MSIs, Institutional Design, and Institutional Efficacy

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Introduction

The emergence of multi-stakeholder initiatives (MSIs) is intertwined with the history of global "governance gaps" and the story of state struggles to regulate corporate influence in an era of globalization using an institutional architecture built during an era of nation states and superpower competition. As notions of public and private (and, concomitantly, sovereign and non-sovereign) have become increasingly fluid, MSIs have become an ever-more influential regulatory tool. They generally share two characteristics that make them valuable in the face of modern governance gaps. First, they have a functional orientation, addressing business conduct across a range of pressing public policy problems, including environmental degradation, human rights abuse and labor. This is a legacy of their original emergence as functional solutions to specific governance gaps. Second, they are a forum for some sort of engagement – dialogue, deliberation, collaboration - between different stakeholder groups, frequently including civil society, governments, and companies.

Beyond these simple observations, MSIs are hard to define, and indeed, this may be part of their success. They are flexible and adaptable to the specific problems in a particular sector, functioning across many scales from supranational to local, and with little formal dogma. Drawing on the specific functional contexts in which different MSIs operate, researchers have so far sought to understand how to define MSIs (without a great deal of success given MSIs’ functional orientation), the conditions under which MSIs emerge, the forces driving the evolution of such initiatives, why companies participate, as well as the political and social dynamics influencing the efficacy, legitimacy, and authority of particular MSIs. Scholars have also looked at the interactions between MSIs and provided normative arguments about how they interact with public regulatory regimes.
Today MSIs have proliferated. Yet, while there is little doubt that MSIs have become embedded in global industries and recognized as a new form of governance, the precise – or even approximate – number of MSIs is unknown. Anecdotally, they increasingly consist of a number of repeat players. Furthermore, as they have expanded, they have spilled beyond dealing with specific problems in particular sectors. As a result, some recent empirical and analytical work has urged us to think of MSIs as an emerging organizational field, marked by some isomorphism of formal characteristics and the sharing of best practices.

The idea of MSIs as an emerging organizational field suggests the need for deep, structured analysis – and related research agenda - of MSIs, exploring the nature and prescriptions of the field. MSI Integrity was founded in part out of this recognition of the need for an organized, systematic research agenda, and we take it as the starting point for this workshop. The workshop is happening against the backdrop of a mapping project developed by Kenan Institute for Ethics at Duke University, with the Institute for Multi-Stakeholder Initiative Integrity (MSI Integrity) and the law firm Miller Chevalier. This is an attempt to grapple with the extent of the organizational field, bringing to the fore key recurring isomorphisms and recurring points of definitional contest about what constitutes an MSI. We will circulate information on the mapping project along with your think pieces in early May.

In the workshop, we focus on questions about institutional design, a natural consequence of the institutional isomorphism that marks an organizational field: a shared sense of legitimate, or even desirable, design features will tie the field together. By institutional design, we mean a process rule or formal organizational feature that has been deliberately designed to meet a specific, stated end.

We seek to explore a descriptive and a normative question around institutional design. The descriptive: what institutional design features are emerging as typical for an MSI, what do they do, and to whose benefit? The normative: what sort of standardization might be desirable, and what sort should be resisted?

This workshop begins by exploring these questions at a micro level, using case analysis, coupled with a limited number of studies taking a macro approach to shared design features across many MSIs. Our goal is to understand the origins and implications of institutional design though detailed studies, rather than high level theorizing or correlative analysis.

