

# Introduction

## *How Private Rule-Makers Evolve through Crises*

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### I.1 INTRODUCTION

Transnational private regulation (TPR) is gradually expanding beyond regulatory areas traditionally associated with private rules such as technical standardization, finance in domains such as trade in derivatives and payment systems, or the field of sports. Private rules are increasingly encroaching upon areas traditionally considered as the preserve of State regulation such as sustainability, food safety, and human rights. The relative importance of private regulation varies across domains. In some instances, such as in the domain of sustainability, or food safety, private regulators fiercely compete for acceptance and uptake by the market and the State. In fields such as finance, on the other hand, private regulation is at times the preserve of a strong “monopolist” wielding considerable power and influence.

The main reason for private bodies’ success in the acquisition and consolidation of their regulatory influence lies in their epistemic knowledge that endows them with the capacity to design rules that are complementary to (and, in extreme cases, substitutes for) public rules at the national, regional, and transnational level. This edited volume acknowledges this fundamental driver while shifting the focus of studies of transnational private regulation to its distinctive organizational features,<sup>1</sup> which, crucially for the purposes of this volume, are activated and leveraged around crises.

Transnational rule-makers display considerable flexibility if compared to public institutions both in exercising their rule-making functions and adapting and transforming in light of endogenous or exogenous events calling for change. Private bodies can easily include broad multi-stakeholder constituencies in rule-making processes and experiment with creative organizational forms and enforcement

<sup>1</sup> See F. Cafaggi, *A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement*, EUI Department of Law Research Paper No. 2014/145.

mechanisms. These may subsequently be institutionalized and incorporated in public frameworks, which further testifies to the success of transnational private regulation.

Organizational forms, procedural rules, informal decision-making processes of transnational private rule-makers, as well as rule-making outcomes and forms appeared and evolved over time as a response to pressures and demands from within and outside these organizations. In particular, crucial events in their regulatory environment – such as a financial crisis, a product safety scandal, a large-scale manufacturing or production failure, or a pandemic – reinforce existing incentives and rationales (or create new ones) for private regulators to internalize the need for change. Arguably, domains of private rule-making such as technical standardization or forms of private ordering in the financial sector evolved relatively insulated from the demands and influence of public authority. Other private regulators seem intimately intertwined with, and even dependent on, public rules and thus extremely sensitive and receptive to changes – be it current or prospective – in regulatory environments, enforcement practices of regulatory authorities, and court rulings.

Private regulatory bodies that seek to persuade various stakeholders about the value of their rules do that by acquiring and maintaining legitimacy. Private standard-setters adapt their rules and procedures to meet demands for legitimacy and accountability from both public authority at various regulatory levels and different stakeholder groups. Change and evolution of private rule-makers improves input and output legitimacy, solves transnational collective action problems, and provides mechanisms through which private regulators are held accountable. On occasions, however, private regulators are also motivated by a need to maintain their operations, protect the interests of their members or a subset of their membership, and pursue other institutional goals to preserve the status quo. On other occasions, private regulators coevolve, as a result of their interaction with other private regulators within the ever-changing environment they collectively create. The evolution of private regulators through critical junctures may occur for several reasons other than a pure instinct for survival, including to defuse internal opposition, to sideline specific interest groups to the benefit of others, perhaps even to hollow out public rules.

Crises may be multifaceted, complex events of a varying intensity and duration. The negative externalities they generate for society often cause States to struggle to address the consequences, whereas private forces, which may have caused, in part, such crises, continue to regulate economic activity; frequently, in an ever-assertive manner. This type of “free riding” (in that private bodies benefit from increased legitimacy without internalizing the costs of, first, acquisition of this legitimacy and, second, regulatory disasters with substantial financial, health-related, or other consequences), is not a new phenomenon. What is new, however, is that private bodies aggressively seek more power in the immediate aftermath of a crisis event, taking

advantage of a crisis-struck State. That is the central hypothesis of the research project Resilience and Evolution of Economic Activism and the Role of Law (REVEAL), which inspired this volume.

Against this backdrop, the objective of this edited volume is to explore the fundamental role of transnational private rule-makers in the regulation of global production and finance, thereby furthering our knowledge of the organizational and contextual features and other characteristics contributing to the flexibility, adaptability, and – ultimately – resilience of transnational private rule-making. More specifically, in this volume, we aim to cast light over the inherently dynamic and evolutionary nature of transnational private regulation when regulatory failures, crises, and critical turning points arise. The reason for choosing this approach is that empirically grounded accounts foregrounding flexibility, evolution, and the associated resilience of transnational private regulators remain scant in legal but also broader regulatory scholarship. Structures, characteristics, internal mechanics, rules, and behavior of rule-making participants and the overarching ecology of private regulation remain systematically underdeveloped in current legal research. The lack of a systematic empirical study of their origin and evolution is striking and in direct contrast to the ever-increasing role such bodies acquired in global governance. However, the perspective of evolution and dynamism in relation to the resilience, effectiveness, and legitimacy of private rule-makers offers a new viewpoint to look into the establishment and development of transnational private regulation, its consolidation as a key staple of global governance, and its impact on the smooth functioning of economic activity.

