The regulation of transnational social and economic relations is pervasive, yet there is remarkably little systematic literature on its distributional effects. In today’s world, regulation is no longer the prerogative of the state. The ‘rise of the regulatory state’ has given way to a ‘conquest of the regulatory space’, in which state, private, and non-governmental actors frequently compete to establish regulatory prerogative over critical policy issues in the domestic and/or transnational domain.

This conquest is aimed at dividing the regulatory space. Access to and the contestability of the regulatory space, and the allocation of the costs of regulatory failure will determine how much control different people have over the regulatory space either directly, in association with others, or as members or citizens of different organizations or states.

In this paper we develop a conceptual map for analyzing and assessing the ongoing conquest of the transnational regulatory space. In what follows we will address the following 4 issues:

1. Defining the Regulatory Space
2. Taxonomy of Regulatory Regimes
3. Distributional Effects
4. Explaining Distributional Outcomes
1. **Defining the Transnational Regulatory Space**

The term “regulatory space” refers to a broad range of technical, social, and economic issues, the regulation of which is deemed important by one or more group of actors for their own or their constituencies’ advancement.

Regulation encompasses the active attempt to control or shape a given issue (positive regulation), as well as preventing others from seeking to influence it (negative regulation). It includes the ‘if’ and the ‘how’ of regulation – the decision whether or not to take part in a regulatory regime and how to design that regime. Thus, regulation alters the options of actors affected by it. At the very least this includes the regulators, the regulated, and the beneficiaries; but it may also include others not targeted but nonetheless affected by a regulatory regime.¹

Neither is regulation exclusively a state or public governance affair. Private actors frequently get together to regulate issues of mutual interest and set regulatory standards that affect themselves as well as others. Moreover, public actors can delegate regulatory powers to private actors, endorse private regulation, or form private-public partnerships to accomplish regulatory objectives.

Regulatory instruments can be private or public, contractual or law-like; consensual or mandatory, based on membership or not; contested or uncontested; exclusive or inclusive; and so forth.²

Viewed in this light, there is no unregulated space as presumed in models that contrast free market with state regulation and that regard market failure and the need for producing public goods as the only justification for regulation.³

Such a broad notion of regulation begs the question what regulation does not entail. We exclude arrangements that are not intended to modify the conduct of others (including third parties) beyond well-specified contractual commitments. Thus, not every contract is regulatory in nature; it becomes regulatory if and when it is meant and designed as a means for organizing similar relations (such as model or standard form contracts).

The notion of the “conquest of the regulatory space” is meant to depict the attempt of different actors to control or shape the regulation of issues relevant to them where regulation does not yet exist or established regimes have been weakened or deregulated. At times, this conquest takes the form of a competitive race; at others different actors search for cooperative solutions. The forms of regulation sometimes complement existing ones, but often occupy new space at the exclusion of others.

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² The different regulatory tools will be discussed in greater detail in section 2 infra.

³ As we will discuss below, normatively speaking regulation should expand the options of as many actors as possible. From this vantage point one can speak of regulatory failure not only when the objectives of a regulatory regime are not reached, but also when the options of too many actors are limited, not expanded.
Specifically, we observe two phenomena: 1) a regulatory gap at the transnational level because of weaknesses of existing regulatory strategies that are rooted in state and international law; and 2) new configurations of public and private regulators who at times cooperate and at other times compete for regulatory hegemony over transnational domains. The shifting balance between private and public actors poses interesting challenges for state sovereignty; the extensive reliance of private regulation on public enforcement mechanisms raises questions about diverting public resources for private use; and the competition of different regulatory regimes raises the potential of opportunities for self-governance by individuals and communities, but might also create regulatory monopolies that limit choices for many.

Against this background this project seeks to explore the likely distributional effects of the ongoing division of the transnational regulatory space. We are interested in exploring how the regulatory space is divided, the distributional effects, and how to explain them. We begin by summarizing the most commonly used taxonomies for describing the conquest of the regulatory space (Section 2 below); proceed to identifying and analyzing three distributional effects, namely wealth, power and institutional capabilities (Section 3); and explore the explanatory power of different regulatory taxonomies for these distributional effects (Section 4). We end in Section 5 with a list of open questions and research agendas.

