

**Multilevel Regimes and Asserting the “Right to Negotiate:”
Fitting the Public into Post-Agreement Negotiation**

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Abstract

Emerging changes to post-agreement negotiation structures and actors can have important implications for the process and outcome of negotiated agreements. These innovations include the coexistence of negotiated global and regional regimes on the same policy issue, as well as civil society organizations that assert their “right to negotiate” at the domestic level to promote national compliance with regime standards and provisions. The evolution of these factors within the post-agreement negotiations of the United Nations Convention Against Corruption (UNCAC) is used as a case study. Globalization and communications technology trends play a major role in promoting these changes.

Key words

Regimes; post-agreement negotiation; national compliance; United Nations Convention Against Corruption; UNCAC; nongovernmental organizations

The afterlife of regime-building international negotiations is complex.² On one hand, the originating negotiation process and agreement can generate relatively predictable regime conditions. The negotiated formula provides a framework for the path forward; its provisions are meant to steer next steps and resolve problems. Rules, procedures, institutions, timetables, arrangements, and understandings are all part of the mutually agreed formula. The originating negotiation process allowed the parties to learn about the interests and limits of the others at the bargaining table. This can increase trust and empathy in the post-agreement period and can result in eased resolution of future details that still remain outstanding.

On the other hand, implementation of the agreed framework may not proceed as planned. Some parties may not comply with the regime provisions because they did not intend to from the outset or they encountered domestic opposition. Even if they do comply, negotiated provisions may not yield the

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anticipated results. Some provisions may operate as intended, but others may not and will need to be reformulated and adjusted. New issues may arise that were not expected, requiring the design of new approaches. Sticking points that were not resolved in the original negotiation may need to be revisited and finally addressed. The path to implementation almost always involves the introduction of new stakeholders at the regional and national levels. These stakeholders may not have been parties to the regime's initiating negotiation and may have new and conflicting interests that can complicate regime implementation.

Many of these characteristics and consequences of regime development in the post-agreement period are discussed in Spector and Zartman (2003).³ The dynamics of regimes are best described as taking the form of *recursive negotiations* that facilitate periodic reviews and adjustments of the results of earlier negotiations. Regimes dealing with complicated policy issues are rarely the product of one-shot negotiations that simply need to ensure compliance with agreed upon rules and norms. They are living and changing fora that, over time, demand continuing negotiation that may eventually result in a dynamic stability.

Kremenyuk (2002) refers to this as a *system of negotiations* in a policy arena, where regimes, sub-regimes, and regime extensions develop and multiply. Recursive negotiations are rarely self-contained and tidy; each round can introduce new issues, conditions, solutions, and actors aimed at adjusting and improving the agreement and tackling the policy problems at the heart of the regime in a more targeted fashion. These continuous negotiations make regime building a fluid process and stabilization of the regime something out there in the future. They provide new stakeholders with more reason and interest in joining the negotiations; there is still the opportunity for them to achieve their interests, even if they were not participants at the originating regime talks.

This article addresses two important elements of such recursive post-agreement negotiations -- new structures and new stakeholders -- that are examined within the system of negotiations surrounding the regime that deals with the global fight against corruption. A regime may have commenced at a regional or global level, but might have been refocused to a different level over time to facilitate implementation or to address the origins of the policy problem more practically. And whereas the originating negotiating parties may have developed a sense of familiarity and understanding among themselves, new parties and structures at the global, regional and national levels may operate within the regime to support implementation, compliance and any future negotiated adjustment of the regime. They can add substantially to the number of stakeholders engaged in the post-agreement negotiation process and proliferate the number of interests and strategies at play, increasing the potential for major challenges and obstructions. Negotiation complexity is magnified. For example,

International regimes may spawn new negotiations to create regional regimes that take into account special regional and cultural issues and conditions. This can result in post-agreement negotiations with new actors and structures that champion new interests at the national and regional levels. The recursive negotiation process can spawn new regime structures with new rules, norms and procedures.

³ As well, several thematic issues of *International Negotiation* have addressed these post-agreement regime negotiation phenomena within various policy arenas, including controlling weapons of mass destruction (Vol. 10, no. 3, 2005), international trade (Vol. 11, no. 3, 2006; Vol. 12, no. 3, 2007; Vol. 17, no. 1, 2012); and river disputes (Vol. 14, no. 2, 2009).

Alternatively, an international regime may itself be the product of scaling-up negotiations from a bilateral or regional level that seek to rectify and/or standardize earlier regional conventions that dealt with the same issue or problem, but were not sufficient or properly focused. In this case, the international regime may need to find a way to coexist with or overtake pre-existing regional regimes without causing confusion and inconsistencies in state party policy. New groupings of stakeholders are likely to emerge to address new regime implementation and continued post-agreement negotiation.

When new regimes are established, they typically require modification of the legal frameworks of each signatory state to achieve compliance with regime standards. For instance, if there are one hundred state parties to an international agreement, compliance may require one hundred nationally-based negotiations engaging the participation of hundreds of legislators in each state party to develop new and acceptable laws. Such post-agreement negotiations at the domestic level can lead down many unpredictable paths.

And at the national level in each member country, the implementation of new approaches, laws and standards will likely have many impacts on non-governmental stakeholders and will be a catalyst for their active political participation. Depending on the extent of policymaking engagement of citizens and civil society organizations in each state party, this introduces an incredibly large number of new actors and interests onto the post-agreement negotiation stage.

This article examines the interplay of various regime levels on a given policy issue and the burgeoning number of stakeholders at all levels getting involved in the post-agreement negotiation period and their implications for regime success. The evolution of post-agreement negotiations within the United Nations Convention Against Corruption (UNCAC) will be used as a case study.