## 1.2 THE COMPLEXITY OF DELINEATING THE CONTOURS OF CRISES

At present, other than the distinction between natural and man-made causations,<sup>2</sup> there is no unequivocal consensus regarding the contours of crisis as a scholarly concept or its normative and prescriptive orientation.<sup>3</sup> We see crisis as a value-laden concept that attempts to capture low-probability yet high-impact events that threaten the very survival of an organization and thus create fertile ground for rapid decisions. Its cause, effect on the organization itself and its stakeholders, and means of resolution are ambiguous. In addition, crises are accompanied by a relatively shared belief that decisions must be taken rapidly due to the significance and impact of the events occurred.<sup>4</sup>

<sup>2</sup> See U. Rosenthal and A. Kouzmin, Globalizing an Agenda for Contingencies and Crisis Management: An Editorial Statement (1993) 1:1 *Journal of Contingencies and Crisis Management*, 1.

<sup>3</sup> See T. Williams et al., Organizational Response to Adversity: Fusing Crisis Management and Resilience Research Streams (2017) 11:2 *Academy of Management Annals*, 733, at 734.

<sup>4</sup> See C. M. Pearson and J. A. Clair, Reframing Crisis Management (1998) 23:1 *Academy of Management Review* 59, at 60.

Crises are extraordinary, erratic events that are perceived as a threat against the core values or life-sustaining functions of a given system, thereby revealing the weaknesses of regular structures and the lack of contingency planning in an organization.<sup>5</sup> Thus, rarity, irregularity, and low likelihood are key traits of crisis events, calling for swift crisis management to allow for recovery. Crises constitute critical junctures that may result in distinct trajectories of change: chain reaction leading to collapse and extinction, transformation for the better, or recovery and rebirth under a renewed framework and context.<sup>6</sup> In that sense, crises are test-beds for effective crisis management and its potential for recovery and readjustment.<sup>7</sup>

A crisis can be instant or grow gradually, notably if it is internal (for instance, a growing sense of delegitimization within an organization). It can often be the result of a regulatory disaster, that is, a catastrophic event or series of events, which are caused, at least in part, by a failure in the design or the operation of the regulatory regime put in place to prevent its occurrence. In this regard, the ensuing crisis will be the result of sometimes unintended and unpredictable consequences of the system's mechanics and its interactions with other systems. In that sense, a regulatory disaster may be deemed as one of fundamental nature, capable of changing ultimately the regulatory approach in a given sector and thus of transforming private activity and its interaction with public regulation. On the other hand, when a crisis unfolds (which is a matter of subjective perception), it is considered that intervention may still limit the effects of an emerging or escalating event. No (timely) intervention may then lead to a disaster.

Much of the organization scholarship focuses on crisis management. Crisis management comprises processes for identification, assessment, and tackling of a crisis before, during, or after it has happened. Relevant scholarship examines under which conditions an organization or system can return to normal functioning after a disruption.<sup>8</sup> Crisis management goes beyond technical containment to control conflicts at the managerial or broader organizational and institutional level, thereby raising issues of power, trust, or legitimacy. Indeed, one could view as crises events that have unprecedented effects within an organization; for instance, events that bring about previously unanticipated internal mobilization, discussions, protests, even boycotts or departures from a given organization altogether.<sup>9</sup> In that

<sup>5</sup> See D. Smith, *Crisis Management: Practice in Search of a Paradigm*, in *Key Readings in Crisis Management: Systems and Structures for Prevention and Recovery* (D. Smith and D. Elliott eds., 2006).

<sup>6</sup> See the contribution by P. Delimatsis, "The Resilience of Private Authority in Times of Crisis" in this volume (Chapter 1).

<sup>7</sup> See also A. Carmeli and J. Schaubroeck, *Organisational Crisis-Preparedness: The Importance of Learning from Failures* (2008) 41 *Long Range Planning* 177, at 179.

<sup>8</sup> See C. Roux-Dufort and C. Lalonde, Editorial: Exploring the Theoretical Foundations of Crisis Management (2013) 21:1 *Journal of Contingencies and Crisis Management* 1.

<sup>9</sup> Cf. Williams et al., *supra* note 3, at 739.

respect, crises call for critical decision-making under conditions of uncertainty and time pressure.<sup>10</sup>

Analytically, we also find it useful to distinguish crises as one-off events and crises as a process that gradually grows to challenge the fundamental attributes, mechanics, and managerial acumen of a given organization, thereby exposing ill-structured systems. The problem with viewing a crisis as a one-off event is that it may neglect how crises are produced in the first place, thereby shifting responsibility outside a given system due to the unpredictability of the crisis event. In contrast, by viewing crises as a process, we can capture the often-observed phenomenon of an incubation period preceding a crisis.<sup>11</sup> Conceptualizing crises as a process helps overcome the problem of responsibility-shifting because it focuses on the need to fully capture the dynamics of crisis-fostering landscapes and factors of organizational degeneration as a process that entails repeated interaction and responses by the various actors involved that are dispersed over time and space.<sup>12</sup>