2. Taxonomies of Transnational Regulatory Regimes

The literature on (transnational) private regulation has produced multiple taxonomies in an attempt to identify and describe the transformation of regulation in the transnational space. These are useful for mapping the scope of regulatory transformation, but they say little about the distributional effects of regulation. The tendency to develop taxonomies that contrast two types of regulation (i.e. private vs. state; domestic vs. international) implies that outcomes may vary along those dimensions, i.e. that private (domestic) actors gain while public (international) actors lose. But that alone says little about what each might gain or lose. Moreover, framing the debate in these terms neglects the distributional effects on actors and issues not captured by the two-by-two or four-by-four matrix.

In the following we summarize the taxonomies that are most widely used and indicate what kinds of distributional issues they have raised.

Public vs. Private

The most well known taxonomy applied in the domestic and the transnational realms is public regulation vs. (private) self-regulation. Public regulation is meant to protect public goods, such as the environment, public health, and the financial system, and to guard against market failures. Self-regulation is the coordinated effort of private actors to
regulate their own affairs, e.g. a stock or diamond exchange for the benefit of its members.

Debates about distributional effects in this literature tend to emphasize the costs and benefits of public/private regulation in terms of effectiveness and market efficiency. State regulation that imposes costs on market actors without generating social benefits that offset these costs are deemed distortive.

**Domestic vs. International**

The conventional view that regulation is a tool of the state to address market failure and provide essential public goods implies that where the provisioning of global public goods is concerned, such as the protection against environmental damage that causes climate change, there is a need for global regulators. Indeed, there are many efforts, such as the Kyoto protocol or other instruments of public international law, to achieve such ends.

However, it is increasingly evident that public regulation at the international level is fraught with delays, fragmentation, and power politics. Many non-governmental actors have meanwhile populated the regulatory vacuum that has resulted from rapid globalization. They include firms, industry organizations, non-governmental organizations (NGOs), and epistemic communities. A growing literature seeks to trace the nature of actors, their regulatory objectives, and the efficacy of their regulatory tools in this sphere of transnational private regulation.

The domestic/international taxonomy leads most observers to analyze the allocation of rule-making powers between developed and developing countries, central powers and global peripheries. The former are the rule setters, the latter the rule takers. Though often implied, the fact that this allocation of rule-making powers may have distributional effects, as well as what those effects are, is rarely fully addressed.

**Actor-based**

A third approach emphasizes the actors that seek to regulate. Many different private or public actors aspire to become regulators. The former include industry groups, non-governmental organizations, and epistemic communities; among the latter are public regulators from different countries with different jurisdictions and varying degrees of expertise and autonomy. These actors may not operate independently, but act through international organizations, associations, or networks that have formal as well as informal characteristics. Nor are these actors necessarily homogenous. Conflicts of interest often arise over the distributional consequences both within and among regimes. Within industry groups, for example, conflicts frequently occur along transnational supply chains

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that link suppliers from developing countries to processors or consumers in developed countries. This suggests that actor-based taxonomies are associated not only with actor-based distributional effects, but also with distributional effects in countries where these actors are located.

**Tool-Based**

Regulatory regimes can also be organized by the tools they employ. A common distinction is between contracts and rules, or in the transnational setting between international regulatory contracts and treaties or convention rules. These tools closely map into the private-public distinction mentioned above. Yet, there is increasing recognition that in both domestic and international affairs public bodies use quasi-private tools, such as contracts, memoranda of understanding, and framework agreements to achieve regulatory objectives. Conversely, private contracts can have de facto effects of unilaterally imposed standards. Moreover, private regulators are often requested to increase accountability and effectiveness of private regulation by following basic principles of due process and transparency. This hybridization of regulatory tools makes it exceedingly difficult to associate a given tool with specific distributional effects that can be identified ex ante. Put differently, naming a regulatory tool does not explain distributional outcomes.

More recently, the toolbox for regulation has been expanded. Attention has been drawn to the fact that indicators that rank firms or countries on a given metric can exert pressures that are as, if not more, powerful as rules or contractual obligations. This is true especially when aid or other benefits are conditioned upon a certain ranking. Indicators raise similar distributional issues as the actor-based approach. The power associated with designing indicators is unevenly distributed and is said to generate uneven outcomes and concerns about democratic deficit or legitimacy. Yet, at least to our knowledge, the framework has not been used to explore different distributional outcomes.

