Epilogue

An Evolutionary Theory of Transnational Private Regulation: Investigating Causes and Effects of Crises

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The rich and stimulating contributions in this book focus on transnational private rule-making and investigate the resilience of private regulators in various sectors, primarily in the field of finance and technical standardization. Within this conceptual framework, special attention has been devoted to the impact of crises on transnational private regulation (TPR) and whether organizational resilience may provide a good conceptual tool to describe the modes of evolution of TPR: its birth, development, consolidation, dissolution.

My analysis first provides a short overview of TPR and then focuses on the impact of crises.

I.1 WHO ARE THE TRANSNATIONAL PRIVATE REGULATORS?

TPR is a form of regulation that encompasses standard setting, monitoring compliance, and enforcement. Unlike conventional self-regulation, where regulation is produced by regulated entities, in TPR, regulators and regulated do not coincide. It differs from the more conventional forms of self-regulation since it includes in the regulatory process not only the regulators and the regulated but also the potential beneficiaries of and those harmed by the regulatory process.[1] Inclusion may take different forms from loyalty (membership) to voice (participatory rights to standard-setting processes for those who are not members of the organization). Increasingly, voice has been provided also to those potentially harmed by transnational regulatory regimes, deepening the differences between transnational self-regulation and private

[*] This short essay has benefited of comments by Panos Delimatsis and M. Konrad Borowicz to whom I would like to express my gratitude. The responsibility remains my own.

[1] See F. Cafaggi, New Foundations of Transnational Private Regulation (2011) 38:1 *Journal of Law and Society*; The Many Features of Transnational Rule Making: Unexplored Relationship between Custom, *jura mercatorum* and Global Private Regulation (2015) 36 *University of Pennsylvania Journal of International Law* 875.

regulation.[2] However, the voice of the disregarded is still limited and the participatory instruments are not always effective.[3]

It is important to consider both the governance structure and the participants in the regulatory process.[4] Often regimes arise out of confrontation between firms and NGOs with some degree of participation by public actors, including international organizations (IOs) and individual states. These features permit the internalization of regulatory externalities, usually left out in self-regulatory regimes. However, whereas the costs of regulatory regimes might be internalized, distributional issues between insiders and outsiders of the regulatory regime often remain unsettled. But even when, as it is the case in the financial sector, private regulation is primarily industry regulation, different forms of accountability have developed to move away from conventional self-regulatory regimes for more integrated standard-setting processes. Governance is relevant but the regulation of standard-setting processes may provide opportunities to increase legitimacy without modifying the single stakeholder governance structure of the private regulator.

TPR differs also from soft law.[5] TPR is produced by private actors, at times in collaboration with public actors, with instruments typically private like codes, guidelines, principles, etc. These instruments only bind those who sign on. Soft law, instead, is produced by public bodies according to the procedures defined for rule-making but it does not have binding effects on the addressees[6].

One common dimension to soft law and private regulation is the role of persuasion. Unlike hard law standards where coercion is the rule, soft law and private regulation are mainly based on persuasion. Steering instead of prohibiting is the main objective. In TPR, consent is at the core of legitimacy and accountability. Clearly the regulatory share of the private regulator affects the role of consent and may transform in practice persuasion into coercion. This is the case where the only available standard is produced by private actors as is often the case in the banking

[2] See R. Stewart, Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness (2017) *American Journal of International Law* 211.

[3] For example, ISO invested resources and efforts to ensure broad and balanced stakeholder engagement in the development of ISO 26000 and to strengthen its cooperation with other organizations developing standards in this domain. This can be viewed as an important strategy to justify its involvement in the domain of social responsibility and to ensure the legitimacy and uptake of its standards. However, ISO later acknowledged that a full and equitable balance of stakeholders affected by the standard was not achieved: "it was constrained by various factors, including the availability of resources and the need for English language skills." ISO, International Guidance Standard on Social Responsibility (2010), vi.

[4] See M. Dowdle, *Transnational Law: A Framework for Analysis* (2022), at 205, distinguishing between technocratic and pluralistic governance models. This distinction can play a significant role when analyzing organizational resilience.

