What Does the UN Convention on Corruption Teach Us About International Regulatory Harmonisation?

Bryane Michael, Linacre College

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Abstract:
Should international institutions promote international regulatory harmonisation? This paper will present arguments, looking at the UN Convention Against Corruption, noting that international institution regulation may play less of a harmonising role that it ostensibly appears to. Section I discusses the underlying motivations for harmonisation, presenting three views of regulation based on the likely effects of "globalisation" and noting most views support global harmonisation. Section II will discuss specifically the UN Corruption Convention and compare the Convention (which aims at global harmonising of certain practices against corruption) against its ideals and an optimal regulation. Section III will discuss the influence of regulatory "clubs" (such as the OECD or OAS Corruption Conventions) and show how regional harmonisation may be superior to global harmonisation in terms of reaching an ideal and optimum. Section III will address how global harmonisation may be deleterious to national interests and will discuss how such global harmonisation may be "domesticated" in the nations' laws and moeurs. Because business practices depend on a wide range of influences in the national business system, attempts at harmonisation are at best "ambivalent".

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Introduction

Much casual observation suggests that international organisations play an important role in the harmonisation of business practices around the globe.[1] The OECD has established "guidelines" for its members in the regulation of multi-lateral enterprises as well as for its members' domestic regulation through a number of committees – including its Public Management Programme (PUMA). The OECD has also established a Convention on the

Figure 1: International Government Organisation Membership

Source: Data reported in Held et al. (2001)
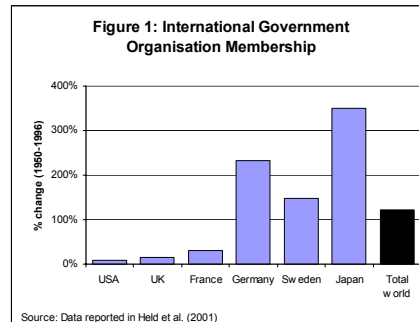
Bribery of Foreign Officials in International Business Transactions, an important example the seemingly successful international regulation.[2] Such casual observation is bolstered by data suggesting that international organisations have increased their influence in the regulation of national business. Looking at figure 1, national membership in international organisations has increased (with Japan representing the largest percentage increase).[3] The nature of this regulation may be under dispute as some commentators such as Rodrik (1999) note that the activities of these organisations would appear to be a type of supra-national regulation while other commentators such as Jacobs (2002) would argue for a nuanced view of harmonisation, noting that the activities of these institutions fit into a "multi-layered governance." Yet, these data ostensibly support he view that international institutions play a role in harmonising business practices around the globe.

Yet, international institutional regulation's effects on harmonisation is more complex than such mono-causality suggests. Regulation is often ambiguous or regulates different areas from those supposedly covered under the treaty or Convention. This paper will present arguments, looking at the UN Convention Against Corruption, noting that international institution regulation may play less of a harmonising role that it ostensibly appears to. Section I will discuss the underlying motivations for harmonisation, presenting three views of regulation based on the likely effects of "globalisation" and noting most views support global harmonisation. Section II will discuss specifically the UN Corruption Convention and compare the Convention (which aims at global harmonising of certain practices against corruption) against its ideals and a theoretical optimal regulation. Section III will discuss the influence of regulatory "clubs" (such as the OECD or OAS Corruption Conventions) and show how regional harmonisation may be superiour to global harmonisation in

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[1] Following Held *at al.* (2001), "international organisations" are taken to be <u>inter-governmental</u> organisations such as the United Nations, the OECD, or the WTO; in contrast with international NGOs or multi-national enterprises.

[2] The OECD has an unsuccessful example in the Multi-lateral Agreement on Investment (Rugman, 2000).

[3] Gamble et al. (2003) discuss the effects of globalisation on international law and provide data on number of international treaties over the later part of the 20th century.

terms of reaching an ideal and optimum. Section IV will address how global harmonisation may be deleterious to national interests and will discuss how such global harmonisation may be "domesticated" in the nations' laws and moeurs. Because business practices depend on a wide range of influences in the national business system, attempts at harmonisation are at best "ambivalent".

Globalisation and Regulatory Harmonisation

Most discussions of regulation begin by considering the reasons for regulation and the obstacles to regulation (Jacobs, 2002). At the international level, the consideration of such reasons and obstacles is tied to a discussion of "globalisation" (where globalisation is defined as increased amount of economic, political and social interaction across physical space). Discussions of the reasons for regulations are based upon a *contingency view* which sees regulation as the result of negative externalities -- often stemming from supposedly increased international economic inter-dependence -- which international action can correct (Nicholaidis, 1997). Increases in capital and goods flows attendant with such globalisation are thus supposed to have required the creation of international "rules of the game" and the provision of international "public goods" mitigating the "public bads" generated by international capital flows, flows of resources between multi-national enterprises, tax avoidance, environmental degradation, and intellectual property right infringement among others (Jacobs, 2002). National regulation often can not address these concerns because of inefficiency, conflicts over the distribution of regulatory costs and benefits, macro-level instability, and security dilemmas (Eden and Hampson, 1997).

The proper regulatory response, and particularly the decision for or against harmonisation, depends upon whether such globalisation promotes economic *convergence, divergence, or ambivalence*. Clearly, if economic structures and outcomes are converging, then a "one-size-fits-all" regulatory approach (namely harmonisation) is sufficient. If these structures and outcomes (and I will be specific about which "structures" and "outcomes" I am referring to momentarily) are diverging, than one type of regulation will not fit all types of economies. If these structures and outcomes are "ambivalent" (where some variables are converging and others diverging, or if definitions of "convergence" and "divergence" can not be established, than the regulatory environment is highly uncertain and probably highly specific. Table 1 presents some views about the nature of globalisation along with implications for global harmonisation. Most of the effects suggest that global harmonisation is the best policy response irrespective of the type of globalisation.
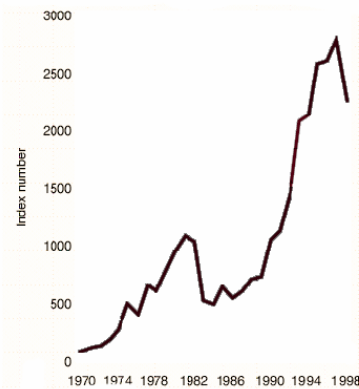
Figure 2: Stances on Globalisation and Regulatory Implications

	Economic Convergence	Economic Divergence	Ambivalent
Enterprise level logic	Globalisation brings economic growth and innovation (Ohmae, 1990).	Globalisation brings MNE outsourcing requiring exploitation (Klein, 2000).	Globalisation requires MNEs to organise for competitive advantage (Bartlett and Ghoshal, 2001; Hedlund, 1994)
Regulatory rationale	Globally harmonised regulation for globally harmonised standard business	Global harmonisation needed to guarantee a universal minimum standard	Global harmonisation sets incentives for organisational strategy
Systemic logic	Globalisation represents US hegemony (Gilpin, 1987)	No real globalisation, regions reign (Hirst and Thomson, 2001).	Globalisation occurring with networks in global governance (Braithwaite and Drahos, 2000).
Regulatory Rationale	Global harmonisation set by hegemon	Minimalist global harmonisation based on regional compromise or bargaining power	Global harmonisation dictated by powerful MNEs
	Regions will integrate into a system – even if it is "divergent" (Berger and Dore, 1996; Hall and Soskice (2001).	State as executive committee of the bourgoisie (Pilger, 2002).	Variety of MNEs (Stopford, 1998)
Regulatory Rationale	Loose global harmonisation encompassing divergence	Global harmonisation based on interests of national capitalist classes	Global harmonisation as result of powerful MNEs or compromise
World-level logic	Globalisation is the next stage of economic evolution – for better or worse (Friedman, 2000; Greider, 2001).	MNEs foster natural differentiation in the "world system" (Strange, 1997).	MNEs are another layer in multi-layered governance (Held et al., 1999).
Regulatory Rationale	Global harmonisation as organic outgrowth of economic evolution	Global harmonisation promoting such differentiation	Global harmonisation codifying and legitimising multi-layered government

Source: author.

