Understanding the Rise of the Regulatory State in the Global South

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Over the last ten to fifteen years, a broad acceptance of the rise of the “regulatory state” around the world has emerged. In a nice turn of phrase, Michael Moran once asked if the regulatory state is simply an “intellectual brazier” around which diverse scholars can gather. Although one interpretation of this is that the term lacks a precise definition, it also conveys the stimulation and dialogue that can be generated by focusing on the regulatory state. This paper aims to provide a framework for a forthcoming project that is based on just such a dialogue. The project will bring together 12-15 scholars whose work focuses on the regulatory state in the so-called ‘developing world’ to try and understand better the rise of the regulatory state in the Global South. As you shall see, we deliberately aim to integrate a range of diverse perspectives, organised in three broad sections each of which is represented by one of the papers following mine. If there is a common argument to this framing paper, it rests on two broad theses. First, that in order to understand the rise of the regulatory state in the Global South, it is critical to integrate politics into not just an appreciation of micro-level case study dynamics, but also our broader theoretical approaches. Secondly, this deep integration of politics into an understanding of the regulatory state departs from the more technocratic approaches of ‘mainstream’ literature on the regulatory state in ways that reclassify core features of developing country regulatory states, shifting them from ‘problems’ to be corrected to endogenous differences which may well, when properly contextualised, turn out to be advantages that are in fact essential for integrated development.

What then, do we take as the core of the regulatory state in this project? Its empirical manifestations include at a minimum the emergence of law-backed specialised agencies, often assumed to operate through administrative means to support the unitary goal of economic efficiency. More generally, the notion of the regulatory state connotes greater reliance on institutions operating at arms-length from government, insulated from daily political pressures and embedding their decisions in technical expertise. In Nicola Phillips’ words: ‘the emergence of the regulatory state refers to a process by which economic management has become ‘proceduralised’: it is characterised by an increasingly rule-based, technocratic and juridical approach to economic governance, in which there is a greater emphasis on institutional self-regulation’ (Phillips 2006: 24 in Minogue and Carino (eds) 2006). The big questions raised by this transition include: Does the “regulatory state” represent a markedly different mode of governing? What is the relationship of the specialised agencies that typify institutional reforms in the regulatory state to recent arguments
about ‘regulatory capitalism’? How does the delegation of decisions, and the structure of formal or informal supervision or review, change both substantial and procedural aspects of decision making? And how does it shift the architecture of political agency that underpins intersecting paths of economic and democratic development?

Although these ‘big questions’ could be asked in relation to any specific empirical context, relatively little work has explored whether, and how, the rise of the regulatory state in the Global South, and its implications for processes of governance, are distinct from cases in the North. The oft-noted features in the South of weak state capacity, constrained resources and powerful external pressures to adopt particular policy transplants might reasonably converge to produce a distinctive trajectory. Whether or not such a distinctive trajectory is in fact emerging is often obscured in the policy literature by the concurrent normative impulse to ‘correct’ these contextual features in the service of the ‘best-practice’ model being imported. We argue that the empirical task is an important prior undertaking that needs to be separated from normative prescription. In other words, deepening our empirical understandings of different manifestations of the regulatory state will have both practical policy implications and implications for the theoretical underpinnings of the regulatory state literature.

This framing paper, and the workshop as a whole, therefore asks as its core question: are there distinctive features of the contemporary “regulatory state” in the Global South, and if so, why and what are the implications? We aim to take seriously the historical legacy of the idea of a North/South divide while also acknowledging the limits to this purported divided caused by increased economic integration between North and South and increased differentiation within the South. Our starting point is the institutional reform of vital infrastructure sectors affecting consumers, in part because of their high social salience and in part because these sectors were typically crucibles for the initial introduction of regulatory agencies in many parts of the industrialised North, and have subsequently influenced patterns of institutional transplant in the South. But our broader aim is to move from an understanding of the empirical specificity of infrastructural institutional reform in the Global South, to a broader appreciation of the capacity of
different theoretical approaches to forge the basis for a fresh understanding of the resonance of the regulatory state in a changing global political economy.¹