[5] See J. Pauwelyn, R. Wessel, J. Wouters (eds.), *Informal International Law Making* (2013).

[6] This is not to say that soft law does not have legal effects but these effects differ from those stemming from signing codes that impose obligations on the signatories. On the distinction between soft law and private regulation, see F. Cafaggi (ed.), *Reframing Self-reguation in European Private Law* (2006); and Cafaggi, *supra* note 1.

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sector for payments or other instruments like the Society for Worldwide Interbank Financial Telecommunication (SWIFT).[7] Hence, consent is relevant, but to understand its real function, it needs to be correlated to the distribution of regulatory power. The more dispersed the power the more relevant is consent for legitimacy and accountability of TPR.

Transnational private regulatory processes do not reflect a single governance framework concerning standard setting, monitoring, and enforcement. Two basic governance models are in place: one based on structural separation and the other on functional separation. In the former, each function is performed by an independent organization. In the latter, all functions are performed by the same organization, but internal functional separation is warranted by having both procedural and substantive safeguards that ensure independence of each division. There is a clear trade-off between independence and coordination. Separation among regulatory functions warrants higher independence but entails greater coordination costs. Organizational resilience may vary depending on which governance model is adopted.

In certain instances, standard setting is performed by one body whereas monitoring is performed by another body. This is the case when, for example, sustainability standards are defined by one organization (ISEAL) whereas their compliance is monitored by another organization (Transparency International). The alternative model is one that incorporates all the regulatory functions within a single body with functional rather than structural separations. Integrated models ensure stronger coordination but present higher conflicts of interest and lower degree of impartiality. Models characterized by functional separation, instead, bear higher coordination costs but warrant more protection to those potentially harmed by failure to apply the regulation or by its misapplication.

I.2 HOW IS THE TRANSNATIONAL REGULATORY SPACE COMPOSED AND ORGANIZED?

The transnational regulatory space is densely populated by multiple players who engage in different types of relationships.[8] The concentration varies significantly. There are areas (like finance and banking) where power is highly concentrated and areas (like food safety and sustainability) where it is fragmented. The space of choice concerning standards by potentially regulated entities is correlated to consent and to the legitimacy and effectiveness of private standards. The wider the choice, determined by low concentration of power and regulatory pluralism, the higher the likelihood that the regulated and the beneficiaries participate in the regulatory

[7] See S. Scott and M. Zachariadis, *Society for Worldwide Interbank Financial Telecommunication* (2014).

[8] See J Black, Legitimacy and Competition for Regulatory Shares, LSE Law, Society and Economy Working Papers 14 (2009).

process. The more limited the choice, when power concentration is high, the more likely is that participation is low and governance hierarchical.

The density of the regulatory space and the objectives of regulation affect the relationships among private regulators. TPR is ever more characterized by a combination of cooperative and competitive relationships among private regulators and between public and private regulators. There are different forms of cooperative relationships among private regulators ranging from informal collaboration to agreements or forms of organizational integration.[9] These collaborative forms may have different weights, depending on whether they focus only on standard setting or encompass the entire regulatory process. The focus on compliance with transnational private standards has generated new and original forms of collaboration between private regulators given also the relatively minor role played by courts. One significant element that contributes to the differentiation of forms of regulatory collaboration is the use of hard or soft law on the public side.

Competitive relationships among private regulators give rise to regulatory competition. Unlike the public domain, where the public regulator is usually a monopolist, in TPR the coexistence of regulators is the rule; often this coexistence produces competition for regulated entities to increase their share in the regulatory market. The extraterritorial reach of TPR determines competition over global shares of regulated entities.

The evolution of private regulatory models depends on multiple factors and differs across sectors. Among the determinants of changes in TPR, the following stand out: (1) power shifts within the marketplace among regulated entities, (2) regulatory failures, (3) increase or decrease of regulatory competition within the sector, (4) rules imposed or recommended by international organizations. Changes require realignment between values, objectives, and regulatory instruments.