**Selection Mechanism**

Yet another approach is to focus on how the regulatory tools are selected: they can be market or non-market based. This is said to reflect whether they evolved in a competitive process or were prescribed by a single regulatory body with monopoly power. Market competition can, of course, also lead to a monopoly situation, where a single firm sets the standard for an entire industry. Moreover, non-market based regulation may emerge in a competitive process – but one that is political rather than market-based.

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The choice between these different mechanisms implies greater access to regulatory power by different agents. The distributional effects that might follow from this are again more frequently implied than explicitly discussed.

**Target of Regulation**

Finally, regulatory regimes can be classified by whether they target the actor or the effects of their actions. There is a strong tendency in antitrust law, for example, to focus on any anti-competitive effect of market practices in the jurisdiction of a given national or transnational regulator. Similarly, consumer protection regulation, including food safety, seeks to safeguard the quality of a product for the end consumer and designs risk management based on the perceived riskiness of the product. In contrast, in the area of banking regulation regulatory jurisdiction attaches to the location of the actor, not the effects of its actions.7

The distributional effect of targeting actors or focusing on the effects of regulation may play itself out differently depending on the regulator’s jurisdiction. If jurisdiction is territorial, as in the case of states, targeting actors limits regulatory powers to those located within the regulator’s territory. If jurisdiction is effect-based it can reach to extra-territorial actors.

**Combined Taxonomies**

Many of the above taxonomies are combined to explain and analyze regulatory regimes. We will not detail these combinations here, as some overlap has been noted in the discussion of the individual taxonomies. Moreover, while combined taxonomies enrich the analysis, the combinations may not necessarily enhance the analysis of the distributional effects.

**3. A Typology of Distributional Effects**

As the previous section reveals, many regulatory taxonomies imply distributional effects. However, the scope of perceived distributional effects and the actors affected may be limited by the chosen taxonomy. Moreover, few discuss explicitly the nature of the distributional effect.

By identifying specific distributional effects we hope to advance the debate about the division of the regulatory space beyond taxonomies. We discuss three distributional effects: wealth, power, and institutional capabilities. We treat these as outcomes, or dependent variables, that may result from the division of the regulatory space. In section four below we will examine what explains these outcomes and specifically discuss the explanatory power of the regulatory taxonomies.

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7 There are exceptions in securities regulation, where effect-based jurisdiction is more common.
Wealth

The accumulation of wealth is of great importance for the prosperity of individuals, firms, nations, and regions. Policymakers around the world seek to identify the appropriate economic, legal, and regulatory policies to advance prosperity of those living in poverty. Multilateral organizations, such as the World Bank and its regional sister organizations, promote economic growth and development in less developed countries. While material goods may not be the only objective of development, the fact that over a billion people in the world live at the bottom of the poverty scale is sufficient reason for a search for policies, including regulatory policies, that will promote their economic well-being.

This then sets the stage for inquiring whether certain regulatory choices enhance the accumulation of wealth overall, and whether they determine the distribution of wealth among individuals, entities, or communities.

To illustrate, the regulatory transformation of the financial sector over the past decades has shifted regulation from public to private and from domestic to international; it has also broadened the range of regulatory tools and increased the number of actors that perform regulatory functions or are targeted as objects of regulation. Finally, it has had disparate wealth effects on different countries, entities, communities, and individuals.

At least in the short term, this has led to greater accumulation of overall wealth. Wealth, however, has not been evenly distributed. The regulatory transformation has redistributed wealth between the financial sector and the real economy; between investors, depositors, and taxpayers; between small and big players in the financial sector; between domestic and transnational players; and between countries that are the home of transnational financial players and those that are hosts to their foreign operations. Some of these wealth effects have compounded each other. The concentration of wealth in the financial sector has increased average wealth in countries with substantial financial sectors (even as it has exacerbated the uneven distribution of wealth in those countries); it has also enhanced the wealth of large financial institutions with international presence and decreased the wealth of many smaller financial intermediaries that were unable to compete or relegated to niche positions.

Power

The creation and enforcement of rules and regulations with binding effects on others allow those in control to impose their will on others. Thus, regulation can be described as an exercise of power. It enables the power wielders to accomplish certain objectives while imposing certain constraints on the regulated. One can therefore distinguish at least three ways in which power relates to distributional effects: (1) The original distribution of

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8 Paul Collier, The Bottom Billion: Why the Poorest Countries are Failing and What can be Done about it (Oxford University Press, 2007).
9 As measured by GDP per capita growth.
power as a determinant of who controls a regulatory space; (2) the manner in which regulatory power is exercised; and (3) how a regulatory regime distributes power among those affected by it. In terms of power as a distributional outcome variable, we are mostly interested in (2) and (3).

