

# Regulation without coercion: The role of regulatory webs in the fight against transnational corruption.

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## I. General approach to the topic

Transnational corruption might be regarded as one of the most intriguing and complex global issues of our times, one that given its harsh effects on the social and economic spheres of developing countries, calls for innovative and effective trends of regulation.

A traditional definition of corruption exposes the phenomenon as “a behaviour that deviates from the formal duties of a public role because of private regarding, pecuniary or status gains; or violates rules against the exercise of certain private-regarding (personal, close, family, private clique) behaviour”<sup>1</sup>

Holding the above in mind, the anatomy of the phenomenon at a supranational level implies a cross border factor diagrammed by fragmentation and globalization and the existence of peculiar entities known as transnational corporations (the supply side). This specific type of private organization operates across multiple jurisdictions, engaging in business activities and interacting with government officials. In the case of transnational corruption, this interaction does not occur according to established legal parameters, but through non legitimate actions that seek to maximize the rent of transnational corporations within distorted political environments based on deformed economies.

From this perspective, among countries plagued with imperfect economies, (demand side) corruption is being employed as “*a measure to retain financial and economic power that is practically necessary in obtaining political power. Internationalization of economic life has increased opportunities for corrupt public officials to use public interest of their respective state as a veil for covering transnational corruption*”<sup>2</sup>.

As a consequent effect, empirical studies have shown how transnational corruption acts in almost the same trend as a tax on investment, which directly

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1. NYE S. JOSEPH, Corruption and Political Development: A cost benefit Analysis. American Political Science Revier. (1967)

2. GAVELIS VYTAUTAS, Corruption in the Context of International Economic Relations. *ekonómica ir vadyba: aktualijos ir perspekyvos*. 2008 3(12).

produces a distortion on government spending. This situation is identified by an explicit misallocation of funds towards inefficient and overpriced contractors, increasing overall social cost. Hence, it's understandable that corrupt authorities will reward the producer who pays the larger bribe, shifting resources away from quality towards bribe payment. What follows will certainly be the inhibition of development and economic growth. This kind of behaviour definitely urges for regulation.

It is accurate to assess that efforts on confronting the globalized issue of corruption has mainly focused on two perspectives. With regard to the demand side, a natural response from states has concentrated on enacting legislation which prohibits the reception of bribery by government officials and thus criminalizing comparable conducts. On the other hand, there have been attempts to ratchet up supply side solutions to the phenomena with the passage of Anti-Corruption Conventions designed to deter transnational corporations to engage in this kind of behaviour by means of establishing criminal prohibition on this matter.

None of the above stated coercive strategies have been effective on curbing transnational corruption. In that sense, within third world countries (demand side) it is precise to affirm that, *"conjunction of interests of political and economical power had turned the mechanism of acquiring of state power and its functioning into a commodity of corrupt transactions"*<sup>3</sup>. Under these circumstances a proper enforcement of law would always be arguable.

With regard to the supply side, it is unfortunate to point out the fact that only multilateral agreements with low targets and compromises have achieved high level of compliance, providing in fact little or not effective reduction in the levels of transnational corruption. *"Compliance with these conventions is the result of political expediency rather than a sustained commitment on the part of the States to deter their corporations engaging in transnational bribery"*<sup>4</sup>.

Providing these not too stimulating results, there is a recent tendency that tries to analyze the subject of transnational corruption from a multilateral approach, taking into account the role of a plurality of actors involved and not just focusing on the state as sole regulator and source of legislation. As many other global issues, transnational corruption involves a conglomerate of actors such as *"states, officials, regulators, non-government organizations, civil society and, not least transnational corporations. Yet despite the centrality of such non-state actors, much of the literature on corruption has neglected any close*

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3. Supra Note

4. OBIDAÍRO SIMEON, *The Prospective Role of Anti-Corruptions in Curbing Transnational Bribery by Corporations*. University of London (2005).

*analysis of them*".<sup>5</sup>

Furthermore these actors dynamically interact in diverse ways and aspects contributing to the foundation of non hierarchical and non state manifestations of law and regulation. This is what legal pluralists define as *soft law*, certainly an innovative approach that stands as an appealing alternative to deal with global problems such as corruption.