Key Issues: Regime Levels and Domestic Actors

While the success of negotiations is usually measured by the ability to reach agreement, a focus on post-agreement negotiation expands the understanding of success to include *the impact* of agreement. Reaching agreement is paired with “getting it done,” seeing the provisions of the agreement applied by the negotiating parties to address the root problems and issues of the negotiations. Implementation of a negotiated outcome is a critical product of the post-agreement process, which usually involves legislative, administrative, and enforcement actions domestically and cooperation, technical assistance, and monitoring internationally to achieve the intended results. Ultimately, it is the quality and completeness of the implemented results by which the post-agreement negotiation process is judged (Spector 2003).

Getting agreements implemented in the post-agreement period requires a focus on details. Finding a formula and devising a workable framework were the job of the initiating negotiation; post-agreement negotiation highlights the nitty-gritty of making that formula/framework a reality. Key stakeholders in all state parties to the agreement need to mobilize their political will to get it done, which means further negotiations among stakeholders domestically, negotiations within stakeholder groups themselves, finding and employing new resources, and finding incentives from external sources if needed. Obstacles can arise. Spoilers and internal factions can delay implementation and refuse to negotiate implementation. If key affected domestic parties, such as civil society advocacy groups and the mass media, were excluded from the original negotiations or are not included effectively in the post-agreement period, implementation can be disrupted.

Multiple Regime Levels

Shifting relations among regime levels can present the need for intensive post-agreement negotiation. If the original negotiations yielded a broad international regime framework, implementation of that agreement over time might come to entail the devolution of initiatives and, as a result, development of multiple regional agreements that customize the solution to the problem on a regional basis. Alternatively, the problem might have been viewed at the outset as dispersed and solvable at the regional level, resulting in several regional regimes. But over time, these existing regional regimes could be seen as deficient, ill-functioning, inconsistent with one another, or not facilitating the resolution of what has become identified as a truly global problem or issue. In these cases, negotiating a global regime in the post-agreement period could be seen as the solution. This was the case, for example, in attempts to ban the movement of hazardous waste, which were addressed first in an Organization of African Unity regime, but then transformed to a global regime in the 1989 Basel Convention (Zartman 2003: 25).

In these situations, the global or regional regime solutions can supplant the other or coexist. If one takes precedence over the other, then continuing negotiations are inevitable to work out the details. Recursive negotiations are inescapable if they continue to operate concurrently to sort out the mixture of similar and differing formulas, definitions, standards and requirements for state signatories. Untidy systems and subsystems of negotiation will seek to make sense of overlapping memberships that create dilemmas for the parties on how and if to comply with each regime. Where do the international and regional regimes intersect? Does one improve on the other or do they merely duplicate the other? Does one contradict the other or were they carefully harmonized? Is there a mixture of contradictory and harmonized provisions? In the end, how do joint members of both regimes comply? Does one regime take precedence over the other in international law or in national interest? Ultimately, implementation of a negotiated global regime will need to reconcile with preceding regional frameworks operating in the same or similar issue areas, but with differing operating rules.

Zartman (2003) lists 13 types of regime evolution patterns in the post-agreement period: some start with regional or bilateral agreements and evolve to global or multilateral regimes; others update provisions based on feedback or scientific/technological progress; others add detail to general principles; others merge small sectoral agreements; and yet others scale-out from a global to multiple regional agreements. None of these paths are clearly better than others; each evolves based on the unique challenges and opportunities at hand to solve the policy problem. The UNCAC case that is discussed below may serve as a 14th type where the problem was initially tackled through several regional regimes that evolved into a global regime, with all regimes living and operating concurrently with overlapping memberships and national commitments.

Multiple Domestic Actors

The principal actors in regimes are state parties at the international level, and domestic stakeholders - governmental and nongovernmental - at the national level; post-agreement negotiations occur at both levels. A growing phenomenon is the inclusion, in some fashion, of nongovernmental actors at the international stage of post-agreement negotiations. Sjöstedt (2012) distinguishes between two types of NGO performance in the World Trade Organization Doha Round negotiations (since 2001): participation (basically, observation) and involvement (direct contributions, including issue formation, lobbying,

information campaigns, and empowering weak countries through capacity building).⁴ In some cases, NGOs have been official members of their country's delegations, but they usually face stricter constraints on their activities than government members. NGOs have also performed as external advisors to government and have been involved in formal dispute settlements within the regime structure.

Analyzing the Doha Round negotiations through 2011, Sjöstedt (2012) concludes that NGO participation and involvement in its various forms had an impact, but perhaps a net negative one on negotiation efficiency. The large numbers of NGOs that showed up at trade talks increased the complexity and disturbed the process of the negotiations. On the other hand, NGO involvement has contributed positively to developing countries' capacity and strength to negotiate. The NGOs have advocated for inclusion of new and, sometimes, non-trade issues, which has delayed the negotiation process but added important content.

Former UN Secretary General Boutros-Ghali (1996) has suggested that CSOs are now considered "full participants" on the international stage. There are many prominent examples of CSOs participating in and influencing international negotiations, for example, the prestigious International Committee of the Red Cross redefining problems relative to negotiating a ban on anti-personnel landmines and the International Institute for Applied Systems Analysis reframing issues related to acid rain emission reduction negotiations in Europe. CSO expertise endows them with legitimacy and makes them valuable additions to the negotiation environment (Albin 1999). During the 1999-2000 negotiations of the Convention Against Transnational Organized Crime, for example, a Trafficking Protocol was adopted that brought two CSO blocs to bear at the negotiating table, each with opposing views, but ultimately contributing effectively to resolving the definitional problem of what constitutes trafficking (Ditmore & Wijers 2003). Parties other than formal governments sometimes have been offered the ability to negotiate by sovereign states. For instance, international organizations sometimes negotiate on behalf of their member states and major corporations negotiate foreign trade deals (Kremenyuk 2002). But largely, CSO roles at international level negotiations have been unofficial, ad hoc, or subject to the preferences of their respective national governments.