1) Who exercises this power and how positions of power were acquired are important questions in their own right – not the least because positions of power often get entrenched for long periods of time. The system of global regulators, including the UN’s Security Council, the IMF, the World Bank, and the WTO, reflects to this day the constellation of global powers at the end of World War II.

2) Even if power breeds power the initial allocation of power does not necessitate that power will be exercised exclusively or even primarily in the interest of the power wielder. Regulatory power may be delegated (i.e. voluntarily transferred from public to private actors, from state to supra-national actors, etc.), and the delegates may have mechanisms at their disposal to hold the power wielder accountable. Applied to transnational regulation, the relevant question then is whether a given regulatory regime is accountable at all, and if so to whom.

3) Power is also, and for our purposes primarily, a distributional outcome variable. The relevant question is if and how the division of the regulatory space affects the distribution of power between regulators and regulated, regulated and beneficiaries, etc. It is necessary to identify the power wielder, all those affected by the exercise of regulatory power, and the ability of those affected to hold the power wielder accountable. Accountability essentially balances the exercise of power and thereby counters abuses of power, such as entrenching the power wielder or favoring the interests of the regulated over the beneficiaries. Accountability may not be evenly distributed. A regime that effectively wields power over many, yet is accountable only to a few, distributes power unevenly.

Institutional capabilities

In this section we introduce the concept of institutional capabilities as a third distributional effect. We submit that this concept helps uncover aspects of transnational regulation that have not been explored previously and that are not fully captured by either power or wealth.

The concept of “institutional capabilities” is inspired by the work of Amartya Sen and Martha Nussbaum on individual capabilities; and both Sen’s as well as Susan Sturm’s extension of these ideas to institutions and organizations.

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Institutional capability is the capacity and ability of institutions, organizations, and communities to regulate affairs of relevance to them and choose the appropriate regulatory means. Put differently, a community or entity possesses institutional capabilities if it has both the option and capacity to make self-determinative regulatory choices. As noted previously, this encompasses the ‘if’ and the ‘how’ of regulation.

Institutional capability is an attribute of a collective rather than of a single individual. Still, several of the individual capabilities Nussbaum has identified – in particular, the capabilities to associate with others, engage in practical reasoning, and control one’s own life – are preconditions for the ability of individuals to become citizens of institutions and advance their institutional capabilities.

As Sturm has emphasized, citizenship in institutions or organizations, including schools, universities, unions, or firms, is critical for advancing individual capabilities. These institutions in turn are members or citizens of larger entities, such as cities, states, transnational networks, or associations. Individuals can realize individual capabilities as citizens of these institutions and in doing so enhance institutional capabilities. This influences the behavior of institutions in the broader realm in which they operate. A corollary of this is that restricting institutional capabilities negatively impacts the propensity of individuals to develop their individual capabilities as citizens of these institutions. In short, individual and institutional capabilities mutually re-enforce each other.

Those with institutional capabilities have greater leeway to determinate their regulatory choice and greater sway over others. This would suggest that the division of the regulatory space maps closely into the distribution of regulatory capabilities before the opening up of the regulatory space. Yet, there are sufficient counter-examples to be skeptical about such a strongly path-dependent argument. The proliferation of NGOs, associations, and other regulatory clubs suggests that the regulatory landscape has changed. These entities did not exist beforehand or did not have much regulatory sway. Perhaps they may be better understood as a simple reorganization of institutional capabilities in the global North. As states weaken, non-governmental and private actors take their role to maintain the North’s control of the world. While more actors may engage in regulatory activity, the distribution of regulatory power at the global level does not change.

Alternatively, the opening up of the transnational regulatory space may have introduced competition for new actors and alternative models, including cooperative outcomes.

12 MARTHA NUSSBAUM, Creating Capabilities: The Human Development Approach  (Belknap Harvard. 2011)
13 There is also some affinity between our notion of institutional capabilities and Sunstein’s concept of enabling vs. disabling aspects of regulation. Enabling regulation facilitates self-determinative choices, whereas disabling regulation restricts such choices. See CAS Sunstein & Richard H. Thaler, Libertarian Paternalism, 93 American Economic Review, 175 (2003).
Emerging markets may have a better chance to influence regulation if it takes the form of private or soft law, rather than formal international treaties. Still, private regulators have substantial leeway in determining the scope and allocation of institutional capabilities both in emerging markets and developed economies. A simple designation of a matter as technical, for example, can invoke transnational standard setting that effectively denies countries, firms, and individuals any say in the design of these standards. Under principles of public international law the presumption of state sovereignty would guard against such intrusion. This would suggest that the shift from public to private regulation in the transnational realm results in a decrease of institutional capabilities in countries that become private rule takers.

