

Choosing Low-Cost Institutions In Global Governance

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Abstract

Contemporary global governance takes place not only through formal inter-governmental organizations and treaties, but increasingly through diverse institutional forms including informal inter-governmental organizations, trans-governmental networks and transnational public-private partnerships. While these forms differ in many ways, they are all what we call “low-cost institutions” (LCIs): the costs of creating, operating, changing and exiting them, and the sovereignty costs they impose, are substantially lower on average than those of treaty-based institutions. LCIs also provide substantive and political governance benefits based on their low costs, including reduced risk, malleability and flexibility, as well as many of the general cooperation benefits provided by all types of institutions. LCIs are poorly-suited for creating and enforcing binding commitments, but can perform many other governance functions, alone and as complements to treaty-based institutions. We argue that the availability of LCIs changes the cost-benefit logic of institutional choice in a densely institutionalized international system, making the creation of new institutions, which existing research sees as the “last resort,” more likely. In addition, LCIs empower executive, bureaucratic and societal actors, incentivizing those actors to favor creating LCIs rather than treaty-based institutions. The availability of LCIs affects global governance in multiple ways. It reduces the status quo bias of governance, changes its institutional and actor composition, enables (modest) cooperation in times of polarization and gridlock, creates beneficial institutional divisions of labor, and expands governance options. At the same time, the proliferation of LCIs reduces the focality of incumbent institutions, increasing the complexity of governance.

I. Introduction

- Why did states establish the Financial Stability Forum (FSF) in 1999, when numerous inter-governmental institutions, including the International Monetary Fund, World Bank and Organization for Economic Co-operation and Development, were available to promote financial stability?¹
- Why did states create the Proliferation Security Initiative (PSI) in 2003 instead of modifying the United Nations Convention on the Law of the Sea, even though doing so left them without authority to interdict high-seas shipments of weapons of mass destruction?²
- Why did states form the Financial Action Task Force (FATF) in 1989 to combat money laundering, despite the availability of capable institutions including the IMF, OECD and regional security organizations?³
- Why did the World Bank, with member state approval, partner with private sector participants in the Prototype Carbon Fund (PCF) in 1999 to support market-based climate change mitigation mechanisms, instead of acting through the Bank itself or the United Nations Framework Convention on Climate Change?⁴

In all these cases, states chose to address emerging cooperation problems not by assigning them to incumbent formal intergovernmental organizations or multilateral treaties, but by creating new institutions of different types, including informal intergovernmental organizations (PSI and FATF), a trans-governmental network (FSF), and a transnational public-private partnership (PCF).

These examples are by no means anomalous. Over the past three decades, the number of informal intergovernmental organizations (IIGOs) rose from 27 to 72, a 167% increase;⁵ transnational public-private partnerships (TPPPs) increased from 26 to 167, a 542% increase;⁶ and trans-governmental networks (TGNs) expanded from 25 to 141, a 464% increase.⁷ At the same time, the adoption of multilateral treaties has stagnated: while some 35 treaties were

¹ Clarke 2014

² Eilstrup-Sangiovanni 2009

³ Hameiri, Jones and Sandor 2018

⁴ Freestone 2013

⁵ Vabulas and Snidal 2013

⁶ Westerwinter 2016:2

⁷ Abbott et al. 2018:10

deposited with the UN in each decade between 1950 and 2000, only 20 were deposited between 2000 and 2010, and none between 2011 and 2013.⁸

To understand how these changes in institutional composition may affect global governance, it is essential to elucidate their causes, and to assess their consequences and likely future development. To do so requires analyzing the institutional choices that states make when confronted with emerging cooperation problems.⁹ To facilitate such an analysis, we develop an actor-centered approach to institutional choice in an international system that is densely institutionalized, and is populated not only by formal interstate institutions, but also by diverse informal institutions including IIGOs, TGNs and TPPPs. Our approach conceptualizes states as boundedly rational actors making conscious institutional choices.¹⁰ More precisely, we assume that states seek to address cooperation problems effectively, but are also sensitive to the costs and risks of cooperation. That is, they seek to balance costs and risks, within the limits of their ability, against the substantive and political governance benefits of particular institutional forms.

We treat IIGOs, TGNs and TPPPs as important members of a common and distinct class of transnational institutions we call “low-cost institutions” (LCIs). Much of the literature independently analyzes IIGOs, TGNs, TPPPs and other institutional forms,¹¹ using distinct explanatory factors.¹² In our view, however, it is analytically fruitful to treat these seemingly diverse institutional forms as a common class, because doing so allows us to explain why states choose such forms – in preference to treaty-based institutions – using a single set of explanatory factors. This increases generalizability, theoretical parsimony and analytical leverage compared to existing approaches. It is appropriate to treat all three as members of a common class because they share features that are highly relevant to states’ institutional choices.

In substance, our approach leads us to argue that state decisions to address emerging cooperation problems through LCIs instead of incumbent treaty-based institutions are based on four common rationales, which reflect common institutional features.

⁸ Pauwelyn et al. 2014: 734-735

⁹ Emerging cooperation problems might be wholly new, problems that have changed significantly, or newly salient problems (JMS 2013:23). The emergence of such problems can be recognized from public statements and actions of relevant governance actors.

¹⁰ This actor-centered approach complements the organizational ecology explanation for the expansion of new institutional forms (Abbott, Green and Keohane 2016), which considers institutions in the aggregate, as populations, and focuses on structural features, especially institutional density.

¹¹ Vabulas & Snidal 2013; Eilstrup-Sangiovanni 2009; Westerwinter 2019.

¹² Separate treatment is, of course, appropriate in analyzing form-specific issues.

- First, the *costs* of creating, operating and changing LCIs, as well as their sovereignty and exit costs, are all, on average, substantially lower than those of treaty-based institutions. All of these low costs derive primarily from LCIs' *informality*: their reliance on non-legally binding obligations and relatively uncomplicated operating procedures.
- Second, LCIs provide *specific governance benefits* – not equally available through treaty-based institutions – that derive directly from their low costs. These include malleability, flexibility and reduced risk, as well as relaxed constraints on state action, widely desired by states. *Participation* by executive, bureaucratic and societal actors (in IIGOs, TGNs and TPPPs respectively) contributes governance competencies and enhances LCIs' ability to target and engage infra- and non-state actors.
- Third, LCIs offer many of the *general governance benefits* provided by treaty-based institutions, although sometimes in attenuated form. For example, LCIs can reduce the transaction costs of cooperation, mitigate asymmetric information, enable working relationships among officials, and establish relatively stable behavioral expectations.¹³
- Fourth, LCIs *empower* their infra-state and non-state *participants*: IIGOs empower executive officials (e.g., vis-à-vis legislatures), TGNs bureaucratic actors, and TPPPs societal actors. This incentivizes those actors to favor the creation of LCIs (of the appropriate type) when they pursue transnational cooperation.

Taken together, these four factors – low costs, specific and general governance benefits, and empowerment – explain why states create LCIs to address cooperation problems rather than assigning those problems to incumbent treaty-based institutions, and thus why LCIs have proliferated. As we elaborate below, these factors encompass both substantive and political considerations: low creation, operating and change costs, governance benefits and participation on the substantive side; low sovereignty and exit costs, relaxed constraints and empowerment on the political side.

In comparative terms, our analysis of institutional costs and benefits suggests that treaty-based institutions are better-suited than LCIs to create credible state commitments. But LCIs can provide adequate or superior responses to many other cooperation problems (*substantive fit*). These include coordination problems and other dilemmas of common aversions, as well as problems characterized by uncertainty and dynamism. LCIs can thus complement treaty-based institutions by addressing different aspects of complex cooperation problems. In addition,

¹³ See Keohane 1984

LCIs' low sovereignty and exit costs allow states to reduce the costs and risks of cooperation (*political fit*). Finally, empowering infra- and non-state actors facilitates engaging targets and stakeholders, while creating new advocates for LCIs (*empowerment*).

