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Introduction

Public–Private Governance Interactions

Ensuring the sustainability of global production processes and supply chains is an increasing concern in many sectors. The production of agricultural commodities such as sugar, coffee, or soy, for example, has been associated with adverse environmental and social impacts, including land degradation, deforestation, and labor exploitation (High Level Panel of Experts, 2013; UNDP, 2016). These commodities travel several thousand miles and cross multiple borders before they end up in the hands of consumers, who are often unaware of the origins of the products they buy and the practices that were used to produce them.

States and international organizations have long since attempted to address sustainability in supply chains. However, they have had many difficulties, and on numerous occasions blatantly failed to comprehensively regulate global production processes. Weak regulations, feeble law enforcement, and ineffective domestic institutions often inhibit countries from effectively addressing environmental problems domestically (McDermott et al., 2010; Steinberg and VanDeveer, 2012). The cross-boundary nature of supply chains renders action by any one country difficult. Effective international coordination has been hard to come by as well. Multilateral environmental and trade agreements attempting to address the negative externalities of global economic integration have often had insufficient impact to reverse trends of large-scale resource depletion and pollution (Young, 2011). Furthermore, voluntary public efforts such as the Guidelines for Multinational Enterprises, developed by the Organization for Economic Cooperation and Development (OECD), or the United Nations (UN) Global Compact, have received mixed reviews as well (Berliner and Prakash, 2015; Bernhagen and Mitchell, 2010; Ruggie and Nelson, 2015; Schuler, 2008).

Over the last three decades, a private form of governance has firmly established itself as an alternative means to address sustainability

concerns.¹ On products, in stores, on company websites, and in corporate advertising we can see the results of such private governance in the form of a plethora of eco-labels and other types of sustainability claims. These private initiatives cover a diverse set of products ranging from produce and seafood to clothing, jewelry, and paper and wood products (Bartley, 2003; Bloomfield, 2017; Cashore et al., 2004; Franzen, 2011; Gulbrandsen, 2009).² Non-state actors rather than governments develop the rules on which these sustainability claims rest. Many businesses and industry associations have developed codes of conduct for which they monitor compliance themselves, giving rise to “self-regulation” (Haufler, 2001). Initiatives that are more recent often encompass coalitions of corporate and civil society actors to establish the rules, while employing an independent auditor to verify compliance and grant formal “certification” to the compliant business. Governments in some instances have been a partner in the rulemaking process in a larger multi-stakeholder setting, yet private governance does not derive its authority from the state and has largely developed outside of the purview of governments (Cashore, 2002). Many private governance schemes, moreover, are transnational in the sense that they are not confined to the boundaries of a given state or polity.

Firms engage with this type of private governance as a new form of corporate social responsibility (CSR) (Auld et al., 2008). This new CSR goes well beyond Milton Friedman’s famous adage that the “social responsibility of business is to increase its profits” (Friedman, 1970) and CSR’s traditional manifestation as corporate philanthropy. In its new incarnation as private governance, CSR aims to directly address the adverse impacts of the core productive activities of firms. If stringent enough, the sustainability rules can induce changes in corporate behavior and be costly to firms, while also potentially offering market benefits in the form of enhanced reputations or price premiums for their sustainably produced products (Potoski and Prakash, 2009).

Building on these expected sustainability and market benefits, some scholars have ascribed a transformational potential to private governance (e.g., Bernstein and Cashore, 2007; Cashore et al., 2007; Pattberg, 2007; Ruggie, 2004). This view highlights the potential of private governance to either complement or provide an alternative to public regulation. This is the case because private governance has particularly thrived in areas where international or domestic rules are lacking or

have proven insufficiently effective. As a result, these scholars situate private governance in the context of the prominent use of market-based environmental solutions and “liberal environmentalism” (Bernstein, 2001), and see it as part of a Polanyian effort to re-embed markets in rules (Polanyi, 2001 [1944]). It is exemplary of the current age of “regulatory capitalism” (Levi-Faur, 2005), part of which implies “using markets as regulatory mechanisms, as opposed to the neoliberal schema of markets as the antithesis of regulation” (Braithwaite, 2008: 7).