Authors who claim that globalisation is promoting global economic **convergence** cite data such as figure 3 showing increases in capital flows – particularly from developed to developing countries.[4] These authors assert that such convergence is due to global economies of scale (Dunning, 1992), the rise of global brands and marketing (Levitt, 1983) or the need for highly efficient firms to seek out new markets (Ohmae, 1990; Doz *et al.*, 2001). Looking more broadly at the national support for such firms, writers such Gilpin (1987) assert that many large international corporations are US companies by origin and their expansion has been seen as a form of US "hegemonic" commercial expansion. Other authors

Figure 3: Capital Flows to Developing Countries (net)

Source: UNCTAD, 1999

such as Berger and Dore (1996) and Hall and Soskice (2001) are less sure that global capital will reflect American capitalism, but will instead differentiate between Europe, Asia and North America. Convergence in this case refers to the convergence toward a functionally integrated yet differentiated world market place (much like differentiated organs make up the physical body). If regionalisation or the retreat of the state is occurring, it is a temporary phenomenon on the road to global markets and global forms of governance – for the better (Friedman, 2000) or for the worse (Grieder, 1998).

If multi-national corporate operations are causing economic convergence, international harmonisation is both necessary and best (optimal). If the *McWorld* view of globalisation, asserting that all markets around the global will be the same, then logically only one type of regulation will be necessary (Barber, 1995). If the economic system is converging to low levels or levels of intolerable suffering, than international regulation will ensure such convergence is welfare enhancing and morally acceptable to prevent convergence at levels which "revive forms of human exploitation that characterised industry one hundred years ago" (Grieder, 1998).[5] Yet the terms of such harmonisation are open for negotiation (Jacobs, 1994).

The rationale behind the assertion that economic convergence implies that international harmonisation is both necessary and best (optimal can be seen from simple logic. The set of all possible "states of the world" -- for example income – can be defined as the set Y with elements y(j) where j refers to a particular country index. The regulatory regime can be denoted as R with elements r(j), again where j refers to a particular country index. Given the set Y and R, a unique relation can be drawn such that $Y \to R$ and for each element $y(j) \to r(j)$ for all countries (j). It therefore follows that if each element y(j) convergences to some y°, then each r(j) must also converge

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[4] Griffith-Jones and Leape (2002) note however that new capital flows are roughly the same now as at the start of the decade.

[5] A non-obvious implication of this line of reasoning is that liberalisation rather than harmonisation would be the best response if globalisation, independently of government regulation, provides the most efficient regulatory programmes. For example, globalisation may provide salaries to the poor-but-talented and can influence governments in developing countries to accept certain policies – some oft-cited examples being increased transparency of East Asian monetary and fiscal policy and the eventual end of apartheid in South Africa. Thus, international harmonisation would occur spontaneously rather than as a result of direct intervention by international institutions.

to some r° for all countries (j). Moreover, it is logical to suppose that such a regulatory regime r° would be designed in such a way that would maximise y. Such an optimal regulatory regime may be signified as r* and could pragmatically be set at a level to maximise Yt+1 in the equation $Yt+1 = R*(Yt)$.

Another view of globalisation insists that globalisation can promote national and international economic **divergence** (rather than convergence), especially due to worker exploitation or inefficient redistribution of income through multi-national (MNE) global outsourcing strategies which offer low salaries to workers in developing countries (Klein, 2000). In a less nefarious form of divergence, no real

Figure 4: Global Diffusion of Pension Systems
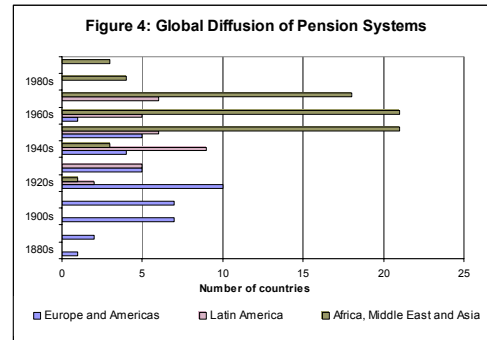
globalisation occurs and most business and economic decisions are taken at the regional level (Hirst and Graham, 2001). According to this "regionalisation" view, economies share certain structure features which require co-ordinated fiscal and monetary policy which may be at variance between structurally different regions. Such difference could occur due either to natural structural differences between regions or due to "implementation lags" in policy lesson diffusion. Figure 4 shows the policy diffusion process for pension system reform for a number of countries over the period 1880 to 1990. As shown, there were three leading adopters (Germany, Denmark and New Zealand) in the late 1800s, with other countries adopting (roughly) according to the classical bell distribution – lagging countries were countries such as the Gambia and Peru in the late 1980s.

If multi-national corporate operations are causing economic divergence, the implication appears again to militate for global harmonisation -- as international regulation is necessary to restrain deleterious economic competition, redress wrongs committed by MNEs and promote an ethic of fair trade. In the case of divergences stemming from "unfair" outsourcing arrangements, harmonisation is required to guarantee a minimum standard and help efficiently redistribute income which powerful market actors have taken from less powerful ones.[6] If such divergence is caused by regionalisation, than harmonisation would be based on regional compromise or bargaining power (as will be discussed below).

The rationale behind the assertion that economic divergence would still militate for international harmonisation can be seen using the logic previous described. For the sets Y and R, each element $y(j) \rightarrow r(j)$ and by the definition of divergence, no two elements can be equal. Yet, some y(j) or "states of the world" will clearly be better than others (irrgardless of how "better" is defined). Thus, if there exists some y*, then it follows that r* must also exist such that r* is "better" than r(j) over a set-set of r(j).

Finally there is a third school which argues against convergence or divergence, but instead notes the changing or "**ambivalent**" power of globalisation. According to

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[6] The case of such redistribution in promoting the stability of the system has been made by Acemoglu and Robinson (2000) and Benabou and Ok (2001) among others.

Held et al. (1999), "globalisation is an idea whose time has come...yet, it [globalisation] lacks precise definition" (p.1). Despite the imprecision of the term "globalisation," the use of the term, according to Held *et al.* reflects increased inter-connectedness in political, economic and cultural matters across the world creating a "shared social space" (*ibid.*) Given this inter-connectedness, globalisation may be defined as "a process (or set of processes) which embodies a transformation in the spatial organisation of social relations and transactions, expressed in transcontinental or interregional flows and networks of activity, interaction and power" (*ibid.*, p. 16). Such processes produce variegated responses, some positive and others negative in a complex "multi-layered" form of governance. There are several specific examples of such ambivalence. Large MNEs are not single consolidated entities and hegemonic organisations, but can often represent alliances or networks based on similar business interests. MNEs may focus clusters of groups with international organisations or other international enterprises which concentrate economic and political power (Braithwaite and Drahos, 2000). If these groups are able to exercise significant political power, such a trend would represent a multi-layered governance structure "'re-engineering' the power, functions and authority of national governments" (Held *et al.* 1991, p. 8). Such ambivalence is also reflected in "glocalisation" thinking which stresses the incorporation of global goods, capital, labour and ideas into local institutions (Pieterse, 2001).