Our analysis builds on the most general actor-centered theory of institutional choice in a densely institutionalized international system, developed by Jupille, Mattli and Snidal (JMS).¹⁴ JMS presents an integrated analysis of states' institutional choice options in densely institutionalized settings, while synthesizing a range of scholarship on choice options.¹⁵ In the JMS logic, states assign emerging cooperation problems to incumbent treaty-based institutions so long as they are expected to produce governance outcomes "above some minimum threshold."¹⁶ For JMS, such status quo choices reduce costs, uncertainty and risk compared to changing incumbent institutions and, especially, to creating new institutions to replace them, the most costly, risky and uncertain option. JMS therefore expects that new institutions will be created only rarely, producing a "strong status quo bias" in global governance.¹⁷

Importantly, however, JMS and the scholarship it synthesizes focus exclusively on institutional choice among treaty-based institutions. We expand that logic by considering how states choose when a broader menu of institutional options is available to them. This allows us to explain why states regularly opt for what JMS considers the most costly, risky and uncertain choice, the creation of new institutions – albeit low-cost institutions. More broadly, our approach calls into question JMS' general conclusion that global governance as a whole is characterized by a strong institutional status quo bias. In contrast, we explain how the availability of LCIs helps to overcome status quo bias, gridlock and stagnation.¹⁸

In sum, our approach adds value to scholarship on institutional choice in a densely institutionalized international system – and thus on contemporary global governance – in four major ways:

- It analyzes how states make institutional choice decisions when a range of institutional forms – not simply treaty-based institutions – is available to them; this analysis better explains the proliferation of diverse institutional forms.

¹⁴ Jupille, Mattli and Snidal 2013

¹⁵ E.g. Aggarwal 1998; Alter and Meunier 2009; Busch 2007; Helfer 2009; van de Graaf 2013

¹⁶ JMS 2013:7

¹⁷ JMS 2013:35

¹⁸ Hale et al. 2013; Pauwelyn et al. 2014

- It enhances theoretical parsimony and analytical leverage by encompassing multiple institutional forms within a single analytical category – LCIs – and explaining the choice of those institutions with a single set of explanatory factors, rather than analyzing the benefits and limitations of each form individually.
- Its actor-centered perspective complements structural approaches such as organizational ecology, providing fuller and more nuanced explanations.
- It more accurately characterizes the implications of institutional choice decisions for global governance, highlighting that LCIs can help to overcome status quo bias, provide a wider range of institutional options, and complement treaty-based institutions in addressing complex governance problems, while remaining less able to address credible commitment problems and reducing the focality of incumbent treaty-based institutions, thus increasing the complexity of global governance.

The remainder of the paper is structured as follows. Section II introduces LCIs. It identifies their common institutional features; explains how these give rise to low costs, specific and general governance benefits, and governance limitations; and presents the three types of LCIs we consider here. Section III describes the JMS logic of institutional choice. Section IV modifies that logic by introducing the availability of LCIs, first in a context of unitary states, as in JMS, and then in a context that incorporates bureaucratic and societal proponents of cooperation. We illustrate our argument with diverse examples. To facilitate further empirical investigations, we derive theoretical conjectures that can be operationalized as testable propositions, in terms appropriate to the particular research question and issue area. Section V summarizes the implications of our analysis for global governance.

II. Introducing Low-Cost Institutions

A. Defining LCIs

LCIs are institutions: “persistent and connected sets of rules (formal and informal) that prescribe behavioral roles, constrain activity, and shape expectations.”¹⁹ While some institutions - such as customary international law - are only implicit, LCIs, like treaty-based institutions, are “explicit arrangements, negotiated among international actors that prescribe,

¹⁹ Keohane 1988:383

proscribe, and/or authorize behavior.”²⁰ Most LCIs are also organizations: “institutions capable of exercising agency.”²¹

We focus here on IIGOs, TGNs and TPPPs. These are particularly widespread and consequential institutional forms in contemporary transnational governance; in addition, each has clear common features and a well-developed literature. Yet these institutions do not exhaust the category of LCIs. Many “private transnational regulatory organizations” satisfy our definition and are significant governance actors.²² The same is true of transnational cooperative arrangements formed by subnational governments.²³ Sub-types could be identified within our three categories. And new low-cost forms may emerge and thrive. However, our focus on IIGOs, TGNs and TPPPs enables us to frame our analysis wholly in terms of institutional choices by state actors, not non-state or sub-state actors, and thus to maintain analytic comparability with JMS.

LCIs have two characteristic institutional features. First, they are relatively *informal*, compared to treaty-based institutions. We define informality in terms of two major traits.

- LCIs are *created* by non-binding agreements or understandings, not by legally-binding treaties among states; by implication, they also have authority to *adopt* only non-binding standards, not legally-binding rules. In contrast to the concept of “soft law,”²⁴ which refers primarily to norms as outputs of international cooperation,²⁵ the LCI concept also encompasses organizational features including participants and procedures.
- LCIs feature decision-making formalities and operating procedures that are less elaborate and complicated than those of treaty-based institutions.

Our definition of informality differs from many in the literature on informal institutions. First, while we focus on “explicit arrangements,” a significant part of that literature emphasizes unwritten norms, ideologies and aspects of culture.²⁶ Such institutions are not the result of conscious design choices, but emerge spontaneously from actor behavior; as a result, they are

²⁰ Koremenos, Lipson and Snidal 2001:762

²¹ Abbott, Green and Keohane 2016:256

²² Abbott, Green and Keohane 2016. These institutions have also proliferated. In climate change, for example, they “barely existed” in 1990, but at least 31 operate today. Id. at 253, 248.

²³ Betsill and Bulkeley 2006

²⁴ Abbott and Snidal 2000

²⁵ Abbott and Snidal’s conception of soft law does, however, include “delegation” of norm-related functions to organizations.

²⁶ For a domestic example, see Kaufmann, Hooghiemstra and Feeney 2018.

not captured by our theoretical approach, which focuses on conscious decisions by governance actors.

Second, most definitions of informality that do focus on conscious institutional choices are tailored for particular types of inter-state institutions. Accordingly, they highlight highly institution-specific features. Vabulas & Snidal, to take a prominent example, define IIGOs as inter-state *organizations* based on explicit shared expectations, with regular meetings but no independent secretariats or headquarters.²⁷ Lipson, in contrast, defines informal inter-state *agreements* as those lacking states' "most authoritative imprimatur, ... treaty ratification," those made at lower levels of government, and those expressed in "less formal" written or oral form.²⁸ We adopt a more general definition applicable to a wide range of informal transnational institutions.

The second characteristic feature of LCIs is participation by executive, bureaucratic and societal actors, rather than or in addition to states. Such participation strengthens LCIs by incorporating additional actor competencies; it also empowers participating actors by providing them direct roles in decision-making. Together, these features constitute LCIs as a distinct class of international institutions, in spite of the differences among individual forms.²⁹

It is plausible to assume that the proliferation of LCIs was enabled by the end of the Cold War and the decreasing costs of transnational communications based on new technologies.³⁰ However, we cannot fully explain this institutional dynamic through structural factors alone. Rather, we must analyze why actors make conscious choices to create LCIs under given structural conditions. To do so, we translate the characteristic features of LCIs into the analytical categories of costs, risks, and governance benefits and limitations, widely applied in analyses of institutional choice and other forms of state action.

B. Costs

We postulate that LCIs enable transnational cooperation at significantly lower costs than treaty-based institutions, on average. Because we are interested in decisions to create institutions, *formation costs* are particularly important. These take two main forms:

²⁷ Vabulas and Snidal 2013; compare Fioretos 2019

²⁸ Lipson 1991:498

²⁹ Pauwelyn et al. (2012) refer to all of these features – non-binding normative outputs, loosely organized procedures and non-state actor participation – as potentially characterizing the process of "informal international lawmaking." We treat them as constituting a particular institutional form.

³⁰ Rogier and Dauvergne 2016:418; Manulak and Snidal 2020

- *Transaction costs* are the transnational costs of putting in place transnational cooperation: the costs of searching for partners, acquiring information, bargaining, contracting, and institutionalizing agreed arrangements.³¹ These are lower for LCIs than for treaty-based institutions because LCIs are not created by legally-binding treaties and lack authority to adopt legally-binding rules; they can thus be formed with fewer inter-state diplomatic formalities and less intensive bargaining than are characteristic of treaty negotiations.
- *Domestic approval costs* are the costs proponents of cooperation face in persuading governments to authorize and engage in particular forms of cooperation. They include the costs of obtaining approval from, e.g., senior executive officials, inter-agency committees and legislatures,³² and the costs of overcoming resistance from opponents of cooperation. LCIs can often avoid procedures such as high-level executive clearance and legislative approval, widely required for treaty-based institutions. It may also be easier to persuade authorities to act through LCIs, and to overcome opposition to them, because of their limited authority.

Other types of costs arise over time. We assume that states and other actors “discount” these future costs and consider them in formation decisions.