In United Nations negotiations, rather standard rules of procedure are typically applied. According to the Rules of Procedure for the post-agreement UNCAC Conference of the States Parties (2007), nongovernmental organizations may participate as observers, while sovereign state members hold full rights of participation (rule 17). CSOs that have consultative status with the Economic and Social Council (ECOSOC) are allowed to attend as observers and others may apply to be observers, though they can be denied. These rules hold sway over international level post-agreement talks. But post-agreement negotiations proceed at both international and national levels. It is within national post-agreement regime negotiations that implementation and compliance is worked out by national level actors, and nongovernmental CSOs have greater opportunities to become active negotiators to resolve regime-influenced initiatives along with other stakeholders.

In the design and development of regime implementation, there is a critical linkage between international diplomacy and domestic politics that is represented in the regime's recursive negotiations: introducing domestic stakeholders into the equation to ensure the member state complies with and/or fulfills the intentions of the global or regional regime (Putnam 1988; Evans, Jacobson & Putnam 1993). Within each

⁴ The terms "nongovernmental organizations" (NGOs) and "civil society organizations" (CSOs) are used interchangeably in this paper.

state party, the regime usually requires implementation that can be accomplished by generating new laws and regulations, establishing or modifying government institutions, administering new processes, and monitoring performance. The negotiators at the originating talks for the country were probably from the executive branch, so they are likely to provide significant political will to implement the regime's provisions. At the same time, spoiler factions may exist in other structures of government to sabotage proper implementation. If the country's legislature needs to be engaged to generate new laws, the door opens to new domestic negotiations among stakeholders that may have had no direct stake in the regime framework and may introduce a range of new interests that they will seek to maximize. Compliance with the regime's intended standards and provisions may suffer. Moreover, if sufficient resources are not available at the state level, even the best of intentions may fail to implement the regime's provisions appropriately.

One of the most volatile domestic level actors that can have a positive or negative impact on the implementation of a regime framework in the post-agreement period is civil society. Depending on the issue or problem that is at the heart of the regime, the public may constitute the major victim of bad policy and the greatest beneficiary of the regime's solutions. Civil society can be the stakeholder most affected by the way a regime is implemented in a country; therefore, engagement with its government to implement regime provisions domestically is an important, but highly variable factor.

How is civil society to be engaged? Civil society and the organizations that represent it are, by definition, all non-governmental. They typically do not have a formal role in international regime negotiations or in post-agreement negotiation at the domestic level, although this is changing in recent years. Largely beginning with the United Nations Conference on Environment and Development in Rio de Janeiro in 1992, civil society organizations have been invited to participate on official national delegations as observers and in some cases as active contributors at major UN regime-building negotiations and at subsequent post-agreement negotiations via Conferences of State Parties (CoSPs) (Spector, Sjöstedt & Zartman 1994). Several earlier resolutions of the United Nations General Assembly called upon member states to elevate direct societal participation in national decision-making processes that implement international agreements.⁵ These advancements have begun to give civil society organizations legitimacy vis-à-vis government representatives in certain international and national level negotiation circumstances.

If accepted to participate, the mechanisms by which CSOs are engaged can and have been interpreted in different ways. Are they observers or advisors? Do they have a formal place at the table? Ultimately, as decided by their government counterparts, CSOs may be allowed to share information, consult, advocate for their interests, dialogue on the issues, educate their constituencies, partner on working groups, and, in some cases, negotiate in post-agreement negotiations (Villarreal 2012: 11).

While recursive negotiations continue at the international level in the post-agreement period, negotiations also ensue at the national level where CSO engagement can be a highly important, but sensitive activity. Do they have the "right to negotiate" which goes beyond passive observation, information sharing, or even advocacy for their constituency's interests?⁶ Negotiation, after all, is a vehicle for decision-making. Whom do the CSOs represent officially? Who sent them to the table? Government officials can be highly

⁵ These include Article 25 of the International Covenant on Civil and Political Rights (1966) (http://www.electionaccess.org/rs/Article_25.htm) and Article 8.2 of the Declaration on the Right to Development (1986) (<http://www.un.org/documents/ga/res/41/a41r128.htm>), among others.

⁶ Nadia Diuk of the National Endowment for Democracy is credited with presenting the phrase, "the right to negotiate," which she used in a presentation at a USAID-sponsored panel on 15 years of change and progress for civil society in Europe and Eurasia (June 2012).

suspicious of CSOs, can view them as questioning their authority, and can reject their active participation in negotiation – as advocates or negotiators.

In many cultures, negotiation (or bargaining) is the common approach to solve most any transaction. In the marketplace, one always negotiates the price, so why can't civil society and CSOs negotiate in the political sphere too? To accept a first offer without making a counteroffer can be viewed as an insult in some cultures. So, if negotiation is a way of life, a common approach to problem-solving, it can also be viewed as a "right" of all who naturally seek to maximize their interests and are most directly affected.

In democracies, it is generally accepted that citizens have the right to advocate – in non-violent ways – to promote their interests. The right to negotiate is a major step beyond advocacy. It involves dialogue, compromise, and resolution among conflicting interests – along with authorized government representatives. From the 1986 "people power" revolution in the Philippines, to the revolutions of 1989 in Eastern Europe, to the Arab Spring of 2011, this right to negotiate seems to have evolved from protest movements to the right to advocate and, now, to the right to sit down at the bargaining table on an equal basis with official representatives. Civil society asserted its right to go beyond pleading for its cause in the streets to negotiating reforms with their governments. This evolution suggests a perception by CSOs and, begrudgingly, by authorities that civil society has a right to a seat at the table. This right appears to have emerged more at the domestic level, but is beginning to show traction at the international level as well.