Other scholars are more critical of private governance. They argue that rulemaking is still dominated by states – and at the international level by the most powerful states – while private governance emerges as a second-best outcome (Drezner, 2007: 81–87). Critics also dismiss private governance as corporate “greenwashing” that is used to obscure destructive corporate practices. Private governance is put down as an exponent of neoliberal economic ideology and the “myths” of the green economy, which merely intends to enhance corporate structural and discursive power at the expense of the regulatory capacity of the state (e.g., Cutler, 2006; Dauvergne and Lister, 2013; Lipschutz, 2005; Scott et al., 2009; Sklair, 2001; Wright and Nyberg, 2014). The market-based logic of private governance and its focus on green consumerism is seen to perpetuate a capitalist, growth-focused rationale ultimately considered destructive to the environment and social relations. As Paterson (2010: 362) aptly phrased it, instead of private governance being “the second half of a Polanyian ‘double movement’, where social actors ‘re-embed’ markets in rules . . . [i]t is rather that the development of rules is the condition of possibility for market actors to realize profits and accumulate capital.”

Whether one embraces a transformational or a more critical perspective on private governance, both positions beg the question of whether there is a role for governments in steering or regulating private governance. From a transformational perspective, one could argue that there is no role for the state. Business has the expertise to improve production processes itself, and the cooperation with civil society actors provides the required credibility to private governance. At most, states could get involved to support the optimal functioning of private governance by ensuring a stable regulatory and institutional framework, such as through secure property rights and enforceable contract

law, and by facilitating and incentivizing companies to engage with private governance (Cashore, 2002; Ebeling and Yasué, 2009).

The critical perspective on private governance offers a clearer rationale for interventions by public authorities. Why would states leave the market to its own devices and allow private actors to define sustainability? This is an important question, since, while in some instances the markets for sustainable products are niche markets, in others there is rapid growth. In fisheries, for example, one of the most prominent private governance schemes, the Marine Stewardship Council (MSC), claimed to cover “nearly 14% of the global wild marine catch” in 2017, in a market for certified seafood products that is worth six billion dollars annually (MSC, 2017b: 4). For cocoa production, the three main private governance schemes – Fairtrade, Rainforest Alliance, and UTZ Certified – together certified over 38 percent of global production in 2015 (International Trade Center, 2017). Indeed, in many sectors we observe the emergence of several competing private governance schemes, which indicates there is a market demand for “green” products and a willingness by firms to invest resources in this market. These dynamics could elicit government intervention to more actively steer private governance efforts, possibly improve their credibility and effectiveness, or even take over private governance and reestablish the primacy of politics (Abbott and Snidal, 2009b; Hospes, 2014).

This book addresses the topic of public interventions in private governance by asking the following research questions: What are the conditions under which a public authority will regulate private governance? What form will these regulatory interventions take? And what are the implications of such interventions for the nature and functioning of private governance and the larger policy field? I assess these questions based on an examination of (non)interventions in private governance in four issue areas in the European Union (EU): organic agriculture, biofuels production, fair trade, and fisheries. The main argument the book develops is that variation in the EU’s regulatory interventions in private governance can be explained by the interaction of two variables: the benefits that regulatory interventions offer domestic producers by publicly differentiating products based on their sustainability characteristics, and the degree to which public interventions can solve problems that result from a fragmentation of the private governance market. The book shows that interest representation and

lobbying by private governance schemes – a topic the literature has overlooked so far – play an important role in bringing about these regulatory dynamics. Furthermore, the book argues that the EU's interventions have had a dual regulatory effect. On the one hand, they have leveled the playing field and raised the bar for some private governance schemes, while excluding clearly fraudulent and underperforming private schemes. On the other hand, the EU has aimed to design the interventions in such a way as to not directly undermine the functioning or regulatory nature of private governance. This outcome results in several possibilities for future policy learning and policy diffusion, whereby private governance innovations can, over time, make their way into public policy.

Public intervention in private governance is an area of study that has not yet received much systematic scholarly attention. As I will discuss further shortly, the EU offers an ideal polity to examine such interventions. The EU has extensive regulatory competences in issue areas that have witnessed the emergence of private governance; it is a global leader in sustainability regulation, and it has experience with engaging private actors through the use of new governance instruments. The central task of the book is to use the European experience to develop an explanatory framework for understanding the political economy of regulatory interactions between private governance and public authority in the context of a global economy.