- *Operating costs* include the salaries and expenses of staff, governing bodies, advisors and other personnel, and the costs of headquarters and other offices. Importantly, operating costs also include the costs of making and implementing decisions, including material expenses, time and political costs. These costs are lower in LCIs because of their less elaborate decision-making formalities and their frequently smaller material footprints.
- *Change costs* arise when participants modify institutional features in response to changed conditions or preferences. These are essentially re-formation costs, and so are lower in LCIs for the same reasons as formation costs are. Low decision costs also facilitate change.
- *Exit costs* are the costs that states or other actors must incur to withdraw from an institution or its rules. Because institutions enable joint gains through collective action, exit costs include foregone cooperation gains. They also include material expenses, domestic and international, of organizing and implementing exit. Finally, exit costs

³¹ JMS 2013:38 n. 44

³² Lipson 1991

include political costs such as weakening an actor's reputation as a reliable partner. While exit from LCIs does forego gains from cooperation, other exit costs are lower than in treaty-based institutions because of LCIs' non-binding character, which gives rise to low operating and change costs.

Finally, *sovereignty costs* are the "decisional autonomy costs that states face in accepting encroachments on their sovereignty."³³ They "range from simple differences in outcome on particular issues, to loss of authority over decision-making in an issue-area, to more fundamental encroachments on state sovereignty." Sovereignty costs increase to the degree that states "accept external authority over significant decisions," especially decisions that "impinge on the relations between a state and its citizens or territory."³⁴ Because of their non-binding character and low exit costs, LCIs entail less "loss of authority" than treaty-based institutions.

Not every LCI has equally low costs. For example, a TPPP with many disparate partners may have higher transaction and decision costs than a TGN of a few like-minded officials. Likewise, not every treaty-based institution has equally high costs. For example, a multilateral treaty may incorporate escape and withdrawal clauses that reduce sovereignty and exit costs.³⁵ Yet such isolated islands of flexibility rarely produce costs as low as those of LCIs, where low costs pervade institutional structures and procedures. Thus, our central point is that the *average* LCI enables transnational cooperation at significantly lower costs than the *average* treaty-based institution.

C. Governance benefits and risks

LCIs generate three kinds of governance benefits: specific benefits that stem from their low costs; general benefits like those produced by all types of institutions; and benefits derived from the participation of executive, bureaucratic or societal actors.

First, the relatively low costs, on average, of LCIs produce specific governance benefits that help states to address governance problems (*substantive fit*) at acceptable costs and risks (*political fit*).

- The structures, procedures and rules of LCIs are highly malleable: they can be fine-tuned at formation to fit specific problem characteristics and contextual features more

³³ JMS 2013:25

³⁴ Abbott & Snidal 2000:436-437

³⁵ Rosendorff & Milner 2001

easily and effectively than those of treaty-based institutions. Malleability derives from LCIs' low formation costs, especially transaction and domestic approval costs; avoiding diplomatic and legal formalities provides more diverse and nuanced institutional options. Lower operating and decision-making costs also enhance fine-tuning.

- Actors can modify the structures, procedures and rules of LCIs over time more easily and effectively than those of treaty-based institutions, because of low change costs. Flexibility allows LCIs to adapt to new conditions, information, issues, preferences and governance demands. It also helps LCIs to engage in experimentalist governance, trying different approaches and learning through trial and error.³⁶
- LCIs' low formation, change and exit costs reduce the risk that transnational negotiations will unfold in unforeseen and harmful ways. Low change costs reduce the risk that a new institution will permanently fail to effectively address the problem at hand. Low sovereignty and exit costs reduce the risk that an institution will unduly limit freedom of action or impinge on state authority.
- LCIs impose more relaxed constraints on states than do treaty-based institutions, reflecting LCIs' low sovereignty, change and exit costs. As discussed further below, relaxed constraints are in some circumstances a serious limitation, reducing LCIs' ability to create and enforce credible commitments (see Section D). Yet states often place a high premium on freedom of action, and in those circumstances relaxed constraints can facilitate (modest levels of) cooperation.

Second, because they enable governance actors to interact continuously on the basis of agreed principles or (soft) rules, LCIs provide many of the governance benefits associated with institutions of all kinds. Thus, LCIs can reduce the transaction costs of sustaining and expanding cooperation; build transnational working relationships; mitigate inadequate or asymmetric information by producing and disseminating information; construct actor reputations and provide fora in which to assess them. These benefits are not premised on relationships of harmony; rather, LCIs help reduce discord by establishing shared expectations that reduce uncertainty about actor behavior.³⁷

These benefits are sometimes more limited than in treaty-based institutions. For example, LCIs may create less stable behavioral expectations due to their low change and exit costs and

³⁶ Sabel and Zeitlin 2010

³⁷ See Keohane 1984: Chapter 6

limited enforcement power. They may also create lower reputational costs due to relaxed constraints and limited institutionalization. Yet other benefits may be stronger than in treaty-based institutions: for example, LCIs often disseminate information particularly effectively and create candid and highly productive working relationships among officials, as in many TGNs.

Third, LCIs empower particular governance actors, both within and outside the state, by enabling them to participate directly in global governance: IIGOs empower executive officials (*vis-à-vis* legislatures), TGNs agency officials, and TPPPs private actors. Their participation produces additional governance benefits. It allows LCIs to draw on the competencies of diverse actors, including the expertise of government agencies, the material resources of business and the normative commitment and legitimacy of civil society organizations. It also enables LCIs to engage more effectively with infra- and non-state governance targets and stakeholders: more knowledgeably framing rules and policies to influence their behavior, and more effectively interacting with them to promote implementation. These benefits are particularly important for cooperation problems that require regulating non-state actors and enlisting them in developing solutions, such as climate change.

D. Governance limitations

The same institutional features responsible for LCIs' low costs and specific governance benefits constrain LCIs' ability to address demanding cooperation problems. In general, LCIs are less highly institutionalized than treaty-based institutions, and so cannot offer the same centralization of cooperative activities and institutional independence.³⁸ More specifically, LCIs cannot adopt legally-binding rules or implement strong monitoring and enforcement. As a result, they cannot tackle issues that require highly credible commitments to overcome incentives to defect, as in international trade. Put differently, they are unable to induce states to behave in ways that diverge significantly from their ideal policies.³⁹ Thus, LCIs are sub-optimal institutional choices in settings where distributional conflicts are strong, defection from cooperative solutions is likely, and noncompliance is difficult to detect.⁴⁰

³⁸ Abbott and Snidal 1998

³⁹ Downs et al. 1996

⁴⁰ Abbott & Snidal 2000:45-46

E. Types of LCIs

In this section, we briefly introduce and illustrate the three types of LCIs we consider here, showing how each reflects the common features, benefits and limitations of LCIs as a class of institutions.

IIGOs:

An informal international organization (IIGO) is “an explicitly shared expectation – rather than a formalized agreement – about purpose [...] with explicitly associated state ‘members’ who participate in regular meetings but have no independent secretariat or other significant institutionalization such as a headquarters and/or permanent staff.” Examples include the G7/8, G20 and other “G-groups,” and the Financial Action Task Force (FATF). Unlike other types of LCIs, IIGOs are “by definition *intergovernmental* with states as the key participants (at the ministerial or executive level).”⁴¹

IIGOs can be formed “more quickly and with lower negotiation costs [than treaty-based institutions] because ... commitments are less binding and permanent.” Domestic approval costs are low, as IIGOs avoid costly procedures required for treaty-based institutions. With no secretariat or headquarters, operating costs are also low. Moreover, IIGOs provide substantial flexibility in responding to changing circumstances.⁴² “Less binding and permanent” commitments reduce sovereignty and exit costs, and thus uncertainty and risk. In the G20, for example, “states are unencumbered by procedures and less concerned that their commitment will be strongly binding.” Yet these same features limit IIGOs’ ability to create and enforce strongly credible state commitments: the G20’s informality may limit the institution to “putting out fires.”⁴³

TGNs:

Trans-governmental cooperation involves “direct interactions among sub-units of different governments” that “are not controlled by the policies of the cabinets or chief executives of those governments.”⁴⁴ The members of trans-governmental networks (TGNs) – such as the Body of European Regulators for Electronic Communications (BEREC) and the International Organization of Securities Commissions (IOSCO) – are not states, but “discrete, specialized

⁴¹ Vabulas & Snidal 2013:197-198

⁴² Vabulas & Snidal 2013:209-211; see also Lipson 1991.

⁴³ Viola 2015:27, 32

⁴⁴ Keohane and Nye 1974:43

agencies of governments.”⁴⁵ This makes TGNs particularly suitable for complex and technical policy areas.