A fundamental finding of theories that view crises as a process is that even otherwise run-of-the-mill events can accumulate and evolve into substantial triggering events, notably due to mistaken assumptions, information asymmetries and overall complexity, organisational culture that misses or misinterprets critical signals, and unjustified optimism.<sup>13</sup> Crucially, an as-a-process conceptualization of crises diminishes the element of unpredictability. In other words, certain crises of this type may be anticipated and handled.<sup>14</sup> Depending on the context, crises may be generated by small disturbances that were overlooked. Therefore, such disturbances should be encouraged, as they increase the adaptive capacity of the organization or system and its ability to innovate, self-learn, and share upward flows of information.<sup>15</sup>

In addition, we argue that considering crises that bring organizations to the brink of collapse as either exogenous shocks or internal deficiencies may be too reductive of an approach. In practice, change will often be instigated by a blend of internal

<sup>10</sup> See J. Wolbers, S. Kuipers, and A. Boin, A Systematic Review of 20 Years of Crisis and Disaster Research: Trends and Progress (2021) 12 *Risk, Hazards and Crisis in Public Policy*, 374, at 375.

<sup>11</sup> So-called creeping crises are threats to widely shared societal values or life-sustaining systems that evolve over time and space and is foreshadowed by precursor events, subject to varying degrees of political and/or societal attention, and in part or insufficiently addressed by authorities: See A. Boin, M. Ekengren, and M. Rhinard, Hiding in Plain Sight: Conceptualizing the Creeping Crisis (2020) 11:2 *Risk, Hazards and Crisis in Public Policy*, 116, at 122.

<sup>12</sup> Cf. Roux-Dufort, Delving into the Roots of Crises: The Genealogy of Surprise, in *The Handbook of International Crisis Communication Research* (A. Schwarz, M. Seeger, and C. Auer eds., 2016), 24.

<sup>13</sup> See the seminar work by B. Turner, Organizational and Interorganizational Development of Disasters (1976) 21:3 *Administrative Science Quarterly* 378.

<sup>14</sup> Gundel calls such crises “conventional.” He goes on to identify another three types of crisis: unexpected, intractable, and fundamental: See S. Gundel, Towards a New Typology of Crises (2005) 13:3 *Journal of Contingencies and Crisis Management* 106, at 110.

<sup>15</sup> See R. Biggs et al., Toward Principles for Enhancing the Resilience of Ecosystem Services (2012) 37 *Annual Review of Environment and Resources* 421.

processes and exogenous forces as they interact with the organization, its stakeholders, and the surrounding environment, causing a shift of state by bringing a system of reduced resilience into a tipping point.<sup>16</sup> Following this line of thought allows us to scrutinize both the nature of the crisis and the system that it affects by exploring the origin, evolution, reaction, and adaptation of a given organization before, during, and after a triggering event.

Overall, we believe that, by putting crises at the heart of this volume we capture moments in an institutional setting where we can observe strategies, values, rules and their enforcement, learning by doing, mutability, diffusion patterns and understanding of interdependence, and institutional memory (and the factors for deviating therefrom) with a view to offering robust explanations as to how and why certain institutions survive through fire and water.

### I.3 CRISES AND THEIR INTERACTION WITH THE QUEST FOR ORGANIZATIONAL RESILIENCE

Just as recovery cannot exist without a preceding crisis, resilience presupposes a disturbance that instigates a moment of stress, and which is surmounted after the organism or system demonstrates certain resilience-causing traits. Throughout this volume, the institutional setup of a system (for instance, the actor constellations and conflict dynamics in the previous period) is a significant variable. While crises are potentially devastating moments that put a spotlight on any deficiency in the design and activities of an organizational system and therefore put the resilience of an organization to the test, they will also most likely offer opportunities for certain actors (willing to be) involved in their management and leadership.

More generally, external triggering points that challenge the institutional status quo; question the legitimacy, practices, and mechanics of a given organisation; and call for urgent introspection, action, and radical institutional reform challenge the resilience of that institution. Over time, as institutions grow in prominence and legitimacy gaps emerge, contestation internally and externally increases. Often, delegitimation is the result of internal conflicts that intentionally challenge, through discursive and behavioral practices, the adequacy of the status quo. In those instances, we refer to critical junctures and how institutions internalize them.

As a concept, resilience is strongly associated with crises, as it entails a process of adaptation, improvisation to find responses to shocks, and recovery. Notably, if we view crises as a dynamic process that evolves over time, then resilience and crises are two closely interrelated concepts with similar characteristics. The dynamism of resilience is an inherent trait thereof; indeed, it cannot be otherwise. The resilience of organizations is constantly tested by triggering events that bring about adversity.

<sup>16</sup> See M. Scheffer et al., *Catastrophic Shifts in Ecosystems* (2001) 413 *Nature* 591.

