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Sampson, Steven

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The Age of Compliance: Performing transparency in the global anti-corruption industry

Steven Sampson
Dept of Social Anthropology, Lund University,
Contact: steven.sampson@soc.Lu.se

Abstract: Over the past decade, a new global regime of anti-corruption has taken shape. Pushed by NGOs such as Transparency International, and with coalitions of international organizations, Western governments, and private business circles, we now have a framework of conventions and regulations that impel governments and international firms to act with integrity and to prevent corruption in business and international development. New anti-bribery laws reward whistleblowers and penalize firms whose employees are caught bribing foreign governments or paying facilitation payments. Yet conventions must be enforced. Statements of good intention are not enough. Governments and firms must show the world that they are actually implementing these new regulations and conventions and establishing anti-corruption programs. We have entered the Age of Compliance. What does compliance look like? How do organizations, firms and countries 'perform' compliance? How do they make compliance 'real'. How do we know that the transparency of compliance practice is not simply a vacuum? Based on fieldwork with various actors in the anti-corruption industry, including Transparency International, this paper describes the elements of the emerging compliance regime.

In a panel on transparency, it is appropriate to begin with the two conventional meanings of the term. One has to do with clarity between the outsider and the object or process being viewed. If an organization or an organizational process is transparent, the outsider – be it the client, the press, the controller, the evaluator, or the social scientist – the outsider can decipher what is going on. Opacity is reduced or disappears. The gap between the organization's surface and its core dissolves. Transparency in this sense is an open window. Pursuing transparency is opening the window. To refine this metaphor, we can say that sometimes the window is closed, but other times it is tinted.

There is of course another definition of transparency, that of emptiness, of substanceless as Amy Levine has said. In this sense, a person or an organization, or a strategy is simply devoid of content. It is not opaque but simply facade. We open the window and there is nothing there. What you see is what you get.

These two definitions, lets call them Transparency I and Transparency II, one denoting clarity the other emptiness, depict relations between surface and depth, or appearance and content. Going beneath the surface to reveal the true content is good. We don't like mysteries. So we dig

deeper, when others do it, it's called exposure. When we do it ourselves, we call it disclosure, or being transparent. Being transparent in this sense is a good thing.

In a simple way, I would like to highlight a few questions about transparency as such. They are simple questions, but sometimes simple questions help us think. First, why is transparency hot? Why is opacity so bad these days? Second, in what way is transparency an end state, and in what way is transparency a social practice. Without making up yet another cool word, let me ask, what is transparenting like?
Third, in what way does the pursuit of transparency I, lead to opacity in other senses, or even to a transparency II.

Calls for transparency seem to be everywhere these days, probably because there is so much opacity out there. And we should not forget that calls for transparency, much like campaigns against corruption, are themselves interesting objects of study.

There seems to be this battle going on between the forces of transparency and the forces of opacity, and because no one wants to be accused of being opaque, we need to ask questions about such processes at institutional and informal levels. I am particularly interested in transparency for two reasons: first, I am doing research on the anticorruption movement, which happens to be led by an organization called Transparency International. TI, which is seeking a corruption free world and accentuates 'integrity' in all its policy statements, sees itself as a model for NGO transparency. My interest is in how the anticorruption industry works, and how exposure and disclosure interact. That is, disclosure is forced upon actors who may not want to disclose and the weapons of disclosure are ensuring compliance with various anticorruption conventions and their monitoring –disclosure -- , plus a focus on whistleblowing and whistleblower protection, exposure.

Second, I have an interest in conspiracy and conspiracy theories. And we might say that conspiracy is the very opposite of transparency. The work of a conspiracy theorists, connecting the dots, uncovering clues, interpreting signs, is in fact the work of exposure, of making things transparent. If we gave all this a name, we might call it 'transparenting'

Transparenting is about the social process which are supposed to reduce opacity and stimulate ensure transparency. Transparenting is a set of practices, supported by moral imperatives: it's not a choice or option, but something you are supposed to do. If you do it, only good things can happen: we get honest politicians, more effective organizations, more satisfied clients, happier donors.

I am particularly interested in transparenting processes of the 'soft power' type, i.e., processes in which the regulating authority seeks to involve the object of power in a kind of self-monitoring regime. Some would call this governmentality. I called these processes 'compliance regimes'.

And I am particularly interested in compliance with standards of good governance, antibribery and anticorruption. Compliance regimes are a way of looking at transparency processes.

Compliance regimes have hit home very hard as governments have sought to regulate the financial transactions and practices of transnational corporations, and particularly the bribery of foreign officials to obtain contracts, and the hiding of these bribes through accounting practices. Here I will describe three such compliance regimes and how they interact with transparenting, the U.S. foreign corrupt practices act and the newly revised Dodd Frank law sanctioning whistleblowing, the UK antibribery law, and the UN convention against corruption. National laws are not the same as UN conventions, but they do contain normative statements, legal standards, sanctions or threats of sanctions, and monitoring and compliance mechanisms for those companies or organizations who are affected by them.