TGNs are formed by voluntary agreements among agencies, not inter-state treaties. This minimizes “international diplomatic formalities and domestic approval processes,” including “layers of domestic legal review,” reducing formation costs.⁴⁶ TGNs adopt only non-binding decisions – although member agencies can implement these through binding regulations – and generally act by consensus, limiting sovereignty and exit costs. Decision costs are low because of limited formalities and shared epistemic orientations. Again, however, these features limit TGNs’ ability to enforce strong commitments.

The non-state character of TGN membership may appear inconsistent with our analytical focus on state decisions. However, while some TGNs are established by agencies with little involvement from states as such, many are “sponsored” by states or treaty-based institutions, which direct or encourage their formation.⁴⁷ The EU, for example, has sponsored or created numerous TGNs, including BEREC, to coordinate member state implementation of EU rules;⁴⁸ the World Health Organization (WHO), to take another example, sponsored the Blood Regulators Network. We focus on sponsored TGNs, which involve institutional choices by states.

The same analytical logic may apply more broadly. States and interstate institutions regularly sponsor institutions other than TGNs. For example, the G8 (an IIGO) sponsored the International Partnership for Energy Efficiency Cooperation (an independent IIGO) to facilitate knowledge-sharing.⁴⁹ In addition, while we focus here on IIGOs, TGNs and TPPPs, because they are so well-defined, widespread and consequential, states also orchestrate⁵⁰ and delegate authority to⁵¹ other types of LCIs, including private and subnational institutions. We encourage future research to extend our analysis of states’ institutional choices to these actions, broadening its empirical focus.

⁴⁵ Raustiala 2002:3. Some institutions that operate as TGNs, and are treated as such in the literature, are formally structured as inter-state bodies. Examples include the PSI and FATF.

⁴⁶ Abbott, Kauffmann & Lee 2018

⁴⁷ Abbott, Kauffmann & Lee 2018:14

⁴⁸ Eberlein and Newman 2008

⁴⁹ van de Graaf 2013

⁵⁰ Abbott et al. 2015

⁵¹ Green 2018

TPPPs:

Transnational public-private partnerships (TPPPs) are “agreements for collaborative governance between public actors (national governmental agencies, subnational governments or IOs) and non-state actors (foundations, firms, advocacy organizations, or others) which establish common norms, rules, objectives, and decision-making and implementation procedures for a set of policy problems.”⁵² Examples include the Roundtable on Sustainable Biomaterials; the Global Fund to Fight AIDS, Tuberculosis and Malaria; and the International Code of Conduct for Private Security Service Providers Association.⁵³

TPPPs are “based on soft agreements not carrying the force of international law, and are structured around decentralized networks with low level of bureaucratization,” producing low formation, sovereignty, operating, change and exit costs. TPPPs can be fine-tuned to specific conditions, and are highly flexible. They pool “authority, competences, and resources from both the public and the private spheres,” helping to engage and influence private actors. TPPPs “complement the functions of intergovernmental institutions by creating numerous niches for incremental, outcome-oriented collective action...”⁵⁴ However, like other LCIs, they cannot adopt legally-binding rules or implement strong monitoring or enforcement.

In all of these categories, we focus on free-standing institutions. However, treaty-based institutions frequently create internal mechanisms and more or less tightly-linked institutional “progeny”⁵⁵ that are structured and operate much like IIGOs, TGNs or TPPPs. For example, the OECD conducts much of its work through committees and working groups of expert national officials, like TGNs. The “opening up of international organizations”⁵⁶ gives private actors greater roles in policy formulation and implementation, as in TPPPs. The WHO, for example, sponsored the Global Outbreak Alert and Response Network (GOARN) as an independent TPPP, but houses its secretariat and integrates it into WHO’s own operations.⁵⁷ Other internal mechanisms and progeny take distinct, idiosyncratic forms, such as the Intergovernmental Panel on Climate Change.⁵⁸ In addition, powerful member states create informal bodies and practices within formal international organizations to gain influence over

⁵² Andonova 2010:25-26

⁵³ Schleifer 2013; Bartsch 2007; Avant 2016

⁵⁴ Andonova 2010:26-28

⁵⁵ Johnson 2014

⁵⁶ Tallberg et al. 2013

⁵⁷ Ansell et al. 2012

⁵⁸ Johnson 2014:103-33

important decisions, as in many IIGOs.⁵⁹ Here again, future research could extend our analysis of institutional choice to such governance arrangements.

III. The JMS model

The logic of institutional choice developed by Jupille, Mattli and Snidal seeks to explain the collective institutional choices that states make in a densely institutionalized environment to address emerging cooperation problems. Dense institutionalization means that states rarely make these decisions on a clean slate, but “in the context of an already institutionalized status quo with a focal institution that is the default institutional alternative,” such as the World Health Organization in global health. In this context, state decisions result from “interactions between cooperation problems and the institutional status quo.”⁶⁰

JMS posits four distinct choice strategies available to states: USE (address the problem through the default focal institution in the issue area), SELECT (choose one out of two or more incumbent institutions), CHANGE (modify an incumbent institution), and CREATE (form a new institution to replace an existing one). JMS argues that states consider these choices in sequence, as represented in Figure 1.

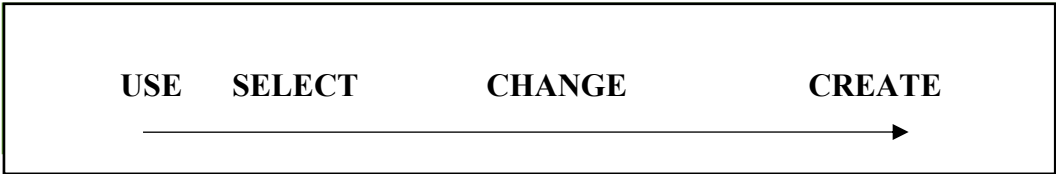


Figure 1. JMS Choice Sequence

For JMS, USE of an incumbent focal institution is the choice with the lowest costs, uncertainty⁶¹ and risk, as states are familiar with the institution’s capabilities. SELECT is only modestly more costly and uncertain, as all incumbent institutions are familiar and appear potentially suitable for addressing the problem.

⁵⁹ Kleine 2013; Stone 2011

⁶⁰ JMS 2013:9, 19

⁶¹ For JMS, “uncertainty” captures uncertainty about the state of the world and the impact of institutional choices.

CHANGE is substantially costlier and riskier – and thus is shown farther to the right in Figure 1. Here states must modify the structure, mandate, authority or other features of an incumbent institution so that it can address the problem at hand. CHANGE is costly in part because of the transaction costs of negotiating and implementing institutional modifications, but even more because of uncertainty concerning the outcome of negotiations, the changed institution’s effectiveness and the sovereignty costs it may create.

A decision to CREATE a new institution is substantially costlier and more uncertain than CHANGE, and is shown even further to the right. Transaction costs, uncertainty and risk are all higher than with CHANGE, where many features of the current institution remain intact. For JMS, importantly, CREATE means that a new institution completely replaces the incumbent one (JMS 2013:10), so all of its benefits and costs are uncertain.

In the JMS model, unitary states make institutional choices rationally and strategically to advance their joint interests. However, JMS does not assume that states possess the “synoptic” rationality of classic rational choice theory. Rather, it adopts the “more realistic and fruitful” assumption that states are boundedly rational: it is costly for them to gather information and make decisions, because of the complexity of the world and their own cognitive limitations.⁶² Boundedly rational states cannot compare the costs and benefits of all available options, and thus cannot make optimal choices. Rather, they act as “satisficers,” economizing on information by accepting solutions that are “good enough” States will consider institutional choices that involve greater costs, risks and uncertainty only when they see the status quo as “clearly inadequate”⁶³ – in Herbert Simon’s words, when it falls below their “aspiration level.”⁶⁴

States will therefore adopt the lowest-cost, lowest risk option USE – even where superior institutions are available – unless they conclude that the performance of the incumbent institution will be clearly deficient. JMS does not theorize satisfactory performance; it simply assumes that “satisficing” states will stick with the incumbent institution so long as it meets some “minimum threshold requirement.”⁶⁵

If the incumbent institution does not meet this threshold, states will move away from the institutional status quo in incremental steps. They will next consider SELECTING another incumbent institution. Only if none appears satisfactory will states consider incurring the

⁶² Keohane 1984:111

⁶³ JMS 2013:7, 31-33

⁶⁴ Simon 1972:168

⁶⁵ JMS 2013:7

additional costs and risks of CHANGE. And only as a last resort will they consider the most costly and risky decision to CREATE a new replacement institution – “typically after systemic breakdown or in the face of a major crisis.”⁶⁶

The JMS approach makes important contributions, but its theoretical claims have limited scope, because it theorizes state choices wholly in terms of treaty-based institutions.⁶⁷ To be sure, JMS claims to “consider public-private or private governance schemes,” and empirically analyzes private accounting governance.⁶⁸ However, while JMS identifies some benefits of *particular* private institutions, it does not integrate these into its theoretical model. Rather, its theoretical claims focus exclusively on treaty-based institutions designed to make and enforce credible commitments, especially in international trade. These are crucial functions, but global governance also involves additional functions for which LCIs are better suited.

