, in *Private Standard and Global Governance: Economic, Legal and Political Perspectives* 60 (Axel Marx, Miet Maertens, Johan Swinnen & Jan Wouters eds., 2012); Marianne Beisheim & Klaus Dingwerth, *Procedural Legitimacy and Private Transnational Governance. Are the Good Ones Doing Better?* (Freie Universität Berlin, SFB-Governance, Working Paper Series, nr.14, 2008), [https://www.sfb-governance.de/publikationen/sfb-700-working\\_papers/wp14/SFB-Governance-Working-Paper14.pdf](https://www.sfb-governance.de/publikationen/sfb-700-working_papers/wp14/SFB-Governance-Working-Paper14.pdf); Schaller, *supra* note 10; Nicolas Hachez & Jan Wouters, *A Glimpse at the Democratic Legitimacy of Private Standards Assessing the Public Accountability of Global G.A.P.*, in 14 *Journal of International Economic Law* 677 (2011); Rüdiger Hahn & Christian Weidman, *Transnational Governance and the Legitimacy of ISO 26000: Analyzing the Case of a Global Multi-Stakeholder Process*, in 5 *Business and Society* 90 (2016).

<sup>12</sup> Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, in 2 *REGULATION & GOVERNANCE* 137, 140 (2008).

dynamics within these environments. In addition, there is literature that attributes the success of an SSB to the skills of so-called institutional entrepreneurs in transforming the organization and field structures.<sup>13</sup>

These literatures and empirical studies find that SSBs have an adaptive capacity to dynamically respond to challenges and threats to their legitimacy from within and outside their organization. Apart from certain innate features of SSBs that can explain such adaptive capacity,<sup>14</sup> these literatures support the view that we should consider how and to what degree an organization's evolution is attributable to contextual elements. The presumption is that the evolution of SSBs should be understood in relation to the continuously evolving environment in which they are situated, and in which they encounter unique pressures, challenges, and opportunities to assert their right to rule. Exogenous events affect systems and regulatory dynamics within and across areas of manufacturing, at least within certain periods of time, which in turn affect the internal dynamics and decision-making of SSBs, posing new challenges and opportunities for SSBs in fulfilling their rulemaking functions and ensuring their continued relevance.

This paper conducts a review of the aforementioned influential theories and empirical case studies to examine how SSBs have evolved and ensured their survival and continued presence in rulemaking roles both despite and because of their continuously evolving regulatory environments, in relation to crisis. It focuses on two areas of goods in which SSBs have assumed a prominent regulatory role, namely forestry and food safety, and pays attention

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<sup>13</sup> Halina Szejnwald Brown, Martin de Jong & Teodorina Lessidrenska, *The Rise of the Global Reporting Initiative: A Case of Institutional Entrepreneurship*, in 18 ENVIRONMENTAL POLITICS 182 (2009); David L Levy, Halina Szejnwald Brown, Martin de Jong, *The Contested Politics of Corporate Governance: the Case of the Global Reporting Initiative*, in 49 BUSINESS AND SOCIETY 88 (2010); Allison Loconto & Eve Fouilleux, *Politics of Private Regulation: ISEAL and the Shaping of Transnational Sustainability Governance*, in 8 REGULATION & GOVERNANCE 166 (2014).

<sup>14</sup> Enrico Partiti, *Dynamism as Source of Resilience of Transnational Private Regulators* (2020) (unpublished manuscript) (on file with author).

mainly, but not exclusively, to GlobalG.A.P., the Forest Stewardship Council (“FSC”), and the International Social and Environmental Accreditation and Labelling (“ISEAL”) Alliance. These SSBs share certain similarities. GlobalG.A.P. and the FSC have come to exercise prominent, if not dominating, roles in private collective action within their respective domains, and have demonstrated adaptability and resilience over time. Both organizations are subscribed to ISEAL which has acquired global recognition as a private meta regulator. Moreover, these initiatives have emerged and developed against the backdrop of regulatory disasters and scandals. Research suggests however that these SSBs differ in terms of their institutional design, (heterogenous) membership composition, and adherence to legitimation strategies. Also, the domains of food, forestry, and sustainability in which these SSBs operate vary significantly in terms socio-economic and political structures. A review of the literature about GlobalG.A.P., the FSC, and ISEAL reveals the salience of industry specific contextual factors and conditions for the evolution and resilience of an SSB.

This article adds to the existing literature a taxonomy of four contextual elements and corresponding factors that serve as drivers behind changing SSBs. These drivers are: (a) socio-economic contexts and the incentives of private actors, (b) institutional design and the logics behind internal legitimacy demands and strategies, (c) the institutional environment of the SSB and the logics behind external legitimacy demands and strategies; (d) the performance of institutional entrepreneurs in institutionalizing SSBs and reconfiguring fields, and changes in these elements. It finds that existing literatures are attentive to interactions and the trade-offs involved in responding to changing internal and external pressures and challenges to an SSB’s legitimacy. However, they provide limited clarity on how SSBs assess and make choices about regulatory strategies in practice, and how contextual elements affect these choices and an SSB’s freedom from structural influences.

This article also provides a set of hypotheses for future empirical investigations about how these contextual factors interact with the

decision-making of SSBs and outcomes when they experience “legitimacy” crises. For the purpose of this paper, a crisis is defined in relation to an SSB as an exogenous or endogenous event or series of events that reveals or creates problems of legitimacy for the organization. The SSB is compelled to respond because this problem of legitimacy has potential or actual implications for its regulatory authority, sometimes raising doubts about the organization’s continued existence. The assumption is that an SSB can face a number of legitimacy crises of varying scales of intensity throughout its lifespan. This article’s hypotheses focus on crises related to sector specific regulatory disasters or scandals, pandemics and economy wide shocks. They set forth a path for future empirical research about how sector specific conditions prevalent during exogenous events affect an SSB’s margin of autonomy to make decisions legitimating its activities in order to continue to exercise a dominant regulatory role and survive over time. More specifically, they raise the question of whether these contextual elements open up opportunities for these organizations to make decisions relatively free from structural influences in its external and internal environments at critical moments. These contextual elements and corresponding opportunities and challenges are unique for each organization and future research should examine them empirically and on a case-by-case basis.

## **2 Socio-economic drivers and private interests**

The proliferation of private SSBs across various areas of manufacturing has been studied through the analytical lens of TPR by scholars from different disciplinary backgrounds, including law, economics, political science, and sociology. From this perspective, SSBs have emerged spontaneously or under the influence of public authorities in order to address collective action problems that cannot be resolved within the jurisdictional boundaries of a State, e.g. to promote the interoperability of products, to improve product quality and safety, or to regulate the management of common resources. SSBs perform important regulatory functions ranging from standard

setting to monitoring and enforcing compliance.<sup>15</sup> Their private standards are of a voluntary nature, thus not binding in a strict legal sense. SSBs rely on private law instruments and other innovative enforcement mechanisms to foster compliance. Moreover, their embedding in other institutional structures has resulted in their private standards taking on further *de jure* or *de facto* binding properties, and regulatory effects.<sup>16</sup> SSBs can operate autonomously or in coordination with public regulators.<sup>17</sup> Public authorities have come to rely on private SSBs' expertise and competences to fulfill complementary regulatory functions in the general interest, e.g. the coordination of global supply chains.<sup>18</sup>

SSBs may pursue objectives that extend beyond the private benefits for the regulated; however, this literature suggests that markets and the private interests and rationales of economic actors, like companies, retailers, and NGOs, or combinations of these, have served as important drivers behind the creation and evolution of SSBs. Such economic actors have incentives to create and participate in SSBs because they believe private standards will ensure certain returns, protect their private interest by preempting public regulation or advance public objective goals, e.g. eliminating the negative externalities of production and consumption processes such as food risks or the depletion of forest biodiversity. Economic actors also have an interest in cooperating and coordinating with other actors and engaging with broader interests to legitimize their standard setting activities and engagement with public interest objectives.

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<sup>15</sup> Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, in *THE POLITICS OF GLOBAL REGULATION* 44 (Walter Mattli & Ngaire Woods eds., 2009) (distinguishing four categories of regulatory functions: agenda-setting and rulemaking, adaptation and implementation, monitoring, enforcement, and evaluation and review); Fabrizio Cafaggi, *Gouvernance et responsabilité des régulateurs privés*, t. XIX, 2 *REVUE INTERNATIONALE DE DROIT ÉCONOMIQUE* 111 (2005) (explaining how an SSB can perform one or more regulatory functions, and how regulatory functions can be performed either by one private regulator or jointly by several).

<sup>16</sup> Donal Casey & Colin Scott, *The Crystallization of Regulatory Norms*, 38, 77 *JOURNAL OF LAW AND SOCIETY* 76 (2011).

<sup>17</sup> Cafaggi, *supra* note 9.

<sup>18</sup> Cafaggi, *supra* note 8, at 222.



## 2.1 Private interests and rationales

### 2.1.1 Food

The rise of SSBs in the area of food is attributable in part to retailers' and producers' needs to react to consumer demands and concerns, and their efforts to preempt public legislation.<sup>19</sup> Private standards in the area of food have emerged in response to risks relating to the quality and safety of food products, which are discernable to consumers. Consumers' interest in protecting themselves from food risks has been a main driver behind consumer choices. Private standards that guarantee the quality and safety of products have often been defined and dictated by retailers. Retailers have embraced private standards and by way of their incorporation into transnational contracts, have imposed them on their suppliers and producers in an attempt to manage food risks in their global supply chains. Food standards can serve as a means for retailers to attract consumers or to offset costs resulting from changes in consumer behavior due to actual or perceived food risks. Moreover, food retailers have relied on private standards and certification as a strategy to market and differentiate their products and to gain a competitive advantage over rivals. The scope of private food standards has expanded strategically and dynamically in response to changing consumer concerns, which extend beyond price and food safety to environmental, economic and social considerations relating to food production.

The Euro-Retailer Produce Working Group ("EUREP"), the predecessor of EUREPGAP, which was later renamed GlobalG.A.P., was born out of the Bovine Spongiform Encephalopathy ("BSE") crisis. "Mad cow disease" and resultant consumer concerns about food safety prompted powerful European supermarkets to draft individual and industry-wide food codes

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<sup>19</sup> Axel Marx & Jan Wouters, *Competition and Cooperation in the Market of Voluntary Sustainability Standards*, in *THE LAW, ECONOMICS AND POLITICS OF INTERNATIONAL STANDARDISATION* 215, 227 (Panagiotis Delimatsis ed., 2015).

imposing requirements for food safety and quality on their suppliers. They also prompted national retailer associations in the UK, the Netherlands and the US to develop standards harmonizing practices at the national level.<sup>20</sup> EUREP joined these national standard-setting initiatives in 1997. It was created by thirteen major retailers as a regional third-party certification scheme in a collective effort to respond to consumer concerns relating to food safety.<sup>21</sup> GlobalG.A.P. is said to have originated out of an attempt by Northern agricultural products retailers to meet demands of “political consumers” for organic and environmentally responsible production.<sup>22</sup> The GlobalG.A.P. standards for Good Agricultural Practices (“GAP”) reflect these broader consumer demands, addressing environmental, economic and social aspects of sustainable farm production.<sup>23</sup> The EU’s reform of its legal regime for food safety in 2002 after the BSE crisis and a number of other food scares reinforced incentives for retailers to develop private standards and to impose them on producers involved with their supply chains.<sup>24 25</sup>

Private standard setting in the area of food has seen a shift in market power from producers to retailers. Market share and regulatory power have increased for retailers within buyer-driven supply

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<sup>20</sup> Stephen M. Maurer, *Self-Governance in Science: Community-Based Strategies for Managing Dangerous Knowledge* 24, 25 (2017).