**Defining MSIs:**

MSIs still have no common or shared definition—let alone term – even though many

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1 See e.g. Klaus Dingwerth and Philipp Pattberg, ‘World Politics and Organizational Fields: The Case of Transnational Sustainability Governance’ (2009) 15 European Journal of International Relations 707.
have tried. Many studies of MSIs focus on the generic regulatory form MSIs take: "These multistakeholder instruments can be seen as public-private or civic-private co-regulation mechanisms" (citations omitted). Others focus on the range of stakeholders and the function of the MSI: Jeroen Warner, writing on water governance, sees MSIs as some form of "institutional innovation" within which stakeholders come together to solve a problem that they all perceive in the same way. In this view, an MSI should uphold the democratization of the management of a good or sector. Yet others simply stress the special nature of MSIs (with a nod to their collaborative process): "...expectations from practitioners and research warrant an analytical separation of [MSIs] into a separate category of inquiry, specifically because of the collaborative nature of standard setting involving groups across public-private and profit-nonprofit boundaries, contrary to NGOs." In general, we might find scholars attempting to pin down what an MSI is by turning to some combination of certain formal qualities; certain functional commitments; certain normative commitments; certain players; and certain historical trajectories (e.g. pointing out the need to incorporate social concerns into corporate regulation or standards; tracing state failure adequately to do so; and arguing for the direct incorporation of civil society voices into a deliberative-regulatory space to remedy this failure).

This absence of a definition can be a strength, keeping MSIs flexible and adaptable to the problems they face. At the same time, the lack of definition can be a curse, allowing any actor claim to the MSI label, perhaps as a strategy to legitimize an initiative rather than to signal a meaningful cross-sectoral approach. MSIs, then, are caught in the definitional Catch-22 that marks many institutional and textual fields as they coalesce and concretize: overdetermining the core object or idea (here, being over-specific about what constitutes an MSI) could operate to exclude marginalized actors and render the field irrelevant to real-world problems; and yet, underdetermining it could have exactly the same effect – when the field is vague, it offers cover for a set of strategic operations by powerful participants to capture the field and to undermine the less powerful.

Recognizing this definitional Catch-22, we adopt a (potentially overly) broad definition for the purpose of this workshop, but recognize it to be a heuristic and flexible one to enable a common discussion: MSIs are voluntary initiatives in which more than one

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2 We use "MSI" here as a placeholder; terms that have been used to describe this phenomenon, with varying degrees of specificity, include "multistakeholder partnerships", "multi-stakeholder networks", "global action networks", "private standard initiatives", "societal learning and change initiatives", "global public policy networks", "nonstate market-drive governance systems", "trisectoral networks", "multilateral transnational governance schemes", "private transnational governance", "transnational business governance", "public-private partnerships", and "civil regulation". The term "multi-stakeholder initiative" appears to have been first used prior to the United Nations Conference on Environment and Development (the Rio Summit) in 1992: Lucy Koechlin & Richard Call and, "Standard setting at the cutting edge: an evidence-based typology for multi-stakeholder initiatives", in Anne Peters et al., Non-State Actors as Standard-Setters 84, 85 (2009).

3 Laura Alabareda, “Corporate responsibility, governance and accountability: from self-regulation to co-regulation” Corporate Governance 430 (2008), at 436.


stakeholder group (i.e., industry, civil society, government, affected communities) collaborate in the governance, including operation, of the initiative, which aims to address business conduct that implicates issues of public concern.

This definition centers on participation in governance, meaning the processes by which responsibility, power and authority are organized. It includes a narrow approach in which different stakeholders share decision-making authority. But it also allows for initiatives in which a single stakeholder type holds final decision-making power while other stakeholders participate in more advisory or operational roles (for example on an advisory council, in setting standards or monitoring reporting and compliance). We are currently using this broad definition for the mapping project, but are considering whether to shift to the narrow definition once the data is collected.

In the context of this workshop and the mapping project, we adopt this more expansive or over-inclusive approach not to validate it, but for the purpose of enabling a broad discussion of diverse institutional arrangements. We do not want to assume that certain governance design features (e.g. decision making) are necessary to merit the label of MSIs while dispensing with others. Rather, by considering institutional design choices, both narrow and broad, we hope to see which MSI definitions are getting the most traction and becoming the most concrete in practice (rather than at a conceptual level). By looking at the impact of design choices, we also hope to make a normative statement about emerging practical definitions.