Each view of globalisation has different implications for international regulatory harmonisation. If the world is converging toward homogeneity in social, economic and political structures, than a "one-size-fits-all" type international regulatory structure may be optimal. Without convergence, given both the positive and negative aspects of globalisation, "one-size-fits-all" regulation would be clearly inappropriate as harmonisation would over-regulate in certain cases and under-regulate in others. Global harmonisation would set incentives for organisational strategy which may be sub-optimal. Worse, global harmonisation may be dictated by powerful MNEs -- thus, regulation must occur at the decentralised level -- often on a case-by-case level.

The rationale behind the assertion that an ambivalent globalisation would led to no fixed view of regulatory regime can be seen using the logic previous described. For the sets Y and R, each element $y(j) \rightarrow r(j)$. Yet, by the definition of ambivalence, $r(j)$ may be non-unique for various elements of j. If there is an optimal r^*, than such an optimal may apply to more than one $r(j)$. Indeed, by the definition of ambivalence, the nature of the relationship between $y(j)$ and $r(j)$ may be "loose" in the sense that no direct relationship may apply or that the definition of r may be ambiguous.

This discussion is summarised in Figure 5 which shows the implications for regulation based on different types of globalisation. If the state of the world for all countries j is converging to one level y*, then r converges to r* and international institutions need to make sure harmonisation efforts aim at r* (if globalisation does not take care of it itself). In the case of divergence, each element of Y approaches a unique and non-indentical yj for all j. Because some y are better than others, and specifically y* is the best of them all, then r(j) should be set by an external power (such as an international institution) such that r(j) = r* for all j. If globalisation is ambiguous, then no one-to-one relation between the nature of globalisation and the regulatory regime can be established and "anything goes." International regulation needs to be broad enough to allow for fact that r* is no longer unique.

Figure 5: Implications of Globalisation on Harmonisation

	Y	R	relation of Y and R
convergence	$y \rightarrow y^*$	$r \rightarrow r^*$	unique
divergence	$y \rightarrow Y$	$r \rightarrow R$	unique
ambiguous	Y	R	non-unique

If all areas of regulation are subject to these three tendencies, than a discussion about one particular type of regulation can shed light on regulation more generally. If R is the set of all possible regulations for all countries and R_{ac} is a sub-set of R (where the sub-script ac refers to anti-corruption), than what is true for R_{ac} could well be true for R. International regulatory harmonisation of individual country j regulations forbidding bribe payments to public officials represents one type of such regulation. The harmonisation of regulations governing executive agencies responsible for handling payments or making public sector regulation reflects another specific instance of such regulation. These regulations more generally are referred to as anti-corruption regulations or regulations against corruption.

The factors which influence such anti-corruption regulation can shed light on the discussion of international regulatory harmonisation more broadly. If the state of the world Y is converging, than a universal harmonisation of regulations – led by the United National -- against corruption would be best (R*). Such a presupposition is clearly guiding regulatory convergence on other standards such as accounting standards (Sylwia Gornik-Tomaszewski *et al.*, 2003). If there is divergence, than a UN Convention would either be vital (if they can find and enforce the optimal r*) or it would be sub-optimal and countries should pursue either regional initiatives (such as the OECD Convention on Bribery, or the OAS Convention) or engage in unilateral action.[7] If globalisation is ambivalent, than "anything goes" and a UN Convention would have little real impact because it would be interpreted or re-interpreted according to individual countries needs.

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[7] See Richardson (2001) for an overview of corruption treaties.

Regulatory Responses and Pressures for Harmonisation: The UN Convention Against Corruption

The United Nations Convention Against Corruption represents an example of global harmonisation led by an international institution. The Convention, successfully negotiated in October 2003 (and adopted in early November), was the result of two years of negotiation by 130 governments participating in the Convention – starting with the "Vienna Declaration" issued at the Tenth UN Congress on the Prevention of Crime and the Treatment of Offenders in April 2000. The Vienna Declaration resulted in the United Nations General Assembly adoption of resolution 55/61 in December 2000, requesting the analytic reports necessary for a Convention and resolution 55/188 of the same year proposing the establishment of a group of experts on international illegal corruption-related cash flows. The following spring, another meeting was held in Vienna to assess progress made and consider the Secretary General's report.[8]

The Convention mainly aims at improving accounting standards, preventing money laundering, reducing bank secrecy, aiming at the return of illegally obtained assets, and promoting co-operation between the private sector and government authorities. Specifically on international business, the Convention urges member states:

> "to prevent corruption involving the private sector through measures that focus, *inter alia*, on: (a) Promoting cooperation between law enforcement agencies and relevant private entities; and (b) Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest" (UN, 2003; article 11).

In this case, the text is relatively ambiguous. What type of cooperation is being sought and how would such cooperation be implemented in practice? Other equally ambiguous statements are found elsewhere in the Convention such as in articles calling for the establishment of an adequate supervisory framework for financial institutions, promotion of transparency among private entities, prevention of the misuse of public procedures regulating private entities, and the prevention of conflicts of interest. Yet, in other cases, the measures are concrete such as article 2, noting that "each State Party shall deny the tax deductibility of expenses that constitute bribes" and "each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of business activity."

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[8] For some antecedents, see UN Declaration on Corruption and Bribery in International Business Transaction (General Assembly A/Res/51/191 passed on December 16, 1996, UN Resolution on International Code of Conduct for Public Officials (General Assembly A/Res/51/59), UN Resolution on International Cooperation Against Corruption and Bribery in International Commercial Transactions (GA A/Res/52/87) passed on December 12, 1997, and the UN Convention Against Transnational Organized Crime, passed on November 15, 2000.

In any contract, "rational ambiguity" could be the result of contracting parties' desire for flexibility in the face of non-contractual elements, unexpected changes in the state of the world, contracting costs, and other factors (Salanie, 1997; Eggertsson, 1990). Ambiguity could also recognise the evolutionary aspect of regulation, that "optimal" regulation requires learning and that a variety of different regulatory approaches could provide the variation needed to assess which approach results in more desired outcomes (Nelson, 1995; Rapaczynski, 1996). Completely defined contracts are too rigid whereas completely ambiguous contracts offer little value over an ill-defined status quo. As such, there is probably some useful degree of ambiguity.

The degree of ambiguity of a set of regulation R can be defined for each article i in regulation r(j) as a(i). Such ambiguity can be quantitatively bounded between two arbitrary measures $p < a < q$ where p is the minimum of the scale and q is the maximum for each article. As a approaches p, such regulation can be described as "loose" whereas as a approaches q, such regulation could be described as "tight" or "binding". For a scale where p=1 and q=5, this ambiguity can be plotted as shown in Figure 6. In Figure 6, each article of the UN Convention Against Corruption was analysed based on its specificity. A score of 1 indicates the article refers to a broad principle. A score of 2 indicates that the article refers to a particular mandate and a general direction for fulfilling the mandate. A score of 3 notes that the article outlines a mandate in detail and suggests broad mechanisms for fulfilling the mandate. A score of 4 is given for articles that define reasonably detailed requirements and provide specific instructions for compliance. A score of 5 is given for articles that provide a relatively (for international treaties!) concrete, specific and well-defined obligations and actions needed to fulfill the obligation.