The evolution of TPR is responsive to the change of regulatory needs and to the distribution of power among the different constituencies participating in the organization. These changes may depend on the shifting balance of power among the regulated (market players) or between the regulated (firms, banks) and the beneficiaries (consumers, customers). The example of food safety provides a clear illustration of the evolution of forms and instruments of regulation and the rise of certification with the change of powers from producers to retailers that occurred at the end of the last century.[10] The emergence of GFSI, a benchmarking institution for food certification, was the response to the change of market power along the

9 See F. Cafaggi, Convergences and Divergences: Comparing Contractual and Organizational Models in International Regulatory Cooperation, in *Convergences and Divergences in Private Law in Asia* (G. Low ed., 2022).

10 See G. Gereffi, The Organisation of Buyer-Driven Global Commodity Chains: How U.S. Retailers Shape Overseas Production Networks, in *Commodity Clains and Global Capitalism* (G. Gereffi and M. Korzeniewicz eds., 1994).

supply chains and of excessive private regulatory competition concerning safety standards.

The creation of GFSI did not eliminate competition but provided a constructive framework for competition among certificate scheme owners. Nevertheless, what is even more relevant is that an organization born as a membership body of retailers in opposition to producers has later become a foundation composed by both and by service providers. This transformation of the governance is the result of a change in the regulatory space. It highlights the link between the organization of regulatory space and the transformation of relationships among private regulators.[11]

1.3 WHAT IS THE RELATIONSHIP BETWEEN TRANSNATIONAL PRIVATE AND PUBLIC REGULATORS?

TPR operates in a framework of institutional complementarity between private regulators, States, and international organizations.[12] Institutional complementarity encompasses both cooperative and competitive relationships between private and public actors that can evolve over time.[13] Cooperative relationships may be compatible with common or separate standard setting where both concur to the definition of rules of conduct by the regulated. Transnational regulatory cooperation increases legitimacy and contributes to regulatory effectiveness.[14] In the past twenty years, memoranda of understanding, consultation agreements, or mutual participation in the governance structures have developed to favor regulatory cooperation.[15]

It is important to underline that the relationships between transnational private regulators and public bodies might also be competitive, where public and private actors compete for regulatory shares. Competition occurs especially when public standards are not mandatory as is the case for soft law instruments. Competition in the short run often leads to collaboration in the longer run.

[11] See T. Havinga and P. Verbruggen, "The Evolution of the Global Food Safety Initiative: The Dynamics of the Legitimacy of a Transnational Private Rule-Maker" in this volume (Chapter 9).

[12] See Cafaggi, *supra* note 1.

[13] See B. Eberlein, K. Abbott, J. Black, E. Meidinger, and S. Wood, Transanational Business Governance Interactions: Conceptualizations and Framework for Analysis (2014) 8:1 *Regulation and Governance*; B Cashore, J Steen Knudsen, J Moon, and H. van der Ven, Private Authority and Public Policy Interactions in Global Spheres: Governance Spheres for Problem Solving (2021) 15:4 *Regulation and Governance*, doi.org/10.1111/rego.12395 (distinguishing three forms, and subtypes, of public/private interactions: "complementary," "competitive," "coexistent").

[14] See OECD, International Regulatory Cooperation (2013); F. Cafaggi, A. Renda, and R. Schmidt, *Transnational Private Regulation, International Regulatory Co-operation: Case Studies, Vol. 3: Transnational Private Regulation and Water Management* (2013).

[15] See Agreement on technical cooperation between International Organization for Standardization and European Committee for Standardization (Vienna Agreement) (1991); Memorandum of Understanding between the International Organization for Standardization and the International Labor Organization.

Food offers a good illustration. Not only have GFSI internal constituencies changed, moving toward a more collaborative structure, but it has also evolved over time developing collaboration with states and public entities.[16] As a result, it has generated more products like the Global Food Security Index.

Historically, regulatory failures within the public domain have triggered important changes in the private domain. The well-known example of environmental protection and the birth of private actors in forestry after the crisis in 1994 is illustrative of one dynamic leading to the emergence of private organizations as a result of public failures.[17] The opposite dynamics occurred in relation to the payment system with the failure of the self-regulatory regime in EU and the adoption of the first payments Directive.[18] These are examples of how shortcomings in the public domain have sparked the birth of new private organizations or determined the decline of existing private organizations when political or regulatory failures have occurred.