Much of the extant body of work on the regulatory state focuses on the US or Europe, although there is now a growing body of work on Latin America. A significant amount is explanatory in orientation, with a tendency to assume relatively homogenous pathways of development and modernisation globally. In particular, functional arguments for the transplant of independent regulatory agencies have dominated, viewing them primarily as agents of depoliticization that diffuse across countries in a process of institutional isomorphism. The influence of Pablo Spiller’s work (Spiller 1993), as well as that of Giandomenico Majone (Majone 2001), has been important here, highlighting a theoretical framework of sustaining ‘credible commitments’ in the context of delegation to non-majoritarian institutions. The applicability of this framework in the empirical context of the South has been taken forward by two lines of work: the valuable empirical work of Jordana and Levy-Faur on Latin America, and the work of the Manchester-based Centre for Regulation and Competition (CRC).² Both these lines of work have explicitly sought to integrate legal and political analysis into what is felt to be a predominantly economics-focused literature, as well as to foreground the institutional and resource constraints faced by developing countries, and the greater dominance of poverty as an urgent policy issue in these countries.

Yet the conceptual sway of the developed country literature proves difficult to dislodge. In Levy-Faur and Jordana’s work, this manifests in a striking tension between the macro and micro levels of analysis of the spread of independent regulatory agencies in Latin America. While at the macro-level a theoretical emphasis on functional diffusion of relatively depoliticised institutional design issues predominates, their micro-level analysis leaves more space for social and political dynamics as well as local specificity. And the analysis undertaken under the auspices of the CRC tends to veer back towards a perspective that places competition at the conceptual heart of the regulatory state, integrates institutional specificity of developing countries in terms of technical capacity-building, and addresses poverty as a relatively apolitical function of the welfare and distributional

¹ We hope that this conception will also avoid the pitfalls of atheoretical and inappropriate regulatory policy transfer (Cook and Mosedale 2007, Ch.6), but do not intend the workshop to focus primarily on policy relevance.
² A representative snapshot of CRC’s work on regulation in developing countries is collected in Minogue and Carino 2006 and in Cook and Mosedale 2007.
effects of regulation and competition. As Cook and Mosedale acknowledge in the introduction to *Regulation, Markets and Poverty*, the bulk of CRC work has a predominantly specialist audience in econometrics. Where CRC work departs from this, it reflects the macro-micro split identified as a feature of Levy-Faur’s work: that is, the intertwined nature of politics and regulation is acknowledged at the case study level, yet is not deeply embedded at the macro-theoretical level.

In addition to these well known ideas, there is a growing literature on the regulatory experience and an emergent regulatory state emerging from within the Global South. Much of this work, although empirically driven, blends descriptive-analytical mapping with normative evaluation. This emergent literature is also eclectic in its theoretical moorings, drawing variously from political sociology, Global Administrative Law, and institutional economics. We suggest that it is helpful to begin identifying the specificity of the regulatory state in the Global South, to establish a productive dialogue between these different orientations to the spread of independent regulatory agencies to the South.

In order to do so, the workshop (and, mirroring that, this framing paper) proceeds in three sections. The first section explores the introduction of IRAs in infrastructure sectors such as electricity, water and telecommunications, highlighting functional delegation approaches to regulatory policy transfer, while at the same time interrogating and supplementing them. The second and third sections of the project broaden the theoretical approaches to the regulatory state. In the second section, we retain the focus on infrastructure sectors for the time being but move beyond a preoccupation with agencies at the institutional level, looking more broadly at other actors including courts, informal providers, and investors. In the final section, we detach our analysis from both infrastructure and IRAs to explore whether alternative theoretical starting points have the potential to capture the distinctiveness of regulatory state development in the Global South. Potential theoretical approaches include perspectives coming from transactional economics; broader sociological accounts of regulatory capitalism; global administrative law; international relations approaches to transnational governance; perspectives from law and development especially on the developmental state; regulation and rights; regulation and risk.

3 Of course the CRC is not the only line of work that reflects this perspective: much World Bank analysis similarly does, and in fact key authors within the CRC take a much more political approach: see, e.g., chapters by Phillips and Minogue in Minogue and Carino 2006.
The rise of the regulatory state is typified by the spread of the regulatory agencies that constitute its archetypal institutional form. The larger project which this paper forms a part of includes a range of case studies of this phenomenon, drawing from multiple geographic regions and infrastructure sectors. The case studies are not structured so as to form a basis for systematic cross-country or cross-sectoral comparison: instead, we hope to inductively identify from these case studies key elements of the regulatory experience in the South, building particularly upon two broad lines of questioning linked loosely to different levels of governance.