**MSIs and Institutional Design:**

Research on the institutional design of MSIs is nascent. It offers diverse and at times conflicting depictions of the MSI institutional landscape. Some scholars suggest that MSIs have converged around a set of core institutional features. Klaus Dingwerth and Philipp Pattberg argue, for instance, that transnational sustainability initiatives have converged around in their design, rhetoric and processes. In terms of institutional design, they highlight how most MSIs share a tripartite structure consisting of a board of directors, a permanent secretariat and, in their view most strikingly, a “strong” stakeholder body. By contrast, other analyses indicate that key differences in the institutional features of MSIs persist. For instance, Luc Fransen documents variation in the design of MSIs regulating labor standards across three dimensions: scope of standards, specificity of implementation and enforcement rules, and the degree to which stakeholders can control governance mechanisms (including decision-making, monitoring, review, and information dissemination). These distinct images of converging and diverging MSIs raise the possibility that different trends characterize different industries or types of MSIs (labor vs. sustainability). Yet, in line with the idea of the emerging organizational field, current

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6 Luc Fransen notes a similar narrow-broad distinction as indicative of two fundamentally different MSIs existing “under the same flag”—the first he terms “involvement and the second ”consultation”. Fransen and Kolk (2007) at 669.
scholarship on the origins and impact of institutional design offers accounts that appear relevant across industry and MSI type.

Understanding the Origins of Design

What explains the institutional design choices of MSIs, both their shared and divergent features? Scholars have pointed to a range of explanations, including the purpose of the initiative, the MSI negotiation process, the relative power of stakeholders involved in its creation, and the external context (including crisis, criticism, and isomorphism).

Viewed through a functionalist lens, MSIs fall into at least two broad categories, regulatory and informational.9 Standard-setting initiatives propose or reference standards of behavior and then include a range of design features aimed at fostering adherence to such standards, including reporting and evaluation mechanisms, certification and other forms of sanctioning provisions. Informational MSIs are geared towards fostering dialogue and facilitating learning through building networks, holding forums for diverse stakeholders, and conducting and disseminating case studies on topics like best practices and lessons learned. These MSIs tend to lack monitoring and accountability procedures or place secondary importance on them.

The functionalist account of institutional design, however, faces a number of limitations: it can be post-hoc, assuming that the nature of the problem to be solved shapes the core design choices (as regulatory or informational), rather than looking to the politics surrounding problem framing and participant incentives. It risks being reductive; MSIs may have multiple and sometimes conflicting goals or their core purpose may be contested, including by members of the initiatives. The functionalist account may be too static. MSIs tend to evolve over time, both in their design features and sometimes in expanding or reframing the set of problems to be addressed.

A second factor influencing institutional design, specifically governance structure, relates to the negotiation process used in creating the initiative. Drafting processes in which industry representatives are the only or outnumber other stakeholders have led to initiatives with governance structures that prioritize industry perspective.10 By contrast, if the negotiation process gives equal participation rights to NGOs, affected communities, and other stakeholders, the resulting governance structure appears more likely to reflect this diversity as well.11

It is less clear how the negotiation process – specifically the inclusion of diverse stakeholders – shapes other aspects of institutional design, such as monitoring and evaluation. In their analysis of 49 standards (some of which were multi-stakeholder in their drafting process and others business-led), Luc Fransen and Ans Kolk find that MSIs are no

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11 Fransen and Kolk (2007) at 676.
different from business-led initiatives in their reliance on audit companies, rather than NGO stakeholders, for evaluations. They note, “It is not always clear that multi-stakeholder standards are truly multi-stakeholder in their operations.”

The relative power of stakeholders also influences institutional design choices, sometimes through interactions with the negotiation process. In *The Governance Triangle: Regulatory Standards Institution in the Shadow of the State*, Kenneth Abbott and Duncan Snidal identify two forms of power – “go it alone” and “inclusion” power – that influence whether stakeholders establish an initiative and the form it takes. The bargaining power of stakeholders interacts with situational and other factors, such as the number of stakeholders involved in negotiations, to affect key questions about who is included in initiative. In his analysis of the Kimberley Process, Oliver Westerwinter similarly looks at how the formality of institutional context (such as voting rules, membership criteria) shaped different dimensions of participants’ power – economic, institutional and network power – to influence choices about monitoring and enforcement.