Changes can also stem from excessive private regulatory competition and fragmentation. Excessive fragmentation and competition among private regulators have been a major driver of change of both the governance and the standard-setting activity. Food safety standards, as well as sustainability standards, provide examples of how regulatory competition may lead to a credibility and legitimacy gap and therefore instigate governance changes increasing procedural accountability and stakeholder participation.[19] Competition has also brought about aggregation and cooperation among private regulators triggering forms of meta-regulation.[20] The creation of GFSI in the area of food and of ISEAL in the area of sustainability provide good illustrations of these changes. Their creation has deeply affected the organizations participating in the meta-organization but also of those that did not enter the regime either because they did not want to or because they were excluded. Regulatory competition has also influenced the content and the scope of standards.

[16] P. Verbruggen and T. Havinga, Transnational Business Governance Interactions in Food Safety Regulation: Exploring the Promises and Risks of Enrolment, in *Transnational Business Governance Interactions: Empowering Marginalized Actors and Enhancing Regulatory Quality* (S. Wood et al. eds., 2019), 28–51.

[17] On the origins and development of FSC, see C. Overdevest and J. Zeitlin, Assembling and Experimentalist Regime: Transnational Governance Interactions in the Forest Sector (2014) 8:1 *Regulation and Governance* 22.

[18] Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market. On the evolution of the payment system, see A. Janczuck, Governing Global Payments Markets: The International Payments Framework-A New Actor on the Scene, in *The Governance and Regulation of International Finance* (G. Miller and F. Cafaggi eds., 2013), at 117.

[19] See A. Marx and J. Wouters, Competition and Cooperation in the Market of Voluntary Sustainability Standards, in *The Law, Economics and Politics of International Standardization* (P Delimatsis ed., 2015), at 215.

[20] See C. Scott, Regulating Everything: From Mega- to Meta-Regulation, UCD Geary Institute Discussion Paper Series WP 24 (2008).

The turn to the consumer protection and to sustainability by ISO has also been driven by external competitive pressure.[21]

So far primarily endogenous changes have been described. But exogenous factors have also played a role in the transformation of TPR. Often changes of private regulators' organizational models have been stimulated by rules recommended or imposed by IOs. This is part of the phenomenon that has successfully been labeled orchestration.[22] Prominent in orchestration has been the role of WTO.[23] WTO standards and rules have affected both the process and the content of transnational private standards.[24] These are, instead, exogenous-driven changes that do not present the features of a crisis but may transform the identity and mission of the private regulator.

Changes have come not only from IOs but also from the interaction between transnational private regulators and States. A form of regulatory interaction is clearly identifiable between ISO and the individual States.[25] Similarly, a very illustrative example of reciprocal influence is the relationship between International Swap and Derivatives Association (ISDA) and States in relation to bankruptcy where reciprocal influence has occurred over time.[26] These are examples of a broader phenomenon of institutional complementarity between transnational private regulators and public organizations including both States and international organizations.[27] The dynamics of institutional complementarity have been investigated through the lenses of interactions leading to, among other things, enhanced regulatory capacity.[28]

None of these changes, no matter how radical they might be, can be compared to those produced by systemic crises. Both the causes and the effects differ. But it is important to compare and to contrast dynamics of changes in ordinary times and

[21] See S. Bijlmakers, "The International Organization for Standardization: A Seventy-Five-Year Journey Toward Organizational Resilience" in this volume (Chapter 13).

[22] See K. Abbott, P. Genschel, D. Snidal, and B. Zangl (eds.), *International Organizations as Orchestrators* (2013).

[23] See W. Mattli and T. Büthe, *The New Global Rulers: The Privatization of Regulation in the World Economy* (2013); and P. Delimatsis, Global Standard-Setting 2.0: How the WTO Spotlights ISO and Impacts in the Transnational Standard-setting Process (2018) 28 *Duke Journal of Comparative and International Law* 273.