First, to what extent and how is the regulatory state of the South shaped by the interface between the domestic and the international, especially in relation to external agencies and multinational corporations? Pressures from external agencies to establish regulatory agencies are oft-noted aspects of institutional history in developing countries, yet rarely explored in detail. Ahmed Badran’s paper, for example, uses a detailed examination of the genesis of Egypt’s telecommunications regulatory agency to point out that to explain delegation to an independent agency in terms of insulation against political uncertainty, as Moe (1990) does in the context of the North, depends upon assumptions of sovereign autonomy in the economic policy-making zone that is in practice severely constrained by external pressures from donors and private investors. Even the making of ‘credible commitments’, the famous explanatory concept articulated by Spiller, is invested with a different sensibility when it is fully understood to what extent the institutional arrangements assumed to secure such credibility have been effectively externally imposed. Credibility requires conscientious commitment and internalisation of particular moralities and logics: neither is easily developed under external pressure.

Badran’s paper, then, points to the altered resonance in the South of even the standard mainstream accounts of the genesis of regulatory agencies. But the context for this account has also shifted in important ways in recent year. Many regulatory agencies, such as those in Argentina explored by Murillo and Post, were established in the 1990s during a period when linked agendas of privatization and liberalisation were dominant: a context in which ‘credible commitments’ and the
provision of stability and predictability for private investors seemed naturally to come to the forefront. But this is no longer the ‘commonsense’ political consensus in either North or South. What are the implications for regulatory transplant of the shift away from privatization and liberalisation? Has the shift diversified or simply amended patterns of institutional isomorphism? For example, what, if any aspects of the post-Washington consensus are reflected in the design of independent regulatory agencies in the 2000s? Has the revived popularity of the concept of the ‘developmental state’ (Leftwich 1995; White et al 1998; Trubek 2008) generated any commonalities in the spread of regulatory institutions in the Global South? What is the role of different corporate regulatory traditions, which can cut across ‘varieties of capitalism’? Or are the important patterns more notable at national or even sub-national level, driven by factors such as variable investment needs or local political dynamics?

Secondly, how do the various ways in which regulatory agencies are embedded in national contexts shape the specificity of the regulatory state in the South? Although it is clearly important to be sensitive to the substantial differences that exist between states in the South, we want to pose the question of whether there are distinctive implementation dynamics in relation to regulatory agencies in developing countries. We are especially interested in the implications for the growth of regulatory institutions of three attributes we would argue are shared at a broad brush level by many developing countries: weak state capacity, ill-functioning political institutions with which agencies interact, and the challenge of imposing any of the costs associated with regulatory reform on poorer people, a challenge that is much larger than that experienced by agencies’ counterparts in the North. Other key points for exploration will include the salience of public vs. private ownership of regulated entities; the politics of exclusion; the prospects for regulatory capture, including “everyday forms of capture” grounded in shared assumptions; specifics of institutional design including issues around inter-institutional collaboration; and the micro-politics or institutional sociology of regulatory agencies.

Although it is useful heuristically to structure our enquiry by reference to ‘international’ and ‘national’ sources of influence, we would also argue that important features driving the spread of independent regulatory agencies subsist in a transnational space that is neither clearly international nor domestic (see also Morgan 2008). In particular, procedural changes that shape
national political contexts (at the macro-level) and regulatory practices (at the micro-level) are important. Under certain conditions, such procedural changes can create opportunity structures within regulatory agencies that can foster their status as new democratic spaces. We explore this democratic potential further in the next section, but emphasise in this section the broader transnational architecture that facilitates such potential. In addition, trends in sectoral variation (where identifiable), are often transnational in nature, and may shape the genesis and form of the regulatory state in the South to a greater degree than geographic variation. Both of these transnational lines of enquiry arguably reflect the effects of a viewpoint that “Power in the form of capital, and particularly financial capital, flows – while politics remains tied to the ground, bearing all the constraints imposed by its local character…The overall result…is that the ‘economy’ is being progressively exempted from political control…, resulting in the disempowerment of politics as an effective agency” (Bauman 2001). As we shall see in the next section, part of our aim is to re-inject a positive sense of the role of local politics back into the study of regulatory transplant and the specificity of the regulatory state in the Global South.