Figure 6: Clarity of UN Convention Against Corruption
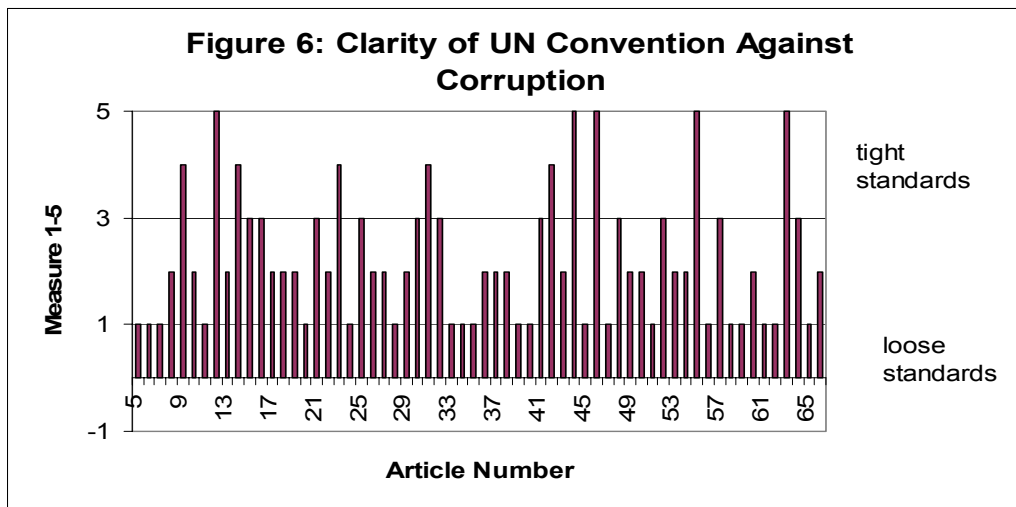
As shown in Figure 6, there is wide variation in the clarity of articles in the UN Convention. Such variation reflects, in part, "non-divisibility" problems of taking a coherent and logically consistent document and breaking it into parts. Any Convention must define the principles which guide it and provide specific measures for addressing those principles. Such an interpretation would imply, however, a pattern of clarity and ambiguity in the data – with introductory articles establishing broad principles and later articles establishing concrete measures for every sub-

section of the Convention (the convention is divided into a number of sections). Yet, as shown in Figure 6, no such pattern seems present.

In other cases, the Convention appears to address issues only marginally associated with corruption -- such as accounting standards (Article 12), prohibiting the establishment of off-the-books accounts, inadequately identified transactions, recording of non-existent expenditure, or the use of false documents (among others). Money laundering is another area with important yet indirect effects on corruption and the Convention requires (in Article 33) the criminalization of money-laundering of proceeds of corruption, in Article 58 prohibitions against invoking bank secrecy as a ground for refusal of international mutual assistance and in Article 61 and 62 promotes the recovery of assets.

The degree of relevance of a set of regulations R can be defined for each article i in regulation r(j) as q(i). Such relevance can be bounded between two arbitrary measures t <q < u where t is the minimum of the scale and u is the maximum. For a scale where t=1 and u=5, this relevance can be plotted as shown in Figure 7. In Figure 7, each article of the Convention was analysed based on its relevance to anti-corruption. A score of 1 indicates the article is not related to fighting corruption. A score of 2 refers to an article which is related to corruption but only tangentially. For example, articles promoting criminal co-operation are related to corruption but would probably be better placed in a treaty on criminal co-operation. A score of 3 indicates the proposed measure is often one component of a "standard" anti-corruption programme but the article does not directly discuss anti-corruption. A score of 4 indicates the article is directly related to anti-corruption, but the article is vague. A score of 5 indicates the article is directly related to anti-corruption.


Figure 7: Direct Relevance to Anti-Corruption
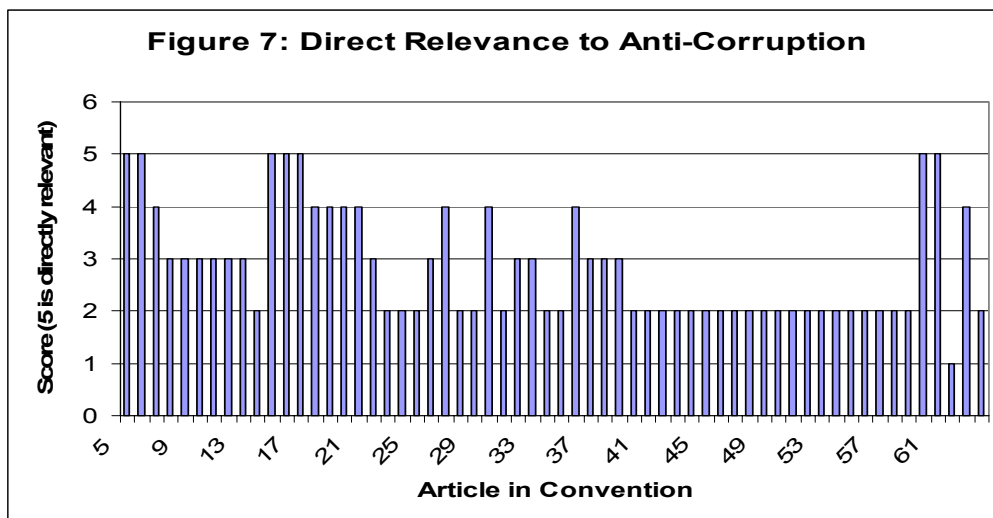
As shown in Figure 7, many of the articles appear only tangentially related to corruption, possibly reflecting Braithwaite and Drahos's (2000) "agenda shifting." In other words, the proponents of the UN Convention (such as the United States) may have been interested in passing international regulation on improving accounting standards, preventing money laundering, reducing bank secrecy, aiming at the return of illegally obtained assets, and promoting co-operation between the private sector

and government (especially in a post-September 11th environment). Given the current global policy environment which views corruption as particularly harmful, these tangential issues may have been easier to pass under a "corruption" banner than under conventions on accounting standards or money laundering.

If the ambiguity and relevance of the articles of the Corruption Convention are analysed together, some indication is given of the total article "distance" from some optimum or normative aspect heralded by the Convention. If i' represents the ideal article or the content of the article claimed by the proponents of the Convention, and d is the actual distance from that ideal (where d in this case is the arithmetic average of a and q), than d can be portrayed as shown in Figure 8. As can be seen, from the figure, the articles in the Convention have different differences from an admittedly ill-defined "ideal".[9] Looking at the articles as a whole, it would appear that the UN Convention does not achieve the ideal to which it aspired.