A fourth feature influencing institutional design choices relates to the external context in which the initiative is created and evolves. At least three types of conditions may provide an impetus for the establishment of an MSI and have reverberations for design choices: crisis, criticism, and isomorphism. Some initiatives are formulated as a response to industry-perceived crisis in which NGOs have launched a campaign putting corporate reputations at stake. This experience of crisis may make companies more willing to submit to inclusive governance structures and stronger accountability mechanisms than would otherwise be possible. But crisis may also induce the opposite tendency, pushing companies to establish weak and narrow initiatives as superficial gestures to contain or mitigate reputational harm.

Criticism by NGOs, while falling short of an industry crisis, may also shape initial or evolving design choices. NGOs may target companies directly, moving them to participate in the formation of MSIs. NGOs may also target the MSIs themselves for being too weak – either in their standards or their enforcement mechanisms. MSIs have responded, in some cases, by revising institutional mechanisms, strengthening existing enforcement and reporting mechanisms, or adopting new ones.

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12 Fransen and Kolk (2007) at 678.
15 For instance, the Fair Labor Association emerged out of a series of sweatshop scandals in the 1990s. The Kimberley Process stemmed from a campaign by Global Witness and other NGOs to raise awareness about “blood diamonds.” The creation of Global Network Initiative was a response to widespread disapproval of the technology industry for cooperating with Chinese government demands for access to user data.
16 After confronting intense NGO lobbying, the Kimberley Process, for instance, added in 2003 its peer review mechanism in which states and NGOs review the compliance of other members. The Global Compact responded to NGO naming and shaming in 2004 and 2005 with procedural reforms that included a new annual reporting requirement and a de-listing mechanism for companies that fail
Lastly, researchers have pointed to isomorphism to explain increasing similarities in institutional design. In their analysis of sustainability MSIs, Dingwerth and Pattenberg highlight coercive and mimetic pressures underlying the institutionalization of MSIs. MSI founders have depended on the same set of key funders and looked to one another and a burgeoning industry of best practices and practical guides as they designed their initiatives.\textsuperscript{17} In her study of forest certification, Overdevest, by contrast, noted the competitive dynamics driving isomorphic convergence towards the same model of MSI. Industry-dominated initiatives responded to civil society efforts at delegitimation by bolstering their environmental standards to more closely resemble the leading MSI initiative, FSC.\textsuperscript{18} By contrast, some scholars note that competitive dynamics can also lead to divergence in institutional design, with industry creating initiatives that, for legitimacy reasons, resembles MSIs but that exclude non-corporate participation in core decision-making and implementation processes. As Fransen notes, these competitive dynamics lead to “a divergence between the surface appearance of governance models and the actual functioning of programmes.”\textsuperscript{19}

\textit{The Link Between Design and Efficacy}

Taken together, function, bargaining process, relative power, and external context draw our attention to the ways in which the institutionalization of an MSI (rather than, albeit influenced by, its players, its rhetoric, or its norms\textsuperscript{20}) distributes power and regularizes contests. We can then ask to what ends and to whom the benefits?