At an everyday level, active CSOs often joining together in coalitions and partnerships, have demonstrated their ability and capacity to negotiate with government authorities on behalf of their constituencies' interests to implement and change laws and processes of governance. The author has been personally involved in building the capacity of CSOs in several countries to facilitate their move from protest to advocacy to negotiation with the goal of achieving desired reforms (Spector 2007). For example, moving a step beyond advocating for reform, Ukrainian media CSOs successfully negotiated with parliamentarians to draft a new public access to information law that was officially adopted in 2009 (MSI 2009). In 2006, Russian CSOs in various localities formed public-private partnerships with government officials to negotiate holding budget hearings that were opened to the public and agreements to include citizen representatives to provide official oversight on procurement commissions (MSI 2007). And in 2003, the Albanian Coalition against Corruption (ACAC) negotiated with the national parliament to draft a new law requiring high government officials to disclose their financial assets, which was subsequently adopted as law (USAID 2003).

This article examines the implications of new regime levels and new domestic actors in the post-agreement negotiation process for the United Nations Convention Against Corruption (UNCAC), the first comprehensive global agreement to fight corruption. Analysis will focus on two propositions:

Structure: Post-agreement negotiation is a nonlinear learning process that sometimes evolves from international frameworks that scale-out to multiple regional agreements or evolves from regional frameworks that eventually get wound up in a global agreement or remains at its original structural level if the underlying problem or issue gets resolved by the original regime's solution. The nature of this evolution depends on the regime's initiating catalysts, political will, and globalization factors. Any of these progressions that either roll-out or roll-in the regime need to account for overlapping memberships and consistency of compliance.

Actors: The success of post-agreement negotiation hinges upon the inclusion of affected nongovernmental stakeholders, especially at the national level, since they may be impacted

personally by the issue or problem that the regime is attempting to resolve. To be most effective, and to legitimize the process, these domestic stakeholders need to be engaged not just as passive observers of the process, but as active negotiators to design and develop national compliance strategies and support their implementation. The outcomes of negotiations with such active domestic stakeholder participation are likely to enjoy enhanced effectiveness and legitimacy.

The UNCAC post-agreement negotiation is presented as one path that post-agreement regime negotiations can take. It is neither offered as a unique nor a typical approach, but one that is rich in examples.

The UNCAC Case

The United Nations Convention Against Corruption was adopted by the UN General Assembly in 2003 after 2 years of negotiation, and entered into force on December 14, 2005. By no means was UNCAC the first international agreement concerning corruption, but it was the first comprehensive agreement in the area with a *global* membership. In fact, the process leading up to the adoption of UNCAC itself can be considered a post-agreement negotiation. It was borne from almost a decade of negotiations at the regional level from which emerged several regional regimes that were each negotiated separately.⁷ UNCAC also set in motion the engagement of CSOs in every signatory country as new and very involved stakeholders and active negotiators in the national post-agreement process of implementation. In the Foreword to the UNCAC agreement text, Kofi Annan (2004) wrote:

The Convention introduces a comprehensive set of standards, measures and rules that all countries can apply in order to strengthen their legal and regulatory regimes to fight corruption. It calls for preventive measures and the criminalization of the most prevalent forms of corruption in both public and private sectors. And it makes a major breakthrough by requiring Member States to return assets obtained through corruption to the country from which they were stolen.

UNCAC includes provisions on preventing corruption, criminalization and law enforcement, international cooperation, asset recovery, technical assistance, and information exchange. In comparison to preceding regional regimes, UNCAC's prevention, criminalization and international cooperation features go further and are more comprehensive. UNCAC broadens the list of behaviors that are defined as corruption. It criminalizes both active and passive forms of corruption. It includes more fully elaborated provisions on money laundering and embezzlement than the preceding regional agreements. Asset recovery is addressed as a fundamental principle. On the other hand, private sector corruption is not treated as forthrightly in UNCAC as in some of the regional regimes. While UNCAC increases the scope of anti-corruption controls and reforms, many of its articles are non-mandatory and even the mandatory ones can be interpreted in different ways in practice (Joutsen & Graycar 2012).

Multiple Regime Levels

When the Cold War ended in late 1991, corruption became elevated as an important international issue. Corruption and organized crime in Eastern Europe and elsewhere were seen as intertwined and threatening, while the end of socialist rule ushered in rapid privatization and deregulation that offered many new opportunities for corruption and criminal activity to thrive (Webb 2005: 193). At the same

⁷ This paper does not describe or compare in detail the provisions in the UNCAC agreement or other regional and international agreements. Others, including Webb (2005), Babu (2006), and Institute for Security Studies (2004), provide excellent discussions of the content of these regime frameworks and how they differ.

time, international donors and financial institutions that were supporting many governance and economic reforms realized that their funds were easily diverted into the pockets of corrupt oligarchs and they wanted to put a stop to the practice. Globalization and trade liberalization of the 1990s also raised the problem of corruption from purely domestic to global levels. Developed countries were obtaining greater access to the internal markets of developing countries and began to experience the impacts of their pervasive corruption. There needed to be a concerted effort to generate greater rule of law and transparency in these countries to put an end to rampant political influence, state capture, and money laundering – to bring some uniformity to the legal framework across all trading partners so that transnational companies would not be disadvantaged (Babu 2006: 3). Corruption was no longer only a domestic issue; it had international ramifications.

Even earlier in the United States, the Foreign Corrupt Practices Act (1977) became law after investigations of over 400 US companies that admitted to making illegal payments to foreign government officials. The US began pressuring the Europeans to enact similar laws to create a level playing field in international commercial transactions, so that bribery and corruption would not generate unfair advantage. As well, every five years since the mid-1980s at the UN conferences on crime prevention, and at ECOSOC meetings, the United Nations negotiated and adopted various codes and declarations on corruption, gradually building up interest. But conflicts between the industrialized and developing countries, as well as Cold War security concerns, prevented more substantial anti-corruption agreements during these years (Babu 2006: 7, 29; Schultz 2007: 2).