What I want to argue here is that for anthropologists interested in transparency, that compliance may be yet another window for us to jump through. Compliance regimes link together actors and the authorities who are to control them. You comply with an external regulation or law, but you also have to SHOW that you are complying with it. Compliance is a practice, but it is also a performance with an audience, spectators, producers, directors, and critics…..

In everyday life we often confuse these two sets of behaviours. Let me give an example. If you are an anthropology teacher, it is not enough to say to yourself, or to your department chair, that you are doing a good job, you have also to SHOW you are doing a good job, and you have to show it so that an external authority –the evaluation office -- believes it: hence, we have students rating us after our courses, or websites where students can rate their professors. Compliance tells us WHAT it is we have to show. Transparenting is about HOW we show it.

Now there are consequences to all this: as Levine, Pjelkmans among others have shown, making something transparent may also mean making something else invisible. Acts of disclosure are also acts of concealment something else. Making something transparent may be called policy, but making things invisible well that's politics.

Like many theorists of neoliberal governance and proponents of governmentality, I believe that there is more and more compliance behavior taking place. And that this behavior, in conjunction with the move toward good governance both locally and globally, has contradictory outcomes. The contradiction is that it creates both more clarity in terms of transparency, more T1 but also more façade-building, more emptiness, T2. Compliance regimes create both more transparency and more opacity simultaneously. Much like Pjelkmanns talks in discussing religious NGOs in Kirghizstan, transparency practice is both opening and closing simultaneously. Such contradictions are good to think with, as Levi-Strauss might say. They help us understand what is going on within that field known as 'good governance', and that there is, in the middle of all the good governance chatter, the openness and accountability measures, a lot of hiding and

concealment going on. From a transparency perspective, then, we not only need to find out if there is more or less transparency in, say, anticorruption activities, but the kind of transparency that is occurring – the T1 or T2, clarification kind, or the emptying out kind. A colleague of mine in Sweden has written a book about organizational development called the Triumph of Emptiness. All of us have been involved in evaluation or accountability exercises in which the emphasis is on the form of reporting rather than content. All of us have written, read or heard about reports and evaluations that are produced, but never read, except for the executive summary. We all complain about it, it makes us uneasy, but things keep going on. Malinowski called this the inponderabilia of daily life, the unquestioned routines. Transparency and compliance regimes are becoming routines, and routines are what anthropologists should study.

COMPLIANCE REGIMES IN THE WORLD OF ANTICORRUPTION

I will do this by describing some of the compliance measures that have emerged in the wake of the new global anticorruption regulations. In the world of anticorruption, as in many other fields of social activity, it is not enough to establish standards, regulations guidelines or laws. The real problem is in the implementation and enforcement of these. What factors operate that global actors – countries, organizations, corporations – will in fact adhere to or respect the treaties or standards to which they have signed? Conversely, what factors operate so that these actors will ignore or contravene these same standards? In political science there is a lot of talk about the spread of standards. This spread is not always simply an imposition by powerful actors; people or organizations also join up, or 'get on board'. The ISO in Geneva is dedicated to this process.

Compliance is interesting because it is the phase of ensuring that policies or routines are adhered to by those who participated in or are subordinated to these policies. Discussions about compliance are frequently more acute than the negotiations that led to the establishment of such treaties. Countries or corporations may be encouraged to sign on to such treaties and conventions for reasons of image or propaganda – as is clearly the case with various human rights and anticorruption conventions—but may have little or no incentive to actually enforce or respect them.

What we are witnessing, however, is a renewed effort by other global actors to not only establish moral and legal standards, but to establish effective means of enforcing these. If laws, treaties and conventions are standards, then compliance is about the standards for standards so to speak. We are witnessing not just the emergence of regimes of governance –understood here as a new relationship between powerholders and objects of power in which both actors objects participate and take responsibility for their action. We are also witnessing the emergence of regimes of compliance, new methods and techniques for enforcing governance regimes.

So let me use the rest of the paper here to describe compliance and transparenting within the anticorruption industry. I do not use the word 'industry' lightly. An industry, as I see it, has

certain properties: standardization of routines, an organizational approach to problems, globalization and division into smaller interchangeable units, a financial bottom line. The opposite of industry is 'craft': small, local, improvisational, done with passion, client centered. Small anticorruption activists and groups, some risking their lives against authoritarian states or vicious politicians, have now evolved into a worldwide anticorruption 'movement' which includes global anticorruption NGOs, measurement of corruption rates, international conventions, aid priorities and budget lines and hundreds of anticorruption projects aimed at public authorities, private firms, and raising public awareness. This 'industry' can be conceived as a landscape where various resources move: these resources are money, people, knowledge and symbols.