<sup>21</sup> Cafaggi, *supra* note 8, at 217-18.

<sup>22</sup> Enrico Partiti, *Elusive after all. How Transnational Private Regulation Escapes Public Influence* (2020) (unpublished manuscript) (on file with author).

<sup>23</sup> Doris Fuchs & Agni Kalfagianni, *The Causes and Consequences of Private Food Governance*, in 12 BUSINESS AND POLITICS 1, 4, 5, 9, 17 (2010).

<sup>24</sup> Axel Marx & Jan Wouters, *Redesigning Enforcement in Private Labour Regulation: Will It Work?*, in 155 INTERNATIONAL LABOUR REVIEW 435 (2016).

<sup>25</sup> Under this new regime, primary responsibility and liability was transferred from national governments to the food industry. Producers and retailers could rely on private standards and certification to demonstrate compliance with public laws and regulations, and to protect themselves from exposure to legal liability. A revision of the scope of the EU Product Liability Directive to encompass agri-food products led certain food retailers to be considered “producers” for the purposes of the directive, and to be exposed to strict liability for harm caused by defective food products. For instance, retailers would be considered “producers” under the Directive if they attached a private label to their products, imported food into the EU, or if it they sold products from an unidentifiable producer. Also, the adoption of EU Regulation 178/2002/EC (“The General Food Law”) created incentives for food business operators to develop private standards to meet the requirement for “an integrated and comprehensive approach to control of food safety risks by food business operators throughout the food supply chain.” Verbruggen, *supra* note 5.

chains.<sup>26</sup> Changes in these global supply chains and market structures have further driven private standard setting activities.<sup>27</sup> Private regulators have expanded their regulatory influence in managing Global Value Chains (“GVC”) by prescribing process standards and broadening quality management standards that shape the form and function of supply chains.<sup>28</sup> The confluence of changes in global supply chains and changes in market structures have led these schemes to assume important rulemaking functions that complement or act as equivalents to public action.<sup>29</sup> Their influence does not serve the public interest per se, as Cafaggi notes, where coalitions of firms rely on private standards for product

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<sup>26</sup> Spencer Henson, *The Role of Public and Private Standards in Regulating International Food Markets*, in 4 JOURNAL OF INTERNATIONAL AGRICULTURAL TRADE AND DEVELOPMENT 63, 67-68 (2008).

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<sup>28</sup> Cafaggi, *supra* note 7, at 30.

<sup>29</sup> Enrico Partiti, *Orchestration as a Form of Public Action: The EU Engagement with Voluntary Sustainability Standards*, in 25 EUROPEAN LAW JOURNAL, 94, 97 (2019).

standardization and these standards become “anti-competitive devices to raise entry costs” and “constitute a barrier to trade by promoting processes of consolidation and aggregation, driving smaller producers out of the market.”<sup>30</sup>

### 2.1.2 Forestry

A key driver behind the creation of SSBs in the area of forestry has been the need to address the negative externalities resulting from the global timber production and trade. Forests serve as an important natural resource for the production of goods, such as food, furniture, construction, and packaging material.<sup>31</sup> Economic interdependence, the global demand for these goods, and other commercial values of forests are partial reasons for why forests are under threat.<sup>32</sup> Forests are a “commons” and the collective actions of individuals exploiting them in their self-interest, be it through overharvesting, monocropping, or the use of fertilizers,<sup>33</sup> has resulted in the depletion of their biodiversity, a phenomenon that is referred to as a “tragedy of the forest commons.” The rise of private regulation in this area has been attributed to a failure of States and private ownership to provide a solution to this coordination problem and the loss of ecosystems and tree cover across the world.<sup>34</sup> Unlike SSBs for food governance, an area already highly regulated before SSBs emerged, SSBs in the area of forestry were created to fill certain regulatory gaps where public regulation was absent, and to build a consumer market for products that protect the biodiversity of forests.

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<sup>30</sup> Fabrizio Cafaggi, *Transnational Governance by Contract – Private Regulation and Contractual Networks in Food Safety*, in PRIVATE STANDARDS AND GLOBAL GOVERNANCE: ECONOMIC, LEGAL AND POLITICAL PERSPECTIVES 195, 202 (Axel Marx, Miet Maertens, Johan Swinnen & Jan Wouters eds., 2012).

<sup>31</sup> Zuzana Burivalova et al., *A Critical Comparison of Conventional, Certified, and Community Management of Tropical Forests for Timber in Terms of Environmental, Economic, and Social Variables*, in 10 Conservation Letters 4, 4 (2017); Zuzana Burivalova & Shreya Dasgupta, *Does Forest Certification Really Work?*, Mongabay Series: Conservation Effectiveness (Sept. 21, 2017), <https://news.mongabay.com/2017/09/does-forest-certification-really-work/>.

<sup>32</sup> Frans van Waarden, *Governing Global Commons: The Public-Private Protection of Fish and Forests*, in PRIVATE STANDARDS AND GLOBAL GOVERNANCE: ECONOMIC, LEGAL AND POLITICAL PERSPECTIVES 15, 17-19 (Axel Marx, Miet Maertens, Johan Swinnen & Jan Wouters eds., 2012).

<sup>33</sup> TIM BARTLEY, *RULES WITHOUT RIGHTS: LAND, LABOR, AND PRIVATE AUTHORITY IN THE GLOBAL ECONOMY* 15, 76 (2018).

<sup>34</sup> Cafaggi, *supra* note 8, at 217-18.

The FSC is a multi-stakeholder initiative created in 1993 in a collaborative effort between industry and NGOs to build a market for certified wood and paper products.<sup>35</sup> It was presented as a “compromise” and a market-based solution after attempts by States to find an inter-state solution had failed. Negotiations within the International Tropical Timber Organization (“ITTO”) and at the 1992 UN Conference on Environment and Development (the “Earth Summit”) to develop a multilateral convention on forestry were not successful. Forest-producing countries for various reasons might not be able or willing to enact or enforce rules or laws for industries that address irresponsible and unsustainable management of forests.<sup>36</sup> States seeking to protect biodiversity by restricting trade to labeled timber or increasing import tariffs might be acting in breach of their obligations under the World Trade Organization (“WTO”) legal regime if such restrictions amount to barriers to trade.<sup>37</sup> Privatization and the farming of trees in plantations have provided only a partial solution. For instance, private property owners might not have the economic incentives to protect species going extinct on their land,<sup>38</sup> and recognition of land rights, or lack thereof, might result in land grabbing and conflict between communities and logging companies.<sup>39</sup>

Literature suggests that the FSC originated from protests and boycotts staged by NGOs and citizens throughout the 1980s. These social pressures emerged out of a global concern about the loss of

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<sup>35</sup> Bartley, *supra* note 31, at 17.

<sup>36</sup> For instance, Brazil lost a record amount of 7,900 km<sup>2</sup> of Amazon forest over the course of just over one year. Illegal logging increased sharply since 2003 after Brazil’s governments granted amnesty to those involved in illegal forestation in the past, privatizing public lands and slashing the environmental ministry’s budget. *On the Brink: The Amazon is Approaching an Irreversible Tipping Point*, THE ECONOMIST, Aug. 3-9, 2019, at 14.

<sup>37</sup> Van Waarden, *supra* note 32, at 24; Sandra Moog, André Spicer & Steffen Böhm, *The Politics of Multi-Stakeholder Initiatives: The Crisis of the Forest Stewardship Council*, in 128 JOURNAL OF BUSINESS ETHICS 469, 484 (2015); Bartley, *supra* note 31, at 13; Bartley, *supra* note 31, at 12-13.

<sup>38</sup> Van Waarden, *supra* note 32, at 25-26 (explaining that property owners have incentive to manage their forests sustainably in light of their exclusive rights to reap the returns of sustainable (re)production of trees. Such allocation of private property does not necessarily ensure that landowners will protect species at risks of going distinct, like bugs or butterflies populating their forests, especially if these creatures undermine such productivity).

<sup>39</sup> See Burivalova et al., *supra* note 31; Burivalova & Dasgupta, *supra* note 31.

tropical rain forests and their biodiversity, and were often directly targeted at retailers, pressuring them to stop selling products from illegal logging in tropical forests.<sup>40</sup> These retailers' need to respond to consumer concerns<sup>41</sup> seems to be a less important driver behind the standard setting and certification of forestry products. According to Van Waarden, consumers do not make purchasing decisions on the basis of the quality of lumber. Certain wood might be preferred because it works better or appeals to consumer taste for exclusive wood. The quality of lumber is unlikely to differ depending on whether it was sourced from a certified or non-certified forest. Hence, meaning consumers are unlikely to derive more or less utility from a product or production method because it meets FSC standards, at least not directly. Hence, Van Waarden asserts that consumers are compelled to buy certified wood products mainly out of altruistic reasons, rather than self-interest.<sup>42</sup>

The prevailing reasons for retailers to initiate or join private standard setting in the area of forestry have been pressure from NGOs and the opportunity to obtain a competitive advantage while protecting themselves against the risk of reputational damage. After the FSC's creation in 1993, retailers decided to join and stay within the organization for pragmatic legitimacy considerations.<sup>43</sup> The promise was that FSC certification would enable retailers to obtain a competitive advantage by differentiating their products from competitors and attaining some premium from the market, for instance by securing "price premiums" for their "green products"<sup>44</sup> and give "certified companies access to newer, possibly more environmentally aware, and lucrative buyers."<sup>45</sup> Moreover, FSC certification was considered good risk management; retailers sought to reduce their exposure to reputational risks and brand damage by demonstrating that their products originated from well-managed

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<sup>40</sup> Van Waarden, *supra* note 32, at 28-30.

<sup>41</sup> *Id.* at 29.

<sup>42</sup> *Id.* at 27.

<sup>43</sup> Marx, Bécault & Wouters, *supra* note 11, at 80.

<sup>44</sup> See Burivalova et al., *supra* note 31; Burivalova & Dasgupta, *supra* note 31.