Standards and Procedural Regulations

To answer the research questions that are at the heart of this book I assess, for each of the four cases, whether and why the EU has intervened in two key features of private governance's functioning (Auld, 2014b: 4). The first feature comprises the capacity to develop standards of appropriate business behavior. In the context of this book, these standards detail the practices that are permitted or prohibited in the production process of a good. I refer to a public intervention in this standard-setting feature as "standards regulation." Standards regulation not only encompasses substantive rulemaking around production processes, but also an intervention by a public authority that regulates the way compliance with the standard is communicated to a broader audience. This communication can occur in the form of an on-product label or some other indication of

sustainability. These consumer communication instruments are part of standards regulation, since they function as the exteriorization of the substantive sustainability standard.

The second key feature of private governance’s functioning comprises the way private governance schemes organize themselves by the governance procedures they use. These procedures can encompass a variety of elements, such as the practices that private governance schemes employ to develop and revise a substantive standard; the rules regarding the composition of a private scheme’s membership; the relationship between a private scheme and the company seeking compliance with the substantive standard; the relationship between a private scheme and the auditor that verifies compliance; and the accreditation of the auditors. I will refer to public interventions in these private governance procedures as “procedural regulation.”

The dependent variable of this study – EU interventions in the form of standards and/or procedural regulation, or the absence of intervention – bears some relation to existing concepts in the literature, as I will also discuss further. The interventions could be considered a form of “orchestration,” as defined by Abbott et al. (2015), whereby public actors use intermediaries such as private governance schemes to indirectly govern their rule targets, who are, in most cases, producers. However, the authority relationships between public authority and private governance as examined in this book are more hierarchical than those covered by the general orchestration concept of Abbott et al.’s 2015 edited volume. In that respect, the public interventions discussed in this book are more akin to Abbott and Snidal’s (2009b, 2010) earlier and more specific concept of “directive orchestration,” which entails a state or international organization imposing its sovereign authority directly on private governance through mandatory rules. Furthermore, the private governance schemes discussed in this book are all examples of what Green (2014) has coined “entrepreneurial private authority.” She contrasts this type of private authority with “delegated private authority” that entails the state-based delegation of policy functions to private actors. As the empirical chapters will show, this book discusses instances in which these two types of private authority are merged. Through its interventions, the EU may enroll private governance schemes by delegating responsibilities to them and regulating this delegation (Black, 2003). This type of delegation, as a result, forms an extension of Green’s model of delegation, since it

entails a delegation to entrepreneurial authority, thereby combining the two types of private authority.

The ways in which standards and procedural regulations are designed can vary. Public intervention could be minimal, in that it entails little public infringement on how private governance schemes substantively regulate their rule targets and organize their governance procedures. At the other extreme, a public authority can “take over” and very stringently describe what sustainability in an issue area substantively entails, and how private governance schemes need to organize themselves; this leaves private schemes no space to develop standards or procedures as they see fit. While these different *degrees* of public intervention have important ramifications for the continued functioning of private governance, this book is, in the first instance, committed to explaining the *form* of public intervention: standards and/or procedural regulation, or their absence altogether. In the final chapter, the book addresses the issue of degrees of intervention when discussing how public interventions in the different issue areas have impacted on private governance: Did the interventions lead to a complete takeover by the EU, or is there still space left (and how much) for private actors to govern as they see fit?

Empirical Puzzle

The empirical puzzle this book addresses is why the EU has intervened extensively in private governance in some issue areas, while in others it has decided not to do so. In the cases of organic agriculture and biofuels production, the EU has intervened with both standards and procedural regulations, while it has not (yet) intervened at all in the areas of fair trade and fisheries.

Organic agriculture is a prominent example of public intervention in private governance. Organic agricultural practices date back to the first half of the twentieth century, when small-scale farmers first developed these farming methods. In the late 1960s and early 1970s, private certification and eco-labeling initiatives formalized these practices. Their intent was to create larger knowledge networks, spread information about agricultural practices that were considered an alternative to large-scale industrial farming, and provide quality products for which farmers could get broader market recognition. Throughout the 1980s and early 1990s, governments started to get involved with

organic agriculture as well. Policymakers attempted to support and define organic agriculture and started to integrate this new policy domain into existing agricultural policy. In European countries, for example, this happened in France in 1980, in Denmark in 1987, and in Spain in 1989 (Lampkin, Foster, and Padel, 1999; Lampkin, Foster, Padel, et al., 1999).