The history of anti-corruption regimes evolved from regional to global agreements. This may be a function of how the problem was perceived initially and the comfort zone of government officials whose corruption schemes might be threatened by such regimes. Regional agreements could tackle corruption problems in transnational trade among neighboring states that are generally used in dealing with one another and would keep industrialized countries outside of any monitoring and control mechanisms that the regimes would establish. However, the growing sense of interdependence across countries on trade and economic issues, and on development and military assistance, led negotiations moving relentlessly toward a global pact.

It was not until 1996 that the first regional convention on corruption – the Inter-American Convention Against Corruption -- was adopted to begin to fill the gap. This regime became possible as a result of strong negotiation leadership by Venezuela and spurred on by the spread of democratic governments throughout Latin America. Post-agreement negotiations in Conferences of State Parties (CoSP) have tackled some of the remaining issues, especially designing a monitoring mechanism of peer reviews.

In 1997, the OECD countries negotiated, adopted, and put into force (in 1999) its Convention Against Bribery of Foreign Public Officials in International Business Transactions, based on extensive pressure from the United States to extend the US Foreign Corrupt Practices Act to other countries. It is more limited in scope than the Inter-American Convention.

The Convention of the European Union on the Fight Against Corruption was negotiated in 1997 and serves to ensure that each state's criminal provisions against corruption covering bribery of their own public officials also extends to bribery involving public officials from other EU countries or public officials of the European Communities as well. It was motivated to protect EU states' financial interests across the entire EU.

The Council of Europe followed with two anti-corruption treaties, the Criminal Law (adopted in 1999, in force in 2002) and Civil Law (adopted in 1999, in force in 2003) Conventions on Corruption. These negotiations were catalyzed by human rights interests and are monitored through peer reviews organized by the Group of States Against Corruption (GRECO).

One blip in this trend – an interim global agreement – the UN Convention against Transnational Organized Crime – was negotiated and adopted in 2000 and brought into force in 2003. It sought to close loopholes that hindered international law enforcement of organized crime and includes two articles on corruption (articles 8 and 9).

The regional path continued with the Southern African Development Community Protocol on Corruption which was signed in 2001 and brought into force in 2003. It includes provisions to prevent, detect, punish, and eradicate corruption in the public and private sector. Following that, the African Union Convention on Preventing and Combating Corruption was adopted in 2003; it incorporated mechanisms for corruption prevention, criminalization, international cooperation, and asset recovery and was motivated by the goal of promoting the continent's economic and political development. The 2003 EU Framework Decision on Combating Corruption in the Private Sector concerns bribery committed between private parties in a business context and is concerned with sanctioning and enforcement rather than prevention. In 2010, the League of Arab States negotiated and adopted the Arab Anti-Corruption Convention.

In each region, these negotiated regimes have mutually exclusive memberships that have engaged in further post-agreement negotiations to address details that were not addressed initially. Beyond improving these regional regimes, additional post-agreement negotiation commenced in December 2000 producing a UN General Assembly resolution that began the process of negotiating a broad global convention against corruption, while taking into account all that had been accomplished regionally over the previous decade. Negotiations started in 2001 and culminated with the UNCAC agreement in 2003.

But why yet another anti-corruption regime? Couldn't the multiple regional regimes coexist and continue to serve the purposes for which they were established? There were several motivations. Initially, there was a belief that the corruption issue was a purely domestic legal concern that could be dealt with most effectively at a local level among neighboring states. But that belief changed over time as more was learned about how corruption impacts not only domestic governance and economics, but international trade and investment as well. A global membership and mandate was needed to deal with the transnational implications of corruption and its impact on international trade and development (Vlassis 2012: 63; Babu 2006: 4). An international regime with a wider range and more comprehensiveness than the existing regional regimes could "ratchet up" and properly refocus the state actors (Webb 2005: 205, 226). The growing reach of globalization made it critical to have all states sign up to the same standards and that there be a single and clear "rules of the road" to promote global trade and investment.

Second, the developing and developed countries held different priorities for the future of anti-corruption policy, but both leaned toward global solutions. The Group of 77 and China wanted to strengthen international cooperation around asset recovery. This could not be done easily within regional regimes. Meanwhile, the developed countries wanted more emphasis on preventive measures (for example more transparent public procurement, merit-based civil service reforms, and independent judiciaries) that would protect their investments overseas. These preventive provisions were not the main focus of the existing regional regimes (Schultz 2007), but a switch to a global regime would encourage such changes more evenly throughout the world. These issues offered a useful tradeoff for the parties to go global.

But the most potent explanation for moving to the global level involves national incentives. Initially, many developing countries wanted to create the appearance of taking action to keep corruption in check to attract foreign investment and trade, while keeping the major industrialized nations away from monitoring compliance and potentially upsetting domestic corruption schemes. Therefore, building regional, rather than global, regimes made sense to them. But as time went on, the industrialized countries felt they were the ones suffering the most from corruption, as trade liberalized and globalized. They asserted their power to design a more inclusive global anti-corruption regime and succeeded.

UNCAC is more innovative in its provisions and goes further than its predecessors. Its asset recovery, private-to-public bribery, and political party financing clauses build on the regional regime formulas and extend the legal practices required. UNCAC also broadens the types of corruption that are under discussion, not only bribery, and is more detailed on money laundering, international cooperation, and technical assistance. It provides a wider framework than the earlier instruments for anti-corruption responses by states. Overall, UNCAC is seen as recommending more practical regulations and concrete tools to improve domestic legislation than the regional regimes which tend to offer more basic frameworks (Martin 2011: 9). A limiting factor of UNCAC involves its non-mandatory articles because they give state parties greater discretion in what and how to implement the regime's framework.