<sup>45</sup> Burivalova & Dasgupta, *supra* note 31.

forests.<sup>46</sup> If their products were to be associated with the destruction of tropical forests' ecosystems, then this could come at a significant cost; masses of customers could abandon them.<sup>47</sup>

## 2.2 Private regulatory competition and coordination

The area of forestry has seen a proliferation of certification schemes and competition among these schemes, resulting in a race for global market dominance.<sup>48</sup> In the 1990s, forest owners, industrial logging companies and business associations created various national industry-led certification schemes, such as the North American CSA labelling scheme and the Sustainable Forestry Initiative ("SFI") labeling scheme, in an attempt to compete with the FSC. The forestry industry associations behind some of these initiatives perceived the FSC's standard-setting activities, and its cooperation with economic and social actors in particular<sup>49</sup>, as a threat to their own private interest.<sup>50</sup> The industry led schemes have competed with the FSC for business adherence *inter alia* by offering lower standards.<sup>51</sup> The FSC has experienced competitive pressure especially from the Pan-European Forest Certification ("PEFC") scheme, which was created by forest owners in Europe in 1999. The PEFC, after having incorporated the CSA, the SFI and other schemes, surpassed the FSC as the world's largest certification scheme in 2011. The intense competition between the FSC and the PEFC is said to have resulted in these organizations observing and changing their standard-setting activities in response to each other's behavior.<sup>52</sup> This competitive dynamic seems to have caused the PEFC to ratchet up its standards and practices<sup>53</sup>, while the FSC has

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<sup>46</sup> Van Waarden, *supra* note 32, at 29.

<sup>47</sup> *Id.* at 29, 41.

<sup>48</sup> Moog, Spicer & Böhm, *supra* note 37, at 478-479.

<sup>49</sup> Van Waarden, *supra* note 32, at 45.

<sup>50</sup> Moog, Spicer & Böhm, *supra* note 37, at 478-479.

<sup>51</sup> Abbott & Snidal, *supra* note 2, at 324 (depicting the most significant schemes in terms of participation of three categories of actors – IOs/states, NGOs and firms).

<sup>52</sup> Maurer, *supra* note 20, at 32-36.

<sup>53</sup> Marx, Bécault & Wouters, *supra* note 11, at 89; see also Christine Overdeest, *Comparing Forest Certification Schemes: The Case of Ratcheting Standards in the Forest Sector*, 8 SOCIO-ECONOMIC REV. 47 (2010).

been compelled to diversify<sup>54</sup> and loosen<sup>55</sup> its standards in order to keep and expand its share of the world's market for forestry certification.

The competitive dynamics between the FSC, the PEFC and other labelling schemes have not only created a downward pressure on FSC standards, but also a proliferation of “eco-labels,” which is said to have led to consumer confusion and a loss in legitimacy and credibility for well-established schemes, as consumers have difficulty in differentiating them from less credible systems.<sup>56</sup> Moreover, the costs of certification can serve as a barrier for entry for global south producers or owners. The costs to get certified increase in case retailers demand compliance with different schemes that do not mutually recognize each other.<sup>57</sup> These problems related to the proliferation of SSBs are not unique to the area of forestry but are recognized to exist in other regimes of goods as well.<sup>58</sup> Within this context, there is an increased need for regulatory cooperation and coordination between SSBs, in order to mitigate the adverse effects of such competitive and dynamic markets.<sup>59</sup>

Food governance has also seen high levels of private regulatory competition among schemes in agri-food supply chains and food manufacturing. This competition is fueled by major retailers (e.g. Ahold/Delhaize, Carrefour, Tesco and Wal-Mart) and manufacturers (e.g. Bureau Veritas, Lloyds and Société Générale de Surveillance)<sup>60</sup> developing their own standards, resulting in a plurality of competing standards and schemes competing over influence on supply in these markets.<sup>61</sup> Fragmentation and regulatory

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<sup>54</sup> Maurer, *supra* note 20, at 32-36.

<sup>55</sup> Moog, Spicer & Böhm, *supra* note 37, at 478.

<sup>56</sup> *Id.* at 482.

<sup>57</sup> Marx & Wouters, *supra* note 19, at 232 (explaining a retailer might need to apply for two or more labels to meet multiple certification requirements, and where systems do not allow multiple labelling, might need to develop different packaging).

<sup>58</sup> *Id.* at 241.

<sup>59</sup> *Id.* at 232.

<sup>60</sup> Paul Verbruggen, *Understanding the ‘New Governance’ of Food Safety: Regulatory Enrolment as a Response to Change in Public and Private Power*, 5 *CAMBRIDGE J. INT’L & COMP. L.* 418, 433 (2016).

<sup>61</sup> Henson, *supra* note 26, at 67-68.



competition in the area of food can not only increase costs for suppliers in the global south, but also make risk management difficult when it requires adherence to common principles to prevent crises such as outbreaks and pandemics.<sup>62</sup> According to Cafaggi, the area of food has seen attempts at a shift towards forms of mutual recognition and transnational cooperation among SSBs.<sup>63</sup> Meta-private regulation has grown in response to a need for cooperation and coordination in order to address the complexity, conflicts and inefficiencies resulting from such regulatory competition.<sup>64</sup>

Cooperation or coordination between schemes has proceeded by way of meta-regulation,<sup>65</sup> public authority<sup>66</sup>, and “system of equivalence” or “mutual recognition” (in which one SSB formally recognizes the criteria or requirements of another SSB it considers equivalent, or where such recognition is symmetrical or reciprocal). According to Wouters and Marx, “mutual recognition is especially suited to address cost issues, while meta-regulation might contribute to leveling the playing field within the market of VSS.”<sup>67</sup> The initiation of private meta-regulation can be explained by various causes, the combination of which furthermore varies per sector.<sup>68</sup>

Private meta-regulatory systems have been created that draft common principles in codes and guidelines or set certain equivalent requirements among different regimes performing similar

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<sup>62</sup> Cafaggi, *supra* note 8, at 201.

<sup>63</sup> *See id.* at 196; Press Release, Glob. Food Safety Initiative, GLOBALG.A.P. Adds to Its GFSI-Recognition (Aug. 25, 2016), [https://mygfsi.com/press\\_releases/globalg-a-p-adds-to-its-gfsi-recognition/](https://mygfsi.com/press_releases/globalg-a-p-adds-to-its-gfsi-recognition/) (last visited Apr. 17, 2021); *see also* Glob. Food Safety Initiative, *GFSI Benchmarking Requirements* (May 9, 2017), <https://www.mygfsi.com/certification/benchmarking/gfsi-guidance-document.html> [<https://web.archive.org/web/20170509224837/https://www.mygfsi.com/certification/benchmarking/gfsi-guidance-document.html>].

<sup>64</sup> Cafaggi, *supra* note 8, at 212.

<sup>65</sup> *Id.* at 211-213.

<sup>66</sup> Partiti, *supra* note 29, at 97.

<sup>67</sup> Marx & Wouters, *supra* note 19, at 241.

<sup>68</sup> Cafaggi, *supra* note 8, at 217-18.

functions.<sup>69</sup> For instance, scheme owners have established the Global Food Safety Initiative (“GFSI”) that harmonizes and benchmarks food safety management certification programs against a meta-standard called the GFSI Guidance Document in order to promote a level playing field “such that, once a food business is certified for one scheme, its certification is accepted under other schemes as well.”<sup>70</sup> GlobalG.A.P.<sup>71</sup> and most major food safety schemes have sought recognition by the GFSI by way of GFSI benchmarking.<sup>72</sup> GlobalG.A.P. has subscribed to, and the FSC is a full member of, ISEAL. ISEAL develops codes of good practice for VSS that guide SSBs in standard-setting, compliance verification, and impact assessment.<sup>73</sup> It seeks to scale up voluntary standard systems in order to transform global markets of sustainable products across domains of manufacturing and to create positive social, environmental and economic impacts.<sup>74</sup>

### 2.3 Variation and change in contextual elements

These studies contribute to our understanding of socio-economic forces and market-based actors and private interests as important drivers behind the creation and change within SSBs. These drivers are industry specific, and not static but subject to change over time. Also, the impact of national and regional legislation on the rationales and incentives behind private standard setting is not uniform across the different domains of manufacturing. For instance, important drivers behind the rise of private regulation in the area of forestry have included a global concern about the loss of ecosystems and tree cover across the world, the “tragedy of the forest commons”, NGO pressures, a regulatory vacuum as States and private ownership have not provided an adequate solution, challenges to the reputations of

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<sup>69</sup> *Id.*

<sup>70</sup> Verbruggen, *supra* note 60, at 433.

<sup>71</sup> Press Release, Glob. Food Safety Initiative, *supra* note 63.

<sup>72</sup> See Glob. Food Safety Initiative, *Recognition*, <https://mygfsi.com/how-to-implement/recognition/> (last visited Aug. 31, 2020).

<sup>73</sup> Paul Verbruggen & Tetty Havinga, *Hybridization of Food Governance: An Analytical Framework*, in *Hybridization of Food Governance* 1, 9 (Paul Verbruggen & Tetty Havinga eds., 2017).

<sup>74</sup> Loconto & Foulleux, *supra* note 13, at 170.

retailers, competitive dynamics between industry specific schemes, and the precariousness of a newly created consumer market for products that protects the biodiversity of forests.<sup>75</sup> Private standard setting in the area of food has been driven primarily by consumer concerns about the safety and quality of food and production processes safeguarding certain minimum criteria relating animal welfare, the environment, and fair trade. Private food standards have emerged in the shadow of food crises and the perceived failure by public governance systems to protect consumers against risks, consumer demands for regulatory change, the responses of retailers to such crises and their efforts to preempt and complement public regulation and to avoid legal liability risks under public food regimes, the globalization of supply chains and the growing concentration of economic power and competition amongst retailers within these global supply chains.<sup>76</sup>

A contextualized understanding of how SSBs evolve and the salience of socio-economic drivers and factors behind an SSB should be examined empirically and on a case-by-case basis. An exogenous event or crisis might trigger, reinforce, or have other effects on the socio-economic drivers behind private standard setting and the incentive and rationales of private actors to create and shape SSBs across industries. For instance, in the area of food, public and private interests are aligned in their aim of addressing food risks that are discernable to consumers. The consumer concerns and demands that arise when food crisis manifests can have an immediate effect on consumer choices and markets. Such a crisis might expose a regulatory failure on the part of the State, and SSBs might act spontaneously or under the influence of public regulators to acquire and retain regulatory competences. Crises in the area of forestry where private market regulation emerged to fill a regulatory vacuum left by the State are less likely to elicit a similar and comparably immediate response. Consumers might relate to forest fires in the Amazon and Congo, or violations of indigenous people's

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<sup>75</sup> Cafaggi, *supra* note 8, at 217-18.

<sup>76</sup> See Verbruggen, *supra* note 60.

rights in Peru<sup>77</sup> but are less directly affected by these incidents or similar scandals. Such critical events might result in pressure on industry players and challenges to their reputation instead, as well as those of SSBs.