II. Beyond the Regulatory State: Mapping Regulatory Spaces

Possibly one of the clearest lessons emerging from attempts at North-South regulatory transplant is the ambiguity of the label ‘independent’ as a descriptor of a regulatory agency. This ambiguity arises in significant measure from the fact that regulatory agencies operate at the intersection of both political and private sector influences. Either or both of these very different sources of influence can be characterised undermining independence, with different normative import depending not only on the specific context but also on the pre-commitments of those writing about or shaping the regulatory regime. Tony Prosser’s argument, in a panel taking place at the same time as this one, that two different visions of regulation contest for space in regulatory debates – one emphasising regulation as an infringement of autonomy and one stressing its collaborative nature – suggests one set of pre-commitments that would lead to very different evaluations of ‘independence’. But even given a shared prior vision of regulation, the persistent hybridity of contemporary forms and contexts of regulatory transplant is arguably even more distinctively present in the South than in the North, given the influence of consultants on regulatory design, the fact that regulation is more often imposed on state-owned operators than on private enterprise, or
the frequency of contracting-out to complex public-private partnerships. All this combines to suggest intractable limits to the concept of ‘independence’ as an organising principle.

Given this, the second move in our consideration of the specificity of the regulatory state in the South starts with the premise that the regulatory agency may not be a necessary or even useful place to start in understanding a regulatory context. Papers in this section will explore and map regulatory problems from a range of different starting points. The commonality of these starting points is a recognition of the necessity (and even virtue) of viewing the regulatory state as a political rather than technical enterprise. In literature focused on independent regulatory agencies, the tendency is to prioritise a technical-functional analysis, even when observation of micro-level dynamics concedes an inevitably more hybrid perspective. The papers here share a commitment to (productively) integrating macro-politics into considerations of how the regulatory state works.

There are several ways of understanding this integration of politics. As part of a direct dialogue with the first part of our framing argument, one might argue that what is going on here is a common enterprise of grafting broader considerations of ‘regulatory space’ onto the institutional focus more common to the agency-focused literature, encouraging a view of regulation that encompasses collaboration across networks and deliberation between different participants, rather than a narrower focus on institutional design. The extent to which this brings in ‘politics’ per se remains, however, quite open-ended. Take for example, a line of argument that would put issues of democracy more to the forefront than they usually are in regulatory state literature. In a rare example of thinking through the specificity of developing countries, John Braithwaite explores the relevance of ‘responsive regulation’ to that context (Braithwaite 2005). His emphasis is on the importance of NGOs and local social pressure groups as an avenue for developing a ‘regulatory society’ model that might bypass the regulatory state, and in so doing, avoid problems caused by weak institutional capacity at the state level. He elaborates in ways that bring democratic theory to the forefront of the analysis:

If we believe that democracy is fundamentally an attribute of states, when we live in …. a state with limited effective capacity to govern, we are disabled from building democracy…and waste our breath demanding state responses that it does not have the capacity to provide. But when our vision of democracy is messy – of circles of deliberative circles, there are many kinds of circles we can join that…actually matter in building democracy. (Braithwaite 2005: 5-6).
He concludes (p.16) that a fertile research agenda for the future would combine theories of networked governance, responsive regulation and republican separation of powers.

So far, so coherent, perhaps. But this agenda could take very different turns depending on the resonance of ‘politics’, which has a very different resonance for different audiences. For some, ‘politics’ may encompass deliberative brainstorming by semi-professionalised NGOs with significant expertise in the regulatory arena (Sybil Rhodes, focusing on the role of consumer organisations?); for others it may mean the repertoires and informal practices of community activists and social movements (Nai Chng). And while both of these otherwise very different perspectives move beyond state actors, the shadow of the state can usually not be ignored, if only because it remains part of the ‘messy circles’ to which Braithwaite refers. And once more, ‘politics’ will here again connote very different things, from negative attributions (politics as a source of partisan and clientilistic intervention, or as an arena for corrosive arbitrariness) to more positive conceptions of deliberative state fora (Thiruvengadam and Joshi, focusing on the role of the courts; Dubash) or virtuous cross-sectoral connections between domestic investors and local politicians that actually help stabilise the regulatory environment (Post and Murillo).