UNCAC was the product of post-agreement negotiations spawned by the earlier regional regimes. What was learned from these regimes raised the bar on both the provisions required in anti-corruption regimes and the benefits of universal membership that could only be achieved in a global regime. Meanwhile, the existing regional regimes still serve a useful purpose, continue to operate and continue to conduct post-agreement negotiations to advance their own objectives. Figure 1 presents a flowchart of the post-agreement negotiation process and system of negotiations from regional to global regime development for UNCAC.

A comparison to this system of anti-corruption regimes can be seen in the buildup of regime systems in the environment and development sector over the past 30 years. With a growing recognition that environmental and developmental problems were both interdependent and global in scope, the negotiations that resulted in the UN Convention on Environment and Development in 1992 carefully reviewed and analyzed previously negotiated international and some regional regimes in subsectors to assess the best ways to generate interconnectedness and bring the issues up to scale (Chasek 1994). Unlike the anti-corruption regimes though, the environment and development system tended to remain global in membership, expanding by subsector, not by regime level.

The Introduction of New Domestic Actors

Few international regimes are self-executing. They require action within each national entity to implement the provisions of the regime appropriately. This necessarily requires the engagement of the executive branch and the legislature to add to or adjust laws, regulations, institutions, and processes at the national level. The monitoring mechanisms established by each regime periodically assess the degree of country compliance. With varying degree, many of the state parties to UNCAC and the preceding regional regimes have changed and implemented their national legal frameworks in accordance with the regimes' standards, but much still needs to be done by most countries to fully comply (Joutsen & Graycar 2012: 426).

Beyond the official government actors who negotiate legal and regulatory adjustments, the most innovative phenomenon under UNCAC has been the green light provided within the regime agreement

itself for non-governmental actors, particularly at the national level, to mobilize themselves to participate actively in the post-agreement negotiation process. More so than in many other recent regional or global regimes, UNCAC explicitly contains language that invites NGOs to active participation – and even active negotiation – in the post-agreement period at the country level along with government authorities (Villarreal 2012: 24-25).

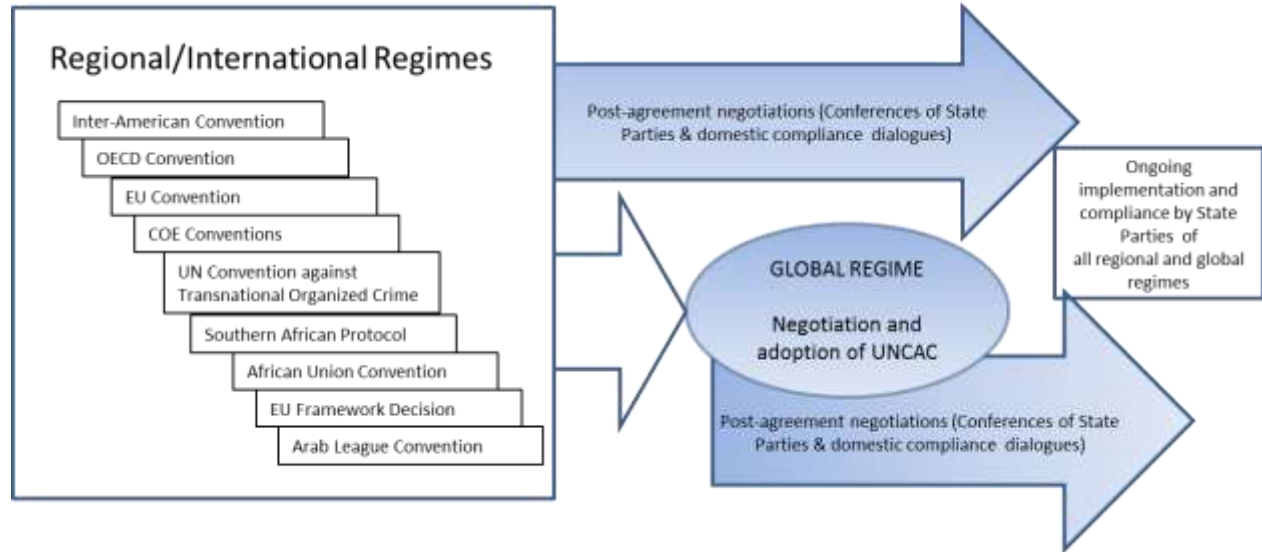


Figure 1. Regional to Global Regime Development through Post-Agreement Negotiation

The principal articles of the UNCAC agreement in this regard are Articles 5.1, 13, 60 and 63 (emphasis added below).

Article 5. Preventive anti-corruption policies and practices. (Paragraph 1). 1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that ***promote the participation of society*** and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.

Article 13. Participation of society. 1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to ***promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental and community based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.*** This participation should be strengthened by measures such as: (a) Enhancing the transparency of and ***promoting the contribution of the public to decision-making processes***; (b) Ensuring that the public has effective access to information; (c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public information programs, including school and university curricula; (d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information about corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary: (i) For respect of the rights or reputations of others; (ii) For the protection of national security or public order or of public health or morals; 2. Each State Party shall take

appropriate measures to ensure that the relevant anti-corruption bodies referred to in this convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this convention.