**Delineating the Three Distributional Effects**

Before proceeding with this analysis it may be useful to delineate more clearly the distributional effects discussed in the previous section. We skip a discussion of the difference between wealth and power effects, which we believe is self-evident. Differentiating institutional capabilities from both wealth and power is the more interesting task. It also highlights the strength of the institutional capabilities approach.

Institutional capabilities may or may not be correlated with wealth. As Sen has pointed out, increasing wealth is not the only objective of development; freedom too is important. Similarly, using regulation to advance the wealth of the regulated or the beneficiaries may be an important objective, but being able to control one’s life, both individually and as a community, is also important. Further, wealth is a fleeting concept. Measures that promote wealth in the short term often turn out to be unsustainable. This raises the question whether the price often paid for such measures, namely the abdication of institutional capabilities (or the potential to develop them), is worth the benefits.

A regulatory regime may be wealth increasing for a community or entity, while depriving it of the institutional capability to self-govern. Bilateral investment treaties, for example, are said to improve access to foreign capital flows, i.e. to make host countries wealthier. They also allow foreign investors to invoke international arbitration proceedings in the event of regulatory takings by the host government, and therefore effectively and intentionally limit a host country’s ability to regulate any issue that might negatively affect foreign investors. In doing so, they constrain a country’s institutional capability to regulate matters that may be of relevance to domestic stakeholders, such as environmental protection, social inclusion, or monetary policies.

Possessing institutional capabilities implies the power to regulate – not only to be regulated. Institutional capabilities thus focus attention not only on the current distribution of power but on the possibility of expanding the scope for self-determinative choice. This sets the inquiry into institutional capabilities apart from an inquiry about power and accountability. The discussion about the distributive effects of power is mostly concerned with limiting abuse; in contrast, the institutional capabilities approach goes

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15 The evidence is, in fact, weak and the direction of causality still subject to debate.
further and asks whether communities or entities are ‘enabled’ or ‘restricted’ in their ability to make regulatory choices and/or control their effects.16

To illustrate, regulatory monopolies exercise power over others by dictating the terms of a regulatory regime. A monopoly may be accountable – i.e. public regulators often have a regulatory monopoly and are accountable, if only indirectly, to the electorate. Alternatively, the regulated may have voluntarily agreed to be regulated by the monopoly. Even then, a regulatory monopoly restricts entities and communities in their ability to choose alternative forms of regulation, i.e. to develop institutional capabilities. The absence of such capabilities may be felt well beyond the dissolution of a regulatory monopoly. The reason is that it puts the passively regulated structurally at a comparative disadvantage vis-à-vis those with superior regulatory skills.

4. Explaining Distributional Effects

In this section we explore how the three distributional effects may be associated with the various regulatory taxonomies discussed earlier. Whether or not the taxonomies have explanatory power for any of the three distributional effects is ultimately an empirical question. By mapping relations that are at least plausible we can get a better sense of how powerful the taxonomies are in explaining distributional outcomes, what control variables need to be introduced, and whether we need alternative explanatory models.

Private vs. Public

The division of the transnational regulatory space has seen an increase in private regulation. We suggest that this may result in a distribution of wealth that favors (some) private actors over the public.

The liberalization and deregulation of financial markets has shifted wealth to the financial sector both prior to the global crisis and again during the crisis when the sector required a public bail out.

The shift from private to public regulation also affects the distribution of power. Transnational private regulation empowers private regulators while disempowering public regulators and the regulated.

Private food safety standards established by retailers side-step public regulators in exporting countries and monopolize regulatory standards vis-à-vis suppliers.

In terms of institutional capabilities, the introduction of private regulation in a world where public regulation had dominated may seem to expand the scope of institutional capabilities as many more actors can develop and exercise regulatory capacity. Powerful private transnational monopolies may, however, undermine that prospect.