Resilience is a heavy-laden yet malleable concept that permeates various scientific disciplines, issue areas, and even discussions in the public discourse.<sup>17</sup> When talking about resilience, discussions evolve around resilient society, network systems, financial institutions, or ideas. Often, resilience is presented as an outcome but also as a process. In all cases, resilience is typically mentioned in a positive manner and is associated with and viewed under the prism of risks or shocks, which often will be exogenous to the subject; yet such shocks can very well result from internal conflicts and system dynamics, jeopardizing the existence or survival of the subject, at least in its previous form.<sup>18</sup>

Resilience should not be confounded with sustainability: for a system to achieve the latter, resilience is a necessary but insufficient condition. Resilience enhances perseverance, functioning, and reliability of an organization against events that challenge its existence. Resilience can be a set of traits present in an organization in order to avoid adversity. These would include resources and energy to grow – a flexible structure but also complexity and heterogeneity to maintain maturity.<sup>19</sup> However, resilience can also relate to a set of traits that allow an organization or system to overcome adversity either by recovering or, crucially, by reaching a new state of equilibrium. These traits would entail low connectivity to decrease vulnerability of a system; information flow through feedback loops; the ability to improvise and reorient, for instance, through emergent leadership; or the learning of new behaviors and organizational patterns. As a consequence, then, resilience should be deemed as including pre-adversity organizational capabilities, capabilities of in-crisis organization and adjustment, and post-crisis resilient responses.<sup>20</sup> Still, past resilience may only to a limited extent allow predicting future resilience, as, conceptually, resilience implies the ability to navigate new and potentially different challenges.

Finally, there is also a dark side to resilience, which is often neglected.<sup>21</sup> Resilience may also mean resistance to change, inability to learn and adapt, and lack of flexibility and transformational capacity. Resilience then has a flip side, which relates to the vulnerability of a given organization: while being resilient suggests the existence of a successful mechanism to address adversity, a near disaster also brings to the fore the importance of identifying how prone an institution can be to similar perilous situations and how important future caution with respect to mitigating potential risks can be.

<sup>17</sup> See J. Walker and M. Cooper, *Genealogies of Resilience: From Systems Ecology to the Political Economy of Crisis Adaptation* (2011) 42:2 *Security Dialogue* 143.

<sup>18</sup> See C. S. Holling, *Resilience and Stability of Ecological Systems* (1973) 4 *Annual Review of Ecology and Systematics* 1, at 17.

<sup>19</sup> See B. Fath; C. Dean and H. Katzmair, *Navigating the Adaptive Cycle: An Approach to Managing the Resilience of Social Systems* (2015) 20:2 *Ecology and Society* 24.

<sup>20</sup> Cf. Williams et al., *supra* note 3, at 742.

<sup>21</sup> *Ibid.*, at 756.

#### 1.4 A MULTIDISCIPLINARY INQUIRY INTO TRANSNATIONAL RULE-MAKING THROUGH CRISES

This edited volume is a multidisciplinary inquiry into the dynamics of transnational private rule-making, an empirically under-researched yet fundamental component of global governance. We believe that directing our attention toward these evolutionary forces, their impact on the goals pursued by transnational private regulators, as well as on the implications for targets and beneficiaries of their rules will contribute to shedding new light on the mechanics and dynamics of resilience of private regulation and its implications.

It will also allow us to evaluate from a new perspective the relation between public and private authority and, in particular, the capacity and limitations of the former to effectively enroll, steer, and influence the latter. Finally, this edited volume tackles organizational resilience and crisis management together, which, quite paradoxically, is rare in the relevant literature in management and organization studies and much less in the legal and political science literature. The volume therefore aspires to inform legal and regulatory debates about input and output legitimacy of transnational private rule-makers, as well as various strands of literature concerned with the interplay between public and private rules and public steering of transnational regulators, with a distinct focus on the role of crisis events.

The mix of selected contributors is particularly fitting to tackle these issues. We have invited scholars from various fields of law, financial regulation, economics, management, international relations, and public policy. Contributors were carefully selected to include both renowned experts in various key domains intersecting with transnational private regulation and younger, emerging scholars with a genuine willingness to delve into the dynamics and evolution of transnational private rule-making and the impact of crises on institutional dynamics, both conceptually and empirically.

Contributions to this volume take a careful look at the evolutionary dynamics of transnational private rule-making in selected issue areas. Other than the conceptual and theoretical contributions that set the scene, most contributions take the form of a case study-based inquiry into specific private bodies, with two case studies covering a public and a hybrid body to offer fitting comparisons. Previous crises-related scholarship has shown the adequacy of such method in advancing research in this field. The regulatory domains covered by the case studies include rule-making in financial domains of debt restructuring, decentralized financial institutions, and financial benchmarks. They also include case studies tackling product standardization in the areas of food safety, sustainable production, technical standards set by the International Organization for Standardization (ISO), the International Telecommunication Union (ITU) and Information and Communication Technology (ICT) bodies, and sectoral self-regulation in the oil industry as well as sport-related bodies. Through this exercise, we can identify



distinct evolutionary trends in transnational private regulation. Do private regulators manage to design effective solutions under the pressure of various stakeholders and critical events? How do private regulators respond to legitimacy and accountability demands from different constituencies? Do crises and regulatory failures contribute to bring back rule-making competences to public authority or rather contribute to further expand the competences of private regulators? What variations between these bodies, their relations with public authority, and other contextual elements can explain different outcomes?