A question thus arises about the varying implications of exogenous shocks for the socio-economic drivers and factors behind private standard setting across industries, including the incentives and rationales of economic actors for creating or joining SSBs.<sup>78</sup>

*Hypothesis:* regulatory disasters or scandals, pandemics and economy wide shocks trigger and reinforce socio-economic drivers behind private standard setting, including the incentives of economic actors to initiate or join an SSB.

### **3 The institutional design and the logics of internal legitimation strategies and demands**

#### 3.1 The logics of normative legitimation strategies

Private SSBs fulfill regulatory functions similar to States in supplying rules and regulations that can have a significant impact on the public interest. SSBs are often established as nongovernmental organizations or associations whose rulemaking authority, unlike that of States, does not derive from a democratic mandate by the people. Political scientists and international relation scholars have theorized and assessed how SSBs have sought to acquire rulemaking

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<sup>77</sup> See, e.g., Chris Lang, *New Documentary Slams FSC: "The Eco-Label Could Not Slow Down the Forest Industry"*, FSC-WATCH (Oct. 18, 2018), <https://fsc-watch.com/2018/10/18/new-documentary-slams-fsc-the-eco-label-could-not-slow-down-the-forest-industry/>.

<sup>78</sup> *Id.* at 9.

authority by way of legitimizing their institutions and activities. Most often, the legitimacy of private regulation is associated with a need to meet certain normative ideals of democratic governance.<sup>79</sup> Scholars have relied on a conceptualization of democracy as political legitimacy in institutional analysis assessing whether an SSB's design and/or performance ought to be regarded as legitimate because they adhere to certain normative criteria associated with democratic decision-making processes (e.g. inclusiveness, deliberativeness, participation, transparency, accountability).<sup>80</sup> Often, studies find use in Scharpf's two-dimensional conception of democratic legitimacy, assessing whether the decisions of SSBs emanate from the preferences of the members of the community (input legitimacy) and the outcomes of decision-making meet the collective goals, values and interests of the community to which SSB is accountable (output legitimacy).<sup>81</sup> Political legitimacy is considered an important resource that an SSB<sup>82</sup> can rely on as a strategy to assert a right to rule.<sup>83</sup> Where an SSB's private standards

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<sup>79</sup> JAN WOUTERS, AXEL MARX & NICOLAS HACHEZ, *Private Standards, Global Governance and International Trade: The Case of Global Food Safety Governance*, in PRIVATE STANDARDS AND GLOBAL GOVERNANCE: ECONOMIC, LEGAL AND POLITICAL PERSPECTIVES 255, 267 (Axel Marx et al. eds., 2012) (“[D]iscussions are unsettled as to what democratic legitimacy requires regarding private regulation.”).

<sup>80</sup> STEPHANIE BIJLMAKERS AND GEERT VAN CALSTER, *Global Business and Human Rights Governance: The Case of Corporate Social Responsibility*, in GLOBAL GOVERNANCE AND DEMOCRACY: A MULTIDISCIPLINARY ANALYSIS 117 (Jan Wouters, Antoon Braekman, Matthias Lievens & Emilie Bécault eds., 2015).

<sup>81</sup> Input legitimacy (governance *by* the people) entails that political decisions emanate from the authentic preferences of the members of the community. It can be achieved through a political process that is of a certain participatory and representative quality and respects certain procedural criteria like “representation of relevant stakeholders, inclusiveness, transparency and deliberativeness.” Output legitimacy (governance *for* the people) entails that governance systems have to govern for the people and that an institution's policies decisions ought to deliver goods that meet the collective goals, values and interests of the community to which it is accountable. As such, output legitimacy of an institution involves an assessment of “the procedures and mechanisms established to ensure that policy decisions are fairly and efficiently opened to contestation and criticism.” Marx, Bécault & Wouters, *supra* note 11, at 68–69.

<sup>82</sup> Philip Schleifer, *Varieties of Multi-Stakeholder Governance: Selecting Legitimation Strategies in Transnational Sustainability Politics*, 16 GLOBALIZATIONS 50, 53 (2019).

<sup>83</sup> Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INTERNATIONAL AFFAIRS 405 (2006) (“To say that an institution is legitimate in the normative sense is to assert that it has *the right to rule*—where ruling includes promulgating rules and attempting to secure compliance with them by attaching costs to noncompliance and/or benefits to compliance.”).

lack the binding force of law, and such normative legitimacy can motivate compliance, it is often seen as instrumental if not essential to an SSB's effective exercise of authority.<sup>84</sup>

SSBs have often been established with a multi-stakeholder governance model based on democratic normative ideals in an attempt to ensure the normative legitimacy of the institution, and its rules and procedures. For instance, the FSC has sought to attain normative legitimacy through its multi-stakeholder institutional structure, which ensures the representation of heterogenous interests from industry and civil society within its organization and decision-making procedures. The FSC General Assembly's ("GA") tri-partite chamber approach (environmental, social, economic) seeks to ensure a balanced representation of the interests and values of its various stakeholders and North/South parity in its decision-making. The FSC's voting arrangement within the GA seeks a balance of voting power between the three chambers; each chamber has an equal share of 33.3 per cent of the GA's total votes, and the North and South both have 50% of their respective chamber's total vote.<sup>85</sup> The FSC furthermore provides for institutional discursive spaces and stakeholder consultation within the GA as well as through national and regional platforms. A study by Bécault et al. indicates that "by demanding inclusiveness and equitable representation in standard development, encouraging active stakeholder consultation and participation and decision-making transparency, the FSC demonstrates that thinking about procedural normative democracy beyond the nation-state is not an entirely ill-founded task." It concludes that in terms of input legitimacy, the FSC's governance structure holds "remarkable democratic promise."<sup>86</sup>

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<sup>84</sup> Marx, Bécault & Wouters, *supra* note 11, at 68.

<sup>85</sup> *Id.* at 73.

<sup>86</sup> The study also identifies points of critique, however, in that certain heterogenous groups cannot effectively voice their concerns because they do not squarely fit in one of the three categories (social, environmental, and economic). The representation of global south interests and values is not in par with that of northern counterparts, and not all of those affected by the FSC are adequately represented. *Id.* at 74–75.

### 3.2 The logics of internal socio-legitimation demands and strategies

Studies have shed light on how SSBs have in fact managed and attained the legitimation of their private standards as a strategy to legitimize their rulemaking. According to Casey and Scott, an SSB can manage its legitimacy by way of the institutionalization of policies, structures, and processes that respond to the legitimacy demands of those whose behavior they seek to shape.<sup>87</sup> An organization might face legitimacy demands from multiple subject to their standards, which may be rooted in a number of different rationales, which themselves may be normatively, pragmatically, and/or cognitively based. For instance, the FSC has acted to garner support from business members by way of managing their pragmatic assessments of the organization. As indicated above, retailers are interested in joining and participating in the FSC where this might lead to a competitive advantage such as an enhanced reputation, or other economic benefits.<sup>88</sup> These benefits range from price premiums and increased revenues to improved efficiency and market access.<sup>89</sup> The FSC also offers recipients of these benefits general and specific measures to address economic problems.<sup>90</sup> The FSC has also relied on NGOs to impose political pressure on retailers:<sup>91</sup> NGOs have been instrumental in getting retailers to collectively demand FSC products from their suppliers through “buyers groups” and “trade networks.”<sup>92</sup>

SSBs have demonstrated an adaptive capacity to dynamically respond to such socio-legitimation dynamics within their own

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<sup>87</sup> Casey & Scott, *supra* note 16, at 91.

<sup>88</sup> *Id.*

<sup>89</sup> See, e.g. Gijs Breukink, Joshua Levin & Karen Mo, *Profitability and Sustainability In Responsible Forestry: Economic impacts of FSC certification on forest operators*, Jürgen Freund/WWF (2015), [http://assets.wwf.org.uk/downloads/profitability\\_and\\_sustainability\\_in\\_responsible\\_forestry\\_main\\_report\\_final.pdf?\\_ga=1.254525576.1241702820.1436385161](http://assets.wwf.org.uk/downloads/profitability_and_sustainability_in_responsible_forestry_main_report_final.pdf?_ga=1.254525576.1241702820.1436385161).

<sup>90</sup> The benefits of FSC certification are not obvious to businesses where consumers seem unwilling to pay price premiums for FSC certified forest products, and where demand for FSC certified products has remained weak. Dasgupta, *supra* note 31.

<sup>91</sup> See generally Casey & Scott, *supra* note 16.

<sup>92</sup> Moog, Spicer & Böhm, *supra* note 37, at 478-479; Bartley, *supra* note 33, at 17.

organizations. For instance, a study by Bécault spotlights how the FSC has reformed its dispute resolution mechanisms in response to criticism by its stakeholders.<sup>93</sup> The presence of a dispute mechanism can enhance an SSB's perceived normative legitimacy.<sup>94</sup> Bécault's study demonstrates how stakeholder perceptions of the FSC's system for dispute and complaint resolution, which enables stakeholders to raise concerns and complaints about the FSC scheme, are important for the FSC's effectiveness, which in turn feeds into its credibility. The FSC's system functioned sub-optimally, at least until 2009. The protocol under which it operated prescribed procedures that were too lengthy and complex, and that could not ensure the FSC's responsiveness to the potential concerns and complaints of all of its stakeholders, especially "smaller and poorer forest stakeholders, especially those located in the South." The system furthermore lacked "impartiality and independence" and was "largely ill-equipped to deal with potential conflicts of interests."<sup>95</sup> The FSC revised its guidelines and procedures in November 2009, which now "seem to offer some improvements in terms of accessibility, transparency, timeliness and efficacy."<sup>96</sup> The study finds that these reforms "demonstrate that the FSC can be adaptable and responsive to longstanding criticisms from a variety of forest stakeholders and independent observers."<sup>97</sup>

### 3.3 Internal socio-normative constraints

An SSB with a heterogenous membership composition may face conflicting legitimacy demands,<sup>98</sup> and an SSB's decision over its legitimacy strategies can involve difficult trade-offs. Such trade-offs

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<sup>93</sup> Axel Marx, *Legitimacy, Institutional Design, and Dispute Settlement: The Case of Eco-Certification Systems*, 11 *GLOBALIZATIONS* 401, 416 (2014).

<sup>94</sup> Marx, Bécault & Wouters, *supra* note 11, at 76.

<sup>95</sup> *Id.* at 78.

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<sup>97</sup> *Id.* at 89.