[24] See *supra* note 23.

[25] See P. Delimatsis, "Relevant International Standards" and "Recognised Standardization Bodies" under the TBT Agreement, in *The Law, Economics and Politics of International Standardization* (P. Delimatsis ed., 2015); S. Wood, Interactive Strategies for Advancing Marginalized Actors in Transnational Governance Contests: Labour and the Making of ISO 26000, in *Transnational Business Governance Interactions: Enhancing Regulatory Capacity, Ratcheting up Standards, and Empowering Marginalized Actors* (S. Wood, R. Schmidt, E. Meidinger, B. Eberlein, and K. W. Abbott eds., 2019).

[26] See M. K. Borowicz, Contracts as Regulation (2021) 17:1 *Capital Markets Law Journal*; C. Scott and J. Biggins, Public–Private Relations in a Transnational Private Regulatory Regime: ISDA, the State and OTC Derivatives Market Reform (2012) 13:3 *European Organisation Business Law Review* 309.

[27] See Cafaggi, *supra* note 1.

[28] See Wood et al., *supra* note 25.

dynamics of changes in times of crisis. Both dimensions of change and time of occurrence differ. During crises, changes are wider and sudden, often not always unanticipated. In ordinary times, changes are more incremental, to a greater extent foreseeable and they spread over time.

1.4 TPR AND CRISES RESPONSES: FROM ORGANIZATIONAL TO RELATIONAL RESILIENCE?

In Section 16.3, three dimensions were analyzed: (1) the structure of the regulatory process in transnational private regulation, (2) the organization of the regulatory space and the combination of competitive and cooperative relationships among regulators, and (3) the complementarity between public and private transnational regulation, its forms, and effects.How do crises impact on these three dimensions? How do changes and dynamics occurring in ordinary times differ from those originating from crises? Clearly the specific features of TPR call for a specific account of crises' impact and resolutions.

The relationship between crises and regulatory changes is at the core of many chapters in the book. A rich set of questions emerge. What are the characterizing elements of crises? How does one distinguish between a crisis and other types of radical or incremental institutional changes in regulatory processes? Is the impact of the crisis on regulatory processes permanent or temporary? Are the institutional consequences of a crisis reversible or irreversible? What factors should be considered to assess the impact of a crisis and evaluate its intensity and reversibility on transnational private regulation? Does transnational private regulation feature specific aspects in relation to crisis responses compared to public regulation? How can the impact and the role of organizational resilience in determining the consequences over TPR be measured?

The book's editors suggest that "rarity, irregularity and low likelihood are key traits of crisis events, calling for swift crisis management to allow for recovery. Crises constitute critical junctures which 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.[29] In that sense, crises are testbeds for effective crisis management and its potential for recovery and readjustment."[30]

The editors opt for a process rather than one-off-event definition of crisis. They suggest that both exogenous and endogenous factors determine both the characteristics and the responses to the crisis. A crisis is characterized by radical and

[29] See P. Delimatsis, "The Resilience of Private Authority in Times of Crisis" in this volume (Chapter 1).

[30] See also A. Carmeli and J. Schaubroeck, Organisational Crisis-Preparedness: The Importance of Learning from Failures (2008) 41 *Long Range Planning* 177, at 179.

unanticipated changes in the regulatory process. In the more radical scenario, it determines the dissolution of regimes and the emergence of new ones.

Crises should be distinguished from regulatory failures. Crises are characterized by sudden occurrence and unanticipated systemic effects. They involve a whole sector or even more than one sector. Once we distinguish between crises and regulatory failures and, within crises, we separate organizational from relational resilience, the next question is whether a unified theory of impact crisis can be proposed, or whether crises differ from one another and from sector to sector so that a single and unified impact theory cannot be plausibly offered.

Crises are characterized by unexpected and often sudden modifications of institutional conditions, determined by factors beyond the control of those institutions. The legal aspects of crises also differ depending on whether fundamental rights are at stake. This is one of the many differences between the financial crisis of 2008 and the sanitary crisis of 2020. Within crises, distinctions should be drawn depending on whether the driving factors of the crisis are endogenous or exogenous to the organization. The editors focus primarily on exogenous driven crises. A complementary inquiry into exogenous factors can help examine the impact of crises on TPR.