Nai Chng’s paper later in this panel provides one example of a nuanced interweaving of several of these perspectives. He argues that contentious collective action by informal water providers in the Philippines makes a (possibly unintended) positive contribution to the water regulatory environment. This occurs by means of regulatory mobilisation, when ‘brokering’ NGOs institutionalise previously weakly connected sites of local resistance into a sustainable network with regulatory clout, assist local informal operators in securing formal cooperative status, and support dialogues that influence macro-policy issues in favour of the local cooperative operators. Chng counters the optimism inherent in this assessment of the micro-dynamics of the water sector, however, by pointing out how these dynamics (again in possibly unintended ways) tend to facilitate an entrenchment of the patrimonial state at the macro-level, particularly over the medium to long-term.
**III. Toward Understanding a Regulatory State of the South: Broadening the Conversation**

The final section of this framing paper returns to the big questions of how to govern, given weak institutional capacity, distinctively large challenges of inequality and poverty, and the pathologies of command and patrimonial clientilism. As a basis for forging a common ground for a broad discussion of larger governing questions such as these, we are including in this section attempts to theorise the regulatory state drawing on a variety of other literatures that approach similar questions from different perspectives. Four such potential bodies are briefly discussed here. A possible common theme uniting them is they all increasingly centre on “partnership” stories that cross state-market-civil society lines, taking the centrality of politics as an important starting points for exploring the appropriate institutional structuring for those partnerships.

From this starting point, several different directions emerge. One direction opens up perspectives that can *reclassify* core features of developing country regulatory states, shifting them from ‘problems’ to be corrected to endogenous differences that may well, when properly contextualised, turn out to be advantageous to integrated development. Michael Dowdle’s paper, for example, uses economic geography to argue that distinctive economic logics found in industrially-peripheral Global South countries produce affirmative regulatory responses that are, far from the regulatory failures they appear as through the lens of mainstream regulatory literature, rational adaptations to the specifics of their environment that can provide resilience, flexibility and coherence.

From a different theoretical perspective, we could ask whether the developmental state, currently enjoying a revived popularity, better captures the distinctive conditions of the Global South than notions of the regulatory state? Peter Evans’ well-known concept of embedded autonomy (Evans 1995) claims that only when bureaucratic autonomy and societal embeddedness are properly joined can a state be called developmental. His elaboration of the relationship between autonomy and embeddedness supplements the notion of bureaucratic autonomy from societal and political interference (which by itself is consistent with mainstream regulatory literature) with an insistence that bureaucracies must also become involved or embedded in concrete social ties that bind them to society. These ties underpin institutional channels for negotiating – and importantly, renegotiating – goals and policies with external groups – effectively an avenue for constructive

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4 See also the recent work of Professor David Trubek and his colleagues in a project on *Law and the New Developmental State*: [http://www.law.wisc.edu/gls/lands.html](http://www.law.wisc.edu/gls/lands.html).
political engagement between state and society that is minimised by traditional accounts of the regulatory state. In more recent work that links in interesting ways to the democratic concerns of Part II of our framework, Evans suggests (Evans 2006) suggests that positive developmental trajectories in the South are typically embedded not in the narrow conceptions of private property rights that are increasingly the object of protection by the regulatory state, but instead in a state apparatus with two distinctive characteristics: a relatively egalitarian distribution of property rights to a broad cross-section of the population, and a focus on building capacity to provide effective infrastructure (as opposed to building up coercive force to protect narrowly concentrated property rights’ allocation). Evans’ analysis shares a commitment to integrating politics into an understanding of Southern states, but goes further than the analyses in Part II insofar as it suggests this integration produces an entirely different kind of state. This approach raises the challenge: if the regulatory state integrates politics, collaborative procedures and democratic aspirations to the extent that Part II suggests it could, does it in fact morph into something conceptually different, where the label ‘regulatory state’ begins to confuse rather than aid analysis?