<sup>98</sup> Donald H. Schepers, *Challenges to Legitimacy at the Forest Stewardship Council*, 92 *J. of Bus. Ethics* 279, 285 (2010).



can be a source of tension and affect an SSB's credibility. An SSB might endure legitimacy crises of different degrees of intensity. For instance, the study by Bécault, which also adheres to a constructivist/socialist conception of legitimacy, finds that the FSC experienced a "confidence" or "credibility" crisis after the Rainforest Foundation published a report in 2002 revealing a number of credibility issues tainting the organization.<sup>99</sup> An important critique was linked to the FSC's fast growth strategy, and its efforts to rapidly expand the supply of FSC certificated products. This strategy was set out for the FSC to obtain the broadest possible segment of the global consumer market and to increase the scheme's global scope, recognition and impact. In doing so, the FSC approved the issuing of certificates to forest operations that were not compliant with some of the FSC's key criteria.<sup>100</sup> This move led some social and environmental groups to criticize the FSC's credibility, and absent substantial reform by the FSC, led some of its most important NGO members to resign.<sup>101</sup>

The socio-legitimation dynamics at play within an SSB can drive change in SSBs. These dynamics are complex, however, and in order to understand an SSB's choice of one or a combination of different strategies, it is important to consider contextual elements and their impact on opportunities and outcomes of such decision-making. For instance, an empirical study by Schleifer of three SSBs in the field of sustainable agriculture sheds light on the conditions under which the institutional architects of newly created SSBs decide to adhere to normative democratic ideals:<sup>102</sup>

It finds that while institutional designers respond to criticism and contestation in their environments, there is often no clear identifiable demand for more inclusiveness, expertise, and procedural fairness. Instead, normative legitimation strategies are often

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<sup>99</sup> Marx, Bécault & Wouters, *supra* note 11, at 89.

<sup>100</sup> *Id.* at 79.

<sup>101</sup> *Id.* at 79-80.

<sup>102</sup> Schleifer, *supra* note 82, at 51.

used to fend off more general criticism and contestation. Institutional designers also follow the logic of appropriateness when adopting these features. However, the resulting isomorphic effect is limited, as emerging transnational norms leave considerable room for interpretation. This creates opportunities for ‘window dressing’ and instead of true interest representation the creators of new MSIs often opt for less intrusive legitimation strategies in order to maintain control over the regulatory process. Thus, depending on the preferences of these actors and the internal conflicts and power struggles within MSIs, decisions about legitimation strategies can vary significantly. However, once taken, they often develop path dependencies that are difficult to reverse.

This study suggests that external contextual factors affect a designer’s choice to adhere to the multi-stakeholder model at the moment of an SSB’s creation. It is key for a designer to consider the need to respond to contestation and critical voices in the field whose actions can affect an SSB’s long-term success. The internalization and representation of these stakeholder interests within organizational structures and decision-making processes can lead the SSB to be perceived as more legitimate. The multi-stakeholder model may be a source of normative and sociological legitimacy in this regard; however, it also binds an SSB to stakeholder interests and restrains its ability to make decisions free from their influence. Including various stakeholder interests can result in the internalization of contestation and political debate that can legitimize but also restrain an SSB’s decision-making, and it can give rise to certain path dependencies within an SSB. The findings of the study suggest that a designer might decide not to adhere to such normative ideals in the absence of external protest and contestation, or to adhere to general normative principles and interpretations of these principles that enable it to receive the

benefits of positive legitimacy assessments without restraining its autonomy to rule.<sup>103</sup>

The previous studies suggest that SSBs have demonstrated an ability to adjust their policies, standard setting procedures and decision-making processes to obtain positive legitimacy assessments of their stakeholders. SSBs with a multi-stakeholder structure inhibit different degrees of heterogeneity, which can furthermore engage its organization, decision-making and standard setting procedures.<sup>104</sup> A heterogenous membership composition can be a source of normative legitimacy and empower an organization by fostering acceptance of its standards by its constituencies, and fostering compliance by its regulatory targets. The internal pressures an SSB faces are specific to its heterogenous membership composition, and an SSB must tailor its strategies to its membership for its stakeholders to regard it as appropriate and congruent with normative expectations, which can be based on different rationales (normative, cognitive, pragmatic).<sup>105</sup> This literature supports the argument that a contextualized approach is warranted in light of the varying organizational structures and heterogenous membership composition of SSBs.

Decisions over legitimation strategies are determined to a certain degree by internal contextual elements and the configuration of interests within an organization. An SSB with a multi-stakeholder structure is less free to make decisions independent from its diverse membership composition. Inclusiveness toward multiple stakeholder interests can serve as a catalyst for SSBs to reform and mobilize their organizational structures and procedures. It can also restrain an organization in its search for legitimacy in the face of diverging and conflicting interests among and within stakeholder groups, and the tensions that might arise if difficult trade-offs are

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<sup>103</sup> See generally Schleifer, *supra* note 82.

<sup>104</sup> Fabrizio Cafaggi, *A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement* 14 (European Univ. Inst. Dep't of L., EUI Working Paper, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2530516](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2530516).

<sup>105</sup> Casey & Scott, *supra* note 16.

made.<sup>106</sup> Research suggests that MSIs are more “fragile and conflict prone” because of such inclusiveness of participation.<sup>107</sup> The internal dynamics and tensions that can arise in case of conflict between stakeholder interests can result in an organization to experience a “legitimacy crisis.”

A question arises about the implications of exogenous shocks, assuming that the legitimacy of an SSB is implicated, for the configuration of interests and socio-legitimacy dynamics within the organization, and the autonomy of designers of SSBs to make decisions free from membership interests to ensure the SSB’s continued relevance survival.

*Hypothesis:* The influences of membership interests and tensions between membership interests on an SSB are relaxed in the face of exogenous shocks that affect the SSB’s legitimacy, at least for a certain period, allowing it to consider a wider range of plausible choices and to make decisions freer from the influence of membership interests to ensure the organization’s continued existence.

#### **4 The institutional environment and the logics of external legitimation strategies and demands**

Theoretical and empirical studies have looked beyond SSBs as units of analysis to analyze the dynamics of relationships between SSBs and other actors, including public regulators at various levels, within

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<sup>106</sup>

Loconto &  
Fouilleux,  
*supra* note  
13, at 175.

<sup>107</sup> Schleifer, *supra* note 82, at 50-66.

their environments. These studies build on theories and concepts of regulatory governance as developed within the literature on international relations, political economy and governance. More specifically, they rely on theoretical perspectives of “polycentric governance” and “orchestration” to arrive at new insights about how the ecosystems in which SSBs are situated and how the regulatory and legitimacy dynamics that stem from the interaction between public and private actors within these ecosystems can drive change within SSBs. This literature illustrates how legitimacy is an important resource for SSBs, especially when newly entering a space, to justify their existence and regulatory roles.<sup>108</sup> SSBs can manage their legitimacy by way of engaging with, and “enrolling” actors in their regulatory environment.<sup>109</sup> This environment is continuously evolving, posing unique challenges to SSBs seeking to legitimize their activities by interacting with other actors in their respective fields of manufacturing.

From the perspective of polycentric governance, rulemaking is functional, and is performed through the interactions between various actors and sites of governance, in order to solve joint problems to address particular goals.<sup>110</sup> There is no central role for the state in supplying rules and regulations in the transnational sphere.<sup>111</sup> Regulatory roles and responsibilities can remain with one actor but more commonly are fragmented and dispersed among various actors, which furthermore have diverging rulemaking authority and capacities. Decision-making takes place at multiple sites at the sub-national, national and transnational level.<sup>112</sup> The

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<sup>108</sup> *Id.* at 37.

<sup>109</sup> *Id.* at 38 (defining “legitimation” as “the processes that organizations engage in to gain, maintain and repair their legitimacy”).

<sup>110</sup> Black, *supra* note 12, at 139.

<sup>111</sup> *Id.* at 140.

<sup>112</sup>

regulatory strategies that characterize these regimes are “hybrid (combining governmental and nongovernmental actors), multifaceted (using a number of different strategies simultaneously or sequentially), and indirect.”<sup>113</sup>

Black provides an analytical framework for the analysis of the dynamics of legitimacy and accountability relationships within polycentric regimes, and SSB responses to such dynamics.<sup>114</sup> Drawing from Suchman’s definition of sociological legitimacy, Black notes how an SSB depends for its legitimacy on its credibility within, and acceptance by, the legitimacy communities in its environment.<sup>115</sup> For a regulatory body to be considered legitimate within a regulatory or governance context means that “it is perceived

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<sup>113</sup> Black, *supra* note 12, at 140.

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<sup>115</sup> *Id.*

as having a right to govern both by those it seeks to govern and those on behalf of whom it purports to govern.” Perception of an SSB’s legitimacy may be based on different types of evaluations (normative, pragmatic, cognitive).<sup>116</sup> SSBs may seek to strategically manage their legitimacy, e.g. by conforming to or manipulating perceptions. The dynamism of newly emerging or changing legitimacy communities poses challenges to an SSB seeking to build its legitimacy.<sup>117</sup> According to Black, satisfying the multiple and possibly conflicting claims made by legitimacy communities is essential for an SSB’s authority to be recognized and accepted, “and thus for their continued survival as a regulatory body.”<sup>118</sup>

#### 4.1 The logics of external socio-legitimation demand and strategies

Studies analyzing how SSBs interact with their institutional environments rely on Black’s perspective on legitimacy dynamics within polycentric regimes. They assume that SSBs are embedded in environments populated with a diversity of legitimacy communities and structured by institutional forces and social structure norms. SSBs are interdependent with their environments for important resources, including legitimacy. Such interactions can take different forms, such as “enrolment, endorsement, collaboration, co-option and imitation.”<sup>119</sup> “Mutual enrolment”<sup>120</sup> has served as a strategy for SSBs to dynamically respond to changes

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<sup>116</sup> *Id.* at 146.

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<sup>118</sup> *Id.* at 149.

<sup>119</sup> *Id.* at 38.

<sup>120</sup> See Julia Black, *Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation*, PUBLIC LAW 63, 63 (2003).

in regulatory capacities and power within its regulatory environment, and increasing regime complexity.<sup>121</sup> The understanding is that regulatory capacities within this area are fragmented and dispersed among various actors, which furthermore have different degrees and kinds of capacities (e.g. “information, expertise, wealth, authority and legitimacy, strategic position, and organizational capacity”<sup>122</sup>). Actors with different configurations of regulatory capacities are linked in order to increase the capacity of both actors, and of the regime as a whole, to achieve certain regulatory goals.<sup>123</sup>

Studies have drawn insights from these perspectives of polycentric governance and “enrollment” to analyze the socio-legitimation dynamics of SSBs. A study by Verbruggen provides examples of how GlobalG.A.P. and other SSBs, acting within the hybrid regulatory regime of food safety and quality governance, have “enrolled” other private and public participants from within their regulatory regime to harness their legitimacy and effectiveness in ensuring regulatory outcomes in the area of food safety.<sup>124</sup> This study suggests that private SSBs can seek enrollment across at least three dimensions of the regulatory space of food safety via their interactions with transnational public regulators, national private actors and national public actors. An illustrative example is GlobalG.A.P.’s cooperation with national certification schemes. GlobalG.A.P. has established a benchmarking process that allows for national schemes to be recognized as equivalent to GlobalG.A.P. certification for certain modules.<sup>125</sup> This system of equivalence enables the benchmarked national certification scheme to offer the farmers it has certified the prospect of accessing global supply chains for primary produce and western markets (EU, North America, Australia). According to Verbruggen, it has benefitted GlobalG.A.P. as well: it can coordinate its relations with these national certification schemes and build its regulatory capabilities

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<sup>121</sup> *Id.* at 420.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 426-27.