Figure 8: Distance from Stated "Ideal"
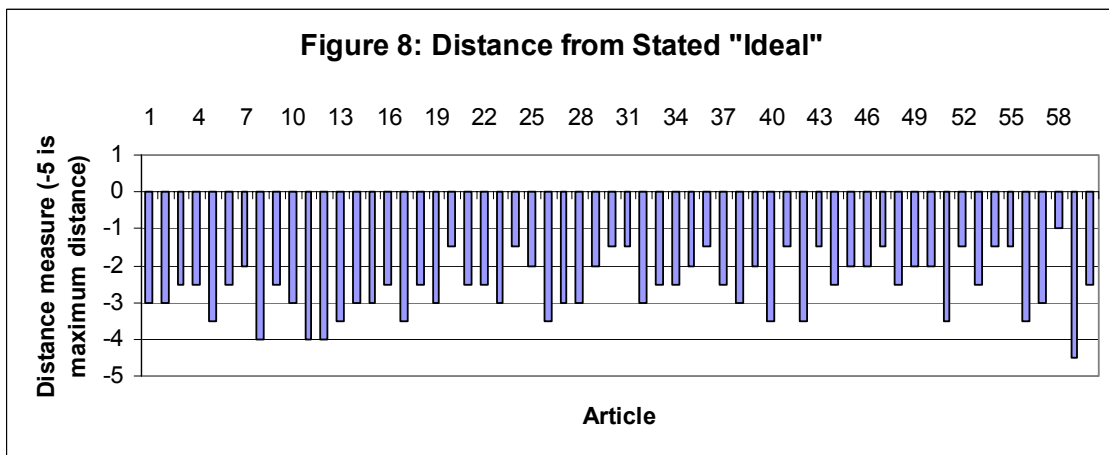
Yet, the "ideal" regulation and the "optimum" regulation may not be equivalent. If i' represents the "ideal" article as previously discussed in regulation r' (which is comprised entirely of ideal articles i') and i* represents the optimal article in regulation r* (also entirely composed of optimal articles r*), than it is possible that r also as previously discussed, it is possible that $r(j) \neq r'(j) \neq r*(j)$ for a regulation in country j. Indeed, an optimum international regulation would allow for variety and diversity and make provision for national institutions. For example, Figure 9 shows regional differences in national rule of law. As can be seen, regions such as the Former Soviet Union have relatively little rule of law – thus little capacity to implement globally harmonised regulation. The ideal regulation r' for the sub-set of countries j which comprises the former Soviet Union

Figure 9: Comparing Rule of Law

may not be the same as for the OECD countries. However, the optimum regulation r* might take ability to implement into account. Such optimal regulation might also take

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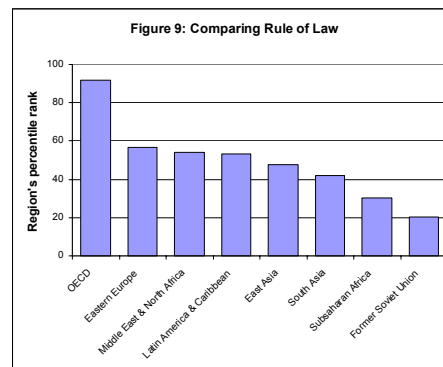
[9] Figure 8 has been plotted with negative distances to portray zero as an ideal "asymptote."

into account the corruption promoting effects of increased regulation in an environment of low administrative capacity. In other words, anti-corruption regulation may create the administrative barriers civil servants can use to extract bribes!

The optimal regulation in some cases may be very "tight" (high value of a) and in other cases "loose" (low value of a) because generally international standardisation and harmonisation have a number of draw-backs which should discourage international institutions from attempting too "tight" harmonisation (Nicholaides, 1997). Standardisation may serve to discourage innovation and reduce choice. Often the discussion revolves around more high profile sectors such as mobile telephony, computing and service sectors. However, the same principles are applicable to anti-corruption regulation. If standards favour one set of regulations at the expense of others, standards may actually *increase* corruption for some countries (by creating more administrative barriers).

As shown in the case of the global trading system, the establishment of common frameworks could be unfair to developing countries or particular countries. In the case of free trade, instead of an most favoured nation framework, the WTO may wish to ensure transparency, pluri-lateral managed mutual recognition, a globally decentralised framework, and promote regulation in weak countries. In the case of anti-corruption regulation, forcing developing countries to adopt standards which the developed countries did not have to comply with during their phase of development could be seen as putting them at a competitive disadvantage.

Countries should pursue regulatory strategies which serve the country's objectives and goals rather than simply adopt harmonisation (Jacobs, 1994). Among these strategies include negotiated strategies, co-operative strategies (designed with other countries before, during, or after implementation), delegated strategies (to supra-national or sub-national entities), and "semi-government" regulation relying on industry self-regulation and international standards organisations. Moreover, preferences underlying regulation may differ according to country or region. For example, the US prefers a federal system of regulation while the UK prefers a deregulated system (Tate, 2001). Finally, there is an implicit assumption in the literature that global harmonisation is the solution to problem of public goods. As the experience of the creation and regulation of public goods at the national level demonstrates, they are notoriously difficult to influence either due to co-ordination failures, free riding, "tragedy of the commons"-type problems or incomplete information. In the case of anti-corruption regulations, the developed countries see the UN Convention as a public good which reduces drafting costs of developing countries.

Ideal regulation, optimal regulation and actual regulation are three different concepts. In order to clarify some of the issues involved, Figure 10 presents a 2x2 matrix exploring the possible convergences and divergences between ideal, optimal and actual regulation. In this matrix, two relationships are considered: whether the actual level of regulation is tighter or looser than the ideal and whether the ideal is tighter or looser than the optimum. If the ideal regulation is tighter than the optimum, than this represents a "Panglossian world" because the goal being strived for exceeds the optimal – the country wants more regulation than is beneficial. If the ideal regulation is looser than the optimum, than this is a "Machiavellian world" because

the optimal exceeds the ideal – and the country needs more regulation than it defines as its ideal. In a normative sense, if the actual amount of regulation is greater than the ideal, then there is nominal over-regulation (and nominal under-regulation if the actual amount of regulation is less than the ideal). I use the ideal level of regulation as the "pivot" between these two relationships in order to ground the discussion around the UN Convention.

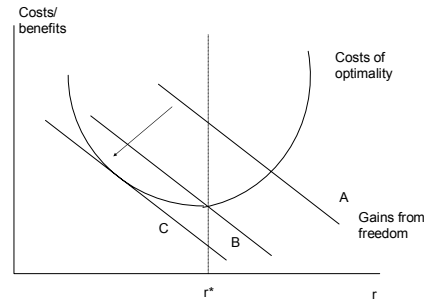## Figure 10: Comparing the ideal, the optimal and the actual

	$r'>r*$ Panglossian world	$r*>r'$ Machiavellian world
$r>r'$ Nominal over-regulation	Effective over-regulated	Uncertainty (is r< or > r*)?
$r<r'$ Nominal under-regulation	Uncertainty (r could be less than r' and r*)	Effective under-regulation

Four possible regulatory regimes can be sketched out. If the actual level of regulation is tighter than the ideal, and the ideal is tighter than the optimal, than this is clearly over-regulation by all standards – thus it is effective over-regulation. If the actual level of regulation is looser than the ideal, and the ideal is looser than the optimal, then there is clearly under-regulation by all standards – thus it is effective under-regulation. Along the trace of the matrix, the choices are clear. However, in quandrants I and III, the choices are not so clear because regulation can fall somewhere between the ideal and the optimum. For example, an optimal amount of regulation may be greater than an ideal (if completely control of corruption is the *a priori* "best" regulatory arrangement (where "best" is defined along some measure).

In cases of uncertainty, countries may wish to follow a regional approach or follow unilateralism – as this would allow them to define their own ideal as closely as possible to their optimum level of regulatory "tightness." The OECD convention against bribery - which has been ratified by 35 countries is one example as is the Draft African Union convention on preventing and combating corruption - adopted by African presidents in Maputo, Mozambique on July 2003. The Council of Europe's Criminal Law Convention on Corruption has had 14 countries ratify this legally-binding instrument. The Inter-American Convention Against Corruption has been ratified by 22 OAS states since March 1997.