Article 60. Training and technical assistance. (Paragraph 4). 4. State Parties shall consider assisting one another, upon request, in conducting evaluations, studies and research, relating to the types, causes, effects and costs of corruption in their respective countries, ***with a view to developing, with the participation of competent authorities and society, strategies and action plans to counter corruption.***

Article 63. Conference of the State Parties (CoSP) to the convention. (Paragraph 6). 6. Each State Party shall provide the CoSP with information on its programs, plans and practices, as well as on legislation and administrative measures to implement this convention, as required by the CoSP. The CoSP shall examine the most effective way of receiving and acting upon information, including, inter alia, information received from State Parties and from competent international organizations. ***Inputs received from relevant non-governmental organizations duly accredited in accordance with procedures to be decided upon by the CoSP may also be considered.***

Understanding that corruption is a problem that civil society recognizes and copes with on a very personal basis in all member states, UNCAC drafters remarkably included rather comprehensive participation language for civil society and civil society organizations in the post-agreement period. Earlier UN General Assembly resolutions on fighting corruption called on member countries to increase the participation of society in decision-making processes, while improving transparency and accountability. Under UNCAC, not only are citizens and NGOs to participate in raising public awareness, but they are to be included in prevention initiatives, they are to contribute to the decision-making process, and they are to develop strategies and action plans along with government authorities. Civil society organizations are not delegated only an observer status, a public awareness function or a watchdog function; rather, much more so than in other previous regimes, they are integral actors along with government officials at the national level. UNCAC also brings business associations more clearly into the post-agreement negotiation picture.

When it comes to the level of CSO participation at the international level in post-agreement negotiations (that is, primarily at the CoSP meetings), UNCAC is a bit less liberal. Duly accredited or relevant CSOs may provide inputs to the review of country implementation, but there remains controversy as to whether they are considered observers or not. Currently, no CSO can participate in any of the CoSP bodies.

According to CSOs and some state parties, by signing the UNCAC convention, each member state has essentially agreed to give civil society and CSOs the “*right to negotiate*” the laws, regulations, and processes that are needed at the domestic level – alongside local officials – to ensure the state is in compliance with standards established in the UNCAC agreement. Articles 5.1, 13, 60 and 63 underline this right which goes beyond mere observer or advocacy status. Fitting the public into the post-agreement negotiation process involves more than relegating NGOs to advocacy action. The next progression, which CSOs view UNCAC as offering, is to have an authorized seat at the table. However, as with other provisions of UNCAC, and most all international agreements for that matter, national monitoring and reviewing to verify state compliance is sensitive.

How has this “right to negotiate” provision been applied at a national level? Is there evidence of implementation? The author has been involved in providing development assistance in several countries where CSO participation in domestic negotiations has been encouraged to implement UNCAC and

comply with its provisions. Here are a few examples. In Indonesia, in mid-2012, the Supreme Court accepted the recommendations of Indonesia Corruption Watch (ICW), an NGO, to freeze the appointment of any new judges for the country's regional corruption courts, pending the delivery of a report from the watchdog group. Supported by international donors, ICW had earlier conducted court monitoring activities which revealed alarming tendencies among many regional corruption courts to acquit graft defendants, even in the face of strong evidence. Following the delivery of ICW's report to the Supreme Court, regional corruption court judges were ordered to Jakarta for additional training to remedy an apparent lack of crucial job knowledge. Building on this earlier success, the ICW negotiated with the Supreme Court to suspend judicial appointments in light of the inherent ethical flaws of some of its recent appointees. The judge overseeing the Supreme Court's special crimes unit, said the request had been accepted, though recruitment, testing and evaluation of judicial candidates would continue. ICW saw the court's agreement as indicating a high degree of respect for the contributions of the ICW. The next step in the negotiation is for both government and non-government representatives to design new recruitment and screening tools (MSI 2012a).

Also in Indonesia, Transparency International Indonesia (TII), another local NGO, is actively engaged with government and business – beyond advocacy actions – in drafting and negotiating laws, regulations and procedures related to the business sector to generate private sector integrity pacts when bidding on public procurements, instituting codes of ethics for business, and gaining government endorsement of the Extractive Industries Transparency Initiative. TII also is involved in negotiations to draft a new public procurement law, to promote greater transparency in political party financing by requiring parties to post such information on their websites, and to strengthen forestry management and governance by reducing corruption in logging permits.

In Afghanistan, a newly formed NGO, the Afghan Coalition against Corruption, which had 50 registered CSO members in 2012, introduced itself to key ministers and senior officials in government, as well as had meetings with the Speaker of the *Wolesi Jirga* (lower house of parliament). This NGO was immediately invited to participate in all parliamentary commissions of the *Wolesi Jirga* in order to negotiate and advocate for reform efforts within the government to seek remedies against corruption (MSI 2012b; Spector 2012).

Discussion

Why have we seen these innovations in post-agreement negotiation structures and actors in recent years? One critical factor at play is *globalization*. The growing interdependence of countries related to trade, investment, migration, and knowledge exchange demands global regimes to solve many policy problems. There is a need for standardization, a common approach, to facilitate proper coordination of business, economic, and political activities across countries. Whereas regionally based regimes can nominally serve these purposes, global standards and regimes are more efficient and cover more possible interactions. So, the trend should be for regional regimes to give way to global regimes and for global regimes to be preferred from the outset for newly addressed issues/problems. It must be said that standardization of approach in national implementation of UNCAC – and many other global regimes – is an ideal that may not always be achievable. For UNCAC certainly, there is considerable variance from one state party to the next on how civil society and the private sector are allowed to participate at a national level.

Can regional and global regimes and their standards coexist? If regional regimes pre-date global frameworks, it is feasible for the regional regimes to persist contemporaneously and with overlapping membership. Regional countries are likely to want to maintain some solidarity with each other in the face

of globalization pressures. With greater pressures to comply with and monitor multiple regime standards, laws, regulations, and institutions there comes an unwieldy coordination of processes that is likely to result in some national noncompliance with inconsistent provisions and inconsistencies in national laws and regulations. But as long as there is basic consistency and harmonization across the overlapping regimes, they can both coexist. And despite the complexity of multiple regime systems, this coexistence serves to elevate the importance of common regime mandates – preventing corruption, enforcing anti-corruption legal frameworks, educating the public, and sustaining international cooperation on the issue.