16 To use Sunstein’s classification; see supra note 14.
Derivatives markets developed outside state or private regulation. The International Swaps and Derivatives Association (ISDA) organized all major financial and law firms engaged in derivatives markets to create model laws that became the industry’s standards. They also lobbied over 50 legislatures to change legislation (netting rules in bankruptcy) to conform with ISDA’s model contracts. They thereby reduced the regulatory choice of governments around the world and instead imposed their own standard.

**Domestic vs. International**

The increase of transnational or international regulation could result in a more equal distribution of wealth. It may, however, also result in no change, or greater concentration of wealth. No change would be the expected outcome if the division of the regulatory space resembles a reorganization of tools and actors without, for example, diminishing the predominance of the global North as rule maker. Greater wealth concentration would be the result if the division of the regulatory space in fact results in its monopolization and rent extraction.

The increase of NGOs that mobilize resources to enforce corporate social responsibilities, including labor, human rights, and environmental standards against powerful private and public actors may contribute to a more even distribution of wealth between shareholders on one hand, and employees and communities where production occurs on the other; it may, however, also shift the costs to consumers.

Standard setting bodies, such as the International Accounting Standards Board (IASB), may be seen as a reincarnation of regulatory powers of the North with no effect (or possibly adverse effects) on wealth with regard to emerging markets. However, it may also redistribute wealth among firms and countries in the Global North.17

The emergence of powerful private regulators in finance (such as the Institute for International Finance) that advise public regulators (the Basel Committee of Banking Supervisors) on establishing prudential standards for the financial system may redistribute wealth in favor of the financial industry.

The increase of transnational regulation may lead to a decrease in power at the national level.

In the field of advertising the power of transnational private regulators is growing, especially with regard to online behavioral advertising, with few constraints imposed by domestic public regulators.

The proliferation of (private) regulators might increase institutional capabilities by promoting different forms of self-governance, at least when the regulators represent the

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17 See Buthe and Mattli (2011) supra note 7 on this point.
different communities with a stake in regulating certain issues. The distributional effects between developing and developed countries may, however, be more complicated.

Certification programs in the areas of environmental protection or food safety, such as fair trade coffee, have shifted regulatory functions to ‘semi independent’ private regulators located in the Global North. As a result, institutional capabilities in developing countries may well be declining.

Actor-based regulatory taxonomies emphasize the proliferation of different actors that engage in regulatory activities and seek to understand the impact different types of actors have on regulatory outcomes.

The mere fact that today there are more private than state actors says little about the distribution of power or wealth. The multitude of regulators may, however, indicate a wider spread of institutional capabilities. Specifically, increased regulatory competition may distribute wealth and power more evenly. Yet, even that is uncertain: much will depend on who these actors are and how much their regulatory strategies are compatible with greater institutional capabilities of others. The best we can say therefore for all three distributional effects is that actors that control the regulatory process are likely to have some say in wealth, power, or institutional capabilities outcomes.

Multinational business corporations increasingly use their own codes of conduct to address regulatory issues, such as the environment, or corporate social responsibility. This shift to private regulation appears to redistribute power and wealth in their favor – at least when their own standards are laxer than those public regulators may have imposed. However, private standards may well be stricter, in which case the distributional effects may favor other stakeholders. Moreover, when private standards are used as a competitive device, MNCs may gain power vis-à-vis competitors and lose power in relation to consumers or environmental organizations.

However, MNCs need to operate in countries and deal with sovereign states. Special agreements between MNCs and (some) governments can counter balance this distributional outcome.

Codes of conduct imply that MNCs enhance their institutional capabilities. However, where codes of conduct are monitored by local NGOs and other actors, this may enhance overall institutional capabilities of private actors.
**Tool-based**

Tool-based mechanisms are also somewhat indeterminate with regard to wealth or power outcomes. Contractual mechanisms and other voluntary forms of regulation may result in a more even distribution of power or wealth. Whether this will actually be the case depends largely on the bargaining power of both parties ex ante and their ability ex post to exit a regulatory regime that does not suit them.

The institutional capabilities approach emphasizes both the capacity and the opportunity for entities and communities to make self-determinative regulatory choice. Contractual and other voluntary tools might expand the scope of self-regulatory activities and increase the opportunity to make such choices. Contracts that empower the regulated to choose implementation strategies and require peer monitoring would be an example. Such requirements would also help develop the capacity of different entities or communities to make meaningful choices. However, contracts can also be used to delegate regulatory powers to monopolies and thereby decrease institutional capabilities of contractual parties.