If these "clubs" can define their r close to r' such that effectively r=r', then the goal of regional Anti-Corruption Convention builders might not be to set the degree of "tightness" as close as possible to the optimal (r*). The regulator's problem is summmarised in Figure 11. The Figure shows the costs to regulating away from the optimum as a quadratic function. The gains come from the benefits of "loose" regulation previously discussed, namely the gain from variety and experimentation. In the graph, three regulatory regimes are shown. Previously, I left the nature of regulation between states of the world and regulatory outcomes vague, suggesting simply that $Y \rightarrow R$. If the efficiency of the regulation regime is taken into account, then the overall benefits of regulation may rise or fall for each level of tightness or looseness. In other words, the gains to freedom curve may shift depending on the structure nature of the regulatory regime – reflecting for example the degree of learning in a regulatory regime.

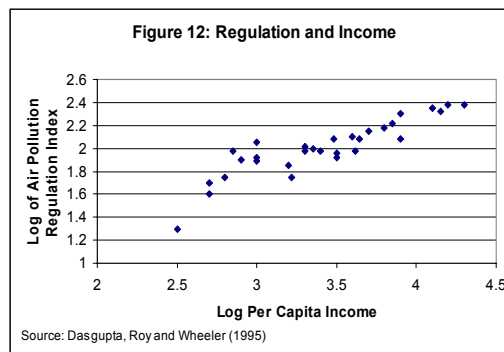Figure 11: The regulator's problem

Regulatory efficiency reflects the *total* rather than *relative* costs and benefits of the regulatory regime. In other words, the position of the gains from freedom curve reflects some notion of the "scale" of the regulatory regime. Line A shows large scale but highly effective regulatory structure which generates large benefits. It also generates high levels of costs in equilibrium -- intersecting the cost curve at a level of regulation well in excess of the optimal.[10] In this "scaled up" regulatory structure, both costs and benefits are high. The second curve portrays a regulatory structure where the gains curve intersects the cost curve at its lowest point, namely at the optimum level of regulation. In this regulatory structure however both the costs and benefits are low. By scaling down the regulatory structure even further (as shown by line C), it is possible to find a structure which finds a middle ground – offering moderate costs and benefits and balancing divergence from the optimum. Intuitively, regulation should be even looser than the short-run state-of-the-world maximising level in order to capture gains from learning and regulatory diversity.

This analysis suggests two possibilities for the UN Convention. First, the convention should be "loose" enough to allow for variety, even if it seems sub-optimal. The ambiguity in the Convention suggests some of this looseness. Second, regulation can be made "tight" but only for a smaller range of countries with a closer degree of convergence on their states of the world (Y). Depending on the variable values, a world of tightly regulations "clubs" may be better than a world of globally harmonised, but loosely defined regulation.

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[10] In theory, there could be multiple equilibria, as line A for example should also intersect the cost curve at a very low level of regulation at a very high level of costs and benefits. This equilibrium can be precluded by assuming that such low levels of regulation would not be a large departure from status quo. Thus, each of the freedom gain lines starts at modest levels of regulation.

Harmonisation Effects of "Clubs"

Should international institutions promote regulatory harmonisation at the "club" rather than global level? As Figure 12 shows, there is strong evidence to support the view that $Y \rightarrow R$ or that regulation is a function of states of the world. The simplest measure of these states of the world is income. As the Figure shows, higher income countries tend to have more regulation. There are two possible explanations. First, these countries are relatively structurally similar, thus they require similar levels of regulation. Such an interpretation would be a contingency theory type view. Second, such regulation could be the result of the policy diffusion previously discussed. Similar clubs have a tendency to form epistemic communities and have more links via trade in goods, services, ideas, capital and labour.[11] Thus, increased regulation occurs and harmonisation at the club level seems likely.[12] Despite claims to the contrary, such clubs do not necessarily represent a phase in a teleological evolution toward a globally harmonised regime under the tutelage of international organisations (Eden and Hampson, 1996). Such clubs may be dynamically "stable" so the OECD and OAS Conventions may not quickly be replaced by the UN Convention. The "optimal size" of such clubs might depend on the bargaining costs related to the creation of the regulatory regime and other factors (*ibid*). Given the stability of these regional groupings, there is little role for global business harmonisation by international organisations – as evidenced by the varying standards of the EU (a mix of national regulations), USA (hyper-liberal) and Asia (different national regulations).
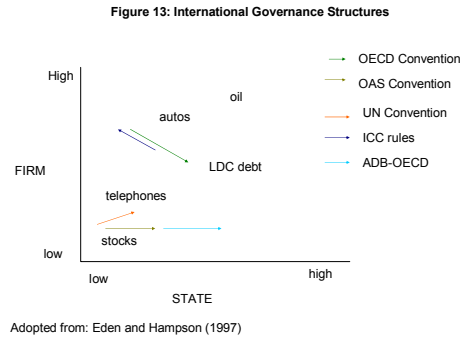

Figure 12: Regulation and Income

Source: Dasgupta, Roy and Wheeler (1995)

The other way to approach the question of clubs is given by Eden and Hapson (1996), who note that such "clubs" form depending on the type of public good to be produced or regulated. These goods vary according to their degree of rivalry (or the degree that joint effort must be taken) and excludability. For example, private goods such as industrial goods or services would be examples of rival and non-excludable goods. Atomic energy regulation or tariffs on international trade would be examples of non-rival but excludable goods. International institutions would have little role to play in harmonisation because each type of good requires a different type of regulation. The case of international regulation by international institutions is further weakened given the role that firms play in self-regulation of "club goods" (Eden and Hampson, 1996). Goods like oil or autos are both controlled by firms *and* governments. Goods such as tin or illegal drugs are heavily controlled by firms and *unregulated* at the international level. In each of these cases, regulation by international organisations is contingent on the degree of regulation by business and no particular force for harmonisation is to be found.

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[11] See Haus (1992) for a discussion of epistemic communities.
[12] Thomas (1980) discusses policy convergence among political parties in the West and finds using an index of policy scores support for such convergence.
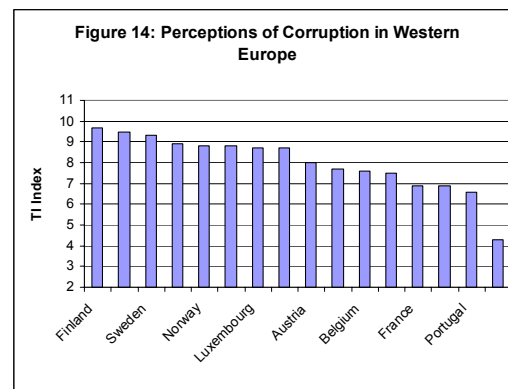
Figure 13 shows the Eden and Hampson analysis with the anti-corruption treaties previous discussed super-imposed on their original diagram. As can been seen, each Convention presses for a new division of regulation between national government and international government on the one hand, and national and international business on the other hand. In the case of the UN (2003) convention, the aim is to raise the "regulatory minimum" from a relatively low level of regulation (especially in developing countries) by both the public sector and the private sector. The private sector plays a role as defined in articles 11 and 12 of the UN Convention. For the Organisation of American States (1996) Convention, there also minimum standards for a geographically more focused area and there is less reliance on the private sector. The Asian Development Bank-OECD (2001) initiative on corruption, while non-binding, potentially extends greatly the power of government to work across borders over a wide range of issues as defined in their action plan. Interestingly, the OECD (1998) Convention and the ICC rules (1999) are work in opposite directions with business claiming the right of self-regulation. Indeed, business has been fighting back as the chairman of the ICC (2003) "experts" worry that the Convention could create "an uneven playing field for business".