In 1991, legislative action was taken at the level of the EU.³ This intervention resulted in the EU providing a formal definition of organic agriculture, thereby specifying the production processes that operators needed to comply with when claiming to be engaged in organic agriculture. The EU initially suggested that operators use the indication of “organic farming–EEC Control System” on products to show that the operators had complied with EU rules. In later revisions of the policy, an EU on-product organic label was created, as well as additional indications, such as “EU/non-EU agriculture,” to provide information on whether the agricultural raw material is farmed in the EU or in third countries.

In addition to such standards regulation, the EU has developed procedural regulation. The EU’s policy provides for the delegation to private auditors of the verification of the public standard. These auditors have to comply with certain criteria, such as third-party auditing, which over time have become stricter and more encompassing. Especially early on, this intervention directly affected private governance schemes since, in many instances, private standard-setting organizations had not yet been strictly separated from audit organizations. In later revisions of the policy, the EU also devised rules for non-EU auditors that verify compliance of products with the EU rules in third countries.

A second prominent case of the EU intervening in private governance by means of both standards and procedural regulations is biofuels production. Private governance schemes addressing the sustainable production of biofuels have been emerging since the early 2000s. While some of the private schemes cover biofuels in general, others focus on particular crops, such as soy, sugarcane, or palm oil. In 2003, the EU promulgated legislation in support of biofuels production, but without interfering with private governance. The policy was based on an overall positive outlook on the biofuels sector’s future development and its contribution to the EU’s sustainability and climate policies. In 2009, however, the EU partly reversed course and created both standards and

procedural regulations. The EU established a set of sustainability criteria for biofuels sold in the European market; these criteria cover greenhouse gas (GHG) emissions savings from biofuels production and the types of land on which biofuels can be grown. Furthermore, the EU developed what is called a “meta-standard” approach, which requires that an operator who wants to show compliance with the EU biofuels sustainability criteria can do so with certification by an EU-approved private governance scheme. This approach has resulted in private governance schemes adopting the EU standard almost word for word and having their entire functioning (i.e., the way they organize and engage in certification and monitoring compliance), scrutinized and approved by the EU before they can operate in the European market.

Public interventions in private governance, as in the cases of organic agriculture and biofuels production, are certainly not the norm. In this book, I examine two cases of nonintervention. The first case covers fair trade. Private governance schemes dealing with fair trade have existed since at least the late 1980s.⁴ Over the years, EU policymakers have engaged in several discussions on how to respond to private governance in this issue area. Both public policymakers and private actors have many times called for EU interventions in the form of both standards and procedural regulations. Yet, on two separate occasions (in 1999 and 2009), the EU explicitly decided not to intervene in this issue area. Moreover, even though the debate reemerges at times, EU policymakers consider interventions in the near future highly unlikely.

The second case of nonintervention is fisheries. Private fisheries governance emerged in the early 1990s. As in the fair trade case, the EU has so far not intervened. Yet unlike fair trade, the fisheries policy area is still in flux, and an EU intervention is within the realm of possibility in the near future. For the last two decades, policymakers have been discussing possible EU regulatory interventions. While a legislative proposal on procedural regulation was developed around 2008–2009, it failed to materialize due to a confluence of events, including European elections in 2009 and a reform of the EU’s Common Fisheries Policy (CFP) between 2009 and 2013. Since this reform concluded, a new round of discussions on regulating private fisheries governance was started. At the time of writing, however, no decision had been taken.

Table 1.1 *EU interventions in private governance*

	Private Governance Emergence	EU Public Regulation
Organic Agriculture	Early 1970s	1991 Standards and procedural regulations
Biofuels	Early 2000s	2009 Standards and procedural regulations
Fisheries	Early 1990s	2008–2009 Unreleased proposal for procedural regulation 2017 No intervention yet
Fair Trade	Late 1980s	1999 Explicit decision against intervention 2009 Explicit decision against intervention

The Argument

What explains these divergent regulatory interventions in private governance? Why did the EU intervene with both standards and procedural regulations in the cases of organic agriculture and biofuels production, while it decided not to intervene (yet) in private governance in the areas of fisheries and fair trade? In this book, I argue that the variation in these public regulatory interventions can be explained by the interaction of two explanatory variables: the domestic benefits of product differentiation by a public authority in support of domestic producers, and the fragmentation of the private governance market, which may result in second-order information asymmetry problems, or trade and competitive distortions.

First, I argue that a public authority will intervene in private governance to support its domestic producers, which are the rule targets of private governance. Since participation in private governance provides firms with access to the market for certified goods, a public authority