This edited volume does not aim to look into accountability or legitimacy in the abstract. Rather, through the various contributions included in this book, we approach the evolution and change of private organizations as a means to build legitimacy gradually and maintain relevance or even achieve dominance in the field in which those organizations are active. Although we do not consider as necessary to conceptualize legitimacy or accountability, certain contributions tackle legitimacy in that they identify events within a given organization that may have created a composite legitimacy crisis. Nevertheless, and arguably more fundamentally than this, we view such events as yet another possibility to properly explore the role of crises in the evolution of institutions.

While claiming to be anything but exhaustive, the proposed edited volume represents a balanced account that foregrounds the importance of a dynamic and evolutionary perspective in analyzing and understanding transnational private regulation. The volume aims to offer to our readership a nuanced understanding of the role of critical events and crises on the operation of private regulatory bodies and their relations with State actors, while also touching upon the allocation of regulatory powers between public and private authority. It will also encourage further empirical and evolutionary accounts of transnational private regulation, a crucial rule-making domain that enables and determines the fate and pace of transnational economic activity and intersects with fundamental public objectives.

### 1.5 THE DIFFERENT FACETS OF RESILIENCE AND EVOLUTION OF PRIVATE RULEMAKING

This edited volume investigates the relentless evolution, mutability, and crisis-absorbing capacity of transnational private regulators and standard-setters from various disciplinary perspectives. The contributions included in this volume intend to provide a thorough account of the dynamic evolution of transnational private regulators and their output in relation to critical events in their regulatory environment. The contributors were requested to identify the external regulatory dynamics and drivers for change, including crises; the interactions with, or requests from, public authority, rules, and legal regimes at various regulatory levels (i.e., international, regional, national, sub-national, and other private regimes); as well as the heterogeneity and internal organizational dynamics within these organizations.

Contributors were then invited to reflect on the impact of these features on the evolution of transnational private rule-makers and their resilience.

In this respect, contributors reflected on certain propositions that we made in the REVEAL project regarding private rule-makers: for instance, that private regulators in the domains under review have a crisis-absorbing capacity owing to their organizational heterogeneity and flexibility or that, through their inertia in the aftermath of crisis events that may be attributed to path dependencies, behavioral biases or capture, public regulators, and supervisors of private rule-makers facilitate the continuous dominance of private rule-making. In terms of the resilience-related inquiry of private authority in this book, contributors also had to reflect on the role that the promulgation of (voluntary) standards exerts in the continuous dominance of private rule-making bodies. In other words, does expeditious diffusion of (new) ideas and lobbying for the wisdom and necessity of private action pay off vis-à-vis public authority.

The book covers the most important areas that are associated with private rule-making (product/manufacturing, financial regulation, sports, professional self-regulation). In addition, it delves into procedural, substantive, and practical elements of private rule-making processes that would otherwise be unobservable without a close empirical lens, covering both institutional and contextual features. At a policy level, the volume calls for comparisons among practices of private bodies in various areas, allowing for important lessons to be drawn for all stakeholders (public or private) active in, or affected by, private and public rule-making. In more general terms, the comprehensive approach adopted allows for a more informed study of areas that have been rarely included in legal books, including business and management studies insights, various layers of governance, or innovation law and economics.

The book is divided into five parts. In Part I, Panagiotis Delimatsis, Rosalba Belmonte with Philip Cerny, and Jan Wouters set the scene. Delimatsis (Chapter 1) provides a conceptual and theoretical framework concerning the resilience-related features of transnational private regulators, based on the role of private standard-setting after a crisis as a power-maximization device. Private bodies take advantage of the procrastination of the State, grow stronger, and become more assertive in norm-creation, overriding and even substituting for State powers. Regulatory disasters leave them intact. Rather, such crises constitute opportunities to accumulate knowledge and develop the capacity to expect the unexpected and absorb it. Free from organizational hierarchies and formal accountability structures and scrutiny, private bodies enhance their collective memory and identity and eventually grow stronger out of episodes and shocks, perpetuating their regulatory dominance.

Cerny and Belmonte (Chapter 2) situate Delimatsis' framework in the context of international relations (IR) theory, which, since the study of IR formally began at the University of Wales, Aberystwyth, in 1919, has been dominated by the presumption

that world politics is at its core a system of states. They argue that this way of conceiving world politics was (a) always problematic and challengeable and (b) time-bound and increasingly anachronistic. In the twenty-first century, world politics is becoming increasingly multi-nodal and characterised by heterarchy – the predominance of cross-cutting sectoral mini- and meso-hierarchies above, below, and cutting across states. These heterarchical institutions and processes are characterized by increasing autonomy and special interest capture. In this context, states are becoming “reactive states” as state capacity is eroded. Their capacity may not have been eroded equally in all domains, as different sectors at various levels and organizational structures play differentially powerful roles in this process. Therefore, it is important to examine the evolution and resilience of transnational private regulation across sectors.