The Corruption Perceptions Index, a publicity move established almost by accident by Transparency International in 1995, is now a standard rating system for ranking countries' credit ratings or entry into the US Millennium Challenge account. Transparency International itself, an elite group of former lawyers, world bank functionaries, diplomats and activists, now has a 10 million euro budget, 80 staff in the Berlin secretariat and 90 affiliated organizations, and plays a major role in formulating and monitoring international anticorruption conventions and organizes the International Anti-Corruption Conference. A host of aid organizations now have anticorruption training and aid programs. And consultants and private firms now offer due diligence, risk management, and anti-bribery training to governments, aid organizations and private firms. The size of this industry has been estimated to include several hundred million dollars and perhaps 3000 anticorruption professionals. The IACC, a biyearly gathering of anticorruption experts and organizations, brings together around 2000 participants. Anticorruption is now a budget line on almost all aid programs and anti-bribery measures a condition of most loans, grants and cooperation agreements. With this comes the issue of compliance.

All this is happening while the problem these organizations are meant to solve, corruption, has itself undergone a conceptual expansion. Corruption once mean the abuse of power by public authorities for private benefit. It is now understood to mean the abuse of any sort of entrusted power, inside a private firm, in a charity, in an NGO, a school or public authority. Corruption is now simply abuse of authority, the abuse of trust, and can now include what we call fraud, embezzlement, nepotism, or other forms of state capture, i.e. purchasing laws, buying off judges or influencing congressmen… lobbying . Now what happens when the problem that you are supposed to be dealing with expands so much as to include many other domains. We have seen this process with other such moral domains, such as human rights, or trafficking, or sexual violence (which can now include mental violence) or environment or cultural protection. Obviously, it means whole new sets of actors can jump in and cultivate their agendas. It also means that what it is that these actors have to comply with becomes more uncertain, and therefore requires expert knowledge to sort out the difficulties and make the proper interpretations.

This has led to a new set of compliance firms, some disguised as NGOs, others law firms, whose job is to guide companies and organizations through the maze of anticorruption, corporate ethics and anti-bribery regulations. Compliance is making sure an organization or company can SHOW an external authority that they are respecting the law, and are not liable if an employee is caught bribing a foreign official. They have names like anticorruptioncompliance.com or U.S. compliance consultants.

As one firm, U.S. Compliance Consultants advertises "Our solutions are designed to simplify the process and reduce the time you spend filling out forms, reviewing documents and worrying about compliance. "

Compliance is something you worry about

To continue:

"All of our [compliance] manuals are fully customized to help you create the 'culture of compliance' regulators are now demanding."

Some branches of Transparency International (TI), for example, are now involved in this kind of activity. After having helped write the UK anti-bribery law in which companies can escape penalties if they have 'adequate procedures'. Some TIs are beginning to establish consulting units.

So what do these companies comply to? They comply to some external authority, i.e. they do what they are told to do.. But more importantly companies and organizations comply to a set of standards. The literature on standard setting and policy making tells us that standard setting itself is complex political process: goals are set, categories designed, measurements made on the basis of priorities, compromises and strategies of various actors. Standards can be imposed, as I have said, but some companies or organizations can pursue standards so as to obtain other resources and be certified in some way.

PROBLEMS OF COMPLIANCE

Standards for fighting corruption, however, pose problems. Standards such as this require a definition of corruption that can be measured, that is baseline standards. The baseline itself requires unambiguous agreement on how the phenomenon, an illegal practice such as bribery, nepotism, influence peddling, etc. can be determined. Baseline standards for corruption, or good governance can be based on the opinions of various experts and specialists (foreign businessmen, for example) or on more practice centered criteria, such as the number of permits needed to start a business, or reporting by business owners about how many bribes they gave. The point here is that compliance itself is full of politics, interpretations, and agendas, even though it may appear

to be an expert-determined overlap with some abstract indices. The compliance firm anticorruptioncompliance.com, a branch of the Kyros internet law firm, advertises its help to companies in the following anticorruption and anti-bribery areas:

> "Facilitation Payments
> Business Gifts, Hospitality & Charitable Contributions
> Company Policies on Business Gifts, Hospitality & Charitable Contributions
> Political Contributions"

The UK bribery law, for example, requires that companies take 'adequate procedures' in place to combat bribery in their firm but do not specify what these would be. Similarly, establishing a 'code of conduct' is easy enough, while enforcing it and adapting it to specific company practices (in England, in Nigeria, in Congo) is the real challenge. Hence, anticorruptioncompliance.com states that

> "The code of conduct is the foundation document of any compliance programme. The contents of a Code of Conduct will vary from company to company but the code should cover all the major compliance risks encountered by a particular business."