In spite of these limitations, JMS draws general conclusions for global governance, especially concerning its institutional status quo bias.⁶⁹ Implicitly, JMS assumes that all institutions perform the same functions, and present the same benefits, costs and risks. To understand recent changes in the institutional makeup of global governance requires a logic of institutional choice that encompasses a wider range of institutional options.

IV. Modifying the logic of institutional choice

In this section we theorize how the logic of institutional choice changes if LCIs as well as treaty-based institutions are available to states choosing how to respond to newly emerging cooperation problems.

A. Bounded rationality

In the JMS model, boundedly rational states seldom even consider options other than USE; CREATING a new institution is a very rare event. We adopt the bounded rationality assumption, as it makes our analysis more challenging: if states are boundedly rational, how can they have established so many LCIs?

Even in the JMS model, states must assess the likely effectiveness of an incumbent institution against their threshold of acceptability; they must make even more complicated comparisons if they move further down the choice sequence. Comparing another familiar institutional

⁶⁶ JMS 2013:10

⁶⁷ JMS 2013:26

⁶⁸ JMS 2013:26, Ch. 6

⁶⁹ JMS 2013:35

alternative demands few additional cognitive resources. To be sure, LCIs were initially unfamiliar, but over time they have become increasingly familiar to governance actors, who can observe the operation of numerous IIGOs, TGNs and TPPPs, some of them very high-profile, and may well participate in some of them. Thus, the low costs, governance benefits and limitations of LCIs have become increasingly well-known, making them salient institutional options offering easily-compared packages of benefits, costs and risks. To be sure, a new example of a familiar form is more uncertain than a familiar example of a familiar form (an incumbent institution). Yet normalization of LCIs steadily narrows the gap.

In addition, states' threshold of acceptable performance is not immutable, but dynamic. What states perceive as acceptable is "adjusted from time to time in response to new information about the environment."⁷⁰ As states observe the performance of LCIs, and frequently participate in them, states gain greater appreciation for their costs and risks, governance benefits and limitations. As states come to recognize the governance outcomes LCIs can produce (in appropriate situations) at relatively low cost and risk, alone or together with treaty-based institutions, they may modify their aspiration levels accordingly.

At the same time, the current gridlock in treaty-based institutions⁷¹ and polarization in interstate relations makes treaty-based institutions less able to meet states' threshold of acceptable performance. These conditions likewise make changing incumbent institutions to fit emerging cooperation problems more difficult. Significant change usually requires unanimous decisions, which are difficult to achieve given multiple veto players and high transaction costs, especially in periods of polarization.⁷² Moreover, treaty-based institutions usually contain few mechanisms for "orderly gradual change."⁷³ As a result, they are often unable to respond effectively to new governance demands, making creation of LCIs increasingly attractive.

More fundamentally, JMS' view of the constraints imposed by bounded rationality is challenged by empirical observations that states frequently do abandon the institutional status quo, creating new institutions in pursuit of superior outcomes. The literatures on soft law and informal institutions, among others, emphasize that states seek institutional opportunities to

⁷⁰ Simon 1972:168

⁷¹ Hale et al. 2013

⁷² Scharpf 1988. The need for CHANGE may also be inherent in SELECT, if the latter requires expanding an institution's mandate, as when the regulation of public-health related intellectual property rights was shifted from WIPO to the newly-established WTO (Helfer 2009).

⁷³ Keohane 2017: 332

achieve their goals more effectively, at lower costs and with fewer institutional constraints.⁷⁴ For instance, states concerned with chemical and biological weapons proliferation created the Australia Group (an IIGO), in which technical experts could coordinate national export controls (as in a TGN) – even though the chemical and biological weapons treaties remained in force and the treaty-based Organization for the Prohibition of Chemical Weapons had been created. The Group provided greater flexibility, lower transaction costs and fewer constraints, and facilitated interactions among governmental experts.⁷⁵

The literature on “cross-institutional political strategies” further demonstrates that states abandon the institutional status quo with some regularity.⁷⁶ States engage in *forum-shopping* and *regime shifting*, moving issues to institutions likely to produce more favorable outcomes.⁷⁷ States create *strategic inconsistency*, developing new rules in one forum to undercut existing rules in another.⁷⁸ And they engage in *competitive regime creation*, establishing new institutions to challenge existing ones.⁷⁹ While not all these strategies involve institutional creation, they demonstrate states’ willingness and ability to consider and implement multiple institutional options.

B. Modifying the logic of choice

Like JMS, we assume that states make collective institutional choices on a rational, strategic basis, within the limits of bounded rationality. States compare the anticipated benefits, costs and risks of incumbent institutions with those of other available choice options, to the extent of their ability. In doing so, states seek to address the governance problem at hand (*substantive fit*), but at acceptable levels of cost and risk, including potential sovereignty costs (*political fit*). Boundedly rational states are attuned to such costs because of budget constraints, risk aversion in situations of uncertainty, distributive concerns, and often the demands of domestic constituents.⁸⁰ Thus, states seek an easily identified “package” of benefits and costs that best meets their needs.

In sub-section (1), we treat states as unitary actors. We utilize this simplified framework heuristically to facilitate consideration of the effects of low institutional costs. In sub-section (2), we relax the unitary state assumption, expanding the lens to include infra- and non-state

⁷⁴ Lipson 1991; Abbott and Snidal 2000; Vabulas and Snidal 2013

⁷⁵ Vabulas and Snidal 2013:214-217

⁷⁶ Alter and Meunier 2009:16; Faude and Gehring 2017:185-188.

⁷⁷ Busch 2007; Helfer 2009

⁷⁸ Raustiala & Victor 2004; Morse & Keohane 2014

⁷⁹ Urpelainen & van de Graaf 2014

⁸⁰ JMS:35, 38-39

political actors. We focus on the proponents of transnational cooperation, who attempt to persuade states to engage in cooperation in particular substantive and institutional ways.

1. Unitary states

How does the availability of LCIs change the institutional choice calculus of states? We suggest that it can modify state choice decisions at three different points in the JMS choice sequence, as shown in Figure 2. Each of these modifications makes decisions to CREATE LCIs more likely. We emphasize the first point, as similar considerations apply in the other two.

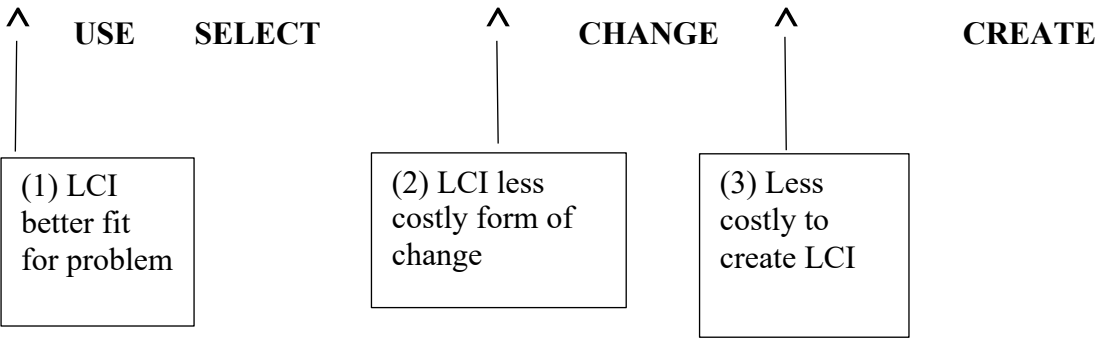


Figure 2. Modified Choice Sequence

Situation (1)

We begin with situation 1 on the left side of Figure 2. A decision to CREATE a new LCI may simply be a better fit for the situation states face – substantively and/or politically – than any institutional alternative. Where an LCI is the first-best choice, states need not even consider USING, SELECTING or CHANGING an incumbent treaty-based institution.

a. Substantive fit

First, an LCI may be a better *substantive fit* for the cooperation problem at hand. As discussed above, the inability of LCIs to create and enforce credible commitments limits their usefulness in addressing dilemmas of common interests: cooperation problems in which actors try to *ensure* particular outcomes, as in the Prisoners’ Dilemma. However, the general and specific governance benefits of LCIs make them appropriate for addressing dilemmas of

common aversions: cooperation problems in which actors seek to *avoid* particular outcomes.⁸¹ These include pure coordination problems, in which actors seek to align their actions, and “Battle of the Sexes” problems, in which actors have different preferences over how to align. LCIs may even help to address dilemmas of common interests where the incentives to defect are relatively weak or reputational costs weigh heavily.