Jan Wouters (Chapter 3) studies the interplay between public and private authority while zooming in on the dynamics of standard-setting through a case study of the growing (security) concerns for regulatory capture in the critical standard-setting domain of international telecommunications within the ITU. Wouters sheds light on the regulatory battles currently waging within the ITU; Chinese delegations, including Huawei and state-owned enterprises, have a strong presence and participate actively within the ITU’s study groups that develop the technical basis for ITU agreements, standards, and reports. China and its companies team up to exert (normative) influence by submitting proposals and seeking acceptance of new international standards on various topics. Wouters views a need to better safeguard democratic legitimacy and accountability of transnational rule-makers both *ex ante* and *ex post* through forms of recognition and a need for stronger scrutiny of these regulatory processes from a human rights point of view.

Part II deals with evolution and resilience in finance and banking.

In his chapter discussing the resilience of the Institute for International Finance (IIF), a lobbying group for private creditors of sovereign debt, M. Konrad Borowicz (Chapter 4) highlights the role of standard-setting as a strategy of organizational resilience. In the IIF’s case, the success of the strategy, most recently highlighted by the IIF’s role in the immediate aftermath of the COVID-19 crisis and its possible impact on the solvency of sovereign debtors, is attributed to a combination of endogenous and exogenous factors. On the endogenous side, enterprising management capable of anticipating opportunities for developing and promoting standards, forming alliances, and attracting new members all contributed to the IIF’s success. On the exogenous side, the success of the IIF’s standardization efforts is attributed to the failure of transnational public bodies, such as the IMF, to establish an alternative framework for sovereign debt resolution.

Path dependencies and capture may affect different public regulators differently. Pierre-Hugues Verdier (Chapter 5) attributes the somewhat unexpected shift of the equilibrium between public and private authority toward the former in the case of the LIBOR scandal to the involvement of a particular set of agents – namely

prosecutors and the enforcement arm, the United States Commodities Futures Trading Commission. As Verdier notes, priorities and incentives of these public actors differ substantially from those of public actors active in prudential banking regulation traditionally involved in overseeing private standard-setting in the banking industry allowing for less deference to private ordering.

The proactive activities of private regulators stand in stark contrast to the activities of public regulators, which tend to be reactive. The protracted negotiations of the reformed Basel package described by Matteo Ortino (Chapter 6) are a case in point, providing further support for the claims made in the framing chapter about states becoming reactive actors in world politics and global governance. In his chapter, through a legal and political economy perspective, Ortino offers a fitting comparison of transnational private regulation with the study of a public body, the Basel Committee on Banking Supervision, and its own strategies for resilience in the face of repeated regulatory failures to which it has contributed. His analysis suggests that even when states do react, they find it difficult to overcome the path dependence and capture that have characterized rule-making in the area of banking for decades.

In Part III, the edited volume turns to the evolution and resilience of private regimes in the domains of sustainability and food safety.

Enrico Partiti (Chapter 7) shows that prospective legislation on mandatory human rights due diligence (HRDD) profoundly affects rules and approaches of voluntary sustainability standards (VSS). This chapter adopts a comparative perspective to analyze the adaptations and transformations of some of the most relevant multi-stakeholder and industry-driven initiatives across domains covered by VSS to this change in (regulatory) context. The domain of VSS is characterized by NGO pressure, a declining trust in voluntary certification, and a lack of a binding international framework, which has resulted in considerable institutional emergence and proliferation of rather heterogeneous private standards.

In his chapter, Partiti illustrates how for private schemes, the forthcoming HRDD legislation can be viewed as an organizational crisis, creating both opportunities to consolidate their regulatory prerogatives and a threat of losing in relevance to other risk management tools and (firm-level) initiatives. VSS have demonstrated a capacity to expand the application of key requirements to non-certified volumes and firms, and their activities to new non-regulatory domains, which attests to their resilience. The relationship of complementarity between VSS and public regulation is refined as the former aligns its standards and approaches to the emerging HRDD requirements set by the latter. According to Partiti, “this could be seen as an instance where public authority has been capable, if partially, to get a handle on economic private activism.”

Juliane Reinecke and Jimmy Donaghey (Chapter 8) investigate how one of the largest industrial incidents of modern time, the Rana Plaza building complex collapse, triggered the emergence and development of the Bangladesh Accord for Building and Fire Safety (Accord), a transnational private regime for collective

action around workers' safety in Bangladesh. This Accord was created as a legally binding agreement between unions and over 200 companies to end the series of deadly accidents in the Bangladesh garment sector. The authors investigate the collective action approach driving this initiative and how the crisis nature of Rana Plaza for brands sourcing from Bangladesh played a role in shaping it. This study highlights certain institutional conditions and operational principles that were at the Accord's foundation, which prompted its efficacy as a governance mechanism.