<sup>124</sup> *See generally* Verbruggen, *supra* note 60, at 422.

<sup>125</sup> *Id.* at 434.



by enrolling local actors and their “information, expertise and strategic position” in their standard setting procedures.<sup>126</sup>

A study by Casey<sup>127</sup> focuses on GlobalG.A.P.’s interactions with States and its delegated entities, accreditation bodies, and certification bodies (rule intermediaries), and finds that these legitimacy communities play an important role in constructing and maintaining GlobalG.A.P.’s legitimacy.<sup>128</sup> The study shows how GlobalG.A.P. has sought to legitimate its standard setting and implementation procedures by drawing upon international standards by State actors, and also by seeking their support and endorsement.<sup>129</sup> Moreover, GlobalG.A.P. enrolled in the “tripartite standards regime” of standard setting organizations, certification bodies, and accreditation bodies. Through interactions with these accreditation and certification bodies, which act as carriers of international norms and standards by states, GlobalG.A.P. can draw from these international norms and standards to enhance the legitimacy of its implementation procedures, and draw upon the scientific and epistemic knowledge of these bodies to ensure its continued integrity.<sup>130</sup> According to Casey, these interactions and legitimation strategies have shaped GlobalG.A.P.’s governance activities and are thus indispensable to understanding its evolution within the broader context of food safety and quality governance.<sup>131</sup>

#### 4.2 Public regulators and trust building

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<sup>126</sup> *Id.* at 445-46.

<sup>127</sup> Donal Casey, *Structuring Private Food Safety Governance: GLOBALGAP and the Legitimizing Role of the State and Rule Intermediaries*, in *HYBRIDIZATION OF FOOD GOVERNANCE : TRENDS, TYPES AND RESULTS* 31 (Paul Verbruggen & Tetty Havinga eds., 2017).

<sup>128</sup> *Id.* at 34 (conceptualizing legitimacy as “congruence between the regulatory structures and activities of an organization and broadly accepted models, norms and/or beliefs that permeate a society or which are held by an organization’s legitimacy communities”).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 32.

<sup>131</sup> Moreover, GLOBALG.A.P. has engaged with high profile actors on several occasions, for instance the SPS Committee. The rationale behind such engagement is that these actors can grant “moral legitimacy, market legitimacy, democratic legitimacy, or cognitive legitimacy and authority to standard setting.” *Id.* at 42.

Enrollment with public regulators can allow an SSB to be regarded as a more legitimate and competent actor, and to extend its regulatory authority.<sup>132</sup> Studies have relied on the theoretical perspective of orchestration<sup>133</sup> to understand the relationship between public regulators and private SSBs. The term “orchestration” was introduced by Abbott and Snidal to argue from a normative standpoint that International Organizations (“IOs”) can and should use their limited regulatory capacity to enhance the regulatory capacities of private actors and institutions by entering into collaborative relationships with these actors and supporting and shaping their standard setting activities. This strategy arose out of a need for IOs to address their own inadequacies in filling existing regulatory gaps resulting from “state failure” to address social and environmental production externalities and the problem of “market failure” resulting from decentralized regulation. According to Abbott and Snidal, orchestration can be considered a “specific strategy of enrolment,” though it presumes a more centralized role for States that seems incompatible with Black’s purest decentralized and polycentric account of regulation.<sup>134</sup> The strategy of orchestrating private regulators is not used only by IOs: national and regional/EU public regulators have mobilized private actors acting as regulatory intermediaries and have harnessed their resources, capacities and competences in the pursuit of public regulatory objectives.<sup>135</sup>

A study by Partiti<sup>136</sup> draws from the perspectives of polycentric governance and orchestration to theorize about how States engage

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<sup>132</sup> Partiti, *supra* note 29, at 96.

<sup>133</sup> Abbott & Snidal, *supra* note 2, at 317 (“orchestration entails mobilizing and working with private actors and institutions to achieve regulatory goals, for example, by catalyzing voluntary and collaborative programs; convening and facilitating private collaborations; persuading and inducing firms and industries to self-regulate; building private capacities; negotiating regulatory targets with firms; and providing incentives for attaining those targets.”).

<sup>134</sup> Verbruggen, *supra* note 60, at 429.

<sup>135</sup> Partiti, *supra* note 29, at 95 (characterizing regulatory intermediaries as “those often private actors which mediate between regulator and target in the regulatory process”).

<sup>136</sup> See generally Enrico Partiti, *Trust and Global Governance. Ensuring Trustworthiness of Transnational Private Regulators*, 52 N.Y.U JOURNAL OF INTERNATIONAL LAW AND POLITICS 415 (2020).

with and enlist SSBs to regulate public interests, such as responsibility features of global production. This involves an indirect engagement whereby public regulators steer but exercise limited control over an SSB's activities. The study adheres to an approach based on the concept of institutional trust to identify how the relations between public and private regulatory authority are and should be structured. It suggests that SSBs can strategically legitimize their activities in the eyes of their stakeholders and public authority by adopting procedures that fulfill certain "good governance" criteria. Internalizing such conditions allows SSBs to prove their trustworthiness with respect to those affected by their activities and their capacity to fulfill certain regulatory functions in the public interest in tandem with their private interests. The study assumes that the legitimacy and regulatory authority of SSBs expands once a public regulator perceives them as trustworthy, and even more so once they have become enlisted in a structured regulatory arrangement.<sup>137</sup>

Partiti's study theorizes about the possible rationales for public and private authorities to enter into trust-based relationships. It distinguishes between trusting relations based on normative expectations of how the SSBs ought to behave towards a public regulator. SSBs are motivated by normative considerations and internalize certain conditions for trust out of goodwill towards the vulnerability of a group of affected actors. Alternatively, a trust-based relationship can be based on rational-choice congruence of interests between a public and private authority. In such cases, the public regulator and the SSB share a common public interest goal, and the former relies on the latter's capacities and competences to achieve its goal. The SSB's engagement is based on interest calculations and concern for the outcome, while disregarding motivations and procedural requirements. The study also suggests that public authorities, because of jurisdictional and capacity restraints, are in a weak bargaining position vis-à-vis VSS on which they rely to perform regulatory functions in global supply chains.

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<sup>137</sup> See generally *Id.*

“Public authority may be forced to accept that relying on VSS with limited, or no, venues for control is a necessary pill to swallow to assert a partial regulatory presence at the transnational stage, and to overcome limitations imposed by WTO law.”<sup>138</sup>

#### 4.3 External socio-normative constraints

This literature suggests that SSBs have a certain autonomy and agency in deciding how to pursue their goals, including how to strategically manage the demands of their legitimacy communities within their regulatory environments.<sup>139</sup> Nonetheless, SSBs are also bound in their strategic action to these same environments and the legitimacy communities on whose acceptance they rely to maintain effective exercise of regulatory authority. According to Black, legitimacy is a relational and dialectical concept: “both regulator and regulatee are at once autonomous and dependent on each other.”<sup>140</sup> “[L]egitimacy claims are thus made both on and by regulators, and both regulators and legitimacy communities construct and contest the legitimacy of regulators, and indeed of one another.”<sup>141</sup> The legitimacy of an organization is sensitive to prevailing conditions, which may change over time. In the words of Black, “once gained, maintaining legitimacy may be difficult, not least because legitimacy communities can change; new actors with different legitimacy claims may become relevant to the organization or legitimacy claims of existing actors in the regulators’ environment may mutate.”<sup>142</sup> Moreover, SSBs might face conflicting legitimacy demands, and tensions can arise if they make tradeoffs favoring the interest of a certain legitimacy community over another. In this context, Black notes that SSBs may encounter a “legitimacy dilemma.”<sup>143</sup>

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<sup>138</sup> *Id.* at 471.

<sup>139</sup> *Id.* at 435.

<sup>140</sup> Black, *supra* note 12, at 140.

<sup>141</sup> *Id.* at 149.

<sup>142</sup> *Id.* at 153.

<sup>143</sup> *Id.* at 157-58 (“Actions that organizations may need to take to render them legitimate for one legitimacy community can be in direct opposition to those they need to adopt to satisfy another.”).

Also, Partiti's study suggests that SSBs have a certain autonomy and agency in responding to institutional dynamics and pursuing strategies when seeking the trust and enrollment from public regulators. An SSB can enact institutional and procedural mechanisms to signal its trustworthiness with respect to not only its business members/targets but a broader group of actors affected by its activities. However, it also constrains itself in that it gives up freedom to make decisions independently of the interests of these actors. Moreover, an SSB depends on the public regulator's choice to rely on it, and thereby confer legitimacy onto it, or not. The public regulator's use of the private regulator might come at a cost (hence its vulnerability): it might cause a loss in legitimacy if the private regulator's configuration of power favors business enterprises, or if it does not behave as the public regulator desires.<sup>144</sup> A public authority's selection and endorsement of an SSB can empower an SSB in its pursuit of legitimacy and effectiveness in meeting its regulatory goals. The influence a public regulator can exert over an SSB's substance and procedures once it has been enlisted in a trust-based relationship can further restrain the SSB's regulatory authority.<sup>145</sup> Orchestration can also have "the effect of coordinating and ratcheting up the output and input legitimacy of competing private regulatory regimes."<sup>146</sup>

To be noted is that orchestration is but one form the relationship between a public regulator and an SSB can take, and one that seems less restrictive to the SSB in comparison to, for instance, a principle-agent relationship that involves a direct delegation to an SSB.<sup>147</sup> Orchestration involves an indirect way of governing and does not involve public authorities exerting direct control over SSBs. A public authority may also opt for direct regulation and harmonization of private standards, or incorporation by reference of

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<sup>144</sup> Partiti, *supra* note 140, at 454.

<sup>145</sup> Partiti, *supra* note 29, at 96.

<sup>146</sup> *Id.* at 100-101

<sup>147</sup> *Id.*

private rules.<sup>148</sup> Moreover, an SSB may incur legal liability for non-fulfillment of its regulatory functions or supervisory obligations under certain circumstances when acting in cooperation with a public regulator.<sup>149</sup> The conditions under which autonomous and independent SSBs decide to enter into cooperative relationships with public regulators and to put such safeguards in place have not been empirically studied in the literature. Nor has the how influence of public regulators or judiciaries over SSBs, after a relationship has been formed, affects the SSBs' autonomy to pursue their goals.