Clearly, it is the combination of the pre-existing institutional architecture and the specific factors determining the crisis, which influence the impact and the solution of the problems generated by the crisis, determining how private regulatory authority is redistributed among existing actors and, even more importantly, between existing and new players.

The broader question is "if" and "how" the crises impact on TPR and on the relationship between States, international organizations, and private regulators. More specifically, on which dimensions of TPR do crises have an impact? The recent COVID-19 crisis suggests that when fundamental rights are at stake changes have to be based on clear institutional architectures compliant with the rule of law. But a fully fledged theory of the relationship between crises and the rule of law has not yet been provided. The relevance of fundamental rights protection in crisis management will be shortly examined later.

To define the impact of crises on regulatory processes it is useful to distinguish between short- and long-terms effects. The short-term effects usually determine an increasing role of States and public actors. There is no evidence that during crises wider delegation of regulatory powers to private actors, including standard setting, takes place. On the contrary, emergencies often increase the power of public bodies to control regulatory processes, including those usually delegated to private regulators. This is particularly true when private regulation impinges on fundamental rights, as, for example, the area of data protection, information technologies, and freedom of expression. The COVID crisis however showed that the necessity to ensure compliance with sanitary obligations and the use of soft law has increased the role of private entities in monitoring compliance not only with soft but, at times, even with hard law.

Private standards are de jure voluntary, but the space of choice by regulated entities is determined by the concentration of regulatory power in the hands of regulators. The higher the concentration of regulatory power the more limited is the choice of regulated and the role of consent. Voluntary standards need time to be applied in order to persuade regulated entities to join in and comply. The conventional belief is that emergencies typical of crises can be incompatible with voluntary standards if persuasion rather than coercion is the basis for their adoption.

However, somewhat counterintuitively, the effectiveness of standard setting in times of emergency does not necessarily require hard public law. The COVID crisis has shown that nonbinding soft rules may be more effective than hard binding rules, especially when scientific uncertainty is pervasive and fundamental rights are at stake.[31] If persuasion and consent are the features common to both soft law and TPR then it might be possible that private standard setting might effectively operate even in emergency times. The long-term effects may simply rebalance the relationship with private actors or modify the composition of the private sphere and, at times, even increase their relevance.

A second important aspect, identified by the editors, is that of resilience. They note in the Introduction of this book that:

> 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 would entail low connectivity to decrease vulnerability of a system; information flow through feedback loops; or the ability to improvise and reorient, for instance, through emergent leadership; and 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.

The contributions to the book focus on organizational resilience. The notion of resilience, according to the editors, includes not only the ability to adapt and change to respond to crisis but also resistance. It is preferable to distinguish between resilience and resistance and to correlate resilience with adaptation and change and resistance with lack of change.[32] Crises may generate both resilience and resistance and, within an organization, different interests may lead to either one. For example, the doping scandal that affected WADA prompted the organization to adopt strategies of resistance rather than resilience, as persuasively argued in by Tomic and Schmidt in their

[31] See F. Cafaggi and P. Iamiceli, Uncertainty, Administrative Decision-Making and Judicial Review: The Courts' Perspectives (2021) 14:1 *European Journal of Risk Regulation*.

[32] See P. Delimatsis, "The Resilience of Private Authority in Times of Crisis" in this volume (Chapter 1).

contribution to this book.[33] S. Tomic and R. Schmidt, "The Accountability Response of the Global Anti-doping Regime to the Russian Doping Scandal" in this volume (Chapter 11). In their account, legitimacy pressures can be a catalyst of a regime's institutionalization of accountability mechanisms, but the extent of such institutionalization will be limited by the regime's prior structure. Resilience clearly depends on the impact of change upon the preexisting distribution of power, its influence both within the organization and between the private organizations and the public actors.