Authors such as Braithwaite and Drahos as quoted by Delaney in his seminal paper "*Transnational Corruption; Regulation Across Borders*", assess the necessity to delve into non state methods of regulation basically involving dialogue, influence and reputation among transnational actors; methods that seem to be particularly beneficial within an environment where no supranational sovereignty exists and the effectiveness of intergovernmental cooperation remains limited.<sup>6</sup> This becomes the foundation of normative structures known as "*regulatory webs*", specifically "*dialogic webs*" as opposed to traditional "*webs of coercion*".

The global regulation of transnational issues such as corruption, focusing on non traditional mechanisms as the above specifies, remains an appealing subject of study which certainly requires a multidisciplinary approach in order to delve into its very much complex aspects.

From a legal perspective, the focus of this new approach stands on the implicit connotations that arise as horizontal manifestations of norms and standard of conducts emerge on the global environment, as well as the prospective effects of those norms with regard of activities involving the state and private actors. From my perspective, the analysis and understanding of spontaneous and non coercive forms of regulation at supranational levels configures itself as a stimulating and innovative academic subject which requires profound and even more frequent efforts in order to reveal up the complexities and alternatives of our global reality.

On the other hand the subject remains of a great relevance, given the distressing social and economic effects of transnational corruption on poor countries. From a political and social perspective transnational corruption "*has the potential to create a disaffected civil society which leads to a plethora of social evil. Societies of disaffected people do not support their elected leaders or respect the rule of law, allow their institutions to erode and could ultimately see their society teetering on the brink of collapse*".

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5. DELANEY PATRICK, *Transnational Corruption: Regulation Across borders*. Virginia Journal of International Law. 2007, Vol 47; Number 2, pages 413-462.

6. Supra Note.

7. WARE GLEN, NOONE GREGORY, *The Anatomy of Transnational Corruption*. International Affairs Review, Volumen 14, No. 2. 2005

Such devastating effects call for a more effective approach to the matter; one that should take into consideration the plurality of actors interacting at a supranational level, in order to modify negative but rational parameters of behaviour.

## **II. The prospective effect of regulatory webs on deterring transnational corruption: Identifying a research area.**

The main object of this paper is to assess the academic necessity of exploring in detail the peculiarities, advantages and limitations of non hierarchical methods of regulation based on soft law, specifically with regard to transnational corruption.

This might imply as noted by Delaney, a detailed analysis of the role of “*regulatory webs*”, and their non-state participants such as the international civil society and transnational corporations. It will be then consequent to explore the normative activity that takes place within these structures, one that appeals to dialogue and persuasion as a mean to achieve a redefinition of interests’, rather than deterrence based solely on the threat of legal sanctions as in the traditional sense given by the state and the law.

Accordingly, it has become an academic issue to identify if regulatory webs are a feasible and effective mechanism to generate compliance with regulatory goals in the international sphere, specifically with regard of transnational corruption. One of the basic arguments to support this theoretical approach will be that webs of control are less important than webs of dialogue within global regulatory regimes.

In this sense, the approach to the regulation of transnational corruption requires to be a comprehensive one. It needs to focus on the multiplicity of actors involved in the phenomenon, rather than remaining conceptually and exclusively attached to the state. From that perspective, special attention might be given to non-state actors and the way they interact, structuring *dialogic webs*.

It is in this particular aspect that we have found an important gap in academic literature. For obvious reasons till this moment, academic effort has been mostly conducted to analyze the normative parameters implemented by the state or international bodies such as the Organization for Economic Co-operation and Development (OECD) and the United Nations (UN). Nevertheless, very little has been written about the regulatory role of other participants such as the international civil society and other non governmental organizations that currently interact among each others in connection with state authorities, forming webs of influences that might be able to achieve, until certain extend, an expected

globalization of regulation.

The proper role of transnational corporations within the so mentioned webs has been neglected or at least overestimated; although, the position of these entities as main subject of regulation remain very clear. In this sense, very few “*scholars such as Parker and Braithwaite have advocated dialogic mechanisms of corporate regulation that, through consultation between corporation and regulator, enhance the likelihood of compliance*”.<sup>8</sup>

It is our view that it is of an utmost importance to determine the effectiveness of dialogic webs in matters related to the prevention and deterrence of transnational corruption, taking into account a deep analysis of their operational mechanisms. This might include, following Delaney’s approach: a) The role of epistemic communities on redefining interest; b) Reputation as a restraint mechanism of behaviour; c) The creation of intellectual resources valuable to corporations; d) The incorporation of habitual compliance into organizational routines.<sup>9</sup>

It is important to address that dialogic webs are mainly based on epistemic communities, as defined by Hass “*a network of knowledge-based experts or groups with an authority claim to policy-relevant knowledge within the domain of their expertise. Members hold a common set of casual beliefs and share notion of validity based on internally defined criteria for evaluation, common policy projects, and share normative commitments*”.<sup>10</sup> These kind of fractured communities are particularly important for issue definition as well as for successfully communicated norms.