A third theoretical perspective that could shed light on the specificity of the Global South, and even go further in assisting an understanding of differentiation within the South, is that of varieties of capitalism. Murillo and Post’s paper in Part II engages with this literature essentially by rejecting the constrained isomorphism implied by varieties of capitalism and suggesting that in the weak institutional environments of developing countries, domestic political incentives, technological diversity and investors’ corporate practices will influence outcomes more than regulatory institutions or rules. Other approaches remain more committed to identifying a limited range of variation at a general level, such as the recent work of David Levy-Faur identifying four varieties of regulatory capitalism in an increasingly globally integrated world (Levy-Faur 2009), the work collected by Martinez and her colleagues on varieties of capitalism in Latin America (Martinez et al 2009), and even the allied work of Gough and Wood (2006) on welfare state varieties in the developing countries.

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5 He cites Costa Rica and Botswana as examples of where these strategies have produced positive developmental outcomes.

6 The varieties are Corporatist, Pluralist, Command & Control and Laissez-Faire forms of regulatory capitalism.
The ‘varieties of capitalism’ lens, in contrast to that of the developmental state, remains more committed to the utility of retaining the notion of the ‘regulatory state’. Levy-Faur defines this in his recent work in ways that link to a fourth perspective: that of global administrative law. ‘The regulatory state’, argues Levy-Faur (2009:184) ‘invests in rule making, monitoring and enforcement at the expense of other types of policy including service provision, subsidies and, more generally, redistribution’. Stated as such, the focus of this lens overlaps considerably with that of the literature on global administrative law. In contrast to varieties of capitalism, however, global administrative law is more firmly focused on transnational rather than national regulatory spaces, and on an implicitly normative and prescriptive agenda highlighting transparency and accountability rather than interpretive or explanatory accounts of geographical variation.

While all these bodies of work can illuminate the distinctiveness of the Global South as a generalised category, the common theme noted at the start of this section of increasingly complex hybrid partnerships that cross state-market-civil society lines reminds us that it is equally important to acknowledge the limits to the purported North/South divide. Two important sources of such limits arise from increased differentiation within the South and from increased economic integration between North and South. The first of these, increased differentiation within the South, is capable (as noted above) of being dealt with up to a point within the confines of the theoretical lenses so far alluded to. As noted above, the varieties of capitalism lens explicitly lends itself to this, but so too does the institutional turn advocated by Peter Evans’ exploration of the developmental state – as shown, for example, by Ladawn Haglun’s work disaggregating the notion of ‘embeddedness’ into a typology of developing country states’ capacity to foster broad citizenship by the production of public goods (Haglund forthcoming).

The second limit on assumptions of a North/South divide – increased economic integration between North and South – is analytically much more challenging to engage with. It produces complex dynamics: for example, Mikler (Mikler 2008) argues that domestic liberalisation, a common antecedent of the regulatory state at the domestic level, can, when states with effective market-friendly regulations can influence outcomes beyond their borders, generate global regulation. The examples Mitner uses – UK gambling regulation and Japanese and European fuel-economy regulation – are North-South in terms of directional influence, but the reverse is also
possible, such as in the regulation of geographical indicators in international intellectual property (Rangnekar 2006). As Levy-Faur notes in his discussion of varieties of capitalism Levy-Faur 2009), the influence of non-state, global and regional regulatory structures creates a powerful hybridity in the emergence of ‘types’ of regulatory states; and even Dowdle, who argues for a relatively bright-line conception of the South’s distinctiveness, notes that conditions of ‘peripherality’ – are increasingly appearing even within the core nations of the industrial North (Dowdle forthcoming).

In relation to the complication of increased integration between North and South, its bears notice that of the four different theoretical perspectives noted above, only global administrative law takes as its starting point the predominance of the transnational. It may be that other theoretical perspectives, in particular that of international relations, could provide a fertile reorientation of the regulatory state to complement the work undertaken. This might come from the direction of the transnational spread of commercial relations (see for example Elkins, Guzman and Simmons 2010 on the global diffusion of bilateral investment treaties) or the spread of transnational advocacy networks (Keck and Sikkink 1998; Hilton 2009). The more sociological approach of Braithwaite and Drahos in their comprehensive Global Business Regulation is yet another potential locus. The sources are many; the terrain is fertile: the overarching question which we hope to provoke is whether, as Michael Dowdle frames it, ‘regulatory theory can begin entering into a meaningful dialogue with the Global South: a dialogue in which the South is recognized as a distinct source of positive regulatory knowledge’ (Dowdle, forthcoming).
References