LCIs provide governance benefits throughout the policy cycle. They reduce the transaction costs of cooperative interactions, facilitate communication, enable working relationships and trust-building among officials, and produce and disseminate information. By making and implementing “soft law,” they provide focal points and stabilize behavioral expectations. They support norm implementation by helping to construct actor reputations and enabling others to assess them. The decision to coordinate global financial reforms through the G20 reflects all of these considerations.⁸²

LCIs’ specific governance benefits make them particularly suitable for addressing dynamic cooperation problems, where governance arrangements must be frequently adjusted, and cooperation problems characterized by high levels of uncertainty. Such problems arise in issue areas from low to high politics, even in security, as reflected in the creation of LCIs including the Australia Group, PSI and the Missile Technology Control Regime. While security treaties can establish “credible commitments to ... clearly defined long-term goals among fixed sets of actors,” LCIs are superior when “security goals are ... short term and coalitions are constantly changing” and when “political and technological change ... makes it difficult for states to foresee the consequences of formal, legalized agreements.”⁸³ Similarly, LCIs are well-suited to provide nuanced governance interventions, finely-tuned to problem characteristics and contexts. Their malleability also increases political fit: by offering more diverse and nuanced approaches, LCIs help proponents gain consensual support.

LCIs are also well-suited to problems best addressed by engaging or influencing executive, bureaucratic or societal actors. For example, GOARN and the Prototype Carbon Fund (PCF) were established as TPPPs to coordinate actions by quasi-public and private actors as well as states and interstate bodies. And BEREC was created as a TGN to coordinate implementation of EU rules by national regulators.

⁸¹ Stein 1982:304-305, 309-311

⁸² Viola 2015

⁸³ Eilstrup-Sangiovanni 2009:212

As these examples demonstrate, the very features that make LCIs relatively weak in terms of binding commitments are advantageous in addressing other types of cooperation problems. For example, non-binding norms are beneficial where actors do not know which policies or norms are most appropriate, as they facilitate experimentation and trial-by-error approaches. LCIs' ability to disseminate information and to enhance communication facilitates learning from these approaches. Thus, PCF was intended to trial and demonstrate how carbon emission reduction projects could be structured to contribute to host countries' sustainable development.⁸⁴

In many of these situations, moreover, while LCIs have low costs, incumbent treaty-based institutions can be expected to have unusually high costs, as they must implement new and unfamiliar modes of governance. In effect, the real choice is CHANGE, a costlier option.

In sum, the substantive fit of LCIs, like that of treaty-based institutions, varies across cooperation problems. States making institutional choices must balance the costs, governance benefits and limitations of different institutional forms for the specific problems they seek to address. Where binding rules, monitoring and enforcement are essential, treaty-based institutions will be the first-best choice, LCIs a distant second-best. In other settings, however, the low costs of LCIs and their general and specific governance benefits may well make them the best institutional choice.

Two theoretical conjectures follow from this analytical reasoning:

First, if an emerging cooperation problem is characterized by strong incentives to defect from agreed rules, we should observe states choosing a *treaty-based institution* to address it.

Second, if an emerging cooperation problem is characterized by only weak incentives to defect from agreed rules, we should observe states creating or sponsoring an *LCI*.

To this point we have considered LCIs as free-standing alternatives to treaty-based institutions. Yet neither treaty-based institutions nor LCIs need act alone. In a densely institutionalized system, states often create LCIs to *complement* incumbent treaty-based institutions, not to *replace* them, as JMS assumes. Consider some examples already identified.

⁸⁴ Freestone 2001

- States concerned with weapons proliferation created the Australia Group to facilitate technical interactions among national experts, complementing legally-binding chemical and biological weapons regimes.⁸⁵
- States concerned with money laundering created the Financial Action Task Force to transform how national bureaucracies regulate domestic as well as transnational financial transactions, complementing international finance and security institutions.⁸⁶
- The G7 states created the Financial Stability Forum (now Financial Stability Board [FSB]) to facilitate frank, wide-ranging interactions among senior policymakers, complementing incumbent international financial institutions.⁸⁷
- The World Bank created the PCF to generate learning that would strengthen interstate negotiations under the UNFCCC’s Kyoto Protocol and help the Bank collaborate with private sources of finance.⁸⁸

States also use LCIs to bypass procedural bottlenecks in incumbent treaty-based institutions. The G20, for example, was created to manage financial reform without the “layers of rules and procedures” in the IMF that made “quick, flexible and innovative policies difficult to achieve.”⁸⁹ And the European Competition Network bypassed the “administrative bottlenecks” of centralized European Commission decisions on all cartel cases.⁹⁰ States can also select particular issues and shift them to a new LCI, established with low formation costs, to handle those issues with lower operating costs.⁹¹ This might be advantageous, for example, where states anticipate frequent tinkering with technical rules, and streamlining the incumbent institution is not possible or too costly. Here again, the LCI is complementary, creating a mutually reinforcing division of labor.⁹² Historical institutionalists describe such processes as “layering.”⁹³

This reasoning leads us to the following theoretical conjecture:

We should observe states creating LCIs tasked to take narrowly-defined decisions or actions following failure by those states to take similar decisions or actions within incumbent treaty-based institutions.

⁸⁵ Vabulas and Snidal 2013

⁸⁶ Hameiri, Jones and Sandor 2018

⁸⁷ Clarke 2014

⁸⁸ Freestone 2001

⁸⁹ Viola 2015:27

⁹⁰ Danielsen and Yesilkagit 2014

⁹¹ Vabulas and Snidal 2013:212

⁹² Gehring & Faude 2014

⁹³ Streeck and Thelen 2005:22-24; Fioretos 2011:389-391

Combining diverse institutions through layering will often produce the best overall governance outcomes, especially for multi-faceted problems. Incumbent treaty-based institutions can handle challenging problems such as establishing and enforcing credible state commitments, while LCIs can focus (at low cost) on the governance functions and cooperation problems for which they are best-suited, making their limitations less problematic. In short, an institutional ecology composed of *both* treaty-based institutions and complementary LCIs can govern more effectively than *either* type of institution alone. At the same time, however, the layering of LCIs undoubtedly increases the complexity of governance, and reduces the focality of incumbent treaty-based institutions.

b. Political fit

Second, an LCI may be a better *political fit* for a cooperation problem in situation 1, allowing states to take on acceptable levels of cost and risk. What is acceptable is itself highly political: states seek solutions that protect state sovereignty, allow for freedom of action, and enable governments to satisfy constituents' (changing) demands.

LCIs impose relatively relaxed constraints on state behavior, because they cannot adopt legally-binding rules or strongly enforce them. While these features limit LCIs' ability to address cooperation problems in which incentives to defect are strong, states concerned with sovereignty and decisional autonomy often regard them as politically advantageous. By creating an LCI, states "can (at least partially) achieve their governance goals while keeping [international institutions] relatively weak."⁹⁴ For example, in creating the FSB (an IIGO), states chose "a level of regulatory stringency that strikes a balance between" shared goals of financial stability and national commercial interests.⁹⁵ Similarly, the EU has sponsored numerous TGNs to achieve governance benefits without creating new supranational authorities.⁹⁶

We do not, however, argue that these considerations systematically trump effective cooperation: states seek both substantive and political fit, and conflicts between these goals are less intense with LCIs than with treaty-based institutions. The extent to which states prioritize substantive or political fit depends on the circumstances, especially the salience of costs and risks.