A research agenda with regard of this subject should imply the identification of community memberships<sup>11</sup>, determining their principles and causal beliefs, tracing their activities and finally demonstrating their influence on the fight against transnational corruption.

It is important to point out that current academic literature mostly emphasises on the way epistemic communities’ influences the behaviour of states. In this regard an important issue is to understand if this range of influence might effectively affect the behaviour of transnational corporations’, by means of a redefinition of interest?

Another important subject of analysis reflects on the way reputation acts as restraint of behaviour taking into account theories of “*complex interde-*

8. Supra Note 5

9. Idem

10. HASS M. PETER: Epistemic Communities and International Policy Coordination. International Organization No. 46. 1992

11. According to Delaney an epistemic community focusing on corruption has existed for some years. It includes among its members international actors such a The International Chamber of Commerce and Transparency International. Our proposed research will extend on this subject.

*pendence*". In the specific case of corporations, it is argued that this kind of entity relies on others for cooperation in different areas. In this sense, the intrinsic mechanism of interrelationship that operates is such that to gain the benefits of one cooperative scheme, an actor may have to suffer the negative consequences of another. Hence corporations may accept to fulfil obligations which do not appear to be in their direct interest, as part of a rational strategy based on seeking a larger, beneficial cooperative whole<sup>12</sup>.

As in the case of epistemic communities, "*complex interdependence theories*" were initially rationalized as to be applied to explain the behaviour of the state. It would be interesting to figure out to what extent they might be effectively applied to transnational corporations.

Another area of interest is to estimate the value of dialogic webs as a producer of authoritative information that might be used by corporations in the creation of their internal policies. "*Instead of investing heavily in their own compliance procedures, corporations are able to draw upon the resources provided by non-government organizations. Hence such organizations engage in a form of private capacity-building, making it easier for corporations to regulate themselves*".<sup>13</sup> Examples in this regard are: The International Chamber of Commerce Rules of Conduct; Hence and Dunfee's C2 principles and the International Integrity Pact and Business Principles.

There are obvious advantages in promoting routinized compliance within the corporation as an inner organizational mechanism for corporate control. The internalization of rules of conduct emanated from dialogic webs might be able to save in transaction cost with regard of decision making processes within a corporation. This is so because there will be no need to evaluate in every case the advantages or disadvantages of compliance in regard of rules dealing with anticorruption procedures.

The above exposed group of arguments, mainly extracted from Delaney's work, gives us the chance to diagram the following set of prospective hypothesis.

- I. Dialogic webs are far more efficient than webs of rewards and control within global regulatory regimes.
- II. The regulatory influence of epistemic communities relies on "knowledge specificity", and on its potential to define and transmit standard of conducts to those involved.
- III. Reputation acts as a restraint mechanism of behaviour to transnational corporations, mainly based on complex interdependence.

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12 See KEOHANE O. ROBERT, NYE S. JOSEPH. Power and Interdependence. (1989

13 Supra Note 5.

- IV. Authoritative information produced by dialogic webs saves on transaction cost to corporations on matters related to self-regulation.
- V. Routinized compliance to norms emanating from dialogic webs operates as a feasible mechanism for corporate control.

### III. Theoretical perspective and methodological approach to a further research.

As an introduction to describe the relation of transnational corruption and corporations, as well as the current stage of the debate in matters related to traditional deterrence mechanisms, we find appropriate to rely on the agency framework.

From then on, it is our view that the theoretical perspective of any proposed research should focus on global governance theories<sup>14</sup> as an analytical tool to asses a continuing lack of efficiency and predominance of the state as traditional source of authority and hierarchical control, specifically in connection with supranational matters.

Under this theoretical view it becomes necessary to look beyond the state in order to achieve effective regulatory methods concerning global problems. This ground-breaking approach calls for a horizontal enforcement of an innovative kind of normative tool, different from that traditionally known as law. Self regulation should be the issue of discussion.