For instance, Daniel Berliner and Aseem Prakash analyze the Global Compact’s impact on the environmental and human rights practices of 3000 US firms and find that improvement in corporate practice is cosmetic. Global Compact members improve their practices when it is cheap to do so (gaining value in part from the signaling that goes with adopting certain processes legitimated by the Global Compact), but perform worse than non-members when it comes to implementing more costly changes. The two authors point to institutional design as the cause. They suggest, “exploiting the lack of monitoring and enforcement, UNGC members are able to shirk: enjoying goodwill benefits of program membership without making costly changes to their human rights and environmental practices.”\textsuperscript{21}
Scholars may thus link institutional design directly to *efficacy*, or the ways in which an MSI’s process support its functions or ends (albeit not necessarily in those explicit terms). Marianne Beisheim and Klaus Dingwerth, for instance, propose an argument that procedural legitimacy of MSIs leads to efficacy by increasing the acceptance of MSIs and leading actors to adjust their behavior to the MSI norms.\footnote{Marianne Beisheim and Klaus Dingwerth, “Procedural Legitimacy and Private Transnational Governance: Are the Good Ones Doing Better?” SFB-Governance Working Paper Series (2008), 11.} Their proxies for procedural legitimacy, however, reflect institutional design choices regarding inclusiveness, transparency and deliberativeness.

In looking at the link between institutional design and efficacy, we are thus suggesting that scholars might turn their attention to how upstream design choices are reflected in the relationship between process and outcome for an MSI. That is, do design choices lead to greater harmony between process and outcome (efficacy) and why/why not? To do so requires exploring the factors driving particular instances of institutionalization, unpacking the goods that MSI stakeholders seek – process goods and/or outcome goods – and whether these goods would be realized if process and outcome converged or diverged.

We thus hope to study the institutional design choices of MSIs as *an emerging organizational field* in order to understand the relationship between process and outcomes with respect to the benefits to participants, the distribution of power and, eventually, normative positions that we as scholars might hold. In particular, by setting out the importance of institutional design to process and outcome goods, we hope to provide a fuller accounting of the power dynamics of an MSI, and make any normative approaches more precise, recognizing that actors may care more about process or outcome goods, and/or masking one in the language of another. To that end, we hope that the workshop and its subsequent publication will engage with the following set of questions:

- How does institutional design influence particular outcomes (such as workers protections, human rights, community empowerment, environmental protection, company conduct and compliance with MSI principles)? And particular process goods (legitimacy, transparency, accountability)?
- What is the relationship between the political/social origins of an MSI, institutional design choices, and MSI impact? What path dependencies arise regarding MSI design, influence and public policy outcomes?
- What is the impact of repeat players on MSI design choices? What sort of goods are they seeking? Does this vary by type of repeat player (e.g. civil society, government, corporate)?
- Under what conditions (external; type of actor; power, initial bargaining) do actors seek outcome goods or process goods through design choices? Under what conditions are design choices intended to produce outcome and process goods that are mutually supportive, and when are they antagonistic?
About MSI Integrity and the Kenan Institute for Ethics:

**MSI Integrity** is dedicated to examining the impact of voluntary initiatives that address business and human rights-related issues. MSI Integrity researches the relationship between process and impact of these initiatives, facilitates learning and capacity building in the field, and develops tools to evaluate initiatives. MSI Integrity takes a particular interest in how initiatives include, empower, and impact affected communities.

MSI Integrity has a longstanding commitment to fostering critical research in MSIs, and was designed with the goal of conducting systematic research into MSIs. The organization was incubated in the International Human Rights Clinic at Harvard Law School from 2010-2013. It is committed to fostering deeper research and critical evaluation into MSIs, and has done so through partnering with academic institutions since it was publicly launched as an independent nonprofit organization in 2013.

**The Kenan Institute for Ethics** is an interdisciplinary “think and do” tank committed to promoting moral reflection and commitment, conducting interdisciplinary research, and shaping policy and practice. At Duke we serve as a central node for analysis, debate, and engagement on ethical issues at and beyond the university. We currently feature work on global migration, human rights, regulatory policy, moral attitudes and decision-making, and religions and public life. The Duke Human Rights Center at the Kenan Institute for Ethics explores contemporary international human rights challenges by promoting interdisciplinary collaborations and innovative pedagogy for faculty, students, and practitioners. We encourage critical investigations from a broad range of disciplinary traditions that engage undergraduate and graduate students on the ethical issues at play and that bridge the often-separate spheres of research, advocacy and policy.