Figure 13: International Governance Structures

Adopted from: Eden and Hampson (1997)

National regulation

Perhaps the causality between Y and R is reversed, namely that R → Y. In this view, regulation plays a key role in deciding the realisation of the state-of-the-world. While regulation in other areas besides anti-corruption has probably played an important role in changing Y, in the case of anti-corruption, such reverse causality does not appear likely (yet). Even at the "club" level, the empirical evidence suggests that regulatory harmonisation (R) is not leading the harmonisation of outcomes (Y). For example, in the EU, despite the creation and adoption of similar policies, there are still important differgences between *acquis commautaire* countries in terms of their corruption levels (see figure 14). On the Transparency International scale where 10 is perfectly transparency and 1 is non-transparent, some leading countries like Finland are several points away from others like France. Such divergences in outcomes suggest implementation remains an important issue.[13] Different national networks and regulatory frameworks still remain relatively unchanged and national standards institutions still differ and still operate.

Figure 14: Perceptions of Corruption in Western Europe

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[13] Such divergences also support the "ambivalent" view of globalisation as it was defined previously given the non-unique correspondence of several y(j) to one r (assuming these r have in fact changed in deed as well as in word).

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Such divergence suggests that policymaking is strategic and locally-based – leaving little room for international organisations to harmonise international business practices.

Such trends are also visible by comparing such ranking with the time since the coming into force of the OECD (2003) Anti-Bribery Convention implementing legislation. In theory, there would either be a positive or negative correlation. A positive correlation would exist if corruption acted as pressure for a government to adopt the Convention. A negative correlation would exist if the Convention was effective and promptly helped reduce corruption. No relation

Figure 15: TI Rating and Months since OECD Convention adoption

however, would suggest that such regulatory harmonisation had little impact on corruption. As shown in Figure 15, there appears to be no relation between time since the adoption of the Convention and Transparency International rating. In some cases such as in the Slovak Republic, the TI ranking remains low despite a relatively long time since ratification while Turkey maintains a similar TI rating despite more recent membership.
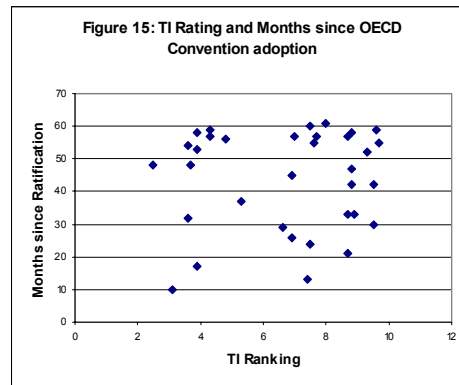
Why might there be no strong relationship between regulation and outcomes? According to authors such as Hollingsworth and Boyer (1997), the regulatory regime should maximise the international competitiveness of the country's firms. For Hall and Soskice (2001), international competitive advantage is derived from the "national business system" and regulation will only be adopted by a country to the extent that it improves international competitive advantage of the national business system. In their model, the national business system consists of four elements: intra-firm relations (industrial relations), inter-firm relations, markets for human capital formation and education, and financial capital markets. Regulation must either support the functional integration of the national business system at the national level or a country's competitive advantage at the international level.

To maximise outcomes, regulation must "fit" in the national business system. In this rather functionalist model, if regulation brings any element of the business system out of alignment with the other elements of the business system, then it is sub-optimal regulation. Anti-corruption regulation may, in the same way, reduce the efficiency of already inefficient national business systems. Figure 16 shows some ways that corruption can help promote output growth in corruption-ridden developing economies for each component of the national business system. In an argument redolent of the shock therapy versus gradualism argument from the transition literature, the global optimum would be to reconfigure the business system without corruption. But if only partial reform is possible, it may forestall the latent (rather than manifest) benefits of corruption – thus moving regulatory away from its local optimum. For example, in the case of labour markets, corruption may allow individuals to obtain training that would be rationed if queues were too long. Data from Latvia is also presented to give a rough indication of the scale of corruption in each sector. As can be seen, corruption is relatively high in all sectors. In the case of

corruption prone economies, the optimal "tightness" of regulation may be much looser *in the short run* than a global Convention may find ideal.

Figure 16: Effect of Corruption in Corruption-Prone Countries

	Benefit	Data for Latvia
Training/ Labour markets	Generates funds to keep teachers in jobs and funds state service provision	55%
Corporate governance/ Capital markets	Allows for informal allocation of scare capital	52%
Inter-firm rivalry	Promotes "co-operation" via joint participation in corruption	53%
Industrial relations	Promotes "co-operation" via joint participation in corruption	*

Source: World Bank (2003).

If regulation does affect national business system "fit", than given important differences in regulatory preferences between countries, there would be little political will inside the international organisations to promote the harmonisation of global business practices (Tate, 2001). Within the Anglo-American "liberal" business system, standards are treated as products of a free market. Market actors define their own standards and market actors are left to determine which standards – sometimes from a variety of competing standards -- to adopt. Even within the "liberal" Anglo-US model, there are divergences as the US system of standards leaves much regulatory discretion to the individual states whereas in Britain, regulation is handled on a national level. Co-ordinated economies such as Germany and Japan tend to favour code-based regulation which extends on existing structures and acts as "infrastructure" rather than as a product of market transactions. Given the diverging nature of regulation between these types of economies, liberal economies would prefer a liberal global extension of regulation whereas co-ordinated economies would adopt an international approach – noting the specificity of regulation to the type of economic co-ordination. In the corruption prone economies, there may be little interest in regulatory harmonisation due to the short-term harms which would ensue.[14]

The discussion of national business systems suggests that the effect of international organisations in promoting harmonisation depends on the ways a country "internalises" regulation (Teubner, 2001). Regulatory "convergence" is determined by domestic political interests which push for or against convergence (such as American "gaiatsu" or pressure which worked with domestic interests in Japan toward trade liberalisation)! While a comparativist perspective would see such success as the result of institutional balances of power (such as the autonomy of legal class), a culturalist perspective stresses the law's fit with society's *episteme*. Teubner (2001) looks at the implementation of the legal principle of "good faith" in Germany and the UK. In Germany, a "good faith" principle can facilitate trust while in UK it can promote opportunistic behaviour. As such, regulation can act more as a legal "irritant" if it does not fit within the "body of law" or *episteme*. Thus, any attempt at harmonisation

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[14] Of relevance is Khanna and Palepu (1999) which finds that deregulation may promote business group bonding (the extent to which this pattern works in reverse is still uncertain).

would not lead to convergence, but to fragmentation and contestation. Thus, the exact same regulation applied to two different cases may be "ambivalent" in its effects.

In some cases, such "ambivalence" could be due to the balance of political interests within the country. In Michael (2004), I argued that the decision to adopt anti-corruption regulation depends on the basic trade-off in outcomes versus redistribution. The policymaker will need to adopt some anti-corruption regulation in order to preserve the legitimacy of the government as well as guarantee some minimum level of functionality. However, as a self-interested profit maximiser, the policymaker will not wish to adopt regulations which drastically reduce current financial returns from corruption. In the paper, I sketched out a model where regulation promotes the legitimacy of the government but reduces returns to the policymakers. The policy problem for the policymakers is than to adopt anti-corruption relation to the point which maximises his or her private gains.