⁹⁴ Abbott et al. 2015:378

⁹⁵ Rixen and Viola 2020

⁹⁶ Eberlein and Newman 2008:35

Material costs are salient where states face significant budget constraints. Political costs, such as sovereignty and exit costs, are salient where issues are highly sensitive, domestically or internationally, and potential losses are substantial, as in security and economics. Risks are salient during processes of institutional CREATION or CHANGE, when the outcome of negotiations, the institution's effectiveness and the constraints it may impose are all uncertain. Risks are likewise salient in other situations of uncertainty: e.g., where a state's own current and future preferences and those of others are difficult to determine; and where the nature of problems and the impacts of potential solutions are not fully understood. Where costs and risks are highly salient, states may prioritize political fit to the extent of choosing or creating institutions that lack the capacity to achieve their stated mandates, even "empty" institutions.⁹⁷

LCIs can ameliorate gridlock by facilitating compromise. Introducing flexible LCIs as elements of negotiation can – perhaps at some sacrifice of strong commitments – help bridge differences in national preferences, circumstances and capacities. LCIs can also bridge differences between weak and strong states. Powerful states are particularly concerned with delegating strong powers to treaty-based institutions, because they fear unanticipated sovereignty costs. Thus, establishing LCIs with little ability to create such costs may encourage powerful states to accept otherwise stronger substantive rules, thereby inducing weaker states to participate as well.⁹⁸

Finally, LCIs may facilitate cooperation when political opportunity structures are malign.⁹⁹ When opportunity structures are benign – characterized by trust and diffuse reciprocity¹⁰⁰ – states can create treaty-based institutions or LCIs based on substantive fit, with little concern for sovereignty costs, constraints and exit. When opportunity structures are malign, however – where trust has broken down, interstate relations are polarized or hostile, and states resort to specific reciprocity – cooperation through treaty-based institutions may be difficult or impossible.

Under these conditions, LCIs offer two distinct pathways to modest cooperation. First, even where relations among national leaders are polarized, those leaders may accept the need for continued international cooperation in limited areas, e.g., technical cooperation on cross-

⁹⁷ Dimitrov 2019

⁹⁸ Abbott and Snidal 2000:447-450

⁹⁹ Underdal 2002

¹⁰⁰ Keohane 1986

border interactions. LCIs are well-suited to advance such cooperation, and to do so with limited publicity, minimizing leaders' audience costs with supporters.

Second, where polarization and distrust are concentrated at the level of national leaders, lower-level officials, as well as non-state actors, may retain more cooperative preferences; they can advance these preferences through LCIs to the extent they have sufficient political space for independent action.

Both pathways depend on the fact that cooperation through LCIs often flies “under the radar;” the general public is simply unaware of many IIGOs, TGNs and TPPPs. The features that reduce domestic approval costs are partly responsible, as is the technical nature of many LCI activities. While reduced visibility raises legitimacy concerns, in malign political opportunity structures it holds out hope for modest levels of socially beneficial cooperation. To be sure, the second mechanism presupposes that leaders do not prevent lower-level officials from participating in LCIs. Yet LCIs are not invisible; capable leaders committed to stamping out cooperation can identify and block their actions. Thus, this mechanism is more likely to operate where leaders' antagonism reflects political strategies rather than sincere beliefs, and where leaders lack the resources or competence to police all forms of governance.

LCIs are also used by sub-groups of states that seek outcomes others may oppose. For example, states that support a particular level of cooperation can create a new LCI to (at least partially) bypass defenders of the status quo – or those lacking the political will for enhanced cooperation – in an incumbent treaty-based institution, a common strategy for actors facing “legislative gridlock.”¹⁰¹ LCIs are well-suited to this strategy because they lack strong norms of multilateralism, allowing states to exclude “spoilers” but include like-minded actors.¹⁰² LCIs are thus often used to organize “coalitions of the willing” within larger groups of states, as both PSI and the Australia Group were. Similarly, states may use an LCI to bypass *opponents* of the status quo, who might otherwise force unwelcome change in an incumbent institution. The US did so in relinquishing control over the Internet Corporation for Assignment of Names and Numbers (ICANN), making it an independent private body.¹⁰³

From this analytical reasoning, we can derive the following theoretical conjecture:

¹⁰¹ Thelen 2003:226

¹⁰² Eilstrup-Sangiovanni 2009; Morse & Keohane 2014:392

¹⁰³ Becker 2019

Following an inter-state dispute on an emerging cooperation problem in an incumbent treaty-based institution, we should observe states that favor a particular level of cooperation creating an LCI with more limited membership to address the problem.

At the extreme, a sub-group of states – e.g., powerful states – may shift issues to an LCI purely to obtain superior distributive outcomes, or to reinforce their power, vis-à-vis other states.¹⁰⁴ To the extent LCI creation reflects such motives, our analysis of the benefits of layering LCIs over incumbent institutions may change.

Situation (2)

Moving to the right in Figure 2, states can layer a new LCI over an incumbent treaty-based institution as a low-cost form of CHANGE. For reasons summarized above, treaty-based institutions are often difficult to change; they may be unable to “update” their initially agreed rules.¹⁰⁵ Layering a new LCI over an incumbent institution can “accommodate and in many ways adapt to the logic of the preexisting system,” but it can also change “the ways in which the original rules structure behavior.”¹⁰⁶ Among other things, a complementary LCI can add new governance functions, modes of operation and participants, without interfering with the activities of the incumbent institution. In the EU, for example, member states sponsored the Focal Point Network on food safety (a TGN), even though food safety was already governed by a formal EU agency. Their intention was to add expertise to the regime without increasing the incumbent institution’s authority.¹⁰⁷

Adding a malleable LCI may offer more nuanced governance options than CHANGE in the incumbent institution. For example, the UK, with other governments and private partners, launched the Renewable Energy and Energy Efficiency Partnership (REEEP) in 2002. By layering this TPPP over the International Energy Agency and Framework Convention on Climate Change, these actors emphasized particular energy issues (including scalable efficiency projects, capacity building and challenging legal barriers); rendered those regimes more effective; and introduced new modes of governance, including working with sub-state and non-state actors, small-scale operational projects, local management, private finance and experimentation – all with low formation and operating costs and the legitimacy of stakeholder engagement.¹⁰⁸

¹⁰⁴ Compare JMS 2013:24-25; see Stone (2011) for similar strategies within institutions

¹⁰⁵ Hanrieder 2015

¹⁰⁶ Thelen 2003:226; Mahoney & Thelen 2010:16

¹⁰⁷ Biermann and Rittberger 2020

¹⁰⁸ Florini and Sovacool 2009

To be sure, states cannot accomplish every kind of CHANGE in this way. It is difficult, for example, to restrict a treaty-based institution's authority or modify its decision procedures. But layering LCIs over incumbent institutions may allow participating actors to bypass existing procedures for particular issues, and can accomplish many other kinds of change. CREATING an LCI often involves lower costs than CHANGING a treaty-based institution: transaction costs and domestic approval costs are lower; uncertainty over the outcome of negotiations and the effects of institutional change are reduced, as the existing institution continues in its current form; and the LCI poses limited sovereignty costs.

Situation (3)

Finally, toward the right of Figure 2, boundedly rational states may sequentially consider the options to USE, SELECT and CHANGE an incumbent institution, but determine that none of those options is satisfactory. At that point, CREATING an LCI may be more attractive than CREATING a new treaty-based institution: formation and operating costs are lower; an LCI creates fewer sovereignty costs; change and exit costs are also lower, reducing risk. In addition, the LCI will neither change nor replace any incumbent institution. Depending on the nature of the cooperation problem, the LCI may offer sufficient governance capabilities to meet states' aspiration level, especially considering costs. Even more frequently, CREATING an LCI will be more attractive than the only other alternatives: leaving a cooperation problem unaddressed or entrusting it to an institution already found to be unsatisfactory.

2. Non-state proponents

The unitary state assumption is a valuable simplification for many purposes, such as explaining state choices between treaty-based institutions and IIGOs or hard and soft law.¹⁰⁹ In fact, however, executive, bureaucratic and societal actors almost always act as proponents and supporters (or opponents) of transnational cooperation, attempting to persuade states to act in certain ways. We assume that these actors, like states, are motivated both by substantive concerns and by their own organizational interests. Considering their actions brings the *domestic politics* of institutional choice center stage along with its *costs and benefits*.

Consider TGNs. In a world with only treaty-based institutions, a government agency concerned with a problem in its domain might see a need for transnational cooperation. Yet its only option would be to persuade "the state" – in the person of the national leader, ministers or high executive officials, and often the legislature – to take up that problem and negotiate

¹⁰⁹ Lipson 1991; Vabulas & Snidal 2013; Abbott and Snidal 2000.

with other states: to USE, SELECT or CHANGE an incumbent treaty-based institution or CREATE a new one.