While the Accord was successful in certain aspects, as demonstrated by improvements in worker safety and the reduction of workplace accidents, the exclusion of Bangladeshi employers from the Accord's governance structures, while being subject to and affected by its operations, generated resentment and opposition over time. The dynamics of contestation about the Accord's actions, which were highly political, eventually contributed to its termination. The actions by the State, through the Bangladeshi court system, brought the Accord to a premature end. This case study provides an instance of public authority overriding and reasserting rule-making competences from a private initiative.

Finally, Tetty Havinga and Paul Verbruggen (Chapter 9) analyze the evolution of the Global Food Safety Initiative (GFSI), a focal industry-driven meta-regulator for food safety, in connection to external criticism that over time was raised about its legitimacy. From a relatively limited retailer-led initiative in 2000, GFSI evolved into a leading and influential actor in the field of global food safety. The authors discuss the transitions in the GFSI's governance structure, its activities, and its framing as perceived through the lens of legitimacy. The authors argue that GFSI has evolved via processes of pluralization of its constituents, increased transparency, ratcheting up of food standards' quality, and globalization of its benchmarking activities. They find that many of these changes can be interpreted as a response to crises, defined as fundamental objections and doubts voiced by external actors against GFSI or the practice of food certification more generally. This chapter illustrates how the GFSI through its responses and meeting (deep-rooted) legitimacy challenges during crisis moments has demonstrated its potential for adaptation, nourishing its resilience and dominance.

Part IV moves to the assessment of evolution and adaptation of private regulators in sector-specific regimes.

In the aftermath of the Deepwater Horizon oil spill, Margarita Nieves-Zárate (Chapter 10) zooms in on the American Petroleum Institute (API), the United States trade association of oil and natural gas industry, and how public regulators reacted to a changed approach by the sectoral organization in regulating offshore activities. The Deepwater Horizon (DWH) oil spill in April 2010 caused serious environmental damage in the Gulf of Mexico. According to the author, this disaster originated a "regulatory crisis," an episode of disorder and uncertainty during which the regulatory regime to prevent accidents and marine pollution from offshore oil and gas operations in the United States was questioned. The API was under pressure

to change in face of criticism about its role in influencing public policy and the reliance of the federal regulator on its standards, which did not reflect “best industry practises.” The API demonstrated its resilience through an organizational response that allowed it to adapt to the post-DWH oil spill era: the creation of the Center for Offshore Safety (COS).

The Bureau for Safety and Environmental Enforcement (BSEE) had adopted new safety regulation making safety and environmental management systems (SEMS) programs mandatory (amended in 2013) after the disaster. The BSEE introduced a co-regulatory scheme to its SEMS regulation and responded to API’s change by approving the COS, giving it a formal role in the implementation of this regulation. In 2015, COS became the first and only accreditation body thus far to assess and accredit audit service providers (ASPs) that audit SEMS programs. The author argues that certain gaps in transparency and regulatory practices may undermine the effectiveness of the new co-regulatory scheme. An important finding is that the API increased its influence in offshore oil and gas regulation in the United States as a rule-maker and supervisor. According to Nieves-Zárate, the reorganization of the API after the DWH accident provides an example of the perpetuation of private regulatory power.

Certain types of private regimes enjoy considerable leeway in handling legitimacy pressures. This is the case when stakeholders have neither formal “voice” nor exit options, as was the case with the hybrid global anti-doping regime analyzed by Slobodan Tomic and Rebecca Schmidt (Chapter 11). Such political economy conditions allow regulatory regimes to direct legitimacy pressures toward solutions that do not structurally diminish their power over the other actors in the regime and stakeholders. Tomic and Schmidt assess the specificities of the hybrid anti-doping regime and the evolving accountability arrangements it established following its repeated failures to ensure doping-free sports. A culmination of this failure was the 2015 Russian doping scandal in which it was exposed that Russian state authorities had been operating a large-scale doping scheme over several years. Tomic and Schmidt analyze how the accountability arrangements of the global anti-doping regime evolved since its creation in 1999, looking into its formal structures as well as the changes surrounding the actors’ understanding of accountability caused by legitimacy pressures.

The authors identify varying degrees of accountability reactions after the outbreak of the Russian doping scandal across five different accountability dimensions. The transparency response seemed especially strong and less threatening to an organization’s power than other accountability responses. Some institutionalization of the regime’s accountability framework occurred after the scandal, with variation in degree across different tiers. This was after the regime had deflected pressures for change and resisted major reform of this kind prior to the 2015 Russian doping scandal. The severity of this crisis is considered to have played a role in catalyzing this institutional change. According to Tomic and Schmidt, legitimacy pressures

can catalyze institutionalization, even in the most unfavorable structural environment. “The extent of accountability demonstration will be shaped by power struggles, and where the prior structure accords one governing actor the position of supreme authority, the accountability institutionalisation will be most pronounced in the ‘lower tiers’ of the system.”