Conclusion

Should international institutions promulgate global and harmonised regulation? Many views of globalisation suggest that international regulatory harmonisation toward some regulatory ideal is desirable. Yet, as the UN Convention Against Corruption shows, such harmonisation based on a regulatory ideal may be undesirable or at least sub-optimal. International regulation often comes to grips with this sub-optimality, either deliberately or accidentally, through loosely defined harmonised standards. In other cases, it comes to grips with this sub-optimality through the formation of "clubs" which take a tighter view of regulation in exchange for membership with more aligned structural features. Given that countries often adapt such harmonised regulations to their national business system, such global harmonisation as emboddied in the UN Convention, may not really matter much anyway. Should the UN have expended so many resources working on the Convention? Only time will tell.

References

ADB-OECD. (2001). *Anti-Corruption Action Plan for Asia-Pacific*. Available at: http://www1.oecd.org/daf/ASIAcom/ActionPlan.htm

Barber, B. (1996). *Jihad vs. McWorld: How the Planet Is Both Falling Apart and Coming Together and what This Means for Democracy.* Ballantine Books.

Bartlett, C. and S. Ghosal. (1989). *Managing Across Borders: The Transnational Solution*. Boston, MA: Harvard Business School Press.

Berger, S. and R. Dore. (1996). *National Diversity and Global Capitalism*. Ithaca: Cornell University Press.

Braithwaite, J. and P. Drahos. (2000). *Global Business Regulation*. Cambridge: Cambridge University Press.

Doz, Y., J. Santos, and P. Williamson. (2001). *From Global to Metanational: How Companies Win in the Knowledge Economy*. Harvard Business School Publishing.

Dunning, J. (1992). *Multinational Enterprises and the Global Economy*. Addison Wesley.

Eden, L. and F. Hampson. (1996). Clubs Are Trump: The Formation of International Regimes in the Absence of an Hegemon. In Roger Hollingsworth and Robert Boyer, ed., *Contemporary Capitalism: The Embeddedness of Institutions*. Cambridge: Cambridge University Press.

Eggertsson, T. (1990). *Economic Behaviour and Institutions*. Cambridge: Cambridge University Press.

Friedman, T. (2000). *The Lexus and the Olive Tree: Understanding Globalization.*

Gilpin, R. (1987). *The Political Economy of International Relations*. Princeton University Publications.

Gornik-Tomaszewski, S. and I. McCarthy (2003). Cooperation between FASB and IASB to achieve convergence of accounting standards. Review of Business. Jamaica: Spring 2003. Vol. 24(2).

Greider, W. (1998). *One World, Ready or Not. The Manic Logic of Global Capitalism.*

Griffith-Jones, S. and J Leape (2002). Capital Flows To Developing Countries: Does The Emperor Have Clothes? *QEH Working Paper Series* Number 89.

Haas, Peter (1992). Epistemic communities and international policy coordination. *International Organization 46*(1).

Hall, Peter A. and Soskice, David (2001) *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage.* New York: Oxford University Press.

Haas, Peter (1992). Epistemic communities and international policy coordination. In *International Organization 46*(1).

Hirst, P. and G. Thompson. (1996). *Globalization in Question*. Polity Press, Cambridge.

Hollingsworth, R. J. and Boyer, R. (1997). *Contemporary Capitalism: The Embeddedness of Institutions*. Cambridge: Cambridge University Press, Chapters 11-13.

Hedlund, G. (1994). A Model of Knowledge Management and the N-Form Corporation. *Strategic Management Journal 15*. Summer: 73-90.

ICC. (2003). Business issues cautious welcome for UN anti-corruption convention. Available at:
http://www.iccwbo.org/home/news_archives/2003/stories/UN_conventio_anti_corruption.asp

ICC. (1999). ICC Rules of conduct to combat Extortion and Bribery in International Business Available at: http://www.iccwbo.org/home/statements_rules/rules/1999/briberydoc99.asp

Jacobs, Scott H. (1994) Regulatory Cooperation for an Interdependent World, Paris: OECD Publications.

Khanna and Palepu. (1999). Policy shocks, market intermediaries and corporate strategy. *Journal of economics and management strategy 8*(2).

Klein, N. (2000). *No Logo: Taking Aim at the Brand Bullies.* Toronto: Vintage Canada Edition

Levitt, T. (1983). The Globalisation of Marketing. *Harvard Business Review*. May-June.

Michael, B. (2004). Depoliticising Anti-Corruption in Bolivia: Local International Intervention and the State. *International Journal of Public Administration*. (forthcoming).

Nelson, R. (1995). Recent Evolutionary Theorizing About Economic Change. *Journal of Economic Literature* 33(1). March: 48-90.

Nicholaidis, K. (1997). Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects. In *Regulatory Reform and International Market Openness*. Paris: OECD Publications.

OECD (1997). Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 I.L.M. 1

OECD (2003). Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 20 June 2003. Available at: http://www.oecd.org/dataoecd/59/13/1898632.pdf

Ohmae, K. (1990). *The Borderless World*. William Collins.

OAS -- Organisation of American States. (1996). INTER-AMERICAN CONVENTION AGAINST CORRUPTION. Available at: http://www.oas.org/juridico/english/Treaties/b-58.html

Orenstein, M. (2003). Mapping the Diffusion of Pension Innovation. Available at: http://www.tulane.edu/~dnelson/PolTransConv/Orenstein.pdf

Pieterse, J. (2001). Hybridity So What? The Anti-hybridity backlash and the Riddles of Recognition. *Theory, Culture & Society* Vol. 18(2-3): 219-245

Rapaczynski, A. (1996). The Roles of the State and the Market in Establishing Property Rights. *Journal of Economic Perspectives 10*(2): 87-103.

Richardson, P. (2001). Corruption. In *Managing Global Issues: Lessons Learned*. Simmons, P. and C. Oudraat. Eds.

Rodrik, D. (1999). *Governing the Global Economy: Does one Architecture Fit All*? Harvard.

Rugman, A. (2000). *The End of Globalization*. Random House.

Salanié. (1997). *The Economics of Contracts: A Primer*. MIT Press.

Stopford, J. (1998). Multinational Corporations. *Foreign Policy*. Winter.

Strange, S. (1997) 'The Future of Global Capitalism; or, Will Divergence Persist Forever?' in Crouch, Colin and Streeck, Wolfgang (eds) *Political Economy of Modern Capitalism*.

Teubner, G. (2001). Legal Irritants: How Unifying Law Ends Up in New Divergences. In Hall, Peter A. and Soskice, David (2001) *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*. New York: Oxford University Press.

Tharp, P. (1976). Transnational Enterprises and International Regulation: A Survey of Various Approaches in International Organizations. *International Organization 30*(1). (Winter, 1976), pp. 47-73.

Thomas, J. (1980). Policy Convergence among Political Parties and Societies in Developed Nations: A Synthesis and Partial Testing of Two Theories. *Western Political Quarterly 33*(2): 233-246.

Gamble, J. E. Allen, and N. Dirling. (2003). International law and globalization: Allies, antagonists, or irrelevance. *Syracuse Journal of International Law and Commerce* 30(1).

World Bank. (2003). *Corruption in Latvia: Survey Evidence.*
http://www.worldbank.org/wbi/governance/pdf/guide_pdfs/latvia.pdf