Another related factor prodding these innovations is the *technological and communications revolution*. The internet and social media have broken down traditional barriers of communication within and across countries. Surveys that demonstrate greater public awareness about corruption and its negative consequences have resulted in social movements, not only to reduce corruption but to overthrow governments. Witness the power and impact of civil society groups that are incensed about pervasive corruption in their countries, as well as their isolation from public decision-making, in Eastern Europe and the former Soviet Union after the fall of the Berlin Wall, in the Arab Spring, and in Turkey and Brazil most recently. None of this strong advocacy could have been accomplished so quickly without the power of new technology and communications tools. Inclusive politics – bringing civil society groups into close engagement with government authorities to dialogue and negotiate about public policy – is the obvious next step.

There may be a fine line of distinction between advocacy and negotiation, but it is a critical one. It defines the difference between a supplicant and a decision maker. The assertion of negotiation as a right by civil society tends to make national systems more democratic. Is this assertion a stretch? Are NGOs really engaged in negotiating regime compliance at the national level or are they just engaged in extended policymaking? At the negotiating table, government authorities typically have the capacity to propose, agree or reject potential solutions. It is still unclear whether NGOs have the same capacity. The cases described earlier suggest that NGO participation in post-agreement negotiation is possible, but its success varies widely from country to country.

Do all NGOs have the capabilities and experience to negotiate effectively with official government stakeholders? They may have interested constituencies, but do they possess a detailed understanding of policy issues, a comprehension of how negotiation processes operate, and the skills to negotiate on a level playing field with the authorities. Process training for NGOs may be required to support their advancement from protest and advocacy initiatives to negotiation with the authorities. Content training may also be needed so that NGO representatives understand the details of the legal and regulatory context in their countries and the institutional systems within which negotiations to comply with regime provisions must be conducted.

The right to negotiate will create new and important roles for NGOs, as well as acceptance or at least toleration of these new roles by government authorities. Overall, this should engender improved democratic processes and outcomes where all stakeholders – government and non-government – have their say and carry their weight in making and implementing policy decisions.⁸ More inclusive and active engagement of stakeholders should result in better compliance with regime standards and provisions, thus resulting in improved and sustained outcomes envisioned by the regime.

⁸ In the post-agreement negotiation period after Guatemala peace negotiations, there is consensus that the enhancement of civil society-government dialogues on a range of issues had the unintended consequences of delayed and deadlocked implementation (Spector 2011: 47).

Conclusions

These trends identified in the UNCAC post-agreement negotiations portend changes in the dynamics of other regimes. They certainly will make the post-agreement negotiation process more complex. Policy issues that were once considered to be local or regional are becoming global in nature, because of changes in communications and technology that have made states more interdependent and require coordinated effort. These changes also make populations in different countries more aware of what solutions are possible and cause agreements to be reopened and reconsidered.

But the decision on whether the regime is built at a global or regional level, and any evolution from that level, has a lot to do with political will and the incentives state signatories are given. Can countries get what they want without too much negative fallout at the global or regional levels? In the case of UNCAC, countries from around the world were willing to move from the regional to global levels if they could achieve certain objectives. Developing countries wanted improved asset recovery provisions without extensive compliance monitoring. Industrialized countries wanted improved corruption prevention measures taken at a national level to protect their trade and investment interests. It was believed all of this could be accomplished, but only at a global level.

The assertion by NGOs of their “right to negotiate” with authorities is increasing, not only when dealing on the national level, but at international negotiation fora as well. It suggests an expanding democratization of the negotiation field – broadening the types of stakeholders participating. It makes a lot of sense to involve direct participation by citizens in the case of the anti-corruption regime, for instance, because more so than in other policy areas, citizens are often direct and personal victims of corrupt behaviors...and they know it.

To ensure that these innovations in post-agreement negotiation produce the results that are intended, some additional initiatives are required. First, technical assessment approaches should be designed to assist governments and NGOs in reviewing existing national legal and regulatory frameworks and contrast that with the requirements and standards set forth in the regime. A systematic approach will help focus where the deficiencies lie and what options are available to fill those gaps. But technical approaches need to be complemented by an understanding of the particular political context in the target country. The technical or systemic remedies have to fit the political situation and be tailored to it if they are to work well. As mentioned earlier, some state parties that have implemented UNCAC object to CSOs preparing and submitting even “shadow reports” on country implementation of UNCAC. Such states are not ready to have constructive dialogues with CSOs as suggested here.

Second, members of global regimes and international donors should consider educating or re-educating NGOs and government stakeholders in the process of dialogue and negotiation at the national level. NGOs need to learn more about negotiating with authorities, not only advocating their position. Government authorities need to learn more about how to collaborate with NGOs effectively and without overpowering them. How can they integrate the other into the process, treat each other on a level playing field, and bargain and compromise fairly to reach mutually acceptable decisions in compliance with the regime? To conduct post-agreement negotiations, both government and non-government actors need to be trained in the skills to plan and strategize for negotiations and, ultimately, to participate in negotiations. In addition, NGOs may need more specialized training on legal and regulatory issues within the subject area, while government actors may need to better understand trends in public sentiment on the issue.

International donor organizations, such as the United States Agency for International Development (USAID), often sponsor such negotiation training programs in developing countries.⁹

Third, new institutional formats can be piloted to bring together government and non-government representatives for dialogue and negotiation on regime issues at the national level. These might take the form of coordination councils, working groups, oversight committees or joint public hearings. But importantly, they need to incorporate the element of practical face-to-face negotiation.

Post-agreement negotiations are not the end of further post-agreement negotiation. Nor is the original agreement or the subsequent negotiation the last word. The recursive negotiations that characterize a regime will continually need readjustment to fit new situations, powers, interests, and challenges. New actors with new roles and new regime systems and subsystems all contribute to the dynamics that seek to produce innovative solutions.

⁹ The author conducted such negotiation training under USAID auspices in Ukraine, Russia, Indonesia, and Albania under contract through Management Systems International.

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