**Selection Mechanism**

This taxonomy emphasizes the competitive process by which market-based regulation is selected and contrasts it with regulatory monopolies. It may well be the case that market-based mechanisms translate into a more even distribution of wealth, power, and institutional capabilities effects than non-market based ones – assuming, of course, that monopolies have an interest in setting regulatory standards that benefit them and that a competitive environment allows no one to do so.

The International Accounting Standards Board uses experts and technical advice to develop regulatory standards. The greater sway European stakeholders have had over the organization meant that firms in Europe faced fewer adaptation costs than firms in the US.

The International Organization for Standardization (and its sister organizations in Europe, CEN and Cenelec) exercises a quasi-monopolistic regulatory power in the field of technical standardization. This concentration of power may lead to more even distribution of power and wealth than if it was left to competition by private actors; however, it decreases the development of local institutional capabilities for developing context-dependent standards.

**Target**

Lastly, regulation that targets actions rather than actors may distribute wealth and/or power more evenly between the regulated and the beneficiaries of regulation. In a world of capital mobility, firms can easily relocate to jurisdictions that promise the least
regulatory constraints. Effect-based regulation expands the reach of territorial bounded jurisdiction and thereby reduces the propensity of evasion.

The US assumes jurisdiction over conduct that has anticompetitive effects on US markets. It also regulates foreign banks if they can exert a systemic effect on US markets.

Even more effective in this regard is universal jurisdiction, i.e. the regulation of any actor or activity irrespective of the actor’s legal home or where the action occurred.

The UN’s Global Compact on corporate social responsibilities applies to the global operations of corporations that register with it.

Effect-based, and even more so, universal, jurisdiction is relatively rare at the state level, as it potentially conflicts with the principles of territorial jurisdiction and comity. Private regulation is not territorially bounded and might fill that gap. However, private regulation frequently relies and even depends on national law, which follows the principle of territoriality.

Only countries incorporated in Germany are subject to mandatory co-determination (labor participation on companies’ boards) – and foreign companies that wish to do business in Germany do not have to abide by codetermination rules. Conversely, the Global Compact establishes a much softer standard for labor rights, but for all registered corporations irrespective of their place of incorporation or operation.

Ironically, the most effective regulation in terms of preventing jurisdiction shopping, namely a centrally administered regulation with universal scope such as the Global Compact, may be the least conducive to institutional capabilities.

In sum, one can tell a plausible story about the distributional effects of all regulatory taxonomies. Assessing one by one, however, reveals that additional factors need to be accounted for if one wants to make reasonable predictions about regulatory outcomes. At the very least this calls for a combination of regulatory taxonomies. It also requires a deeper inquiry into the identity of actors and the mechanisms of accountability available to the regulated, the beneficiaries, and other potentially affected parties as well.

5. Concluding comments

The field of transnational private regulation (TPR) is now well established. It has documented and analyzed the shift from domestic to transnational and from public to private regulation. This shift has been accompanied by new regulatory tools, different actors, and other aspects captured in the regulatory taxonomies discussed in Section 2 above. What has been missing in much of the debate, however, is why this matters. Many analyses have identified winners and losers of this transformation relative to their earlier
status. This is an important question, but goes only halfway in addressing bigger normative questions, such as the distribution of wealth, power, and institutional capabilities in a globalizing world. The goal of this memo, and indeed the forthcoming workshop, is to call attention to these issues – and to highlight gaps in the existing literature and analytical concepts that need to be filled if we are to move the field forward. The previous pages have highlighted some of these gaps, and, as we see it, the need for additional research. Rather than restating them, we conclude this memo with a few questions – some of which we will return to at the workshop.

- What distributional effects other than wealth, power and institutional capabilities should we be concerned with?
- What best explains these distributional outcomes – other than regulatory taxonomies?
- How should we address the tendency of power to breed power, wealth to breed wealth, and institutional capabilities to breed institutional capabilities – i.e., the re-enforcing or endogenous qualities of these concepts?
- What transnational arenas might best lend themselves to a systematic empirical analysis of the distributional effects of regulation?
- How should distributional effects be internalized in regulatory choices?
- How should private regulatory actors be incentivized to internalize the distributional effects of the regulatory choices they make?
- How should indicators be rethought to capture the link between regulatory choices and distributional effects?
- Once the distributional effect of regulation is recognized, what implications does this have for the design and accountability of international regulatory organizations?