The agency would be concerned with domestic approval costs, and with its own role in the collective response – e.g., its position on the national delegation – as well as the effectiveness of that response. Transaction costs, sovereignty costs and uncertainty would be relevant because they influence the state’s willingness to address the problem, as well as its negotiations. But the agency would have a relatively small stake in the precise form of the institution.

Yet the world no longer includes only treaty-based institutions. As the New Interdependence Approach (NIA) suggests, and the examples provided above confirm, globalization has created “new political channels [...] to forge alliances across countries and across levels of transnational and international actors.” As a result, executive, bureaucratic and societal actors increasingly participate in transnational institutions – what we call LCIs – to achieve their goals.¹¹⁰

Once LCIs are available, the agency’s opportunities and incentives change. It now has a strong organizational incentive to favor a particular type of institution, a TGN, which will give it a direct role in global governance, often with limited oversight by ministerial or legislative officials. Participating in a TGN such as IOSCO “helps independent regulators minimize [domestic] political interference in their affairs while building up their reputation and authority.”¹¹¹ The TGN thus *empowers* the agency as well as addressing the substantive problem; this effect may be of limited concern to the state, but it is a central interest of the agency.

The agency therefore has an incentive to persuade the state to sponsor a TGN, rather than to USE, SELECT or CHANGE an existing treaty-based institution, even if that institution is reasonably effective, or to CREATE a new one. TGNs’ low domestic approval costs facilitate the agency’s efforts, while their low transaction and sovereignty costs are important selling points in its efforts at persuasion.¹¹²

Similar incentives apply to private actors and TPPPs. In a world with only treaty-based institutions, NGOs, business groups and other private proponents of transnational cooperation

¹¹⁰ Farrell and Newman 2016:716, 722-723

¹¹¹ Bach and Newman 2014:402

¹¹² TGNs differ from other LCIs in that agencies may be able to create a TGN on their own, with minimal state involvement; this may strengthen their ability to gain state sponsorship.

could only lobby states to take up an issue and negotiate an inter-state solution. Where LCIs are available, though, private proponents can persuade states to join them in CREATING a TPPP, rather than (or in addition to) USING, SELECTING, CHANGING or CREATING a treaty-based institution. As a TPPP will empower them through direct participation, private actors have a strong incentive to press for this option. For example, NGOs supported the creation of the Intergovernmental Forum on Chemical Safety (a TPPP) as it enabled them to participate in debate and form coalitions.¹¹³ Again, low domestic approval costs make the proponents' work easier, while low transaction and sovereignty costs are important selling points.

Our analytical reasoning leads us to the following theoretical conjecture:

When a new cooperation problem emerges, we should observe bureaucratic officials and non-state actors taking political action to persuade governments to create or sponsor a TGN or a TPPP, respectively – rather than addressing the problem within an incumbent treaty-based institution.

The influence domestic agencies and private actors have on states' institutional choices varies across states, proponents and issues. However, these actors have important sources of persuasive power that are relevant across issue areas. For example, states rely on specialized agencies because of their expertise and their ability to address technical problems within their domains.¹¹⁴ Agencies frequently interact with counterparts abroad, so their assessments of potential cooperation are likely to be influential.¹¹⁵ In addition, by proposing the creation of a TGN, agencies offer to take responsibility for a problem; other governmental bodies, with limited resources, will often be pleased to take up their offer. Private actors have similar, if somewhat weaker, persuasive advantages. Most importantly, however, the availability of LCIs gives these actors a strong incentive to favor those institutional forms, changing the domestic politics of institutional choice.

¹¹³ Reinsberg and Westerwinter 2019

¹¹⁴ JMS 2013:32

¹¹⁵ Slaughter 2004

V. Implications

We conclude by suggesting several implications of our analysis for global governance.

1. Status quo bias, gridlock and polarization

Our analysis suggests that the availability of LCIs as institutional options reduces the institutional status quo bias of global governance, making decisions to CREATE (LCIs) more likely than JMS suggests. The figures on institutional proliferation presented at the outset support this suggestion.

LCIs offer pathways for states to at least partially overcome the dysfunctional procedures and gridlock that currently characterize many treaty-based institutions.¹¹⁶ They allow states to bypass burdensome decision procedures, and to increase support for cooperation by fine-tuning governance arrangements to specific problem characteristics, contextual features and political sensitivities. In addition, states seeking collective action can avoid veto players by shifting issues to LCIs.

LCIs facilitate compromise among states with different circumstances, preferences and power. Introducing a range of institutions into negotiations creates additional bases for agreement; LCIs' malleability and flexibility allow them to bridge differences; and their limited legal authority induces powerful states to participate.

Finally, where political opportunity structures for transnational cooperation are malign – as in the current period of polarization and tension – LCIs provide opportunities for modest forms of cooperation. National leaders can use LCIs for technical cooperation, and lower-level officials can use them to advance cooperative preferences; LCIs' limited visibility helps them to avoid politically fraught intervention. These avenues raise thorny normative issues: they can reduce transparency and accountability, favor powerful actors, and produce relatively weak collective action. In positive terms, however, they may well enhance or protect cooperation.

2. Institutional composition

Implicit in JMS' diagnosis of a strong institutional status quo bias is the assumption that the types of institutions that have dominated international governance – treaty-based institutions – will remain dominant. Our analysis, in contrast, suggests that the availability of LCIs will continue to change the composition of global governance institutions over time to include an

¹¹⁶ Hale et al. 2013

expanding proportion of IIGOs, TGNs, TPPPs and other institutional forms. Again, the proliferation of these forms over the past two decades provides strong empirical support.

3. Expanding governance options

LCIs are highly malleable, providing states (and other actors) an expanded palette of governance options. They are also highly flexible, so that states can modify them at low cost as circumstances change. LCIs thus allow states to fine-tune governance arrangements to the substantive and political characteristics of particular problems, and to modify them as problems or demands for governance evolve, or as current arrangements prove unsatisfactory. Layering further broadens the palette. Over time, the emergence and differentiation of LCIs should facilitate more nuanced global governance.¹¹⁷

4. Institutional complementarity

Contemporary global governance is highly institutionalized, with established treaty-based organizations in virtually all issue areas (JMS:19) and a growing number of LCIs. If only by default, then, decisions to CREATE LCIs generally involve adding new institutions to incumbent ones, rendering governance “highly layered.”¹¹⁸ LCIs are frequently intended to, and do in practice, complement incumbent treaty-based institutions.

Complementary LCIs can address cooperation problems, and specific aspects of cooperation problems, for which they are well-suited – such as those involving coordination, information, trust-building, non-state actors and experimentation – while leaving to treaty-based institutions those aspects for which LCIs are poorly-suited – credible commitments and enforcement. In addition, LCIs allow states to bypass procedural and political blockages in treaty-based institutions, and can act as low-cost change agents.

At the same time, LCIs are in some sense competitors to treaty-based institutions. While direct competition is rarely intense, LCIs do provide alternatives to incumbent treaty-based institutions for states choosing governance arrangements. Where states prefer LCIs, their choices reduce the focality of incumbent institutions, individually and as a class, potentially weakening the scope of their authority. Such choices also increase governance complexity, which may have negative as well as positive consequences. Finally, states may choose LCIs for political reasons – e.g., to reduce constraints or to signal action without taking costly steps – where incumbent treaty-based institutions would govern more effectively.

¹¹⁷ See Zürn and Faude 2013

¹¹⁸ Fioretos 2017: 26

In the aggregate, however, the proliferation of LCIs produces a more diverse and variegated global governance system. This should have several positive effects: providing alternatives to dysfunctional institutions, making governance more nuanced and flexible, and generating beneficial divisions of labor.¹¹⁹ In addition, collaboration between treaty-based institutions and LCIs can enhance governance while strengthening both parties.¹²⁰

5. Empowering infra- and non-state actors

LCIs empower their executive, bureaucratic and societal participants. This empowerment is changing the patterns of authority in global governance and its actor composition, in parallel to ongoing changes in institutional composition. Given their rapid proliferation, LCIs appear to have been more responsible for these changes in authority than state delegation to non-state actors, and as responsible as entrepreneurial activities by non-state actors.¹²¹ Because empowerment incentivizes infra- and non-state actors to promote LCIs, we expect governance authority to continue to diversify.

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¹¹⁹ Gehring and Faude 2013

¹²⁰ Abbott et al. 2015

¹²¹ Green 2018, 2014

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