We advise on this theoretical perspective taking into account the difficulties in the regulation of transnational corporations, the supply side in the anatomy of the phenomena called transnational corruption. In this sense, it is undeniable the inefficiency of the state on exercising its regulatory powers with respect to the transnational corporation. On the other hand there is a palpable inability of the law to provide redress in instances of transnational corporate wrong doing. There is “an increasing gap between transnational activities occurring with little regard to political boundaries, and law generated by national bodies whose authority ceases at the border”<sup>15</sup>.

The above stated issue of transnationality, requires in our view the application of a functional analysis of the role of the law which effectively contrasts legal with non legal forms of regulation. This theoretical operation might be done based on drawing upon concepts of the economic based theory of Law

14 Rational Choice and Social Capital theories might be influences.

15 NICHOLS PHILIP, *The Myth of Anti Bribery Laws as Transnational Intrusion*, 2000. Cornell Internacional Law Journal, NO. 33.

and Social Norms and Luhmans' theory of social system<sup>16</sup> as a way of understanding the upraising of global governance regimes as inductive processes of cooperative collective behaviour, i.e any behaviour that contributes to the resolution of collective action problems.

In this very same respect observations should rely on “*governance without government*”<sup>17</sup> theories, as a reference to non-hierarchical modes of coordination and the involvement of non state actors in the formulation and implementation of global policies to overcome transnational corruption.

Theoretically any research approach in this matter should be committed to pluralism, being its purpose, as it has been shown, to apply alternative analytical perspectives and test competing hypothesis.

Concerning the methodological approach we vote for network analysis, as a clear mechanism to establish the rationality of regulatory webs. Let us first define the Level of the Analysis:

Essential cooperation is needed in order to diagram the interaction of global actors within regulatory webs. In this sense, inter-organizational relations might represent the main level of analysis to a proposed study. According to our view a network perspective on organizations would be considered as “networks of recurring relationships and organization and environment as fields of relationships that binds together the most significant elements of organizations”<sup>18</sup>. According to this, an inter-organizational perspective is suitable to explore contemporary interaction under global governance.

Network analysis is a well structured methodology with definitions of terms as centrality, cohesiveness, prominence, equivalence and range<sup>19</sup>. From this view, a web or inter-organizational network might be analyzed from a micro level and a macro level. The micro level is specifically concerned with situations such as how global actors made their decisions. The macro level on its side is concerned with the way these actors interact with other organizations and how those factors influence the outcomes of supranational cooperation.

The Unit of Analysis would be the organizations. Our view assumes

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16. Graf-Peter Calliess & Moritz Renner, *From Soft Law to Hard Code: The Juridification of Global Governance*. <http://ssrn.com/abstract=1030526>

17. Rosenau, JN, and Czempiel, *Governance without Government: Order and Change in WorldPolitics* (Cambridge, Cambridge University Press 1992).

18. NOHRIA, N., ECCLES, R.G. (Eds), *Networks and Organizations*, HBS Press, Boston, MA, 1992.

19. International relations research has regarded networks as a particular mode of organization, distinguished from markets or state hierarchies. In contrast, network analysis permits the investigation and measurement of network structures—emergent properties of persistent patterns of relations among agents that can define, enable, and constrain those agents. See Hafner-Burton, Kahler and Montgomery: *Network Analysis for International Relations*. Cambridge University Press. 2009

that organizations integrating a web have autonomy to form some interaction strategies of their own accord. Those strategies would be given according to their culture, standards and operating procedures.

According to the above methodology, the major dependable variables of a prospective study will be given by establishing and measuring the outcome of interaction/ cooperation within global actors in a web. These major dependable variables consist of various sub-variables such as: effectiveness, quality, redefinition of interest, increase of interaction, equalization of interest and patterns of cooperation.

The variable mainly includes the following sources: The seminal work by John Braithwaite and Peter Drahos, *Global Business Regulation* (2000); Peter Haas “*Choosing to Comply: Theorizing from International Relations and Comparative Politics* and Patrick X Delany “*Transnational Corruption: regulation Across Borders*”.

The independent variables will be: global actors and its role on global regulation. It will be of a great interest to analyze the inner structure of transnational corporations and non-governmental organizations as international transparency in order to understand how they might affect the outcome of webs interaction.

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