In TPR, resilience associated with crises concern both the changes of individual organizations and the web of regulatory relationships within the sector. The impact of a crisis is correlated to the degree of organizational resilience and, more specifically, to the resilience of private actors within the organization (individual resilience) and between organizations (systemic resilience). The correlation between the impact of a crisis and resilience is not linear. Resilience does not necessarily increase or reduce the impact of a crisis; it affects the quality of the impact rather than its intensity. It operates differently for short- and for long-term effects of the crisis.

How does organizational resilience impact on the interactions between public and private actors in transnational regulatory processes? Crises often modify the relationship between public and private actors and redistribute power within the private domain. Usually, crises produce a concentration of regulatory power in the public hands during the time of crisis management. Thereafter, a reallocation of regulatory power between public and private occurs as a long-term effect of the crisis and the resilience of private authority emerges. As aptly illustrated by Nieves-Zárate in her contribution to this book, following the Deepwater Horizon oil spill, organizational changes introduced by the American Petroleum Institute (API) in response to demands and pressures by the US public regulator, resulted in API's standards to gain more influence in the federal regulatory framework. Within the private domain, crises redistribute power between regulated and beneficiaries and between beneficiaries and those harmed by the regulatory process.

Clearly one relevant aspect to analyse impact is represented by the geographical scope of the crisis. Whether its resolution can be delivered at local (national) level or global intervention is necessary. For example, following the global financial crisis, public policymakers in the United States aimed to address the problem of systemic risk by curbing the bankruptcy privileges of derivatives counterparties. The effectiveness of that solution required other jurisdictions to follow suit as derivatives transactions often include counterparties from multiple jurisdictions. Because it was not clear whether other jurisdictions would do it, policymakers relied on the ISDA amend the contracts commonly used in derivatives markets to achieve similar regulatory effects.[34]

[33] See M. Nieves-Zárate, "Organizational Responses of Transnational Private Regulators after Major Accidents: The Case of the American Petroleum Institute and the Deepwater Horizon Oil Spill" in this volume (Chapter 10).

[34] See Borowicz, *supra* note 26.

Often the regional level between national and global tends to be the most appropriate for measuring regulatory resilience. More specifically, the states' interests in devising collaborative versus non-collaborative solutions to the crisis play a role on the impact of crisis and its resolution. Clearly, the answer depends on the distribution of the costs of the crisis and the distribution of the costs of its resolution. Distributional effects concern the States; often crises determine uneven losses and gains across States but also across the different social constituencies. For example, the global financial crisis hit the real estate market first and then spilled over to many other areas until general taxpayers were involved. In the case of COVID-19, lockdowns harmed touristic and transport sectors first and then had a broader effect on other areas, whereas healthcare facilities and pharmaceutical industries clearly benefited from the crisis.

Resilience of public actors is driven by factors different from those affecting transnational private organizations. The allocation of powers can change within the public domain when the state of emergency is proclaimed as a consequence of the crisis. The recent crises, like that caused by the COVID-19 pandemic or by the war in Ukraine, show a shift from legislative to the executive power and an increasing role of judicial review to ensure that even in emergency times the balance of power is maintained and compliance with rule of law is warranted. Suffice to say that the role of emergency declarations to modify the relationship among powers within the State is not necessary in private organizations where the boundaries between ordinary and emergency often do not require or imply major regulatory changes. This is not to say that emergency crises do not have any impact on the operations of private regulators. Rather, it suggests that the effects of crises on the institutional balance within the organization differ depending on the public/private nature of the organization.

In private organizations, usually the effects of crises are not ex ante regulated. The occurrence of external shocks generates ad hoc reactions rather than being regulated in a systemic fashion. Hence, it is within the private autonomy that individual organizations react to crisis both in relation to their governance and their activity. This is not to say that TPR is impermeable to crises and shocks. But, unlike public organizations such as the State where emergency is the subject of specific rules that guarantee separation of powers and democratic principles, similar rules are not usually adopted in TPR – at least so far. Procedural accountability of transnational private regulators, both toward internal and external stakeholders, is certainly influenced by the emergency and given the recurrence of crises it might be important to define how private regulators should operate in time of crises.