The assessment of evolution and adaptation of private regulators in sector-specific regimes in Part IV also reveals that we have much to learn from the long histories of “pre-neoliberal” non-state transnational regulation and standardization. Daniel Quiroga-Villamarín (Chapter 12) provides a fitting historical international law perspective into the development and evolution of transnational private regulation, showing how power struggles and blurring of the public–private divide were already well visible during the development of global standards for containerized shipping in the 1950s. The rise of containerized maritime trade was a revolution that occurred across several decades and regions of the globe and can only be understood against the backdrop of the crisis and collapse of this previous regulatory imagination of world ports. The vigorous competition between private and public actors to set standards for the industry within ISO (and beyond) suggests that the dynamic described in the framing chapter may not be new at all. Instead, as Quiroga-Villamarín suggests, as we are entering an era of “Private Ordering 2.0,” it might be helpful to unearth the blueprints of previous hybrid regulatory constellations that preceded the age of the “territorial” and “public” nation-state.

Resilience in the domain of technical standardisation is discussed in Part V. Stephanie Bijlmakers (Chapter 13) examines empirically how ISO, a hybrid standard setting body, has evolved and increased its resilience throughout its seventy-five-year existence in relation to crisis. It departs from the assumption that ISO’s evolution can be explained in relation to its ability to respond to dynamics and challenges that identify distinct shifts in regulatory paradigms within ISO. Bijlmakers builds on Delimatsis’ contribution and tests some of its claims against the empirical findings. She illuminates important traits of ISO that confer resilience onto the organization today, how ISO has acquired or built these qualities in connection to crisis moments in the past, and their cultivation over time. Bijlmakers affirms that ISO derives strength from its standard-setting capacity and flexibility, having demonstrated an ability to promulgate rapidly their voluntary standards and to ensure their underlying potential and qualities, expanding its influence in existing and new domains of standard setting, also in relation to the state. ISO’s institutional structure and its complexity, and its continued adherence to the governance principles founding it, also confer strength onto ISO. ISO’s ability to resist pressures to enact changes to its governance principles, and its business model, attests to its resilience. Bijlmakers provides an illustrative example of how a standard-setting body over the decades through strategies and meeting challenges during crisis moments has managed to increasingly grow in strength and influence.

Through an empirical quantitative analysis, Justus Baron and Olia Kanevskaia (Chapter 14) study the evolution of ICT standard-setting processes. Their focus is the current dynamics and tensions over undue Chinese influence in standards development organizations (SDOs) developing international ICT standards. The acquisition by Chinese companies, and especially Huawei, of leadership positions within these international ICT SDOs risks their processes becoming partisan toward China's commercial and political strategic interests. Current dynamics challenge well-established institutional principles that safeguard the neutrality and independence of the deliberation processes within these SDOs, creating a "moment of stress" for SDO governance. The authors present empirical evidence of Chinese and Huawei's increased participation in four prominent ICT SDOs (ITU, 3GPP, IEEE, IETF).

Baron and Kanevskaia demonstrate how committee leadership appointments and the expected conduct of individuals holding critical positions are key mechanisms to ensure resilience to political and commercial pressures in standard-setting. They distinguish between four different institutional models of SDOs and examine their ability to safeguard the integrity and independence of standard-setting procedures by how individuals are selected to critical leadership positions. While the four global ICT SDOs have different approaches to the legitimacy of SDO leadership, each contributing checks and balances, they are similar in that leadership appointments are mainly determined by certain requirements of expertise and experience. The authors argue that these requirements demonstrate a strong culture of individual independence and meritocracy that functions outside the SDOs' organizational hierarchy or State-driven processes.

Tim Büthe and Abdel fattah Alshadafan (Chapter 15) examine the history of the International Electrotechnical Commission (IEC). Over the course of its 115-year history, this SDO has faced numerous different challenges to its role and legitimacy as the preeminent global body for developing standards for an ever-broader range of electro-technologies. Büthe and Alshadafan examine how the IEC has responded to those challenges, employing an original theoretical framework that emphasizes its capacity and capability for autonomous pursuit of the organization's institutional self-interest, its embeddedness among stakeholders, and the skill and ambition of the organization's leadership.

Büthe and Alshadafan show that these characteristics have allowed the IEC to respond resiliently to numerous changes in electro-technologies, the rise of possible competitor SDOs, and the growing importance of the Global South for the legitimacy and effectiveness of global governance. In all of these episodes, the IEC exhibited adaptability while keeping its essential, defining attributes intact. Far more challenging has been addressing legitimacy concerns due to the marginalization of consumer interests and alleviating the gender imbalance in IEC standard-setting.

The Epilogue by Fabrizio Cafaggi (Chapter 16) offering several insightful remarks and suggestions regarding how we view resilience in the light of crises as well as



various avenues for future research concludes this volume on international standardization. Although this volume improves our understanding of the importance of standard-setting – be it publicly, privately, or hybrid driven – and the processes used, it also advocates for more comprehensive research efforts that would allow for testing certain hypotheses and assumptions that are – sometimes light-heartedly – made with respect to the mechanics, dynamics, and evolution of actors and values in the standard-setting ecology.