Compliance programs can also center on third party agents. It is also necessary to have monitoring and oversight, that is to see if compliance is actually occurring. Compliance regimes thus foster new forms of soft power and hierarchy in organizations. Administration is now not just ensuring that things get done and products produced, but a parallel administration arises that things get done in the proper way, according to the risks of the company and the demands of external authorities…. It's not just doing it, but doing it right or doing it good….

COMPLIANCE TECHNOLOGY

Compliance requires some kind of reporting system to an external authority so as to demonstrate the level or degree to which they have achieved the standards or goals to which they have signed on. The steps in such a reporting technology would include the actual processes of gathering and transmitting the data to be reported, and the judgment or assessment of those who have received the information – feeding back the feedback as it were. Such judgments could take the form of approval, disapproval, or various forms of provisional approval, a kind of 'could you do just one more thing' or as is so often the case, a refusal to judge and instead request for even more data. The actor spends more time fulfilling these administrative demands than actually doing their job. Or even worse, their job becomes the fulfillment of superior demands rather than carrying out the mission or serving clients. Compliance regimes, therefore, stimulate a compliance practice, an audit culture, or what Michael Power called 'rituals of verification'. This is the oft-cited 'bureaucratization' that so many public sector agencies – teachers, social workers, doctors, are now complaining about.

Compliance regimes would not be complete without some kind of certification technique to distinguish real experts from false ones. Two such organizations are the Society of Corporate Compliance and Ethics and the Association of Ethics and Compliance Officers. Both of them run training courses, certify members, and provide platforms for those seeking jobs and training in the compliance industry. Let us recall that most compliance regimes are systems of rewards and punishments governed by risk. In both the U.S. and the UK, if a company has a proper anti-bribery and ethical program in place, and can show that such program is operating, they can reduce their federal fine by as much as 95%.

WHISTLEBLOWING

Let me end this presentation by highlighting the whistle blowing legislation within the Dodd-Frank financial reform act. Under this provision, a whistleblower can receive up to 30% of the amount of a firm's illegal bribe if they report the bribe-giving it to the U.S. Securities and Exchange Commission (SEC). Companies and businesses have seen this as an obvious threat to their internal compliance monitoring systems: why go to the ethics officer and get a pat on the back, when the SEC can give you millions. However the SEC has enacted measures to "incentivize whistleblowers to utilize their companies' internal compliance and reporting systems when appropriate."

Also, the rules make the whistleblower eligible for an award if the whistleblower reports the violation internally and the company informs the SEC about the violation. SEC has specified rules for how voluntary reports are submitted, protection for whistleblowers, and possibilities of further civil suits. This has led to a whole set of legal firms such as the SEC Whistleblowing Claims Center, who could assist in civil litigation.

The Wall Street Journal warned of a veritable stampede to the SEC once the first multimillion dollar whistleblower payouts are made. The internet newsletter "Compliance Week", (whose slogan is: 'because bad things happen to good companies), is following the concern for companies of the Dodd-Frank act, while at the same time encouraging companies to hire compliance experts (unfortunately, the $1199 annual subscription to the newsletter precludes me from describing Compliance Week in more detail).

The rush to cash in on the Dodd-Frank payout is unmistakable. Foreign Bribery Reporting Center, another law firm looking for clients, advertises "If you know of any improper payments, offers, or gifts made by a company to obtain an advantage in a business overseas report it confidentially to our attorneys."

Let me conclude:

In the NGO world, Hilhorst has talked about what NGOs do as "ngo-ing". In the world of anticorruption, where we conduct a moral campaign against practices which we don't like but cannot always demarcate, we have developed transparency as a tool: *transparenting*. Transparenting involved not only the calls for more transparency (in the same way that anticorruption accusations are now a kind of witchcraft accusation) but now involve a kind of performative transparency in which compliance regimes are the forefront.

In this compliance landscape, there are the moral entrepreneurs, but also the government agencies, and in between the companies and NGOs who will literally help you perform compliance. What we can see is that there are more calls for transparency, more incantations, more demand that this is something that we have to do , and something we should do. And at the same time, this increasing transparency, the possibility to report your firm to the SEC, connotes a degree of mistrust within organizations.

Transparency is supposed to promote trust in institutions, understood as accountability. But trust within organizations may in fact be decreasing. If we are all monitored, if we are all having to report, if we are all having to show that we are doing the right things, it must only mean that there is a climate of distrust. More transparency, more compliance, more distrust.…

We are left with the issue of whether this transparenting activity is producing more of T1 or T2, more clarity or more emptiness. I am not sure. In the same way that I am not sure that with all the anticorruption initiatives of the past decade, we do not know whether corruption has in fact decreased, or simply become more sophisticated.

The situation is…. How should I say this… nontransparent.