TPR operates in a framework of complementarity with domestic and global public actors. Hence, if the focus should be on the relationship between crises and resilience, a question arises about the unit of analysis. Should resilience only be applied to the individual private regulator or should it also refer to the relationship between private regulators and public actors? In the latter case, the analysis should go beyond organizational and include relational resilience. The question is whether regulatory relationships and interactions are resilient to changes determined by crises. This is particularly important to address how complementarity between public and private actors changes during times of crises.

It is contended that organizational responses concerning individual regulators might differ from relational responses related to the sector and that internal dynamics within organizations, including States, might differ from those concerning the relationships between transnational private regulators and public actors. Institutional complementarity requires focusing on relational in addition to organizational resilience. The presence and influence of international organizations in the context of complementarity can play a significant role in promoting resilience and reducing the disruptive effects of crises. The inclusion of representatives of the International Labour Organization (ILO) within the Steering Committee of the Bangladesh Accord discussed in this book appears to have played such a role.

The issue deserves further empirical investigation, but it is fair to assume that crises modify the relationship between public and private bodies, redistributing the shares of transnational regulatory power. Hence, the core dimension of resilience becomes relational rather than organizational.

Resilience includes not only organizational changes but also relational changes concerning the consequences of the reallocation of power among regulators and of the redistribution of costs and gains from crises.

The institutional effects should be measured by analyzing not only the redistribution of power between states and private regulators but also by their modes of interaction during and after the crisis[35]. Hence, one should distinguish how crises change the interaction between public and private actors and then identify the dynamics among private actors within TPR generated by crises. Arguably, crises often tend to redistribute powers in favor of public entities and in particular States. This is especially true in relation to rule-making power, less to monitoring compliance.[36] In other words, the redistribution of regulatory power between public and private actors determined by crisis is not uniform across the regulatory process and its short-term effects differ from medium- and long-term effects. The investigation should verify how and why the regulatory arena and the allocation of regulatory shares is modified and the extent to which regulatory cooperation and interactions persist or cease to the benefit of the one (private) over the other (public).

1.5 TPR AND ITS EVOLUTION: THE WAY FORWARD

Crises have an impact on transnational regulation. They produce changes that usually differ from those brought about by regulatory failures. To determine the

[35] Eberlein et al., *supra* note 25.
[36] This is a common feature of both the financial and the COVID-19 crisis.

impact of crisis on the regulatory process, it is useful to distinguish between short- and long-term effects. The analysis shows that two intuitive conclusions may deserve greater scrutiny. Intuitively, crises should lead to the centralization of regulatory power and to a more intensive use of coercive rather than persuasive power. Centralization is determined by the need to have faster decision-making. Coercion is justified by the necessity to have more effective decision-making.

Both premises are plausible but too simplistic. There are instances where decentralization and persuasion provide faster and more effective regulatory regimes than centralization and coercion even during crises. In relation to centralization of regulatory power, the main variable is the homogeneity of the regulatory space. Centralization helps if local knowledge is not needed because there is homogeneity across regulated entities. Otherwise, when the regulatory context is heterogeneous and there are power and distributional conflicts among regulated entities, decentralization may be faster and more effective. Coercive force operates when there is general consensus about the rules by their addressees. If there are uncertainty and divergent beliefs among regulated and beneficiaries, persuasion may work better than coercion.

Hence, more empirical analysis is needed to understand when and upon which conditions the objectives of faster and more effective regulatory processes can be achieved after crises have occurred. The notion of resilience, which has become overwhelmingly relevant, may also deserve further elaboration, encompassing not only the organizational dimension but also the relational perspective that has engaged scholars in both the descriptive and normative efforts to explain the evolution of transnational regulation. Resilience is not an independent variable. Regulatory regimes can influence the degree of resilience and the ability to react to shocks and stresses.[37] Crises can affect both legitimacy and effectiveness of transnational private regulation. Resilience can contribute to make these challenges an opportunity for change rather than the cause of regimes' dissolution, but it needs to be steered by both institutional and organizational responses.

37 See FAO, The State of Food and Agriculture, Making Agrifood Systems More Resilient to Shocks and Stresses (2021).