This literature provides valuable insights into how SSBs seek legitimacy, act to justify their existence, and respond to other legitimacy claims within their regulatory environments in order to maintain dominant regulatory roles and survive over time. It suggests that SSBs have a capacity to search and act to build their legitimacy, employing strategies of "regulatory enrollment" to strengthen their own regulatory capabilities.<sup>150</sup> Moreover, it suggests that an SSB can expand its regulatory influence and authority by entering into a trust-based relationship with a public regulator. The efforts by the organization to internalize these demands for change and conditions of trust demonstrate a certain adaptive capacity and resilience. These studies also shed light on how an SSB may enjoy a certain autonomy in seeking legitimacy through its interactions with legitimacy communities yet is constrained by the evolving institutional environment on whose acceptance it depends. The literature thus shows how an SSB's legitimation strategies and outcomes relating such strategies are affected by transnational legitimacy and accountability dynamics within the field. The dynamics that shape an SSB's legitimacy decisions and outcomes are regime specific and evolving, posing unique challenges and opportunities for SSBs to render decisions to ensure their continued rulemaking role.

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<sup>148</sup> *Id.*

<sup>149</sup> Cafaggi, *supra* note 8.

<sup>150</sup> Casey, *supra* note 127.

SSBs operate in institutional environments that involve different configurations of public and private actors, which fulfill different functions depending on their regulatory capacity, and reflect different allocations of regulatory power among these actors. These configurations can change over time with changes in regulatory capacity and power allocation. How an SSB interacts with other actors in its environment and the “enrollment” strategies it employs should be understood in relation to its own relative regulatory capacities and those of the actors it seeks to connect to. The success of an SSB depends on its ability to identify and connect to other actors whose configurations of regulatory capabilities can enhance its own. These legitimacy dynamics thus shape an SSB’s strategies and enable or restrain it in building its legitimacy. This literature takes into consideration the “legitimacy dilemma” of organizations facing multiple and conflicting demands from their legitimating communities. An underlying assumption is that an SSB enjoys a certain autonomy and agency in seeking legitimacy, yet it is constrained in its actions by its dynamic and evolving institutional environment on whose acceptance it depends for its survival.

A question arises as to the implications of exogenous shocks, where they affect the legitimacy of an SSB, for the socio-legitimation and regulatory dynamics within the SSB’s environment, and the SSB’s autonomy to pursue legitimation strategies free from constraints to ensure its continued relevance and survival. Presumably, such exogenous shocks shake up and reconfigure existing dynamics.

*Hypothesis:* The normative constraints imposed on an SSB by its institutional environment will be relaxed in the occurrence of a regulatory disaster or exogenous event, creating new opportunities and allowing an SSB to act more freely from the demands of its legitimacy communities in its efforts to legitimize its organization and pursue its goals.

There will be new opportunities for the SSB to seek enrollment by a public regulator where the latter can legitimize its own activities by enlisting the SSB to fulfill a regulatory task, whether through a

relationship of trust based on normative considerations, or by other means. However, an SSB might lose some autonomy to rule once having entered into a trust-based relationship with a public regulator.

## **5 The performance of institutional entrepreneurs and socio-political and economic**

### **field structures**

Another body of literature builds on insights from international relations and global political economy to draw attention to the socio-economic and political structures of the fields in which SSBs are embedded. This literature raises questions about how these field structures affect the evolution of SSBs, but also the role of so-called “institutional entrepreneurs.” These entrepreneurs act as political agents exerting a certain strategic power to create new SSBs or transform existing ones,<sup>151</sup> and to reconfigure or realign organizational fields in the pursuit of particular goals. Scholars have relied on a neo-Gramscian approach to capture how ideas, institutions, and material capabilities can shape the evolution of an SSB in a complex neo-liberalist environment.<sup>152</sup> They presume that SSBs are situated within broader political fields shaped by political struggles waged over “disciplinary neoliberalism, corporate governance, preservation of the global commons, and citizenship rights.”<sup>153</sup> The studies on institutional entrepreneurship illustrate how the evolution of SSBs owes to the efforts and abilities of actors to skillfully analyze these fields, build capacities and develop strategies, and engage in effective moral and intellectual

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<sup>151</sup> Brown et al., *supra* note 13, at 186 (defining entrepreneurship as “the activities of actors who have an interest in particular institutional arrangements and who leverage resources to create new institutions or to transform existing ones”).

<sup>152</sup> These environments are complex due to “a myriad of contradictory and inconsistent material processes, cultural understandings, and organizational trajectories” and unpredictable because they are constantly changing. Moog, Spicer & Böhm, *supra* note 37, at 472.

<sup>153</sup> Hegemonic struggles are waged within SSBs over citizen control of transnational capital versus the privatization of regulation. Advocacy NGOs challenge corporate managers from powerful transnational corporations in these struggles. *Id.* at 470-72.



leadership.<sup>154</sup> The decisions of these so-called institutional entrepreneurs and their outcomes are determined partly by exogenous and endogenous political-economic factors, i.e. an SSB's "political economy,"<sup>155</sup> and the interplay of corporate and social movement strategies.<sup>156</sup>

### 5.1 Socio-political and economic field structures

Moog, Spicer and Böhm adhere to a neo-Gramscian approach to analyze the organizational development of the FSC. The authors depart from the understanding that an SSB can serve as a site for the democratic steering of the global economy, and for effective regulation to tackle collective action problems. Critics have argued that the power relations within SSBs can also solidify powerful corporate interests at the expense of social and environmental interests, and de-politicize SSBs. The study finds that although the FSC holds promise as a space for deliberative democratic steering,<sup>157</sup> it remains a fragile institution because of various challenges that have compromised its capacity to engage in democratic dialogue, and achieve its objectives.<sup>158</sup> The authors refer to the "weakening of standards, NGO deflections and the FSCs current crisis of credibility" and argue that these problems are not due to "cooptation" or "capture," as is the case for other multi-stakeholder governance initiatives, but should be understood in relation to the FSC's broader institutional and political-economic environment. The study demonstrates how new configurations of relationships between States, markets, and civil society within the FSC's governance, macro-economic structures, and disparities of

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<sup>154</sup> Institutional entrepreneurs can serve "as a contemporary "Modern Prince," a political agent who transforms systems through skillful analysis, building organizational capacity, the development of smart strategy, and effective leadership [and] thus exercises a form of strategic power to navigate the organizational terrain, to project moral and intellectual leadership, and ultimately to reconfigure and realign the field." Levy et al., *supra* note 13, at 89-90.

<sup>155</sup> Moog, Spicer & Böhm, *supra* note 37, at 471.

<sup>156</sup> Brown et al., *supra* note 13, at 98 ("the evolving GRI institution represents a classic Gramscian accommodation between business and social pressures for change in which a new institution is assimilated and transformed to conform with broader power structures.").

<sup>157</sup> Moog, Spicer & Böhm, *supra* note 37, at 471.

<sup>158</sup> *Id.* at 471.

material resources have shaped the politics within the FSC, and have affected its operational effectiveness, representativeness, and regulatory capacity over time, and its efficacy as a regulatory instrument.<sup>159</sup>

The study illustrates how NGOs with lesser access to resources face challenges and a strategic dilemma of having to decide whether to participate in, or withdraw from, the FSC. Especially smaller NGOs often lack the significant resources and capacities that effective participation in the FSC demands. The increased complexity of the FSC's multi-level structure exacerbates this problem. Moreover, the FSC has fallen short in delivering on its promise to foster widespread consumer concern and pressure on firms to improve their sustainability records.<sup>160</sup> NGOs, by participating in the FSC, risk more than losing their valuable resources: if their demands do not fit the limited space of deliberation offered by the venue, the authors note, they might also lose their own moral legitimacy and public trust.<sup>161</sup> Moreover, since their participation in the FSC might have the political effect of "lending support to the broader neoliberalist optimism about non-state and market-based regulation of global environmental problems," NGOs might decide that their resources are better spent elsewhere, for example, on participation in other governance schemes.<sup>162</sup>

## 5.2 The performance of institutional entrepreneurs

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<sup>160</sup>*Id.* at 484.

<sup>161</sup>*Id.* at 482.

<sup>162</sup>*Id.*

The study by Loconto and Fouilleux illustrates how ISEAL as an “institutional entrepreneur” has sought to institutionalize a global field for sustainability. ISEAL has acted as an “institutional entrepreneur” through “institutionalizing macro-standards based on a market-driven and procedural vision of sustainability and simultaneously legitimating both the tools and ISEAL through internal and external enrolments and entanglements.”<sup>163</sup> It promotes the institutionalization of meta-standards on sustainability in a wide range of sectors with the purpose of harmonizing procedures among ISEAL members and actively building institutions so as “to shape, provide cohesiveness to, and discipline the sustainability field.”<sup>164</sup> The authors indicate how SSBs depend for their legitimacy and regulatory authority on the acceptance of their rules and rule by their legitimacy communities, which comprise not only of ISEAL’s membership but also other affected groups in the field.<sup>165</sup> ISEAL seeks to garner such acceptance by embedding values and legitimacy principles in its goals for the sustainability standards, thereby enabling other dominant players in the field to distinguish between credible and non-credible voluntary standard systems.<sup>166</sup> The study also describes how ISEAL has engaged in strategies of enrollment and entanglement,<sup>167</sup> not only to promote its vision of a

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<sup>163</sup> Loconto & Fouilleux, *supra* note 13, at 167.

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<sup>165</sup> *Id.* at 179.

<sup>166</sup> *Id.* at 169.

<sup>167</sup> *Id.* at 169 (“where enrolment refers to engaging actors in common activities and idea creation, the notion of entanglement means that all of the actors continue engaging each other so that the activities and ideas can persist through time.”).

participatory, market-based legitimacy but also to legitimate ISEAL itself within the sustainability field.<sup>168</sup>

The authors shed light on how ISEAL's institutional entrepreneurship has both a technical and political dimension. While its standard-setting and implementation are seemingly technical and apolitical, these processes are in fact "fraught with competing visions of the world and political tensions."<sup>169</sup> The study examines dynamics behind institutional entrepreneurship and finds that political tensions remain within ISEAL as some of the original members consider the new member's standards to be weaker, and thus a threat to the legitimacy of ISEAL.<sup>170</sup> Moreover, the authors note:

This case illustrates how the legitimacy of an actor in a field is a fluid, constantly negotiated, and contingent process'. Because some entanglements are easier than others, the conflicting nature of balancing enrolments constitutes a legitimacy challenge for ISEAL and other similar organizations. Furthermore, ISEAL's search for balance among its legitimation strategies illustrates the constant dialogue that is involved between micro-politics within an organizational field and the macro-politics external to it.

The study of ISEAL illustrates how an SSB's success is in part shaped by institutional entrepreneurs' abilities to employ strategies and mobilize resources to institutionalize an organizational field. Moreover, it depends on the entrepreneurs' ability to maintain a precarious balance and make trade-offs to ensure its legitimacy in the field and the efficacy of the organization. This balancing act should weigh elements of existing power and organizational

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<sup>168</sup> *Id.* at 179 (explaining that ISEAL's legitimacy depends on "shared acceptance of rules and rule by affected groups, who constitute the community that grants legitimacy on the justificatory norms they recognize").

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 179.

structures in the field. These trade-offs can empower an entrepreneur to accommodate the interests and expectations of influential business actors, on whose resources and support it can then rely to achieve instrumental goals for the organization. Nonetheless, these trade-offs might come at the detriment of ensuring participation of less influential and resourceful actors and, as the case study of the FSC has shown, cause them to divest from the project because they are marginalized and their expectations are not met. This can jeopardize the organization's success in the long run. Levy, Brown and De Jong argue that "the strategic compromises and fragile coalitions necessary to undertake institutional entrepreneurship and initiative field-level change inherently generate tensions that inhibit and circumscribe more systematic field transformations."<sup>171</sup>

### 5.3 External and internal socio-political constraints

This literature suggests that the complexity and dynamic nature of fields can affect institutional entrepreneurs' ability to exert their strategic power and intervene in these fields.<sup>172</sup> Levy, Brown and De Jong depict fields as complex systems constituted by discursive, economic and political elements, which are stable when these elements align but can also be unstable and unpredictable "in the face of actors' strategies, endogenous forces, and exogenous shocks."<sup>173</sup> The authors suggest that pre-existing field structures and resistance to structural change by influential and resourceful actors restrained the founders of the Global Reporting Initiative ("GRI") in their institutional entrepreneurship. They note that the trajectory of the GRI "deviated from the intentions of the institutional entrepreneur as a result of strategic interplay among the actors, the evolution of their interests, and tensions between competing

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<sup>171</sup> Levy et al., *supra* note 13 at 91.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

institutional logics.” They were furthermore restrained by the financial and capital markets in which the corporate social responsibility field is embedded.<sup>174</sup> <sup>175</sup> Levy, Brown and De Jong argue that “a new institution requires a supportive economic context to stabilize and flourish in the longer term.”<sup>176</sup>

This literature also suggests that SSBs’ environments are issue specific and affect each SSB differently, and that the strategies typically employed by institutional entrepreneurs are shaped to a certain degree by internal and external contextual elements, hence the importance of a contextualized approach. For instance, in order to legitimize their organizations, institutional entrepreneurs have tailored their strategies to their heterogenous membership interest and have skillfully balanced these interests. Moreover, this literature adds that institutional entrepreneurs must weigh existing political structures and configurations, and also take into consideration the consequences of their decision-making for current socio-economic and political realities. The challenge is to connect their projects to the activities and interests of other actors within the field and the field’s conditions.<sup>177</sup> The complexity and uncertainty of these fields over time calls for tailored and evolving strategies. While entrepreneurs have shown an ability to engage in delicate balancing acts and make decisions in face of conflicting expectations and requests from their heterogenous membership, trade-offs they make

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<sup>174</sup> *Id.* at 91

<sup>175</sup> The case of ISEAL illustrates how pre-existing rules and dominant actors in the field constrained its organization. For instance, ISEAL had to adjust its terminology to avoid potential legal disputes under the EU Regulation (EC) 765/2008 that “interprets accreditation to be the sole mandate of national accreditation bodies and the only standard for accreditation to be the [ISO] version.” Moreover, ISEAL relies on ISO guides as a normative reference for ISEAL member’s certification and accreditation activities. Loconto & Fouilleux, *supra* note 13, at 173-74.

<sup>176</sup> *Id.* at 90.

<sup>177</sup> According to Maguire et al., “the key to entrepreneurs’ success is the way in which they are able to connect their change projects to the activities and interests of other actors in the field by crafting their project to fit the conditions of the field itself. They ‘read’ the path-dependent context in which actors in their field operate and are keen to grasp windows of opportunity as they arise. Such opportunities obviously appear when tensions in a given institutional system have become difficult to ignore. They manage to occupy positions with wide legitimacy and bridge diverse stakeholders, theorize new practices and connect these practices to stakeholder’s routines and values.” Brown et al., *supra* note 13 at 186. *See also Id.* at 173.

can give rise to tensions which can jeopardize the success of an organization.

An SSB's success may in part depend on institutional entrepreneurs' abilities to skillfully assess the field and mobilize their resources to advance their project; however, an SSB's structural environment can constrain an institutional entrepreneur's autonomy to act, which should be assessed on a case-by-case basis. Literature suggests that institutional entrepreneurs are constrained by existing asymmetrical institutional structures, rules, and dominant actors that benefit from inertia in the field. Instability, uncertainty, and tensions within these fields can create opportunities for NGOs to outmaneuver influential actors; however, they may well also enable these dominant actors to solidify their interest and to continue to enjoy influential positions, preventing promised gains from materializing.<sup>178</sup> Such conditions can also create opportunities for institutional entrepreneurs to convey the need for change and to propose a project that aligns with the interests of players and conditions within the field.<sup>179</sup> Complexity and uncertainty in these fields can also give rise to new opportunities for institutional entrepreneurs to exert their strategic influence to provide a counter-weight to dominant field players and to change these field structures.<sup>180</sup>

Fundamentally, it is the complex dynamic character of fields that gives meaning to the concept of strategy as a form of power and enables the Modern Prince to analyze, organize, and intervene. Actors can gain only a partial understanding of the structures and processes within a field, but some are better analysts and strategists than others. Complexity leads to errors and unintended outcomes, potentially frustrating the efforts of field dominants to resist

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<sup>178</sup> *Id.* at 173.

<sup>179</sup> *Id.* at 186.

<sup>180</sup> Levy et al., *supra* note 13, at 90.

change, and enabling weaker actors, with less access to material resources or formal authority, to outmaneuver field dominants. Yet strategic power is also constrained by the same forces of indeterminacy and complexity, as well as by the resistance of “institutional defenders” who benefit from the structural inertia of fields.

Moreover, literature suggests certain exogenous events might trigger “a reconfiguration of field membership and/or interaction patterns,” creating opportunities for institutional entrepreneurs to advance their projects.<sup>181</sup>

A question arises about the implications of exogenous shocks, assuming the legitimacy of the organization is implicated, for the configuration of field membership and interaction patterns, and the autonomy of institutional entrepreneurs to strategically intervene in the field.

*Hypothesis:* the influence of political, economic, and organizational structures of the field on SSBs and institutional entrepreneurs relaxes in the event of an exogenous shock or regulatory disaster that creates instability and uncertainty and exposes tensions in a field. The agency and strategic power of an institutional entrepreneur to reconfigure this field becomes greater, and inside the entrepreneur’s own organization, it will have greater freedom to make choices and trade-offs to initiate change.

## 6 Conclusion

This literature review sought to determine how and why SSBs have evolved since their creation both despite and because of their complex and polycentric environments. It argues that the evolution of SSBs should be understood in relation to the continuously evolving and dynamic regulatory environment in which SSBs are situated and exposed to unique pressures, challenges, and

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<sup>181</sup> Loconto & Fouilleux, *supra* note 13, at 168.



opportunities in asserting their right to rule. Based on a review of empirical case studies and influential theories, this paper proposes a taxonomy of four contextual elements that drive change and corresponding factors that contribute to the survival and success of SSBs. These drivers are: (a) socio-economic conditions and the incentives of private actors, (b) the institutional design and the logics of internal legitimacy demands and strategies, (c) the institutional environment and the logics of external legitimacy demands and strategies; (d) the performance of institutional entrepreneurs in institutionalizing SSBs and reconfiguring fields, and changes in these four elements. The empirical case studies confirm that SSBs adapt to changes and challenges in their environments, and threats to their legitimacy from within and outside the organization, in order to continue to exercise a dominant regulatory role and survive over time. The findings in the literature shed light on how an SSB's decision making and the rationales behind its choice of (legitimation) strategies interrelate with its internal dynamics, and how an SSB engages in delicate balancing exercises and trade-offs in order to meet individual or collective expectations for the organizations' goals, while also considering the consequences of their decisions for complex socio-economic and political realities. Moreover, their continued survival depends in part on their agency and margin of autonomy to make decisions free from structural influences and constraints from their external environment.

This article makes the case for a contextualized view of the evolution and resilience of SSBs over time. This topic lends itself to further empirical comparative analysis and theory building to determine inherent characteristics that can explain the resilience of SSBs across industries. Such theory ought to be contextualized to enable us to enhance our understanding of the phenomenon. A theory about the evolution and resilience of SSBs must clarify the ways in which internal decision-making is affected by their membership and other internal dynamics, as well as their regulatory environments and other external dynamics, and how their autonomy to make decisions is affected by socio-economic and political contexts. The environments in which these SSBs operate are industry and issue

specific. The contextual elements and dynamics SSBs face are not uniform. Also, the impact of regulatory disasters and scandals on the environments, internal dynamics, and autonomy of an SSB will be unique for each organization and should thus be examined empirically and on a case-by-case basis. In the pursuit of such external and internal contextualization, the article sees value in testing the proposed hypotheses for future empirical research to determine the salience of contextual elements, including regulatory disasters and scandals, for how particular organizations evolve and survive over time.

### **Annex: A taxonomy of drivers for change**

#### **Socio-economic drivers and private interests**

*Legal frameworks, markets, the rationales and incentives of economic actors, private regulatory competition and coordination*

*Variation and change in these contextual elements*

#### **The institutional design and the logics of internal legitimation demands and strategies**

*The legal mandate, governance structure and heterogenous membership of the organization, and its normative legitimacy*

*The logics of socio-legitimacy demands of members and constituencies (normative, pragmatic, cognitive)*

*Opportunities and challenges: internal socio-normative constraints by heterogenous membership, the legitimacy dilemma involving a delicate balancing of legitimacy demands and trade-offs has implications for the outcome of its membership interests and internal socio-legitimacy dynamics.*

**The institutional environment and the logics of external  
legitimation demands and strategies**

*The logics of external legitimacy demands by legitimacy  
communities and strategies (normative, pragmatic, cognitive)*

*Structures of trust building*

*Opportunities and challenges: external socio-normative constraints  
by the institutional environment, the legitimacy dilemma and  
balancing of legitimation strategies involving tradeoffs can have  
implications for the outcome of its membership interests and  
external socio legitimacy dynamics.*

**The performance of institutional entrepreneurs and socio-  
political and economic field structures**

*The socio-political and economic structures of a field  
Ideas, institutions, material capabilities*

*The performance of institutional entrepreneurs in institutionalizing  
SSBs and reconfiguring fields (discursive, economic, and  
organizational) and the logics of their strategies*

*Opportunities and challenges: the socio-political and economical  
elements of a field structure can empower and restrain institutional  
entrepreneurs; internal politics and the balancing of strategies  
involving delicate considerations and trade-offs can have  
implications for the outcome of its membership interests and  
political-economic realities.*